



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL (MURDER) CASE NO.14 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENARD OWINO MAKOKHA.....1<sup>ST</sup> ACCUSED**

**CLIFTON OTIENO MAKOKHA.....2<sup>ND</sup> ACCUSED**

**JUSTUS MAKOKHA BARAZA.....3<sup>RD</sup> ACCUSED**

**SILAS MAKOKHA OPANGA.....4<sup>TH</sup> ACCUSED**

**J U D G M E N T**

1. Benard Owino Makokha (A1), Clifton Otieno Makokha (A2), Justus Makokha Baraza (A3) and Silas Makokha Opanga (A4) are jointly charged with murdering Patrick Makokha Opanga (The Deceased) contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that the murder took place on 15<sup>th</sup> May 2014 at Elukongo sub location of Butula District within Busia County.

2. It is said that on 15<sup>th</sup> May 2014 at about 6.00p.m, the Deceased was at his house at Mauko with his wife Everlyne Achieng Opanga (PW3). The evidence of PW3 was that she heard a group of people approach them. They were screaming. That when A3 reached the Deceased, he attacked him with a metal rod and hit him. A1 then cut the Deceased on the head. A2, A1 and others not before Court then descended on the Deceased.

3. It was the testimony of PW3 that she was also attacked by A3 who attempted to cut her on her head. She shielded herself using her hand which was cut in the process. PW3 sought shelter in the house of Caroline Adhiambo (PW1). PW1 and PW3 are married to brothers. PW1 helped PW3 to Bumala "B" Health Center where she and one Marko who had also been attacked were treated and referred to Bungoma County Hospital for further treatment.

4. PW1 was at the material time at her home in Mauko village. It was her evidence that as she was conversing with her children, a group of 8 people came running into the compound and attacked the Deceased who was seated outside his house. That A3 hit the Deceased with a rungu and then A2 struck him with an axe on the back of his head. She also saw PW3 intervene but injured in the process when she was cut on her hand. That PW3 then fell into her house. It was also the testimony of PW1 that Marko was also attacked by A3 who cut him on the side of his head. Marko also sought shelter in her house.

5. The attackers left in a hurry after carrying out the attack. PW1, PW3 and Marko then left to Bumala AP Camp to lodge a complaint and later to the Health Center to get medical help. PW1 returned home with the Police only to find that the Deceased had been taken to a clinic in Bumala when they found that he had already passed on.
6. Gistine Makokha (PW2) is the mother of the Deceased. She too was at home at Mauko on the fateful day. She, too, told Court that she witnessed the attack on the Deceased. The evidence of PW2 was that she saw 8 people approach their compound. These included the four accused persons. It was her evidence that the Deceased was cut on his head by A4. She was also attacked and was cut on her head by A1. PW2 and Marko were also attacked and injured.
7. When PW1, PW3 and Marko left for the Police and clinic, she (PW2) was left with the Deceased. She was helped by a neighbour whose name she gave as Obala to take the Deceased to Bumala Hospital. Sadly, on reaching the hospital, the Doctor pronounced the Deceased dead.
8. Administration Police Constable Shem Ngige (PW5) was on duty at Bumala "B" Administration Police Post, when at around 7.30p.m, a group of people reported to the Station. Three of them were bleeding. They reported an attack on them by people known to them. He advised them to seek medical attention at a nearby Health facility. He and one Sgt Moses then left to the home of the Deceased where they found that the Deceased had been taken to hospital. He saw the Deceased motionless at the hospital.
9. Later on 18<sup>th</sup> June 2014 he and his colleagues who included Sgt Moses Ochanda Nyamwaji (PW7) arrested A1 at his father's home. On 6<sup>th</sup> August he and A.P.C Kuria arrested A3 along the Mauko-Chengo road.
10. It fell to Dr. Patson Kubuta (PW6) to conduct on a Postmortem on the body of the Deceased. One of the persons who identified the body to the Doctor was Esther Akinyi Makokha (PW4) who is a sister to the Deceased.
11. The Doctor noted extensive injuries on the external appearance of the body. A systematic examination revealed that on the head the Deceased had suffered multiple extensive penetrative injuries on the parietal and occipital regions. On the nervous system the Deceased had brain substance which was extensively injured by penetrative injuries in the respective lobes that correlated to the parietal and occipital regions. The Doctor formed the opinion that the cause of death was a severe head injury secondary to assault. The Court was of the opinion that the injuries were very serious and were caused by forceful injury.
12. Sgt Edward Ndaru (PW8) investigated the Death of the Deceased on 15<sup>th</sup> May 2014. The officer visited Bumala "B" Health Centre where he found 2 injured persons. The body of the Deceased lay on the corridor of the Health Center. PW8 escorted the Deceased to Busia District Hospital Mortuary while the 2 victims were transferred to Bungoma District Hospital.
13. It was the evidence of PW8 that the Accused persons were arrested on different dates. A1 and A2 were brought in together while the other two were arrested on different occasions. The Police officer thought that the likely cause of the attack was a family land dispute. After carrying out investigations the Police charged the Accused persons with the current offence.
14. At Defence hearing, A1 made an unsworn statement. He told Court that he was 17 years old at the date of testifying which was on 24<sup>th</sup> February 2016. He told Court that in the year 2014, he was a student at Khayagu Primary School and that on 15<sup>th</sup> May 2014 he went to school as usual up to 4.00p.m when he returned to the home of his Aunt by the name Ooko. That is 25km from the home of the Deceased. That nothing unusual happened and that he was informed about the Death of the Deceased on 16<sup>th</sup> May 2014 by his Aunt. He says that he attended the funeral of the Deceased on 24<sup>th</sup> May 2014 and was arrested by a crowd of people at their home on 18<sup>th</sup> June 2014.

15. A2 is Clifton Otieno Makokha. As of the date of the Death of the Deceased, he was a student at St Peters "B" Bumala Secondary School. His brother is Flighton Makokha (DW8). It was his evidence that on the morning of 15<sup>th</sup> May 2014, he and DW8 set off to school on a bicycle but which broke down on the way. They were forced to leave the broken down bicycle at the home of Mzee Bosco (DW7). A2 told Court that they got to school at 6.58 a.m and stayed in school until 5.00p.m.

16. A2 left school with DW8 and passed by the home of Bosco where they picked the bicycle and proceeded for home. That they reached home at 7.30p.m and were received by their Uncle Canar. They took supper at 8.00p.m. A2 then did his "preps" with his brother until 10.30p.m when he retired to bed.

17. A2 told Court that the Deceased was a neighbor and his home was 1½ km from the house of his Uncle Canar. He learnt of the Death of the Deceased from his Uncle on 16<sup>th</sup> May 2014 at 6.30p.m. He testified that he helped in the burial arrangements of the Deceased and attended his burial on 24<sup>th</sup> May 2014. He denied any involvement in the Death of the Deceased.

18. Under cross-examination, A2 told Court that he was arrested on 19<sup>th</sup> June 2014 on his way from home to Butula to visit his aunt by the name Florence. He was arrested by 2 Administration Police Officers who told him that they were looking for him. He was with one Bernard Sanya at the time of her arrest.

19. Steven Bosco Nabwoba (DW7) and Flighton Makokha (DW3) gave evidence that very substantially supported the Account of A2. Answering questions in cross-examination, DW8 gave some evidence about the events at the time of the arrest of A2. DW8 testified that he was not in school in the week that A2 was arrested. This was because he was away for games that were held at Butula Polytechnic. He expected A2 to be in school although he (DW8) was sent away for fees on the Tuesday following. It was his evidence that A2 and himself had school fees arrears.

20. Justus Barasa Makokha (A3) hails from Mauko village. Speaking under oath, A3 told Court that on 15<sup>th</sup> May 2014 at about 6.00p.m he had gone to fetch a cow from the river when he was attacked by the Deceased using a metal bar (Tarimbo). He was hit on his shoulder. A3 snatched the metal bar and started to struggle with him. The Deceased's Brother (Marko) joined in and cut A3 twice on his right hand. A3 hit the Deceased with the metal bar and at this point, Marko tried to cut him again but he (A3) ducked and the blow landed on the head of the Deceased.

21. The evidence of A3 was that PW3 and PW2 also joined the fray. PW3 was armed with a panga and PW4 with an axe. Both attempted to assault A3 but because he ducked they cut each other. He left the scene and reported the incident to the village elder by the name Benedict Ouma. He later learnt of the passing of the Deceased. It was his evidence that none of the Co-Accused were at the home when the attack happened.

22. A3 told Court of a Land Dispute between his home and that of the Deceased. And that the Deceased had destroyed his crop and a formal report made to the Agriculture officer who assessed the damage (D Exhibit 3). The Accused blamed the Deceased and Marko for the destruction of the crop.

23. In his evidence A4 told Court that before the Death of the Deceased, he was a resident of Githurai in Nairobi. It was his evidence that at the time of the alleged attack he was on his way to Nairobi having boarded a Nairobi bound bus at Bumala "A" at about 3.00p.m. The bus christened "Fly Emirates" reached Nairobi at 4.00 a.m the next morning. He then headed for his house at Githurai 45 where he reached at about 6.00a.m. He told Court that he learnt of the Death of the Deceased at about 6.30a.m when his late father called him. He never attended the funeral of the Deceased because, he says, he did not have fare to travel back home having just recently travelled from there.

24. It was his further evidence that in his journey to Nairobi, he travelled with his aunt Nancy Riziki (DW5) in the same bus. DW5 told Court that she met A4 at Bumala where he helped her put her luggage into the bus. At the end of the journey in Nairobi, he also helped her offload the luggage.

25. At the close of both the Prosecution and Defence case, this Court received submissions from both sides. Those submissions shall be considered within the Courts evaluation of the evidence. The evidence and the arguments present the following issues for my determination.

- i. Was the Death of the Deceased as a result of an assault?
- ii. If so, did any or all of the Accused persons strike the blows?
- iii. Are the Alibis set up by A1, A2, and A4 believable?
- iv. If any of the Accused persons were responsible for the Death of the Deceased, was malice aforethought established?

26. There is medical evidence about the severity of the injuries that were inflicted on the body of the Deceased. Just to give an example of those injuries. There were multiple extensive penetrating injuries on the parietal and occipital regions of the head and extensive damage to the brain. The Doctor (PW6) who performed the Post Mortem on the body of the Deceased formed the opinion that the cause of Death was a severe head injury secondary to an assault. In Court, the Doctor was emphatic about the severity of the injuries and nature of the blow that may have caused them. He stated:

**“The penetration was caused by forceful injury – these were very serious injuries.”**

27. It is therefore evident that the Deceased died as a result of an assault. This was confirmed by two opposing versions. That by the Prosecution in the evidence of PW1, PW2 and PW3. On the other divide, A3 alleged that the assault was the result of “friendly fire” when he ducked the blow of one Marko. Which version should the Court believe?

28. It is true as submitted by the State that, if believed, the evidence of PW1, PW2 and PW3 would be direct evidence and that of recognition. It is said that the assault on the Accused took place at about 6.00p.m and in broad daylight. The evidence of PW2 was that the Assailants were the four Accused persons together with 3 other persons named as Nafuyo, Judith and Bonny. Nafuyo is the stepmother of the witness while Bonny is her brother-in-law and Judith is the “co-wife”. PW2 told Court that A1, A3 and A4 are her brothers in law and Clifton was a neighbor. All the 7 would be well known to the witness.

29. What roles are the Accused persons alleged to have played? PW1 says that A1 was armed with a panga and a rungu. A2 with a panga, A3 with an axe and A4 with a panga. According to this witness A3 was the first to attack the Deceased with a rungu. A2 then struck him with an axe. A3 then struck him again with a panga.

30. Let us pose there for a moment. Although A3 is said to have assaulted the Deceased with a rungu and a panga, this witness had just told court that A3 was armed with an axe. In respect to A1, although armed with a panga and rungu, he struck the Deceased with an axe. It was not explained how and at what point A4 armed himself with an axe or A3 armed himself with a rungu and a panga.

31. That aside, how does this account compare with that of PW2 and PW3? PW2 is the mother of the Deceased and would know all the Accused persons well. It was her evidence that the Deceased was cut on the head with an axe and add,

**“Silas is the one who cut Patrick on the head”**

Silas is A4 while Patrick is the Deceased. This Account differs from that of PW1.

32. What is the story of PW3 on how the Accused was attacked? These is what she said:

**“I heard people screaming. Suddenly Justus reached him and hit him first with a metal rod. My husband asked them what was wrong. Benard from behind then cut my husband’s head.**

**Silas, Clifton and others then descended on him. There were nine assailants in total. Justus also cut him with an axe. The others were hitting him with “fimbos”.**

According to this version, Justus (A3) hit the Deceased first and it was with a metal rod. Bernard (A1) then cut him on the head. There was no evidence on the nature of the weapon. A2 and A4 then descended on the Accused. The witness also said A3 cut the Deceased with an axe.

33. The evidence of PW3 is somewhat similar to that of PW2. Just as PW2 told Court PW3’s evidence was that the first assailant was A3. According to both witnesses, this first attack was with a blunt object. PW1 said it was a rungu while PW3 said it was a metal rod. According to both witnesses, A1 then cut the Deceased. While PW3 did not name the weapon. PW1 saw an axe. Again both witnesses agree that A3 struck the Deceased a second time. This time he cut the Deceased. PW1 saw him use a panga while PW3 saw him use an axe.

34. On the attack of the Deceased the versions of PW1 and PW3 are substantially similar. The trio (PW1, PW2 and PW3) agreed that the assailants also assaulted Marko, PW2 and PW3. Later that evening PW5 and PW8 saw the three of them with cut injuries.

35. Were the fatal injuries suffered by the Deceased and the injuries on Marko, PW2 and PW3 sustained in the manner told by PW1, PW2 and PW3 or as suggested by A3? According to A3, he was attacked by the Deceased. He struggled with him, snatched a metal bar which the Deceased had and hit him. At that point Marko attempted to cut him but he ducked and the blow fell on the Deceased’s head. That PW2 and PW3 joined in. PW3 with a panga and PW2 with an axe. He ducked their attack and they cut each other.

36. The version of A3 is however not without difficulty. First, it does not explain how and at what point Marko sustained injuries because A3 does not say that either himself or anyone else inflicted any injuries on Marko. In addition, the impression given by this version is that A3 hit the Deceased once with a metal bar and the Deceased was cut once when the blow of Marko fell on his head. These, unlike the Prosecution evidence, does not explain the Doctors finding that the Deceased suffered multiple penetrating injuries on the head, a penetrating injury on the forearm, and the back. On this aspect the Prosecution witness had given evidence of at least 2 cut injuries on the head and the repeated attack on the Deceased by A3 as he lay down injured.

37. Another reason why the version of A3 is doubtful is because it was not corroborated. It was the evidence of A3 that he reported the attack on him to one Derrick Ouma (a village elder) but A3 did call him as a witness to support his theory. It would also be curious that unlike Marko, PW1, PW2 and PW3, A3 did not deem it necessary to report the incident, which would amount to a criminal assault, to the Police. It does not help matters for A3 that questions of the supposed attack on him by Marko, PW2 and PW3 were not put to PW2 and PW3 during cross-examination.

38. This Court reaches a decision that there was sufficient and corroborated evidence of at least two Prosecution witnesses that implicate A1 and A3 in the assault of the Deceased. A3 presented an explanation and account that is not believable. On the evidence of the eye witnesses (PW1, PW2 and PW3) and on his own admission, A3 was at the scene at the time the Deceased was assaulted. And on the strength of the evidence by the Prosecution and the unbelievable version of A3, this Court finds that the State has proved that A3 was one of the persons that assaulted the Deceased person.

39. The other person that has been strongly implicated is A1. Let me examine his Defence. A1 gave a short unsworn statement. The gist of which is that he was 25kms from the scene at the time of the alleged assault. That he was at the home of OOKO, his aunt.

40. A1 raised the Defence of Alibi for the first time when he made his Defence statement. In **Athuman Salim Athuman –vs- Republic [2016] e KLR** the Court of Appeal observed,

**“The principle has long been accepted that an accused person who wishes to rely on a Defence of Alibi must raise it at the earliest opportunity the prosecution an opportunity to investigate**

**the truth or otherwise of the alibi.”**

Where like here the Defence is raised for the first time in Defence, the correct approach is for the Trial Court to weigh the evidence of alibi against the Prosecution case (see **Ganzi & 2 others -vs- Republic [2005] 1 KLR 52**).

41. As held earlier there is a strong direct evidence of PW1, PW2 and PW3 which is corroborated by the evidence of PW5 and PW8 and the medical evidence of PW6 that implicated A1. On the other hand, he gave an alibi Defence in an unsworn statement. Having come for the first time at Defence, the Prosecution did not have an opportunity to investigate the truthfulness of the Alibi. And having raised it in an unsworn statement, the State did not have an opportunity of testing it by way of cross-examination. In addition the evidence was not supported because A1 did not call the person who allegedly hosted him. This Court finds that the alibi evidence is weak and pale against the strong Prosecution evidence. Accordingly this Court finds that the Prosecution has proved, beyond any reasonable doubt, that A1 was one of the assailants.

42. That leaves A2 and A4. It seems to this Court that the eye witnesses did not give clear evidence of the roles played by these two Accused persons. And even if they did, the two gave strong alibi evidence that creates a doubt in the mind of his Court as to whether they in fact at the scene at the time the offence was committed.

43. The evidence given by A2 is that at the time of that alleged offence he was either at the home of Bosco (DW7) or had just left for their home in the company of Flighton (DW8). This evidence was supported by evidence of DW7 and DW8. The evidence of these 3 was consistent and did not break even in the face of intense cross-examination. I would not find that the said evidence has been outweighed by the Prosecution evidence on A2.

44. A4 told Court that at the material time he was on his way to Nairobi. He boarded a bus called “Emirates”. His story was supported by the evidence of DW5. Both gave consistent and corroborative evidence. Their evidence was subjected to cross-examination and survived it unscathed. This Court would give A4 a benefit of doubt.

45. It is true that there were some inconsistencies in the evidence of PW1, PW2 and PW3. But those inconsistencies were not of such magnitude as to make the evidence of the three witnesses improbable. The aspects that were consistent and corroborative implicated A1 and A3. Their evidence found support in the evidence of PW5, PW6 and PW8. That evidence was sufficient even in the absence of the additional evidence of Marko. Nothing adverse can be made of the failure of State to call this one witness. That failure does not dent the strong evidence by the Prosecution.

46. Was malice aforethought proved? The attack on the Deceased was not provoked on that day. A1 and A3, in the company of others, came into the Deceased’s compound attacked him and caused him to suffer fatal injuries. A1 and A3 are blood brothers and step brother to the Deceased. The Deceased was a child of the 1<sup>st</sup> home while A1 and A3 were children of the 2<sup>nd</sup> home. There was evidence, no less confirmed by A3, that there was a land dispute between the two homes. That dispute proved toxic and was the motive for the vicious attack. It would seem that the attack was premeditated and planned. Even in the absence of such premeditation, the sheer force of the attack leaves no doubt about the real intention of the assailants. It was to cause the death of the Deceased or to cause him grievous harm. How else does one explain a repeated penetrative assault on the head and other parts of the victim? What is to be made of the use of the axe, panga and rungu in the attack? This Court finds that whether by premeditation or by the vicious nature of the assault, malice aforethought has been established as set out in Section 206 of the Penal Code.

47. The result. I do hereby find A1 and A2 guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict them accordingly. I find that the State has failed to prove its case against A2 and A4. I acquit them of the offence of murder or do hereby set them free unless detained for some other lawful reasons.

**F. TUIYOTT**

**J U D G E**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 16<sup>th</sup> DAY OF August 2016.**

**IN THE PRESENCE OF:**

.....**FOR ACCUSED**S

.....**FOR STATE**

.....**COURT ASSISTANT**