



**Republic v Makokha (Criminal Case 19 of 2017)  
[2025] KEHC 6723 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6723 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 19 OF 2017  
SC CHIRCHIR, J  
MAY 22, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**EDWARD M. MAKOKHA ..... ACCUSED**

**JUDGMENT**

1. Edward M. Makokha (the Accused) was charged with murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence are that on 19th May, 2013 at Mukavakava Sub- location, Matioli Location in Kakamega North Sub-County, within Kakamega County murdered William Zaire Kiserem (deceased).

**The Prosecution's Case**

2. PW1 told the court that on the night of 19/5/2013 at about 8 pm he heard gunshots. The deceased and the wife were at the forest. The deceased's wife went to him and told him that her husband, the deceased had been shot by forest guards. He went there and confirmed that the deceased had died. He stated that the deceased had been shot at the chest and back. The deceased's body was removed to his home.
3. PW2 was the deceased's father. He said he was at the deceased's home when the deceased left his house. He then heard gunshots. He heard 3 shots. The deceased's house was near the forest. He went to the forest in the company of Gerishon (PW1) and one Oscar Morati(PW5). He stated that the family homestead border the forest, and the deceased's house is next to the forest.
4. He further told the court that he saw two guards going away. He stated that they are the ones who killed his son. He further stated that they were in uniform and were armed; that he saw the guns. He told the court that the guns were the ones in court (MFI -2A &2B). the crowd followed them but did not catch them. They took the deceased's body to the house. He said the deceased's body had injuries at the back and on the front He stated that he recognized one of guards. It was the accused.



He gave his name as Edward Makokha( The accused). He further told the court he had a case with the accused in Butali court, which went on for 3 years.

5. On cross-examination he stated that the incident took place at 8.pm, but there was moon light. The moonlight helped in identification. He insisted that his son was not in the forest. He admitted that he saw a panga , but the same did not belong to his son. He stated that his son's body was found near his (deceased's) house and not in the forest.
6. PW3 was the pathologist. He told the court that he carried out the post mortem on the deceased's body on 22/5/2013 at Webuye Hospital. On examination he noted an apparent bullet injuries, both inlet and outlet. The first wound was on the ribs. The exit was at the back. The 2nd bullet was at the right lateral renal angle. There was no signs of struggle. He formed the opinion that the cause of death was massive hemorrhage due to bullet shot injury to his right side of the chest. He produced the post mortem report (PExb.1).
7. On cross- examination, he stated that the bullet went from the front to the back and that the deceased was most likely facing the person who shot him. He further stated that the entry wound was 4x2cm meaning that the weapon must have been a high caliber gun. He also opined that the firing was at close range.
8. PW4 was the deceased's wife. She told the court that she had requested the deceased to go and carry firewood for her. While carrying the firewood, two forest rangers came. They approached them from behind. The deceased turned towards them and one of the officers vowed to finish him. She and deceased started running. They run in different directions. Then she heard a gunshot. She did not see the deceased being shot.
9. She went and called their brothers -in-law and went to where the deceased was. They took the body to the house. The deceased was already dead. The forest rangers were in uniform. The time was 8 pm. She saw them approaching but she did not see them well. She did not see their faces. The incident took place inside the forest. The next morning , she was shown two forest rangers at the police station. She was told that the two were the ones who had killed her husband. She was seeing them for the first time . She told the court that she was with the deceased at the time of the incident.
10. PW6 was one Oscar Sachel. .He told the court that he was the deceased's brother. On the material day , at about 8pm he was at home when he heard gunshots.PW3 went to his house and told him that the deceased had been shot. He knew the accused before and knew him as a forest Ranger.On cross-examination he told the court that his brothers' body was in the forest. He did not find any forest rangers. It took him 15 minutes to walk from the house to the forest. He did not find the accused on the scene. He further stated that the accused was not a Resident of the Area but he knew him to reside at the forest camp.
11. PW6 was the OCPD Kakamega North at the time. He was informed at 9.20 pm about a shooting incident. The informer was from Kenya forest service. He also got a call from Kabras Police Station about a report that had been made by 2 forest officers. They indicated that they had been chased by the villagers. They had come to take refuge and to make a report. He and some of his colleagues went to the scene and found a crowd of people. They went to the deceased's house and saw the body. He had a shotgun wound on the chest and abdomen.
12. Some two hundred meters from the house, they found a fallen tree with its branches chopped off. There was a pool of blood next to the log. They recovered Two pangas and an axe. The tree looked freshly cut. They recovered 3 spent cartridges and 2 "rungus".He told the court that there were 3 officers in the forest but he could not establish immediately who had fired the shots.



13. On cross-examination he stated that he was not the first person to arrive at the scene but the first police officer to get there. The cut tree was 200 meters from the deceased's house. He stated that there were several incidences of illegal logging in the area with the villagers sometimes becoming violent.
14. PW7 was a ballistic expert. He presented a report which was done by his colleague, one Emmanuel Langat. He told the court that he was conversant with Emmanuel's signature. He stated that they received Exhibits from PC Joseph Ngumbi and Charles Otieno as follows:
  1. 2 Rifles- a VZ61 with serial No. KEKFS 77683N and a V261 with serial NO. KEKFS 39220M.
  2. 3 spent cartridges
  3. 2 magazines
  4. 26 rounds of ammunitions
  5. 28 rounds of ammunitions
15. On examination it was established that:
  - the 2 Rifles were in good condition and were capable of firing.
  - The 2 magazines were in good condition. The 3 spent cartridges were in caliber of 7.62x39MM. It was established that the 3 spent cartridges were fired from gun serial No. KEKFS 77683N
  - The report was produced as Pex.3B and the Exhibit Memo as 3A.
16. On cross-examination he stated that they concluded that the 3 cartridges were fired from gun No. 77683 based on the examination of bridge fire of the gun and the ejector.
17. On re-examination he stated that both guns were tested but they did not find any cartridges belonging to Gun No. 3922M
18. The witness was later recalled at the instance of the court. On being recalled he testified that each magazine had the capacity to carry 30 rounds of caliber 7.62MM. He further stated that if gun No. 77683 had 28 live bullets when it was recovered, then there was a possibility that one bullet had remained in the chamber. He clarified that it is only a spent cartridge that would be able to tell if a gun has been fired. He could not tell if gun No. 39220M had been fired, as there was no spent cartridge from the said gun.
19. PW9 was PC Charles Obara. He did not investigate the case but was called by the prosecution to take the place of one Joseph Ngumi who was the investigation officer but had failed to turn up in court.
20. He told the court that Gun No. SR/No. 39220M had been issued to the accused while Gun SR/No. 77683N was issued to one Obare. Each gun had 30 rounds of ammunitions on issuance but all of them were not returned to the Armory. Investigation showed that 3 rounds of ammunition were fired at the scene. He further stated that at the time, there was no indication as to which gun had remained with 26 bullets and which one had 28 bullets. He further stated that when the guns were taken for Ballistic analysis one gun had 26 live bullets while another had 28. He produced the Arm's movement Register (Pexb.9).
21. There was a request for the witness to stand down for further familiarization with his colleague's report which was allowed. On resumption of his testimony he stated that the accused gun had 26 rounds of live ammunition at the time of return while the one that had been issued to Obare ( Gun SR. NO. 77683M) had 28 rounds. He stated that at the scene, 3 spent cartridges were recovered. The 3 cartridges marched with the Obare's gun.



22. He further stated that two officers had visited the forest, the accused and one SP Obare. About 10 people were found cutting logs in the forest; two bullets hit the deceased. On the scene were a panga and a rungu”.
23. On Cross-examination, he told the court that he could not tell which gun had been fired but according to the ballistic report, it was Obare’s gun that was fired. He admitted that after the incident Obare’s gun was found to have 28 live bullets notwithstanding that three billets had been fired from it.
24. On re-examination he stated that from spent cartridges one can identify which gun was fired.
25. This witness was later recalled by the court. On being questioned about an alleged inquest held at malaba he stated that he was not aware about it. He stated that there were two Rangers at the scene of shooting; namely Duke Obare and the accused. He admitted that there might have been some interference with the exhibits because while the ballistic report indicate that 3 bullets were fired from Obare’s gun, the gun still had 28 fire bullets on being recovered. On being asked the basis of the charge against the accused, he stated that it was based on the recommendation of the inquest.
26. On being cross examined by the defence counsel he told the court that the spent cartridges were from Rifle No. 77683N, which had been given to Obare. He admitted that the exhibits may have been tampered with. He further stated that if a gun is found to have had more than 30 bullets, then it means the extras were taken or obtained illegally. He also stated that there was no bullet retained inside the body of the deceased.

#### **The defence case**

27. The Accused was put on his defence at the conclusion of the prosecution’s case and he opted for a sworn testimony. He told the court that on 19/5/2013, his in-charge informed him they needed to go for patrol in the forest. He took his gun SR/NO. 39220M, which was loaded with 30 rounds of ammunition. As they approached the forest they could hear people cutting trees. When they were close, his companion stepped on a twig and the resultant noise seemed to have alerted the loggers. They were about ten of them , he stated. They heard them saying “ there they are” and started charging towards them. The in – charge fired in the air but the group kept advancing . He stated that one had a panga and a Rungu. He ran away and left his colleague standing there. He further testified that as he ran, he kept firing in the air; that he fired four bullets towards his right and left in an attempt to confuse them. At the time he did not know if he was being chased. He entered a thicket and hid. Later he heard someone passing , he called him out and he responded and realized it was Obare. He joined him and on inquiring what had happened he did not get a response. Obare called the police and asked for reinforcement. They later left the forest and went to the police station.
28. On cross- examination , he stated that he fired four bullets but he did not know how many his colleague fired; that the deceased was indeed shot. He confirmed that the bullet went from the front part of the deceased’s body to the back . On re- examination he stated that the bullets that he fired did not hit any one and the ballistic report was not conclusive on which gunshot killed the deceased.

#### **Analysis and determination**

29. For the prosecution to secure a conviction on a murder charge, there has to be proof that the deceased died and what caused the death; that the death was caused by the accused either through acts of commission or omission, and that the killing was accompanied by malice aforethought (Ref. Section .203 of the penal code of the penal code.)



## Death of the Deceased

30. According to the pathologist (PW3), the deceased died of massive hemorrhage due to gunshot injuries. He produced a post mortem report (Pexb 1). According to the report, the body was identified by Gershom Iika and Peter Chikamai. Therefore the fact of death of the deceased was proved. The cause of death was also proved.

## Whether the accused caused the death of the deceased

31. The only prosecution witness who testified to have seen the accused shot the deceased was the deceased's father (PW2). I am not convinced however that he witnessed the incident. PW4 told the court she was the one with the deceased and she is the one who came to call the father and deceased's brothers. Further in his testimony in chief he told the court that he went to the forest after hearing the gunshots. PW5 who was in his company also told the court that when they reached where the deceased body was he did not see any rangers. Further, the time was about 8pm and inside a forest, the conditions were not conducive for positive identification. Indeed according to the deceased's wife much as she saw the two rangers approach, she could not see their faces. I find PW2's testimony in that regard implausible.
32. The prosecution's case is therefore purely circumstantial. The nature of Circumstantial evidence has been expounded in several past decisions of the superior courts. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR, the court of Appeal explained the nature of circumstantial evidence as follows:

“However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -

“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.” ( Emphasis added)

33. However before circumstantial evidence can form a basis of conviction it must meet certain conditions. In the case of Abanga alias Onyango v R Cr. App. No 32 of 1990, cited in case of Ahamad Adolfathi ( supra) the same court stated “this court set out the conditions as follows: “It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
34. From the prosecution witnesses' accounts, as well as that of the accused, the incident took place in the forest. The scene was about 200 meters from the deceased's house. The deceased was carrying firewood



- or logging in the forest. The time was about 8pm. There were two forest rangers , being the accused and one Duke Obare on the scene. A shooting occurred and the deceased was shot.
35. The guns of the two rangers, were collected as exhibits, three spent cartridges, two magazines and the live bullets from the two guns. The guns were Rifles VZ61 Serial number (SN) KEKFS77683N (Gun SR/NO.77683N) and VZ261 SR.NO.KEKFS39220M ( Gun SR/ NO. 39220M). The Gun movement register shows, and it is not disputed that gun SR/NO.773683N was issued to Duke Obare and gun SR/ NO. 39220M was issued to the accused herein. Each gun was holding 30 bullets at the time of collection as per the Arm's movement book.
  36. This far the facts are undisputed or the variations, if any, are inconsequential.
  37. Thus, what circumstances are said to link the accused to the death of the deceased?
  38. The accused was placed on the scene at the time of the incident. This was readily admitted to by the accused himself. However he was not alone. He was in the company of Duke Obare, a fellow Forest Ranger. There was shooting and one or both must have fired the fatal shot. The accused has denied shooting the deceased.
  39. The prosecution's case then focused on the arms movement and ballistic examination of the guns and the bullets. The Arm's Movement Register (Exb.9) show that SR/NO. 77683N was issued to Duke Obare, while Gun SR/NO. 39220M was issued to the accused herein. According to the investigation officer (PW9) three (3) spent cartridges were collected from the scene. According to the Ballistic expert (PW7), all the 3 cartridges were found to have been fired from Gun SR/NO. 77683N. None was found to have been fired from Gun SR/NO. 39220M that had been issued to the accused.
  40. When the accused's gun was handed over to DCIO on 20/5/2013, it had a balance of 26 bullets. The ballistic expert told the court that without the spent cartridges, he could not tell if the accused's gun had been fired. The accused however told the court he had fired 4 bullets which seem to tally with the 26 remaining when the gun was handed over. The three spent cartridges that were examined however were fired from Obare's gun and not that of the accused. The three cartridges were collected from the scene of shooting .
  41. whereas the accused admitted that he fired his gun, there is no evidence that it is his gun that killed the deceased, as there were no spent cartridges available for ballistic examination. Further there was no rebuttal to his assertion that he fired on the air.
  42. In a nutshell there is nothing linking the accused to the fatal shooting of the deceased. The fact that he was placed on the scene and that he fired four bullets is not sufficient to infer guilt when considered against the fact that there was another person in the scene who also fired his gun.
  43. I remind myself that for circumstantial evidence to form a basis of conviction the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”( Ref. Ahamad Adolfathi( supra) In my view, based on the entire evidence , the probability in this case is that the killer bullet was fired by Obare ,and not the accused.
  44. I am not satisfied therefore that the prosecution has proved that the accused is the one who killed the deceased.
  45. What clearly emerges in this case is a case of botched investigation and prosecution. The exhibits were tampered with, a fact which PW9 admitted to. A gun with a capacity of 30 rounds of ammunition, ( Obare's gun), collected from the armoury in full capacity , and when there is forensic evidence that three of those bullets were fired, is purportedly returned with twenty Eight (28) live bullets instead



of twenty seven(27). Where did the extra bullet come from? It is either that the investigations officer looked the other way as potential evidence was being tampered with or was an accomplice in the tampering.

46. Secondly, there is overwhelming evidence that Duke Obare was with not only in the company of the accused but also that his gun was fired and the spent cartridges from his gun were collected from where the deceased's body was. The imperative question is, why was Duke Obare not charged with the offence?
47. The Investigation of this case and its prosecution are a sad indictment on the Directorate of Criminal Investigation (DCIO) and the Director of public prosecutions. The two offices failed the family of the deceased, and the course of justice.
48. In the end the prosecution has failed to establish the offence of murder against the Accused. The accused is hereby acquitted in accordance with section 215 of the *Criminal Procedure Code*. He shall be set free forthwith, unless otherwise lawfully held.

**DATED , SIGNED AND DELIVERED, VIRTUALLY, AT ISIOLO THIS 22ND DAY OF MAY 2025.**

**S. CHIRCHIR**

**JUDGE.**

In the presence of :

Godwin Luyundi- Court Assistant.

Ms. Osoro for DPP

Edward Makokha- The Accused

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