THE USE OF EXPERT TESTIMONY ON THE BATTERED WOMAN SYNDROME IN THE CRIMINAL JUSTICE SYSTEM

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072583

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS

STRATHMORE UNIVERSITY

STRATHMORE LAW SCHOOL

FEBRUARY 2019

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Acknowledgements

To my mother, Pamela Ombachi, whose unwavering and often undeserved love and support enabled me to conclude this chapter of my life in spite of myself.

To my family, for giving a troubled young man the encouragement he needed to overcome his personal struggles and complete his studies.

To Messrs. Kisuu, Muigai and Nyamongo, for their inspirational friendship.

To Dr. Peter Kwenjera, for his patience and understanding in the face of my academic struggles.

To Emma Senge, for her indulgence in offering an olive branch to an undeserving student.

To Princess, Vivian, Melissa, Kevin, Claude and the rest of Strathmore Law School I owe an incalculable debt of gratitude for their gracious efforts in aid of my academic pursuits.

Dissertation declaration form

I, Timothy Ombachi Ayako, declare that this dissertation is my original work and has not been submitted for the award of a degree in any other university.

Signed ______________________________ Date ______________________________

Researcher: Timothy Ayako

Supervisor Signature

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Date

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Abstract

This project seeks to analyse the use of expert testimony on the Battered Woman Syndrome (BWS) in cases involving women who have killed their abusive husbands. This dissertation scrutinises case law and statutes in two jurisdictions that have allowed BWS testimony to be presented in criminal proceedings: USA and Canada while also assessing the Kenyan criminal justice system and how it handles cases involving battered women who kill their abusive spouses. This study finds that BWS testimony has been used successfully in the said jurisdictions to help courts understand the battered woman's mind-set. The study further establishes that Kenya's approach to the defence of self-defence is insensitive to the realities of abused women.

List of abbreviations

BWS - Battered Woman Syndrome

CDC – Centres for Disease Control and Prevention

DOJ – Department of Justice

HHS – Department of Human and Health Services

NIJ – National Institute for Justice

NIMH - National Institute of Mental Health

NSCA – Nova Scotia Court of Appeal

OVW- Office on Violence against Women

SCC – Supreme Court of Canada

VAWA – Violence against Women Act

List of cases

American case law

Bradley v. State, Supreme Court of Mississippi, 1824. 1 Miss. 156

Canadian case law

Lavallee v Regina, 55 C.C.C 3d 97 (1990)

R. *v*. Malott, [1998] 1 S.C.R. 123

R. v. Ryan, NSCA 30. (2011)

English case law

Queen v M'Naghten 8 Eng. Rep. 718 [1843]

R v Turner [1975] 1 All ER 70

Falkes v Chadd [1782] 3 Doug KB 157

Davie v Edinburgh Magistrates [1953] S.C. 34

Kenyan case law

Republic v Gachanja [2001] KLR 428

Mohammed and three others v Republic [2005] 1 KLR 722

Mwangi v Republic [1976-1985] EA 355 [1982] KLR 120

Gathitu s/o Kiondu v Reginam [1956] 23 EACA 526

Joyce Mugure Andrew Kathari v Republic Mombasa CACRA No. 69 of 1983

Rex v Olual s/o Kongo [1936] EACA 46

Republic v Gachanja [2001] KLR 428

Msiwa and another v Republic [1999] 2 EA 190

Selemani s/o Ussi v Republic [1963] EA 442

Yozefu Engichu s/o Adiriyano Eduku v Reginam [2003] 1 EA 177

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1 Background

1.1 Introduction

The case of battered women is an all too common occurrence in society. This situation is fuelled and exacerbated by the attitude many different societies hold towards domestic violence. In many African societies, it is viewed as acceptable and indeed, desirable, that a man chastise his wife in fulfilment of his role as the head of the family.[1] At English Common Law, the doctrine of coverture meant that marriage erased a woman's legal identity, which effectively made her body the property of her husband[2]. This has led to gross underreporting of cases of wife battery.[3] In Kenya, 40% of all married women have been abused at some point of their relationship.[4]

According to Kameri-Mbote, violence against women is part of a historical process, with the state being tolerant, if not complicit in it.[5] The institution of family is one of the frontiers on which this system of oppression is carried out. There are cultural sanctions for paterfamilias to discipline the female members of their household, including wives and children. The only limit imposed on this 'privilege" is that the chastisement ought not to hurt the woman to an extent that would impede her from carrying out her wifely duties.[6]

Battery occurs in the form of "physical beatings, with fists or other objects, choking, stabbing, whippings, and any form of husband-inflicted physical violence as well as psychological mistreatment in form of threats, intimidation, isolation, degradation, mind games"[7] Violence against women by husbands and boyfriends occurs at every level of society irrespective of age, income, education, ethnicity, race , colour or occupation, with repeated victimisation leading to a sense of powerlessness in some or all areas of life.[8] A woman who develops this sense of

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[1] Kameri-Mbote P, *Violence against women in Kenya: A legal analysis of law, policy and institutions,* IELRC working paper 2000-1, 19.

[2] Zaher C, *When a woman's marital status determined her legal status: A research guide on the Common Law doctrine of coverture* 94 Law Library Journal 2002, 460

[3] Giannetakis, P *Battered woman syndrome background* 2017, 1.

[4] https://www.nation.co.ke/news/Experts--Law-is-not-fair-to-abused-women/1056-4697932-p8jter=/index.html accessed on 9/1/2019 at 2:07 PM.

[5] Kameri-Mbote, *Violence against women in Kenya,* 19

[6] Kameri-Mbote, *Violence against women in Kenya,* 4

[7] Kameri-Mbote P, *Violence against women in Kenya,* 19

[8] Kameri-Mbote, *Violence against women in Kenya,* 19

helplessness as a result of being in an abusive relationship can be said to suffer from battered woman syndrome (hereinafter referred to as BWS).

In this context of violence that is effectively sanctioned by society, there occurs an even more sinister phenomenon. Battered women may kill or attempt to kill their abusive husbands in a bid to extricate themselves from their dire circumstances. Lenore Walker writes that these women, due to their sense of learned helplessness, feel like the only way they can get out of these abusive relationships is to kill their abusive husbands.[9] In various jurisdictions, the BWS defence has been introduced by defence attorneys to show that their clients, abused women who were charged with the murder of their abusive partners, were justifiable in their actions. Prior to the introduction of this defence, these women would have no recourse other than pleading guilty to murder. In certain cases, they would receive a defence that claimed some form of insanity.[10] The development of this new form of self-defence was facilitated by courts admitting expert testimony by psychologists on the state of mind of battered women.

1.2 Statement of the problem

The approach of the Kenyan criminal justice system to the concept of self-defence is rooted in the archaic idea of physical conflict between two male individuals of close to equal strength. While the Penal Code does not define the right to the defence of defence,[11] it, does state that criminal liability for the use of force in the defence of person or property ought to be determined according to the principles of English common law.[12] Further, the Penal Code provides that where said force is excessive, even where the force was permitted by law or consent, then the person who uses the force is criminally responsible for the excess, taking into account the nature and quality of the act.[13]

Therefore, even though the courts have established that the defence of self-defence is an absolute defence, [14]whereby the accused is fully exonerated if it is established, battered women

[9] Walker, L *Battered women syndrome and self-defense,* 6 Notre Dame Journal of Law, Ethics and Public Policy 1992, 323

[10] Walker, *Battered women syndrome and self-defense,* 321

[11]Musyoka W, *Criminal law,* Law Africa Publishing (K) Ltd, Nairobi, 2013, 125.

[12] Section 17, *Criminal Procedure Code.*

[13] Section 241, *Criminal Procedure Code*

[14] *Republic v Gachanja* [2001] KLR 428. Etyang J, in his ruling, stated that "in law self-defence is an absolute defence to a criminal charge. It absolves the accused from criminal liability for, where self-defence is available to an accused, he is deemed to have acted within the permitted legal limits to repel any attack against him; he is deemed to have acted reasonably and to have used necessary and permitted force."

who kill their husbands are not afforded the opportunity to have their plight considered, resulting in grave miscarriage of justice.

Walker writes that the heterogeneous nature of battered women renders it nigh impossible to provide an objective standard against which to measure the proportionality of a woman's actions to the perceived threat.[15] Given the prevalence of domestic violence in our society, as well as the incidental societal attitudes that afford it such ubiquity, it is imperative that our criminal justice system incorporates a mechanism through which to ensure that women who find themselves in such unfortunate circumstances are accorded as fair a trial as possible.

This research seeks to highlight the benefits to the criminal justice system that would result from the inclusion of testimony on BWS by assessing foreign jurisdictions where the same has been implemented.

Various other jurisdictions have, in recognition of this sad reality, co-opted the BWS defence into their criminal justice systems to varying extents. The laws of Kenya on evidence allow for opinion evidence to be introduced on a point of science, *inter alia*, where such evidence is given by a person specially skilled in that field of study.[16]

1.3 Purpose of the study

This study aims to discuss the concept of the BWS defence, discuss its merits and demerits and interrogate whether the Kenyan criminal justice system would benefit from co-opting it.

1.4 Statement of objectives

The main objectives of this paper are:

1. To examine the development of the use of battered spouse syndrome as a defence.
2. To analyse the Kenyan criminal justice system and how it handles the issue of battered women who inflict harm on their abusive spouses.
3. To assess the inclusion of expert testimony on battered spouse syndrome in the criminal justice systems of various jurisdictions around the world.
4. To discuss the manner in which expert testimony on BWS can be co-opted into the Kenyan criminal justice system.

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[15] Walker, *Battered women syndrome and self-defense*, 323.

[16] Section 48, *Evidence Act*

1.5 Research questions

This study seeks to answer the following questions:

1. What is the "battered woman syndrome defence"?
2. From a legal standpoint, what are the effects of a battered woman on her state of mind with respect to her actions?
3. What defences are currently available under Kenyan law to a battered woman who kills her abusive spouse?
4. Does the Kenyan judicial system have mechanisms that would allow for incorporation of BWS into criminal proceedings?
5. How have other jurisdictions around the world incorporated BWS into their criminal justice systems?

1.6 Hypothesis/Assumptions

This study relies on the following assumptions:

1. That the victims of domestic violence in Kenya are mainly women.
2. That men are generally physically stronger than women.
3. Although this study makes reference to abusive relationships between spouses, the scope extends to non-formal relationships.

1.7 Limitations

Due to temporal and financial constraints, this research relies fundamentally on secondary data sources. As such, primary sources of data such as questionnaires and conducted interviews have not been used.

Domestic violence continues to take place to a large extent within the confines of private homes and as such largely goes unreported.

1.8 Literature review

The plight of the battered woman, perhaps as a result of its unfortunate omnipresence, has been touched on by a great many authors.

On domestic violence in the Kenyan context, Prof. Patricia Kameri-Mbote[17] states that violence against women is part of a historical process, rooted in the idea of male dominance, often sanctioned by the state. The doctrine of privacy, especially in the home, is usually invoked by the state to support its refusal to intervene in matters of domestic violence unless it begins to cause a nuisance to the public. The family institution is one of the frontiers in which male power is violently expressed. Such institutionalized violence results in a general vulnerability amongst abused women. Repeated victimization leads to a sense of helplessness and powerlessness in some or all areas of life.

Dr. Patricia Easteal[18] writes that it has been argued successfully in many US courts that BWS victims who killed their partner while he was unaware of what was going on can be said to reasonably believe that they are in danger. The justification for these women is not that they are battered, but that because they are battered, they are in a constant state of anticipation of violence from their partner. She argues that due to not only physiological differences but also gender differentiation in socialisation, it is ludicrous to hold women to the same standards of reasonable force applied when defending themselves as you would men. She further states that living in a battered state for an extended period of time affects one's ability to act in manner that would be considered objectively "reasonable."

Dr. Lenore Walker[19] writes that the battered woman self-defense was introduced by attorneys on behalf of their clients in an effort to show that the mind of a woman who has lived through domestic violence is so affected by the repeated that an act of homicide by the woman on her abusive spouse may be justifiable.

Maria Guanzon states that the opinion of an expert on whether or not the accused woman suffers from BWS is indispensable to the court arriving at a just decision.[20] She stresses that an understanding of the theory of learned helplessness is required by the court, and only an expert on psychology can provide this understanding. She interrogates the case of *People v. Marivic Genosa*[21] in which the court viewed, wrongfully, in her opinion, BWS as a mental illness and on that basis reduced the sentence of a woman from fourteen years to six years.

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[17] Kameri-Mbote, *Violence against women in Kenya*, 1

[18] Easteal, P, *Battered women who kill: A plea of self-defence*, 37.

[19] Walker, *Battered women syndrome and self-defense*, 323.

[20] Guanzon, R Rowena V. Guanzon, *Legal and conceptual framework of Battered Woman Syndrome as a defense*, 86 Phillipines Law Journal 2011, 129

[21] G.R. No. 135981, January 15, 2004

David Faigman questions the objectivity of the testimony offered by psychiatrists and psychologists.[22] He points out their willingness to give evidence even in cases where the accused, despite claiming to be a battered woman, clearly acted in gross violation of the doctrine of self-defense. To this end, he draws attention to the case of ***State v. Martin***[23] where the accused, Hellen Martin, separated from her husband of 5 years in a violent marriage. The husband then began to threaten to blow up her house, so she hired another man to kill her husband. When her husband came to collect some papers from her house, the hired killer shot him, with Hellen urging the killer to "shoot him again since he's not dying fast enough." After being convicted, Martin sought to introduce Lenore Walker as an expert witness to testify that she was a battered woman. Faigman states that Walker's willingness to testify in this case points to the fact that psychologists act as advocates for their areas of expertise at the expense of credibility.

[22] Faigman, D, *The Battered Woman Syndrome and self-defence: A legal and empirical dissent,* Virginia Law Review, Vol. 72, No. 3 of 1986, 633

[23] 666 S.W.2d 895 (Mo. Ct. App. 1984).

2 Theoretical Framework

2.1 Introduction

This chapter contains two parts. The first part seeks to delve into the murky waters of intimate partner violence with a view to understanding the complex web of issues that lead to the reality of battered women. This part elucidates on the extent to which intimate partner violence is ingrained into our society thus creating a prime ecosystem for the existence of battered women and by way of extension, homicide committed by battered women. In doing so, the chapter will discuss the various institutional elements that have allowed, nigh encouraged, domestic violence and its ancillary consequences.

The second part assesses the philosophical basis upon which the right to life is limited with regard to self-defence. This part seeks to understand the jurisprudence informing the right to defend oneself even where that involves harming another person to do so. In doing so, this part will attempt to reason out that the battered woman ought to be allowed to claim self-defence. This part will focus on two theories of justification:

1. Moral forfeiture theory
2. Forced choice theory

It will be noted that this chapter, and this study at large, makes reference to "intimate partner violence" as opposed to "domestic violence." This etymological diversion is deliberate. The World Health Organisation states that while in many discourses, the two terms are used interchangeably, "domestic violence" may also refer to child abuse, elder abuse or abuse by any other member of the household, which is not the subject matter of this study.[24] Further, the term "intimate partner violence" recognises the fact that the violence being discussed does not necessarily occur in the context of a marriage.[25] That said, the term "domestic violence" is used in a lot of literature on the subject and will therefore arise in direct quotation.

2.2 Contextualising intimate partner violence

The Declaration on the Elimination of Violence against Women defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical,

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[24]https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=037BC28EE03CC2179AC0C28FBFE8A0A3?sequence=1 accessed on 15 February 2019 at 3:44 PM

[25]https://inpublicsafety.com/2015/10/domestic-violence-and-intimate-partner-violence-whats-the-difference/ accessed on 15 February 2019 at 3:50 PM

sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[26]

The CDC takes a more nuanced approach to its definition of intimate partner violence by stating that it is physical violence, sexual violence, stalking and psychological aggression (including coercive acts) by a current or former intimate partner where an intimate partner is an intimate partner is a person with whom one has a close personal relationship that can be characterized by the following:

- Emotional connectedness
- Regular contact
- Ongoing physical contact and/or sexual behaviour
- Identity as a couple
- Familiarity and knowledge about each other's lives[27]

The Protection from Domestic Violence Act defines domestic violence in relation to any person as "violence against that person, or threat of violence or of imminent danger to that person, by any other person with whom that person is, or has been, in a domestic relationship."[28]

2.2.1 African societal approach

Women are subject to a wide array of deliberately perpetuated cultural, social and economic factors that have the consequence of leaving them vulnerable to abuse.[29] Violence is one of the forms through which social control over women is exerted.

Like most cultures, in African traditional culture, the family is maintained by patriarchy. As such, there exists a deep-rooted ideology that emphasises the primacy of men over women and demands women's subordination to men. Women are defined by their relationship to men, with almost no agency.[30]

Kameri-Mbote (2000) writes that the violence is part of a historical process, with the aim being to keep the woman economically and socially impotent thus enabling the patriarchy to exploit

[26] Article 1, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104
[27] https://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html accessed on 15 February 2019 at 4:13.
[28] Section 3(2), *Protection Against Domestic Violence Act* (Act No. 2 of 2015)
[29] Kameri-Mbote, *Violence against women in Kenya*, 4
[30] Odhiambo G, *Wife battering and its impact on the nuclear family: A case study of Nairobi province*, Unpublished MA Sociology Thesis, University of Nairobi, 22 June 2005, 16

her body and labour by protracting her dependence on the male.[31] She further explains that masculinity is deemed to manifest through the exertion of dominance over others, especially by forceful means. The man is therefore required to exert control over those around him, especially the women, while the woman is expected to meekly comply. Such ideologies are supported and promoted by institutions such as religion, custom and even the state.

Sitawa and Yanyi (2008) observe that traditional Kenyan society is organised on the basis of kinship groups, with interactions between individuals being governed by the greater interaction between their respective kinship groups.[32] Marriage comprises of a contractual agreement between two kinship groups, each with their own rights and duties to the other as a result. Therefore the implications of marital concerns transcend the wants and needs of the actual parties to the marriage and become communal concerns. This therefore leads to complications where, for example, a woman would want to leave her abusive husband.

To further compound matters, they explain, the payment of bridal wealth by the groom's kinship group to the bride's implies that the groom has nigh unbridled access and control over the bride, including the right to chastise her, subject only to vague ideas of proportionality and restraint. The bride cannot, therefore, simply leave her abusive husband unless her kin are ready and willing to return the bride wealth already paid.

Cynthia Bowman (2002) echoes this, writing that in African societies, family and communal interests precede that of the individual.[33] She states that all women, not just in African society, are generally defined by their interaction with the rest of the society they live in. However, she writes, due to the inherently communal nature of African society, the individuality of the African woman is even further eroded, rendering her impotent at self-actualisation beyond her pre-determined societal and familial role.

Bowman further explains that the changing environment in which the African marriage finds itself today fuels the fire of intimate partner violence.[34] Today's modernised society, in which prevailing economic circumstances hinder the African man from actualising his polygamous aspirations; in which the African woman is in a position to receive quality education and

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[31] Kameri-Mbote, *Violence against women in Kenya,* 1

[32] Sitawa, K and Yanyi, D: *Gender based violence: Correlates of physical and sexual wife abuse in Kenya* https://link.springer.com/article/10.1007/s10896-008-9156-9#citeas on 15 February 2019 at 5:52 PM

[33] Bowman C, *Theories of domestic violence in the African context*, 11 American University Journal of Gender, Social Policy & the Law (2002), 851

[34] Bowman, *Theories of domestic violence,* 856

improve her economic circumstances; in which a woman's interactions with other men are not governed by her husband's sensibilities; in which a woman's career hinder her ability to perform her "traditional" reproductive roles; this society frustrates the African man, which frustration has an outlet in the form of violence.

Kameri-Mbote further highlights that, prior to the onset of colonialism and a "Western" way of life, the close-knit nature of African society ensured that a man's exercise of his 'right' to chastise his wife was tempered and indeed regulated by the relevant communal organs such as elders. With this new way of life, the nuclear family became further isolated from the greater community, allowing for uninhibited violence to occur.[35]

2.3 Justified murder?

When a battered woman kills her husband, there is no question as to whether or not she committed the deed itself. Her defence rests on her ability to convince the court that in committing the act of homicide, she was acting in self-defence, i.e. that her actions were justified. A justification defence is one that renders conduct that would otherwise be criminal as socially acceptable and therefore not warranting criminal liability.[36]

Dressler (2009) explains that there isn't a single unifying theory upon which justification is based. This study focuses on two theories of justification:

1. Moral forfeiture theory
2. Forced choice theory

2.3.1 Moral forfeiture theory

This theory states that the holder of certain rights may forfeit the said rights as a result of their conduct.[37] John Locke, in the second chapter of his *Second Treatise of Government,* discusses the idea of an offender who, by virtue of his actions, becomes dangerous to the rest of humanity.[38] Locke posits that such an offender declares himself to live by rules other than those of fairness and reason and that every man has a right to inflict as much harm on the offender as would be necessary to make him repent having done it. He further states that where the offence committed directly affects an individual, that individual has a right to reparation.

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[35] Kameri-Mbote, *Violence against women*, 4

[36] Dressler, J *Understanding criminal law*, LexisNexis, San Francisco, 2009, 204,

[37] Dressler, *Understanding criminal law*, 209

[38] Locke, J, *Second treatise of government*, Hackett Publishing Company, 1980, 4

2.3.2 Forced choice theory

This theory posits that, a person is permitted to defend themselves because they have been placed in circumstances that require them to make a choice between their aggressor's lives or their own.[39] Wallerstein (2005) states that self-defence is permitted as a necessary response where the aggressor has no choice but to use defensive force. The responsibility for the choice made by the defender lies in the hands of the aggressor, because it was the aggressor who forced the defender into a position in which he has to choose between lives. As Young Kim (2008) states, self-defence is predicated on the motive of self-preservation, without which the claim falls apart altogether.[40]

[39] Wallerstein, S *Justifying the right to self-defence: A theory of forced consequences* Virginia Law Review, Volume 91, No. 4 (Jun., 2005), 999-1035

[40] Young Kim, J, *The rhetoric of self-defense*, 13 Berkeley Journal of Criminal Law (2008), 26

3 Battered Woman Syndrome and its use as a defence

3.1 Introduction

Battered Woman Syndrome is considered a sub-category of **Post-traumatic Stress Disorder** where once someone undergoes a particularly harrowing encounter, they develop thoughts, feelings and actions that fear it might happen again.

The term "battered woman syndrome" was first used in 1977 as the title to the U.S. National Institute of Mental Health (hereinafter referred to as NIMH) funded research grant that collected data on over 400 self-referred women who met the definition of a battered woman, which formed the basis for this original research.[41] Lenore Walker identified a three-step cycle with intimate partner violence.[42] The first stage is known as the tension building stage, where the victim is exposed to verbal abuse and minor physical assaults such as slapping or hair pulling. During this stage, the victim may be known to pacify the abuser as an attempt to avoid further assault, but this passivity may in fact reinforce the battery. The second stage is the acute battering incident. It is at this point that the perceived and real danger of being seriously injured or killed is maximal.

The third and final stage is the loving contrition, which brings the apology and promises of changed behaviour are offered to keep the victim in the relationship. The tension of the abuser has been released, allowing the appearance of remorse and regret.

The ***battered woman self-defense*** was introduced by attorneys on behalf of their clients in an effort to show that the mind of a woman who has lived through domestic violence is so affected that an act of homicide by the woman on her abusive spouse may be justifiable.[43] This, the argument states, is the case even where the abusive partner was docile at the time of the act.

The battered woman defense has not only been used in cases where the victim of abuse inflicts harm on their abuser, but also where the victim is coerced into committing offences by the abuser. The standard used by most states to define self-defense examines the nature of the force used to repel danger where the person reasonably perceived that they were in imminent danger.

[41] Walker, L *The battered woman syndrome*, Springer Publishing Company, 1979, 49.
[42] Walker, *The battered woman syndrome*, 50.
[43] Walker, *Battered women syndrome and self-defense*, 321

Dressler (2009) categorises battered women cases and the inherent legal issues that emanate from the respective prosecutions into three:

a) **Confrontational homicides:** these are cases in which the woman kills her husband during a battering incident. These cases prove easier to fit within the traditional purview of self-defense in relation to the issue of imminence of danger.
b) **Non-confrontational homicides:** where the woman kills her husband in a period of apparent quietude. This often happens where the husband is in a state of relative vulnerability, such as when he is asleep. These cases raise the issue of whether the defendant is entitled to claim self-defense in the absence of evidence of a direct confrontation at the time of the killing.
c) Cases where the wife contracts or otherwise convinces a third-party to kill her husband. In these cases, the defendants seek to prove that their actions were reasonable given their perception of imminent harm as a result of their battered status.[44]

According to Walker, this *reasonable person* standard is based on the archaic idea of physical conflict between two males.[45] She argues that the situation is further compounded when the accused person is a woman who has experienced a history of abuse, especially if there is no admission of expert testimony to explain the state of mind of a battered woman and how this would affect their perception of danger. Psychological studies help to find commonalities in perception amongst battered women in order to come up with a more uniform standard according to which individuals can be measured.

The definition of ***imminent*** used by most state legislatures is *being on the brink of happening* rather than immediate, which is the colloquial use of the term. This distinction is especially important in the case of battered women self-defense cases due the fact that battered women are able to perceive the more subtle signs that violence is forthcoming that a person who is not them would not be able to perceive.

Walker states that most battered women quickly learn that to fight back would result in even more serious violence. Further, a lot of times the abusive partner manages to track down the woman even if they escape, making escape seem impossible to the battered woman. For these reasons, the concept of imminent danger takes a different meaning in the case of a battered

[44] Dressler, J *Understanding criminal law*, 243
[45] Walker, *Battered woman syndrome and self-defense*, 323

woman. The psychology of a battered woman would also help to demonstrate why a woman would attack her unarmed partner with a knife or a gun or some sort of weapon or why she would attack the man while he's asleep.

Osthoff (1995) states that battered women's defense doesn't exist as a defense unto itself. According to her, expert testimony on BWS ought to be introduced to explain how a battered woman's actions fall within the ambit of self-defense. The effects of the battered woman syndrome ought to be used in support of a self-defense claim, as opposed to replacing it. She further states that information about the nature of the relationship between a murder victim and their assailant is necessary to fairly evaluate the situation at the time of the incident. She argues that this necessity is not unique to self-defense claims by battered women.

Parrish (1995) discards the use of the term "battered woman syndrome" on the basis that this term serves to stigmatize women and create the false perception that they suffer from a mental disease. She instead champions the use of the more inclusive term "battering and its effects" which has been used in many state statutes.

3.2 Case Studies: Canada and the United States

3.2.1 Canada

The case of Angelina Napolitano, which occurred in 1911, is considered the first instance in Canada of battered woman's syndrome being raised as a defence to murder.[46] In this case the accused, Ms. Napolitano, struck her husband with an axe as he slept, killing him. In the ensuing court proceedings, she admitted to killing him, insisting that she did so as a result of recurring abuse and his insistence that she become a prostitute. Counsel for the defence brought up the fact that six months prior, her husband had stabbed her.

In spite of this, Ms. Napolitano was found guilty of murder and the judge sentenced her to death by hanging. In reaching this verdict, the jury was instructed by the judge that Ms. Napolitano was of dubious character due to the fact that she had committed adultery, and therefore her attempts to present herself as a "wronged woman" ought to be given very little consideration.[47]

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[46] https://www.cbc.ca/news/canada/5-cases-using-the-battered-woman-defence-1.1221150 on 6 January 2019 at 9:04 AM.

[47] Despite the guilty verdict, public sentiment at the time was overwhelmingly sympathetic to the plight of Ms. Napolitano, with an international campaign being launched for her to be granted clemency. Her sentence was commuted to life imprisonment and she was released on parole 11 years later.

3.2.1.1 R v Lavallee

It was not until 1990, that the Supreme Court of Canada, in ***R v Lavallee***[48]**,** ruled that BWS was admissible as an extension of self-defence. In this case, Angelique Lavallee shot and killed Kevin Rust, her common-law husband of about four years. In this period, she claimed, he had continually physically abused her. She testified that on the specific occasion, they had argued and she had ran away to hide in a closet. He had then followed her and grabbed her from within the closet. She claimed that it was he who had handed her the gun, and told her that "either you kill me or I kill you". He had then turned to walk away at which point she shot him.

Her defence relied on the definition of self- defence as set out in the Criminal Code of Canada which stated that:

(1) accused persons must have acted under a reasonable apprehension of suffering death or grievous bodily harm at the hands of their assailant and;
(2) they must believe, on reasonable grounds, that they cannot otherwise preserve themselves from death or grievous bodily harm

At the initial trial, expert testimony on BWS was presented to the jury. A psychiatrist, Dr. Fred Shane, testified before the court as to the effects of BWS on a battered woman's perception of danger. He gave testimony to the effect that Ms. Lavallee anticipated violence from Mr. Rust as a result of having previously gone through the cycle of violence with him. He further gave evidence to the effect that due to her "learned helplessness" she reasonably believed that there was no other way to protect herself. On this testimony, she was acquitted.

On appeal by the prosecution, the Manitoba Court of Appeal overturned the acquittal and ordered a fresh trial. It is important to note that the basis of this ruling was not a rejection of the BWS defence, but rather an evidentiary one where the court held that the admission of the testimony of Ms. Lavallee's psychiatrist was procedurally undue.

The defence then appealed to the Supreme Court of Canada (hereinafter referred to as the SCC), which restored the acquittal. The court accepted the defence's assertion that the manner in which a battered woman perceived danger extended beyond situations where she was in immediate danger. The court stated that the perceived danger ought not to be held to an objective standard of reasonability but rather should be observed on a subjective basis that took into account the individual's situation and experience. The court further stated that psychiatric

[48]Lavallee v Regina, 55 C.C.C 3d 97 (1990)

evidence was necessary and relevant to enable the court to better understand the mind of a battered woman, especially regarding her perception of imminent danger.

Ono (2017) writes that in this ruling, the court dispensed with the gender-biased limitations that arose from requiring a "reasonable" perception of danger to defend oneself. A woman, she says, no longer had to "wait for an uplifted knife" to act in self-defence. [49]

Although there were few acquittals as a result of the precedent set in *Lavallee,* there was a marked increase in the number of plea bargains in cases involving women that had killed their abusive intimate partners, in which these women received compassionate sentences.[50]

In a report released by the Canadian DOJ in 2003, of the 19 cases involving female offenders that were review, 15 considered evidence of past abuse by the victim as a mitigating factor. Nine out of the 15 considered evidence of BWS as defined in *Lavallee*. In two other cases, the offender's experience of abuse by previous partners or family members was considered a mitigating factor in sentencing.[51]

3.2.1.2 R v Malott

In *R v Malott*[52], a case similar to *Lavallee,* the SCC expounded on its prior ruling. In this case, a woman also killed her common-law husband and was charged with first-degree murder. At the initial trial, her defence sought to introduce evidence that she suffered from BWS and had acted in self-defence. She was found guilty of second degree murder, with the jury recommending that due to how severe her BWS was, she ought to receive the minimum sentence. On appeal to both the Ontario Court of Appeal and the SCC, her conviction was upheld and she was sentenced to life imprisonment.

It is important to note that in this case, Ms. Malott, after shooting and killing her husband, got into a taxi and went to his mistress' house where she proceeded to shoot and stab her, although she (the mistress) survived and testified as a prosecution witness.

In issuing this ruling, Justices Mclachlin and L'Heureux-Dube stated that BWS was not a defence unto itself, but merely a means through which the court could assess the reasonability of a woman's actions in carrying out what she claims is self-defence. They state that "...all

[49] Ono, E, *Reformulating the use of battered woman syndrome testimonies in Canadian Law: Implications for social work practice,* 32 Journal of Women and Social Work 2017, 24-39
[50] Ono, *Reformulating the use of battered woman syndrome testimonies*
[51] https://www.justice.gc.ca/eng/rp-pr/other-autre/smir-phiri/law-juri.html accessed on 5 January 2019 at 11:40 AM
[52] R. *v.* Malott, [1998] 1 S.C.R. 123

legal inquiry should focus on the reasonableness of the actions of the battered woman within her personal experience and the relationship of abuse between her and her partner…''[53] Therefore the mere fact of being a battered woman does not justify the actions of an accused woman.

3.2.1.3 *R v Ryan*

In *R v Ryan*,[54] a woman, Ms. Ryan (née Doucet) tried to contract a man to kill her husband. Unbeknownst to her, the man was an undercover police officer and thus she was arrested and charged with the crime of counselling to commit murder. At the initial trial, her defence argued that she was under duress due to her status as a battered woman. Her counsel was unable to claim self-defence since by seeking to contract a man for the job, she had gone too far beyond the purview of what could be justified by self-defence.

In her defence, she narrated how she had been subjected to various forms of abuse over the course of 15 years, in which time she had reported him to the authorities numerous times to no avail. She claimed he had threatened to kill both her and her daughter if she ever tried to kill him. Due to these factors, she had felt she had no resort but to kill him by any means possible.

The initial court acquitted her, and the Nova Scotia Court of Appeal (hereinafter referred to as the NSCA) upheld the acquittal. The SCC, however overturned the acquittal. In issuing this ruling, the SCC stated that duress can only be claimed where the accused was directly threatened into committing a particular act. The court thus threw out the argument made for duress. Even so, the court ordered a stay of prosecution, citing that Ms. Doucet need not undergo another trial.

This case is important because it saw the SCC refuse to allow an extension of the defence of duress to allow for consideration of the circumstances of a battered woman in the same way it had done for self-defence.

3.2.2 United States

Nearly 25% of women in the United States will experience domestic violence in the course of their lifetime.[55]

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[53] R. *v*. Malott, [1998] 1 S.C.R. 123, para. 5.
[54] R. v. Ryan, NSCA 30. (2011).
[55]National Institute for Justice and Centres for Disease Control and Prevention *Extent, nature and consequence of intimate partner violence: Findings from the National Violence Against Women Survey,* July 2000

In early colonial America, the doctrine of coverture applied, and a woman was considered her husband's property.[56] A man had the authority to chastise his wife provided he did not inflict permanent damage. In the case of ***Bradley v State,***[57] the Supreme Court of the State of Mississippi ruled that a man was entitled to moderately chastise his wife.

In this case a man was charged with assault and battery against his wife. In issuing its ruling, the court stated that:

"To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement in cases of great emergency and use salutary restrains in every case of misbehaviour, without being subjected to vexatious prosecutions, resulting in mutual discredit and shame of all parties concerned."

Rivers-Schutte (2013) writes that the courts sought to use cases involving intimate partner violence as a means through which to educate the abused women to practice better household manners in order to avoid provoking their husbands.[58] This had the effect of encouraging women to not only accept liability for upsetting their husbands and provoking them into violence, but also to stay with their husbands and try to become better wives.

In the 1960s, the feminist movement sought to bring focus on the failure by law enforcement authorities to afford protection to battered women, refusing to intervene in domestic disputes.[59]

3.2.2.1 Violence against Women Act (VAWA)

The Violence against Women Act (*hereinafter referred to as* VAWA) was enacted by Congress in 1994. It was the first major federal legislation on the issue of domestic violence.[60]

The act was passed following four years of investigations into the extent to which and severity of domestic violence, sexual assault, and stalking was committed against women.[61]

The investigative process involved a series of hearing in which Congress heard testimony from a variety of experts which included law enforcement officers, legal practitioners, medical practitioners and victims of gender-based violence.

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[56] Rivers-Schutte, N *History of the Battered Woman Syndrome- a fallen attempt to redefine the reasonable person standard in domestic violence cases* Seton Law School Student Scholarship, 2013, 3
[57]Bradley v. State, Supreme Court of Mississippi, 1824. 1 Miss. 156, Walker 156.
[58] Rivers-Schutte, *History of the battered woman syndrome,* 5
[59] http://hrlibrary.umn.edu/svaw/domestic/link/policereform.htm accessed on 15 February 2019 at 7:40 AM
[60] Rivers-Schutte, *History of the battered woman syndrome,* 10
[61] http://www.ncdsv.org/images/HistoryofVAWA.pdf accessed on 12 January 2019 at 2:45 PM

The act provided the means for the creation in 1995 of the Office on Violence against Women (OVW) within the Department of Justice (DOJ). The OVW was charged with implementing the VAWA legislation and, along with the Department of Health and Human Services (HHS), administering grant programs to state and local governments. Grants administered by the DOJ primarily fund work to prevent and address domestic violence and child abuse and train victim advocates. Grants administered by the HHS provide funds for shelters, rape prevention and education, programs to address and reduce the sexual abuse of runaway and homeless youth, and community programs to educate on domestic violence. The VAWA also mandates government funding for studies of violence against women.

3.2.2.2 Role of expert witness testimony

Expert witness testimony in criminal cases is allowed as either general testimony or case-specific testimony.[62] In the case of a battered woman, expert testimony is presented to explain how her perception of danger may make her reasonably fearful of an imminent threat of severe bodily harm, even where this imminence is not apparent to the average juror.

Generalized testimony tends to focus on battering and its effects. Such testimony relies on an understanding of scientific and specialized knowledge.

Case-specific expert testimony focuses more on the plaintiff in the case in which the testimony is being presented. Here, the expert is required to conduct a face-to-face interview with the alleged victim of domestic violence and then tie the facts of that case in with his generalized knowledge in the field.

The role of an expert witness in a criminal case involving a battered woman should be limited to assisting the trier of fact in understanding the defendant's experiences and actions, not to excuse them.[63] While it is true in any self-defence case that the jury needs to know facts that tend to show why the defendant felt the need to defend herself, the situation that involves battering that occurs over time is sufficiently different to warrant the need of further explanation. The average juror does not possess the knowledge of the effects of battering and therefore it is proper for an expert to explain battering and its effects on women in relationships.

In criminal cases where a battered woman is being tried for a crime and seeks to introduce a defence of insanity, coercion, or self-defence, or where a battered woman is charged with a

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[62] Rivers-Schutte, *History of the battered woman syndrome,* 23
[63] Osthoff, S in the preface to the NIJ/CDC report.

crime and offers evidence of battering in order to reduce the seriousness of the charge against her, or even where a batterer is being charged with murder or assault and is attempting to introduce evidence of the battered woman's behaviour as part of his defence, evidence in the form of research or studies that explain the effects of battering are relevant and should be admitted. Such research can aid the trier of fact by examining the relationship between the battering and its effects on the battered woman. Research can show how the battering affects a woman's state of mind, perception of danger, and coping mechanisms.

3.2.2.3 What is the general position in the United States on expert testimony on BWS?

Since 1990, nine states have enacted legislation to provide for admissibility of expert testimony on BWS. In 1991, the Texas legislature amended the evidence section of the Texas Penal Code to require courts to admit expert testimony if the woman is trying to establish that use of deadly force was imminently necessary. According to the amendment, the woman shall be permitted to present:

1) Relevant evidence that the defendant had been the victim of acts of family violence committed by the deceased
2) Relevant expert testimony regarding the condition of the defendant's mind at the time of the offense.

Some states, like California and Ohio, have enacted legislation to preclude attacks on admissibility by declaring the BWS is scientifically valid. The state of Maryland has gone so far as to admit evidence of the BWS "notwithstanding evidence that the defendant was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offense."

The vast majority of states allow expert testimony on the BWS in support of battered women's defence claims. Such testimony is most readily accepted in cases involving traditional (confrontational) self-defence situations. Still, expert testimony has also been admitted in a number of state courts in non-traditional (non-confrontational) self-defence situation, such as when a battered woman kills her sleeping abuser (accepted by 29% of the states) or when she hires someone to kill her abuser (accepted by 20% of the states). In about 25% of states, experts can give an opinion on whether the defendant acted in self-defence.

3.3 Conclusion

The courts in the jurisdictions that have been examined have recognised the realities of intimate partner violence and the role it plays in leading abused women to carry out homicide. They

have sought to give due consideration to expert testimony on BWS in order to enable their juries to adequately understand how BWS affects the abused woman. They have not, however, accepted the state of being battered as *prima facie* evidence of innocence. By interrogating individual cases on their own merits, they have been able to develop substantial jurisprudence on the issue of use of testimony on BWS.

4 Kenyan Context

4.1 Introduction

This chapter examines the Kenyan criminal justice system with a view to understanding the existing legal environment under which women who kill their abusive spouses are tried.

4.2 Intimate partner violence in Kenya

Despite a progressive constitution that boldly declares the equality of all Kenyans before the law, Kenya continues to face many hurdles towards realising these noble yet arduous ambitions, especially with regard to women.[64]

According to the 2014 Kenya Demographic and Health Survey (hereinafter referred to as the KDHS), 42% of women in Kenya believe that wife-beating is justified for at least one of a specified number of reasons.[65]

Table 1.1: Percentage of women who agree that a husband is justified in hitting his wife

Background characteristic	Burns the food	Argues with him	Goes out without telling him	Neglects the children	Refuses to have sex with him	% who agree with at least one reason	Number of women interviewed
AGE							
15-19	7.5	21.8	20.9	34.0	11.2	44.5	2,717
20-24	6.4	20.0	22.0	32.2	13.2	39.4	2,691
25-29	6.7	20.7	22.1	32.7	14.5	41.0	2,932
30-34	6.0	19.3	19.6	30.3	14.2	38.3	2,162
35-39	7.7	20.6	22.2	33.6	18.9	42.3	1,780
40-44	7.8	21.9	22.8	36.7	19.7	44.8	1,292
45-49	8.5	24.9	24.7	37.1	21.7	45.9	1,052

[64] Article 27, *Constitution of Kenya*, (2010)

[65] http://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/vaw%20survey/1%20kenya%20dhs%202014.pdf?vs=4916 on 8 February 2019 at 2:15 PM

Interestingly, the percentage of men who think husbands are justified in beating their wives is lower, at 33%. It ought to be noted, however, that these figures are an improvement on those from a similar study conducted 6 years prior in 2008 where women's acceptance stood at 53% and men's acceptance at 44%.

Among married women between the ages of 15-49, 56% of the physical violence they had been on the receiving end of since the age of 15 came at the hands of their current husband/partner followed by their previous husband/partner at 24%.

The women reported experiencing different forms of violence including physical violence, sexual violence and emotional violence.

This research points to a deep-rooted societal ill that has been normalised.

4.3 The Kenyan criminal justice system

To begin with, Musyoka (2013) defines criminal law as an area of law in the realm of public law that is concerned with conduct that has been prohibited for being against societal interests.[66] The modern approach to punishment of criminal offenders takes a more reformatory leaning, with due regard given to the human rights and humanity of the offending party.[67] The state is responsible for the determination of that which constitutes criminal conduct, a role which it carries out in the public interest.[68] Generally speaking, a person is only culpable of a criminal offence if it is established that they committed the act or omission voluntarily and with a blameworthy mind.[69] In *Mohammed and three others v Republic,*[70] Osiemo J states that a person may not be convicted of a crime unless it is proved beyond reasonable doubt that they had both caused an event or been responsible for the existence of a certain state of affairs, and that they did so with a definite state of mind in relation to the causing the event or the existence of the state of affairs.

Section 9(3) of the Penal Code states that the existence or lack thereof of a motive to commit a crime is immaterial in the determination of culpability unless expressly provide for in the law defining that particular offence. Malice aforethought is a requisite factor in the establishment of liability in a murder case. In *Gathitu s/o Kiondu v Reginam,*[71] the court held that the people

[66]Musyoka, *Criminal law*, 1.
[67] Musyoka, *Criminal law*, 5.
[68] Musyoka, *Criminal law*, 5.
[69] Musyoka, *Criminal law*, 27.
[70] [2005] 1 KLR 722
[71] [1956] 23 EACA 526

who had assisted in the burying of a murder victim's body were not guilty of being neither accomplices nor accessories after the fact since they were motivated in their actions by fear and not a desire to help the accused evade justice.

The BWS defence seeks to establish that the *mens rea* element of murder fails to be established where an abused woman murders her abusive spouse. The laws of Kenya offer two defences which such an accused woman can attempt to base her defence. These are:

1. Insanity
2. Defence of self, others or property.

4.3.1 Insanity as a defence

Where the accused pleads insanity, or raises the defence of insanity, the burden rests upon them to establish that this claim is legitimate.[72] The standard of proof is, however, one of a balance of probabilities.

Section 12 of the Penal Code requires that in order to establish insanity, the accused has to show that they, at the time of the commission of the offence, were suffering from a disease of the mind on account of which they were incapable of understanding what they were doing, or incapable of knowing that what they were doing was wrong.

In the case of ***Joyce Mugure Andrew Kathari v Republic Mombasa***[73] the defence of insanity is restricted to the time of doing the act or making the omission.

4.3.1.1 M'Naghten Rules

The case of ***Queen v M'Naghten***[74] led to the development of a test with which to determine the validity of a claim of insanity as a defence. Under this test, in order to succeed with a plea of not guilty by way of insanity, the accused had to demonstrate:

1. **Defect of reason-** the accused must show that at the time of the commission of the offence they suffered from a disease of the mind that caused them to have a defect of reason. Disease of the mind in this case include schizophrenia and depressive diseases. Personality disorders such as psychopathy and sociopathy are not considered insanity as per the section 12 definition and thus cannot form the basis of a defence.

[72] Musyoka, *Criminal law*, 77.
[73] CACRA No. 69 of 1983
[74] 8 Eng. Rep. 718 [1843]

2. **The incapacity to understand what they were doing or that it was wrong** – where an accused suffers from a disease of the mind from a medical point of view, but which does not produce any of the two incapacities, then the defence would not be accepted.[75]

In the case of ***Phillip Muswi s/o Musele v Reginam,*** the court held that a man who killed his wife knowing what he was doing, but claiming to have his judgement of right or wrong clouded by his belief that his wife was practising witchcraft on him was guilty of murder since he knew exactly what was happening.

In *Rex v Kibiro* it was held that medical evidence is not essential to prove insanity since the issue of determining insanity ought to fall on the court. However, medical evidence supporting the claim is relevant, and tends to be the most credible. It should, however, be considered alongside other evidence.[76]

Where the accused is successful in proving their insanity at the time of the offence, but the prosecution is able to prove the *actus reus* elements of the offence, the court must enter a verdict of "guilty but insane."[77] Where this verdict is found, the case must be reported to the President who may then make on order for the person to be detained in a mental hospital, prison or other safe custody. The person in charge of whatever place the accused is detained in then has to give a regular report to the President on the state of the accused subject to which report the President may order for their discharge. The discharge is still subject to an amount of supervision for the safety of both the individual and the public.

As stated in ***Mwangi v Republic,***[78] a verdict of guilty but insane is not a conviction, but an acquittal and the period of detention is not punitive but preventive and that there is no appealing against such a decision.

Section 162 of the Criminal Procedure Code provides that where the accused is of unsound mind at the time of the trial, then proceedings against him shall be postponed and he shall be released on condition that they shall be properly taken care of and prevented from harming themselves or others. This release does not, however, prevent the accused from being brought back before the court should they be found once again to be capable of making a defence. In murder cases, the accused would be remanded in custody.

[75] Musyoka, *Criminal law,* 107.
[76] Musyoka, *Criminal law,* 113.
[77] Section 166, *Criminal Procedure Code.*
[78] [1976-1985] EA 355 [1982] KLR 120.

In *Rex v Olual s/o Kongo*[79] it was held that where an accused who had been found incapable of taking plea by reason of insanity is alleged to have recovered his sanity, the trial court is responsible for making such determination as to the soundness of his mind. The medical report to that effect can serve as evidence supporting the claim but is not as of itself conclusive.

At first glance, this defence seems to adequately address the issue of battered women who kill. The defence may claim that the accused was suffering from a defect of reason. However, victims of BWS are often well aware of their actions and the wrongfulness thereof. They just simply view that avenue as their last resort.

4.3.2 Defence as a defence

The Penal Code does not define the right to the defence of defence.[80]The Penal Code, however, does state that criminal liability for the use of force in the defence of person or property ought to be determined according to the principles of English common law.[81] Further, the Penal Code provides that where said force is excessive, even where the force was permitted by law or consent, then the person who uses the force is criminally responsible for the excess, taking into account the nature and quality of the act.[82]

In *Republic v Gachanja*[83], Etyang J held that self-defence is an absolute defence, absolving the accused person who successfully claims it from all criminal liability provided he acted reasonably and used necessary and permitted force. In *Msiwa and another v Republic*[84], the court held that for a homicide to be justifiable, the accused must show that they were acting in reasonable self-defence.

There are two aspects to the defence of defence:

- Defence of person which is further split into self-defence and defence of another person.
- Defence of property

The general rule with regard to self-defence is that a person may use all such reasonable measures to defend himself having regard to the nature of the assault. On defence of another, the rule is that a person is entitled to use all reasonable force to prevent the commission of a

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79 [1936] EACA 46
80 Musyoka, *Criminal law*, 125.
81 Section 17, *Criminal Procedure Code*.
82 Section 241, *Criminal Procedure Code*
83 [2001] KLR 428
84 [1999] 2 EA 190

violent felony on another person. In defence of property, a person may use all such means and force as are reasonable taking into account all the circumstances.

In *Selemani s/o Ussi v Republic*[85], a felonious attack was defined as one where the attacker seeks to cause grievous harm on the victim or to commit robbery. One has the right to stand his ground and resist a felonious attack on them, and if in the process he should kill the attacker, such a killing would be justifiable if the manner of resistance is reasonable in the specific circumstances.[86] Where the attack is not felonious, then the victim must retreat and not use force.

In *Yozefu Engichu s/o Adiriyano Eduku v Reginam,* the deceased came to a beer party and began to insult the accused. Seeking to avoid trouble, the accused left the party. The deceased followed and physically attacked the accused. The accused, being smaller than the deceased, produced a knife and proceeded to stab the deceased, who then died of the knife wounds. The accused was found guilty of murder, but on appeal it was reduced to manslaughter on the grounds of self-defence.

In *Musyoka and others v Republic*[87], the court held that an accused person must retreat from danger from his attacker until he can retreat no further before he can use force to defend himself.

In the case of *Njoroge v Republic*[88], the court held that the defence of self-defence would not be available where the accused is the aggressor. This is especially pertinent in the context of a battered woman who kills. Often, the incident takes place at a time where the victim was docile, such as when the abusive husband was asleep.[89] In this case, the battered woman plays the role of the aggressor, by attacking a person that, seemingly, was non-threatening.

In *Uganda v Mbubuli* (1975) HCB 225, the court stated that the law of self-defence consisted of four major elements:

- The accused must have been attacked
- The accused must have believed on reasonable grounds that he was in imminent danger of death or serious bodily harm

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[85] [1963] EA 442
[86] Musyoka, *Criminal law,* 126
[87] [2003] 1 EA 177
[88] [1988] KLR 752
[89] Giannetkis, P. *Battered Woman Syndrome*

- The accused must have believed it was necessary to use force to repel the attack
- That the force used must have been believed by the accused, on reasonable terms, to have been necessary to prevent the attack

The court also stated that if a person is attacked and reasonably feels their life is in danger then they were entitled to use force, even deadly force, to repel the attack. It was further stated that in deciding whether the force used was necessary, the court ought to take the following into consideration:

- Whether the accused demonstrated preparedness to temporise and disengage, and perhaps make a physical withdrawal.
- The nature of the attack; seriousness of it; weapon used, if at all
- The state of mind of the deceased; the nature of their relationship with the accused; the specific circumstances of the attack
- The reactions of the accused to the attack; whether the accused used force immediately or employed other means to get out of the situation
- The nature of the force used by the accused to repel the attack, which must be proportionate to the attack.

The court in this case held that the use of a spear to protect oneself from a bare handed attack indicated that the reaction of the accused was not reasonably necessary in the circumstances.

The burden of proof of proving the defence of defence does not rest with the accused. The onus lies on the prosecution to prove that the accused does not pass the test to establish a defence of self-defence.

This approach to self-defence is rooted in the archaic idea of conflict as occurring between two males who are capable of handling themselves physically. It gives very little consideration to the plight of a woman who, after an extended period of cyclical recurring violence, believes that the only recourse available is to end the life of her tormentor.

4.3.3 Expert witnesses

The BWS defence relies fundamentally on the court hearing testimony from an expert in psychology on the state of mind of the accused person at the time of committing the offence.

The opinion evidence of an expert is admissible in court by Kenyan law.[90] Section 48 of the Evidence Act states that where the court has to rely upon an opinion on a particular point, be it of foreign law or science or art, then the court may admit the evidence of a person specially skilled in that respective field. In *R v Turner,* Lawton LJ, in describing the purposes for which expert evidence could be used, stated that:

"Opinions from knowledgeable persons about a man's personality and mental make-up play a part in many human judgements...An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgement more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does"[91]

The expert's duty is to provide the judge with the required scientific criteria upon which to base their conclusions.[92]

It is upon the court to determine whether a person is an expert, and in doing so, the court has to be satisfied that the matter in question requires special skill, knowledge or expertise; and that the witness before it is sufficiently qualified to testify as an expert witness.[93] There are three issues to determine in order for expert opinion to be admissible:

1. That the witness is a qualified expert, whether by means of formal education or practical experience, and therefore has specialized knowledge or skill.
2. That the area of which expertise has been claimed is an area where the alleged expert took extra courses
3. That the opinion is based wholly or substantially on the said knowledge
4. That the matter of which the alleged expert claims expertise is not within common knowledge.

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[90] *Falkes v Chadd* [1782] 3 Doug KB 157 Lord Mansfield CJ stated that: "On certain matters, such as those of science or art, upon which the court itself cannot form an opinion, special study, skill or experience being required for the purpose, 'expert' witnesses may give evidence of their opinion."

[91] [1975] 1 All ER 70

[92] *Davie v Edinburgh Magistrates* [1953] S.C. 34.

[93] Mbobu K, *The law and practice of evidence in Kenya,* 297

In *Bichuru Ngori Ondieki v Republic,*[94] a psychiatrist was called by the prosecution to testify that he had examined the accused, who claimed that when he stabbed a man to death he did not know what he was doing. The psychiatrist testified that he found the man to be normal and not suffering from any mental sickness.

Expert testimony is open to corroboration or rebuttal by other evidence where there is conflict, and it is upon the court to determine such conflict. In *Kistimile Mugisha v Uganda* the Court of Appeal stated that expert opinion does not amount to a statement of irrefutable facts which binds the court to follow it, but rather the court should only rely on it to inform its decision.[95]

Expert testimony based on the results of scientific research is extremely persuasive.[96] Expert witnesses owe a duty to the court to present their unbiased opinion on their area of expertise as it relates to the subject matter of the trial. This is in spite of the fact that expert witnesses are selected by the parties. The Evidence Act, Criminal Procedure Code and the Civil Procedure Act are silent on the issue of court appointed experts, which would be better suited to ensure the impartiality and objectivity of the expert testimony.[97] Mbobu proposes that the role and independence of the expert witness ought to be clarified, perhaps by way of statutory amendment, in order to ensure that the expert does not feel the need to skew their testimony in favour of a party.[98]

4.4 Conclusion

From the foregoing, it is evident that the laws of Kenya on self-defence, if applied at face value, do not afford the battered woman an opportunity to explain the extent to which the abuse they suffered influenced their decision to end their abusive spouse's life. Our laws on self-defence clearly envision fisticuffs between two combatants of similar strength and are therefore manifestly unfair to women, especially those in abusive relationships.

Consider the case of Jane Manyonge, a former headteacher currently serving a life sentence at Lang'ata Women's Maximum-Security Prison for the murder of her husband. In an interview with *Business Today,* Ms. Manyonge recounts that she killed her husband in the course of domestic violence, which she states is "a two-way street".[99] A reading of the court proceedings

[94] CACRA No. 87 of 1994
[95] Criminal Appeal No. 78 of 1976.
[96] Mbobu, *The law of evidence,* 301.
[97] Mbobu, *The law of evidence,* 303.
[98] Mbobu, *The law of evidence,* 304.
[99] https://businesstoday.co.ke/jailed-headteacher-regrets-killing-hubby/ accessed on 12 January 2019 at 4:23 PM.

of her trial, however, reveal that she did not bring up the issue of domestic violence.[100] As a matter of fact, the history of violence in their relationship, which was brought before the court by various witnesses, was used by the judge to establish her motive for killing her husband.

Whether or not Ms. Manyonge was a battered woman would require a qualified psychiatrist to establish and to assert so here would be pure conjecture. However it is evident from the facts of the case as relied upon by the court that there was domestic violence in Ms. Manyonge's home. If the Kenyan courts allowed testimony on BWS to be produced before them, then perhaps Ms. Manyonge's case would have benefitted from it doing so.

As has been established in the preceding section, the law allows for expert witnesses to be introduced by parties to proceedings to help the court better understand areas of specialized knowledge and skill. The idea of expert testimony on BWS being allowed is therefore procedurally valid.

[100] Republic v Jane Nambuye Manyonge [2017] eKLR

5 Conclusion

5.1 Benefits arising from the use of BWS testimony

Taylor (1986) wrote that "female homicide is so different from male homicide that women and men may be said to live in two different cultures, each with its own 'subculture of violence'".[101] From the foregoing discussion, it becomes apparent that a complex network of social, economic, cultural and even legal factors can lead the battered woman to commit murder as a last resort. The admittance of testimony on BWS by courts doesn't produce a "be-all-end-all" solution to these factors. Indeed, the point at which this testimony comes into play means it serves a purpose that is more ameliorative than anything else.

This study has demonstrated the manner in which the law of self-defence as enshrined in common law, fails to give due regard to the plight of a woman under attack. Given the general difference in ability engage in physical conflict, it is unreasonable to hold women to the same standard as men when it comes to the matter of self-defence. This situation is further compounded in the case of woman in abusive relationships with regard to how they perceive imminent danger.

Courts giving consideration to testimony by experts on BWS helps to give the accused woman a fairer trial by giving due regard to all factors that led to her carrying out the deed she finds herself accused of. As has been discussed in this study, the BWS expert testimony ought not to in and of itself exonerate the accused of her alleged crime. Rather, it ought to be considered in tandem with all other relevant factors. To omit it, however, is to cause a grave injustice to the accused woman.

5.2 Challenges facing the use of BWS testimony in murder cases

Due to its categorisation as a mental state, BWS is often mischaracterised as an afflication of the mind, in the same vein as automatism. Ono writes that this has the effect of portraying abused women as unbalanced and mentally ill, deserving of institutionalisation.[102] If not properly instructed, courts can wrongfully reach verdicts of guilty by way of insanity, which in Kenya would mean the accused being committed to a mental institution.

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[101] Taylor L.J., *Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defence* (1986) 33 University of California in Los Angeles Law Review, 1681.

[102] Ono, *Reformulating the use of battered woman syndrome testimonies*, 35

As Justice L'Heureux-Dube pointed out in the *Malott* case, there is a danger that courts might develop a particular stereotype of who a woman suffering from BWS is, and this would lead to consideration only being given to women who fit a particular stereotype of passivity and timidity. Justice L'Heureux-Dube stated that different women's experience with BWS would be different and therefore to apply a blanket standard of how it manifests would lead to some women being wrongfully adjudged to not be battered.

6 Bibliography

Bowman C, *Theories of domestic violence in the African context*, 11 American University Journal of Gender, Social Policy & the Law (2002)

Constitution of Kenya (2010)

Dressler, J *Understanding criminal law,* LexisNexis, San Francisco, 2009

Easteal, P, *Battered women who kill: A plea of self-defence*

Faigman, D, *The Battered Woman Syndrome and self-defence: A legal and empirical dissent,* Virginia Law Review, Vol. 72, No. 3 of 1986

Giannetakis, P *Battered woman syndrome background* 2017

Guanzon, R Rowena V. Guanzon, *Legal and conceptual framework of Battered Woman Syndrome as a defense,* 86 Phillipines Law Journal 2011

http://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/vaw%20survey/1%20kenya%20dhs%202014.pdf?vs=4916

http://hrlibrary.umn.edu/svaw/domestic/link/policereform.htm

http://www.ncdsv.org/images/HistoryofVAWA.pdf

https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf;jsessionid=037BC28EE03CC2179AC0C28FBFE8A0A3?sequence=1

https://businesstoday.co.ke/jailed-headteacher-regrets-killing-hubby/

https://inpublicsafety.com/2015/10/domestic-violence-and-intimate-partner-violence-whats-the-difference/

https://www.cbc.ca/news/canada/5-cases-using-the-battered-woman-defence-1.1221150

https://www.cdc.gov/violenceprevention/intimatepartnerviolence/definitions.html

https://www.nation.co.ke/news/Experts--Law-is-not-fair-to-abused-women/1056-4697932-p8jterz/index.html

Kameri-Mbote P, *Violence against women in Kenya: A legal analysis of law, policy and institutions,* IELRC working paper 2000-1

Locke, J, *Second treatise of government,* Hackett Publishing Company, 1980

Mbobu K, *The law and practice of evidence in Kenya,* Law Africa Publishing (K) Ltd, Nairobi, 2012

Musyoka W, *Criminal law,* Law Africa Publishing (K) Ltd, Nairobi, 2013

National Institute for Justice and Centres for Disease Control and Prevention: *Extent, nature and consequence of intimate partner violence: Findings from the National Violence against Women Survey,* July 2000

Odhiambo G, *Wife battering and its impact on the nuclear family: A case study of Nairobi province,* Unpublished MA Sociology Thesis, University of Nairobi, 22 June 2005

Ono, E, *Reformulating the use of battered woman syndrome testimonies in Canadian Law: Implications for social work practice,* 32 Journal of Women and Social Work 2017, 24-39

Rivers-Schutte, N *History of the Battered Woman Syndrome- a fallen attempt to redefine the reasonable person standard in domestic violence cases* Seton Law School Student Scholarship, 2013

Sitawa, K and Yanyi, D: *Gender based violence: Correlates of physical and sexual wife abuse in Kenya* https://link.springer.com/article/10.1007/s10896-008-9156-9#citeas

Taylor L.J., *Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defence* (1986) 33 University of California in Los Angeles Law Review, 1681

Walker, L *Battered women syndrome and self-defense,* 6 Notre Dame Journal of Law, Ethics and Public Policy 1992

Wallerstein, S *Justifying the right to self-defence: A theory of forced consequences* Virginia Law Review, Volume 91, No. 4 (Jun., 2005), 999-1035

Young Kim, J, *The rhetoric of self-defense,* 13 Berkeley Journal of Criminal Law (2008)

Zaher C, *When a woman's marital status determined her legal status: A research guide on the Common Law doctrine of coverture* 94 Law Library Journal 2002