



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 20 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PASCAL WILLIAM MAKOKHA.....ACCUSED

JUDGMENT

1. **Pascal William Makokha** is charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence in count one are that on the 31st day of July 2015, at **Seka** village, Kisoko sub-location of **Busia** County, murdered **Fredrick Lehja Ongango Obilo Asihya**.
3. In count two, the particulars of the offence are that the 31st day of July 2015, at **Seka** village, Kisoko sub-location of **Busia** County, murdered **Geoffrey Obilo Asihya**.
4. The contention of the prosecution is that when Geoffrey Asihya was tethering some cattle, some two employees of the accused went and started to beat him. The accused was his paternal uncle. Later, the accused joined his workers and shot at Geoffrey Asihya. When Geoffrey's father went to find out what the issue was, the accused fatally shot him.
5. In his defence the accused contended that when he went to stop Geoffrey Asihya from cutting down his trees, the latter and two other men in his company surrounded him. He sensed danger and fired into the air as he retreated. He found his brother Fredrick Asihya waylaying him. When Geoffrey Asihya cut him on the hand, he shot at him. He shot at his brother when the latter attempted to pick a machete to cut him.
6. The issues for determination are:
 - a) What was the immediate cause of the incident;
 - b) Whether there were any trees cut at the scene;
 - c) If they were, in whose land did they stand;
 - d) Whether the accused acted in self defence; and
 - e) Whether the offence of murder was proved.
7. There are two versions of how the incident happened and what was the immediate cause of the unfortunate deaths; one by the prosecution and the other by the defence. The prosecution version was that the accused and two of his workers attacked and beat up Geoffrey Asihya before shooting him. When his (Geoffrey Asihya's) father went to the scene in response to his screams, he was also shot by the accused.
8. Emily Lumumba (PW4) was a casual labourer in the land of Fredrick Lehja Ongango Obilo Asihya, the father of Geoffrey Asihya. She testified that at about 8 a.m., a worker of the accused went up the hill where Geoffrey Asihya was and informed him that Pascal (the accused herein) had asked him to stop cutting firewood and should go to his (accused's) home. The worker went away and shortly the accused went to where Geoffrey Asihya was. He asked the deceased who had sent him there. Geoffrey told him that he was collecting firewood for his bricks. The accused said that Geoffrey was destroying his trees and insulted him. Geoffrey left and went home.
9. The evidence of Lucy Adhiambo (PW5) who was in company of Emily(PW1) gave similar evidence except that due to fear she did not go as close as Emily.

10. Pascal William Makokha the accused in his defence contended that Geoffrey Asihya, Kabwana and another person were cutting his trees. He asked his workers to go and tell the trio to stop cutting his trees. He then went to his brother's home to tell his children to stop cutting his trees. He however did not find him. When he saw him weeding, he informed him about it. His brother told him to go and tell them. He therefore went up the hill where the trio were cutting his trees. Robert Chinungo (DW2) and a grandson of the accused testified to the same effect as the accused.

11. Though the two versions differ on whether Geoffrey and the other two were collecting dry firewood or were cutting down trees, there is a consensus that the immediate cause of the unfortunate incident was the allegation of cutting the trees the accused claimed were his. When the court visited the scene and we were conducted over the disputed area and where the shooting occurred, no single stump was seen. I therefore find that no trees were cut though this was the claim by the accused that led to the shooting of his brother and his son.

12. The evidence that is on record reveal very many instances of animosity between the two brothers and their families emanating from the issue of inheritance. From the scene visit, it was not easy to tell where the disputed trees stood. In his defence, the accused testified that the succession cause was still pending in court. I will revisit this issue later and make a finding whether it would be a justification.

13. The evidence of Emily Lumumba (PW4) and that of Lucy Adhiambo (PW5) who were tilling land near the scene was that when Geoffrey went home, he returned with some cows and while tethering them, two workers of the accused accosted him. The two started to beat him while pushing him towards where the accused was, and who had a big club. The accused hit Geoffrey with the club on the head. Geoffrey fell down. The accused also fell down. At this juncture Geoffrey's father entered the scene. Before he could say anything, the accused shot him. When Geoffrey was struggling to stand, the accused shot him as well. This is what Nelson Asihya (PW1) testified to.

14. The defence of the accused was that when he asked them to stop cutting the trees and move out, the trio surrounded him. When he sensed danger, he started to fire in the air as he retreated. As he was retreating, he found his brother waylaying him while armed with a machete and told him that he was going nowhere. This is when Geoffrey Asihya cut him on the left hand. He shot him on the hand and he dropped the machete. When his brother attempted to cut him, he dodged and he (his brother) fell down and his machete fell down as well. When he attempted to pick the machete, he shot him. Kabwana hit him (accused) with a hoe stick on the right hand and ran away.

15. Of these two versions of the incident that of the prosecution is convincing due to the following reasons:

a) The evidence of Emily Lumumba (PW4) and that of Lucy Adhiambo (PW5) is evidence of independent witnesses not tainted by the family feud over land.

b) Whereas the accused contended that he sent two of his workers, Robert Chinungo (DW2) and a grandson of the accused testified that he was the one who went to Geoffrey and reported back to the accused what Geoffrey had told him.

c) According to Robert Chinungo (DW2) Geoffrey was with Kabwana but according to the accused, Geoffrey was with Kabwana and another person he did not know.

d) The evidence of Dr. Sande Charo (PW8), other than the penetrating bullet wound, the body of Geoffrey had the following injuries as well: a cut wound on the left arm and a swollen face with multiple scalp swellings

e) Though the accused contended that he was injured, there was no evidence to support his claim.

From the foregoing analysis of the evidence on record, I find that the defence of self defence is not available to the accused. Neither is the case of **Mungai vs. Republic [1984] KLR 85** applicable in the circumstances of this case.

16. The accused gave a defence of provocation over a long period, though not expressly. He complained of threats to kill him but during cross examination he conceded that he did not know from whom the threats emanated.

17. The accused linked Asihya with the digging of a trench across his road for when he was stuck, Asihya found him there and did not assist or greet him. This in my view was mere suspicion due to their existing feud over land. The investigating officer conceded that he was aware of some of the complaints. Some were found not to be true after investigations. When is the defence of provocation available to an accused person?

Section 207 of the Penal Code provides:

When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter.

Section 208 (1) of the Penal Code defines the term provocation as follows:

The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

18. In the case of **Peter King'ori Mwangi & 2 others vs Republic [2014] eKLR**, the Court of Appeal while addressing the issue of

provocation as a defence stated:

We start from the premises, that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So, what is provocation? In the case of Duffy (1949) 1 ALL ER 932; provocation was defined as “some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...

19. From the foregoing, it is abundantly clear that the defence of provocation is not available to the accused.

20. For an offence of murder to be established, the prosecution must prove the following three ingredients beyond any reasonable doubts:

- (a) the death of the deceased;
- (b) that the accused committed the unlawful act or omission which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

In the case of **Republic vs. Andrew Mueche Omwenga [2009] eKLR**, D. K. Maraga J, as he then was, spelled out the ingredients as follows:

There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.

21. Malice aforethought has been defined in Black’s Law Dictionary, 10th Edition as follows:

The requisite mental state for common-law murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life, (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

22. Section 206 of the Penal Code gives instances when malice aforethought may be deemed to be established. It states:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- (c) an intent to commit a felony;***
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

23. Liwin Asiya (PW2) a twelve years old girl testified that on the material day, she had been sent home from school to call her parents. She met with the accused who is her grandfather at his gate. He had what she described as “a small black gun”. She greeted him. After responding to the greetings, he told her that he was going to kill her father. She ran and reported to her grandmother, Ruth Obilo (PW3). This is what her grandmother testified to.

24. When Ruth Obilo (PW3) was informed about the threats, she said she called her daughter in law, Nakhabi. They ran towards the hill and when they reached close to the scene, they heard gunshots. The evidence of Ruth Obilo (PW3) corroborated that of Liwin Asiya (PW2). I therefore make a finding that the prosecution has established beyond any reasonable doubts that the accused committed the two offences with malice aforethought.

25. From the foregoing analysis of the evidence on record, I find the accused guilty of each of the offence he is charged with and accordingly convict him.

DELIVERED and SIGNED at BUSIA this 20th day of February, 2019

KIARIE WAWERU KIARIE

JUDGE