



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HCCRA NO. E002 OF 2021

REPUBLIC.....ODPP

VERSUS

BENSON BAITA MWITA.....ACCUSED

JUDGEMENT

Introduction

1. The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 24th of August 2018 at Riyabe village in Rikenye sub-location, East Kitutu location in Masaba North sub-county within Nyamira county, murdered Justin Okoyo Mokaya.
2. The accused pleaded not guilty to the charge and the prosecution called twelve witnesses to prove its case. At the trial, the accused was represented by Mr. Kiseru Advocate while the prosecution was led by Senior Prosecution Counsel Desmond Majale.
3. Jared Mokaya Nyang'ate (Pw1), the father to the deceased, testified that the incident culminating into this case stemmed from a land dispute. On 16th August 2018 he went to the office of the OCS Keroka at 8.00am accompanied by his wife Naomi Kwamboka Mokaya and three of his sons Japheth Mokaya, Justin Okoyo (the deceased) and Stephen Mokaya; his inlaws Ongwenyi and Amina and the assistant chief, Peter Mokaya. The reason for their visit was that his sons had demanded that he distributes land among them. They were referred the area Chief and fixed a hearing date on 24th August 2018. The venue of the meeting was within his homestead. PW1 narrated that the assistant chief, 3 clan elders and his family were in attendance. The problem arose when he declared that he would distribute his land among all of his five sons inclusive of two who he had sired out of wedlock, Tom and Victor Mokaya who were also present. Japheth, Justin and Stephen started a fight throwing the meeting into a disarray.
4. Owing to the turn of events PW1 was advised by the assistant chief to report to the OCS. While he was there, he received a call from his nephew Bernard who told him that his three sons, Japheth, Justin and Stephen had gone to his bedroom and burned everything. Japheth told him not to set foot in his home. He told his other two sons, Tom and Victor to leave and reported what had transpired at the meeting to the OCS. The OCS assigned him three police officers who accompanied PW1 to his home. They found Japheth and his wife cooking in his kitchen. Japheth began insulting him and raised alarm alerting Stephen. PW1 was standing close to the window. Stephen threw the iron bar (MFI 1) at him which he recognised as it was previously in his store. Stephen hit PW1 with the metal bar on his chest. At this point PW1's wife and Stephen's wife started screaming. His wife got hold of one of the police officers to assist the deceased came in and tried to slap him. The officer stood at the gate while the deceased went to his house, got a panga and started chasing PW1 with it. He however gave up the chase and PW 1 saw Japheth still armed with the panga struggling with one of the officers. Japheth and the police officers were still outside. Japheth was holding the police officer (the accused) and they were facing each other. At this point the accused was still holding his fire-arm. Justin then tried to strike the accused with the panga who told the brothers that they had not come to fight. Fearing that the accused would be killed in his compound PW1 left. As he was leaving he heard a gunshot.
5. PW1 continued that he went to Keroka Police Station to make a report and was directed to go to Gucha Hospital as he had swellings on his chest. PW1 was given a P3 form issued on 25th August 2018 then he proceeded to record a statement on all the events that had transpired. While he was at the station he learned that it was his son, Justin who had been killed. PW1 identified the accused as the policeman who had been held by Japheth during the scuffle. Prior to the incident the accused and the officers who accompanied him were not known to him or his family. PW1 informed the court that he currently lives in Kitale. He has only been to the land in issue twice since the incident occurred. His wife and sons still reside thereon.
6. On cross – examination, PW1 reiterated that his sons armed themselves with pangas, axes and iron bars and charged at them. They obstructed the police officers from doing their duty and tried to take a firearm from the accused. Japheth was an ex-officer having served in the GSU for ten years before he was sacked for desertion. As Japheth was trying to wrest the firearm from the accused the deceased tried to cut him with a panga. He however admitted that he was already outside the compound when he heard the gunshot and did not know who pulled the trigger. After the gunshot everyone dispersed including the officers. It was such a dire situation that they could not regroup and go to the station together.

7. Isaac Mwangi, PW2 stated that he was attached to Masaba North Police Station as an Administration Police Officer at the material time. He narrated that on 24th August 2018 at about 6.00pm he got a call from the Chief of Bosaria requesting him to offer assistance to PW1 who had been chased away from his home by his sons after a failed mediation. That PW1 required security to go pick his personal documents and effects so that he could vacate the home. PW2 sent the accused, Corporal Keya and PC Andrew Mutua to accompany PW1. He explained to them that the situation was volatile and likely to get violent and that he expected them to be careful. If the parties made peace, they could leave PW1 behind. At around 7pm, PW2 received a call from the Chief telling him he had heard gunshots. He tried to reach the officers on phone but was unsuccessful prompting him to go to the office. On arrival, he found the accused writhing on the floor. He said he had been hit on the back with an iron bar by one of the sons of that home but managed to escape. PW2 took the accused's firearm performed routine safety checks on it and noted that it had only one round of ammunition. That a magazine usually contains 30 rounds meaning 29 rounds were discharged. He asserted that a single long press or pull of the trigger can result in such discharge known as a burst discharge.

8. Upon inquiry, the accused informed PW2 that during the scuffle one of PW1's sons had discharged the other rounds. PW2 then called a driver who took the accused to hospital. Afterwards, he went to Keroka Police Station, made a report and accompanied a team of police officers to PW1's home but could not gain access. It was agreed that they would visit the scene the next morning. PW2 testified that the accused's firearm was documented by a Sergeant Otiya who was the Officer in Charge of the Armoury. It was an AK 47. He could not recall its serial number and consequently could not tell whether the firearm before court was the one belonging to the ac. PW2 continued that he heard that a person had been injured during the firearm scuffle who later died.

9. P.C John Keya who testified as PW3 was the senior most officer in the team that accompanied PW1 to his home. His testimony was largely in tandem with that of PW1 and PW2. He stated that the situation at PW1's home was volatile. When he got to his house he found the door locked; went round to his kitchen followed by PW3 and Mutua where he found one of PW1's sons cooking. An argument ensued and they tried to diffuse the tension by informing the sons of the purpose of their visit. That they had accompanied PW1 to pick his personal effects. PW1 was hit by an iron bar but PW3 did not see who did it as it was dark. Shortly after, they all went outside. PW1's sons were armed and many people from the homestead came. Sensing that they would be overwhelmed PW3 pulled Mutua to one side while the accused pulled PW1 to the other in an attempt to retreat. They were however blocked. The layout of the home made it impossible for them to leave. PW1 and the accused went one direction and were followed by two young men. PW3 then heard one burst of gunshots followed by silence. They managed to escape in the temporary calm that ensued; walked through a field; found PW1 and proceeded to camp. PW1 was wounded. He was advised to seek medical attention. Sergeant Otiya then told them that the accused had been assaulted and taken to hospital. It was at the station where they went to record their statements that he learned that someone had been fatally shot in the melee. PW3 stated that PW1's compound was poorly lit. They relied on the moonlight and torches.

10. Stephen Makori Mokaya (PW4), a brother to the deceased presented a different version of events. It was his evidence that Japheth, the deceased and himself were the ones who had called for a meeting to resolve money issues between Japheth and PW1 which PW1 initially refused to attend. The subdivision of the land only came up at the tail end of the meeting wherein PW1 purported to divide the property among 5 of them. They then walked out in protest because they had never heard of these two sons who had been born out of wedlock and it was the first time they were being introduced to the family. PW1 then called the chief and they went to Keroka. At around 5pm PW4 went to Keroka to buy meat which Jared said he would cook. PW4 was in bed when he heard a woman screaming. He stayed put assuming it was his brother beating his wife then got alarmed when he heard a man wailing. He proceeded to the kitchen and saw the officers. PW5 attempted to join them but was kicked out by one of the officers.

11. PW4 continued that he was still outside when an officer hit him. He ran away to the neighbour's house. It was raining and there was lightning. That was when he saw the deceased. They met at the field while they were both running away. According to PW5, the deceased told him that he saw one Hesbon running from their home towards his with a panga. They decide to head back home to see if things had calmed down. Lightning struck and they saw the accused standing at the fence. The accused grabbed the two of them by the collar while holding his gun in his right hand. PW5 testified that he managed to slip away and fell. It was then that he heard a loud sound and saw fire. He crawled away towards the homestead then Japheth came with two officers who they escorted towards the gate. One of the officers had a torch. Japheth then saw the deceased lying on the ground with blood oozing from his head, noted that he had been shot and pleaded with the officers to leave so that they could look for mans to take him to hospital. PW4 called the chief who did not respond and his uncle Ongwae who advised them to go make a report at the Police Station. Japheth took the deceased to hospital. They later found out that he had died.

12. On cross-examination PW4 admitted that about eight neighbours came to the scene during the incident. He did not know about the iron bar and denied that he used it to hit his mother and the accused. PW5 stated that there was electricity at their homestead and that the kitchen was lit. He did not see any gun aimed at anybody nor did he know who attempted to wrest the gun from the accused. PW5 denied burning his father's things as alleged and was not aware that the officers had been blocked from leaving the home.

13. Naomi Kwamboka Mokaya, the mother to the deceased and wife to PW1 gave evidence as PW5. She narrated that the land issue between her sons and PW1 began in January 2016 when Japheth approached his father to point out to him the section where he was to build. He had already bought iron sheets. PW1 refused to do so prompting Japheth to lay a foundation on a section of his own choosing. PW1 however demolished it. Japheth sought audience with the area chief who said he would convene a meeting on 24th August 2018. On the said date, the agenda was for the property to be distributed among her three sons but PW1 used it to introduce two young men who were unknown to them and over 35 years of age as extra beneficiaries. Owing to this development the meeting could not continue. PW1 had a long conversation with the chief and the elders and left with the two young men.

14. Pw5 continued that later that evening at around 8pm, her daughter in law Josephine Musyoka knocked on her door and told her that PW1 had brought police officers who wanted to kill Japheth in the kitchen. She ran outside and found PW1 holding a long iron bar which he hit her with on her left shoulder causing her to fall on the floor. PW1 then asked her why she was screaming. Two police officers intervened asking PW1 what he was doing. They helped her up and asked for her forgiveness after she inquired the reasons why they were beating her son. The officers stated that they realised PW1 had brought them to the home for no reason because Japheth was a former colleague of theirs from Molo. They asked PW5 to allow them to leave and PW1 and herself would sort out their differences the following day. PW5 then heard a loud noise. She walked out towards the gate. The officers urged her to go back because they had been told she was diabetic. She then heard someone saying that someone had been shot and was with Japheth when they stumbled upon the deceased. She spoke to the deceased and he waved at her but he later succumbed to his injuries. He had a lot of blood on his head. PW5 averred that the officer who shot him was the one with PW1, the accused.

15. PW 5 denied that her sons became violent at the meeting. People only started grumbling as PW1 had given land to the two men who were not known to the family. She admitted that she did not report her assault nor seek treatment for it. Like PW4, she maintained that Japheth was with the police officers in the kitchen for a while and they only came out to assist her after she was assaulted. That Japheth had locked them in the kitchen and his wife, Joyce escaped through the window to alert her. She narrated that after PW1 hit her, the deceased appeared with Stephen from the other gate but she could not see them. She admitted that the contents of her statement about the police officer holding her sons by their hands and PW1 ordering the officer to kill them; and the officer ordering them to kneel down were what she heard from people during her son's funeral. She did not

16. Dr Charles Ogechi Oginde gave evidence as PW6. He testified that he is a senior medical officer; a holder of an MBCHB from Kampala International University and a fellowship in Hospital Management from USA University in South Korea. PW6 conducted the post-mortem on the deceased at Gucha Nursing Home on 27th August 2018 and produced the post-mortem form marked as P.Ex1. He narrated that the body was of Justin Okoyo Mokaya, a male African aged 30. The deceased wore black trousers and a green t-shirt which were soiled with blood. The body was well preserved in rigour mortis. With regard to his injuries the deceased had two wounds on the occipital region. The small one measuring 2cm on the left side and the bigger one on the right side measuring 4cm in diameter. There was an open fracture of the occipital bone with the larger wound actively bleeding. There were however no fractures on the ribs and rib cage. Internally, all systems were intact save for the subarachnoid haematoma or brain bleed. PW6 formed the opinion that the cause of death was severe head injury with open fractures and subarachnoid bleeding secondary to alleged bullet injury. On cross-examination he reiterated that there was only one entry and exit wound. He could not predict how many bullets were used or whether it was a close range shooting. He also admitted that he is not a pathologist. PW9, Kemunto Grace Jerry who is a wife to the deceased stated that she identified her husband's body to PW6 before he conducted the post-mortem. She corroborated that the deceased had blood on his clothes and PW6 informed them that he had been shot.

17. Mokaya Omwayo Peter, the Chief of East Kitutu Location testified as PW7. He gave evidence that he had been approached by Japheth in July 2018 to help solve a dispute in which his father owed him Kshs. 65000 and had refused to point out to him his piece of land to build. He was present on the meeting of 24th August 2018 after which he advised PW1 to carry out succession proceedings and subdivide the property. PW7 confirmed that there was commotion caused by the presence of PW1's two sons at the meeting who were not known to anybody and that he directed PW1 to seek assistance from the OCS after he called to say his personal effects were being burned. With regard to the shooting PW7 stated that he received a call from one Matara that it had occurred and in turn called the OCS and Mwangi of the Administration Police to inform them of the same. He later heard that the person who was shot had died.

18. Sergeant Otiya Richard testified as PW8. He was based at Masaba South as Armourer at the material time. His duty was to issue firearms to officers while they were going on duty and receiving from those who were returning them. He recorded all this in a Firearms Movement Book. PW8 confirmed issuing PC Keya, the accused and Andrew Mutua with two AK 47s and a CZ respectively on the night of 24th August 2018. Their serial numbers were 59012997 for Keya's; C280941 for Mutua's and 59011200 for the accused's which he identified in court as MFI-3. PW8 then signed the record book and left for the day. Later on he was called by PC Mwangi to the office where he found Chief Inspector Mwangi and the accused who was in pain. Inspector Mwangi handed the accused's firearm to him. He had already taken safety precautions and it had only one bullet in the magazine. PW8 returned the gun to the armoury. The accused had been beaten and Inspector Mwangi made arrangements for him to be taken to hospital. Afterwards, PC Keya and Mutua arrived stating that they had been attacked. They returned their firearms with all bullets intact. PW8 produced an extract of the report concerning the firearms as P.Ex2.

19. Chief Inspector Hadick Jumba, the Investigating Officer who testified as PW10 was part of the team that revisited the home on 25th August 2018 in the company of Japheth to reconstruct the scene. At the rear field where the shooting had taken place they found several spent cartridges scattered all over which they photographed and a sketch plan drawn. The same were produced as P.Ex 3(a) – (j). PW10 also conducted interviews with the officers as well as the family and documented their different versions of events. He testified that when PW1 was escorted to his home by the officers, a confrontation ensued culminating in chaos. Jared's daughter in law raised alarm, screamed and jumped out through the kitchen window. Jared's sons then came armed with crude weapons. PC Mutua had narrated to him that one of Jared's sons tried to grab his rifle but he kicked him. It was also revealed that the accused moved Jared away from the scene but his sons followed them. They attempted to grab his gun, there was a struggle and a burst discharge of ammunition occurred.

20. PW10 averred that he was well versed with the use of guns. That when one opens the safeguard in the middle it will fire a burst but when opened fully to the end it will fire a single shot. He opined that it is very easy to discharge a burst during a struggle if someone pulls the trigger. A witness told him that he heard a "splash" only once. When referred to the sketch plan, PW10 observed that the cartridges were scattered in a region, not in a line. He concluded that they were fired by someone in a distress position. He also confirmed that none of the witnesses had seen the accused aiming and firing at the deceased. Only eight cartridges were picked from the scene. 2 were handed to him by Japheth.

21. PW11, Philip Kibet Sigei a clinical officer attached to Masaba North Subcounty Hospital produced the accused's P3 form and treatment notes as Ex.11(a) and (b). He examined the accused and confirmed that he had a painful swelling on the left upper back, left shoulder and chest pains which injuries he assessed as "harm."

22. Japheth Nyaboga Mokaya, a brother to the deceased testified as PW12. He confirmed that he had sought assistance from the local administration over a land dispute as his father had refused to show him where to build. He however stated that the meeting on 24th August 2018 ended peacefully despite the discomfort caused by his father bringing two strangers who he intended to give land to as his sons. PW12's version was that he was cooking dinner in the kitchen at around 8pm when his father came armed with three policemen. PW1 gave him a fist blow and told the officers that he was the one. PW12 told the officers to tell PW1 not to hit him again which the officers did and went outside. Shortly afterwards, he heard his mother screaming and founce4 his father standing over her holding a metal bar. She was lying on the floor. According to PW12, PW1 hit his mother through the window and dropped the metal bar when he saw him. After that PW1 left with one of the officers who seemed drunk. PW12 remained with two officers. One of them was known to him, a former colleague from his days as a GSU officer. He told the officers his mother was unwell. About fifteen minutes later, PW12 heard gunshots from the area near the road. When he asked the officers what that was about they told him that perhaps the officer who had left with PW1 thought that they were fighting. PW12 then escorted the two to the place where they had parked their vehicle but when he got to the cowshed he saw the deceased lying on the ground bleeding. He did not know the whereabouts of the deceased while he was talking to the officers before but he had been shot in the head. PW12 then told the officers to leave while he attended to his brother. He called the chief who sounded drunk then looked for

means and took the deceased to Kisii Level 5 Hospital where he was pronounced dead. On cross-examination PW12 stated that being an ex-police officer, he knew the workings of an AK47. That it was not possible for a burst firing to occur when people are struggling over a firearm.

23. When the accused was put on his defence he vehemently denied that he murdered the deceased. On the fateful day he was assigned to go on patrol with PC Keya and Andrew Mutua. They were called back to the station by Chief Inspector Mwangi to assist Jared (PW1) who was not known to him. They were instructed to escort PW1 to his home at Riyabe Vilage to collect his documents. On arrival, the accused was left outside while Keya and Mutua accompanied Jared inside. Shortly afterwards he heard a scuffle and screams then Keya telling a woman to stop screaming as they had not gone for war. Japheth, Justin and their mother started beating Jared. He shouted for help and the accused went to him, pulled him outside and walked him away. The next thing he felt was a blow to his chest with a metal rod. Stephen was the one who hit him with the rod marked as P.Ex9. The accused fell to the ground and was attacked by Japheth who held him as they struggled for the gun held by a sling around his neck. As they were struggling, the deceased charged at him with a panga. Right then, Japheth held the trigger of the gun causing a burst fire which released all the bullets at once. The accused asserted that burst firing does not occur in normal use. He did not know what happened to the gun's safety pin as it must have come off during the struggle between himself and Japheth. After the firing, the accused got up to find that everybody had ran away from the scene. He went to the road and stopped a Probox requesting the driver to take him to the Station. He found Police Sergeant Okiya and told him he needed to go to hospital as he had been injured and was bleeding. The accused was first taken to Christa Marian Hospital which issued him with a P3 form marked as P.Ex11(b) that confirms the chest injury; then he was taken to Keroka Subcounty Hospital which issued the treatment notes marked as P.Ex 11(b)

24. The accused reiterated that he did not take aim and shoot the deceased. If he had done so, he would not have sustained only one gunshot to the head as all rounds were discharged at once. Further, the crime scene officers confirmed that spent cartridges were scattered all over the scene. He had struggled with Japheth for about 5 minutes and was not in control of the gun when it fired.

Submissions

25. In his submissions Mr. Kisera Learned Advocate for the accused, stated that there was overwhelming evidence on record confirming that the deceased and the other sons of Jared Mokaya attacked the accused trying to rob him of his gun when the burst firing occurred; no witness testified to seeing the accused aiming and shooting at the deceased; there was evidence of struggle from the scattered spent cartridges and that the accused was assaulted sustaining actual bodily harm. Mr. Kisera further submitted that the burst firing was not caused by the accused nor was there malice aforethought as the deceased and his family was not known to the accused. Counsel stated the facts and circumstances of this case can also not support a case of manslaughter as the burst firing cannot be classified as accidental having been caused by Japheth. He urged this court to acquit the accused person.

26. There Prosecution Counsel. Mr. Majale submitted that the elements to be proved are as set out in the case of **Anthony Ndegwa Ngari vs Republic (2014)eKLR** namely that the death of the deceased occurred; that the accused committed the unlawful act that caused the death of the deceased and that the accused had malice aforethought were sufficiently proved. It was the prosecution's case that the accused was trained to handle a firearm and was familiar with the consequences of discharging the same hence malice aforethought was established.

Analysis

27. The offence of murder is committed when a person of malice aforethought causes the death of another by an unlawful act or omission as stipulated in section 203 of the Penal Code. In essence therefore the prosecution must prove the following elements beyond reasonable doubt as was stated in the case of **Mwaura & Another v R [1980] KLR 127: -**

“The burden of proof remains on the State throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution must negate that defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence.”

28. In the case of **Anthony Ndegwa Ngari v Republic [2014] eKLR** the Court of Appeal enunciated the ingredients of the offence of murder to be:

- i. *The death of deceased.*
- ii. *That there was an unlawful act or omission which caused the death of the deceased.*
- iii. *That the accused committed the unlawful act which caused the death of deceased.*
- iv. *That the accused had malice aforethought.*

29. It is not in dispute the deceased died from a single gunshot wound to the head. This was confirmed by PW6 who conducted the post-mortem. The question is whether the accused aimed and shot at the deceased. From the evidence on record, I am not convinced that this was sufficiently proved. As stated by the Investigating Officer (PW 10); it is highly probable that a burst firing can occur once the safety lock is disengaged by persons struggling over it or if the trigger is held in a certain way. All witnesses spoke of a single loud noise and from the reconstruction of the scene it is evidence that the spent cartridges were haphazardly strewn all over. Moreover, nobody saw the accused aiming and firing at the deceased. If he had done so as alleged, with the single discharge of 29 bullets more than one bullet would have hit the deceased. According to PW10, during his interview Andrew Mutua stated that one of the brothers tried to grab his gun but he kicked him. The accused and his colleagues arrived at the station at different times. They have similar versions yet they did not have time to streamline the same.

30. This court put the accused on his defence so that it could hear his side of the events and that version is similar to that of PW1 and also his own colleague (PW3). Their evidence was that there was tension at PW1's home due to a land dispute and the unexpected introduction at the meeting of PW1's sons who he sired out of wedlock. The Chief (PW7) attested to a violent premature disruption of the meeting and at some point referred to PW1's sons as "wild." The accused's P3 form and treatment notes prove that he was indeed assaulted. I therefore find his evidence that he was attacked by the children of PW1 convincing. The wife and sons of PW1 on the other hand did not make any report of their alleged injuries owing to assault by the police officers nor did they seek medical attention which would have been documented hence making it unbelievable that they were assaulted. PW4 stated that the accused held him together with the deceased by the collars but he managed to slip away from his grasp. However, it does not seem probable that two grown men could be held in that manner by an officer using his left hand while carrying his gun on the right. PW5 on her part stated that the seizure of her sons as described was what she heard at the deceased's funeral but she did not witness it hence rendering her evidence hearsay. My finding therefore is that there is no evidence that the accused was the aggressor or that the accused committed any unlawful act. To the contrary what was established was that the accused was the victim of a violent act of the sons of PW1 and that his gun discharged a burst of fire as the deceased and his brother were trying to wrestle the gun from him. The death of the deceased could therefore be attributed to his own act but not to an unlawful act of the deceased since it was the deceased and his brother who caused the sudden burst of fire. The death could also have been accidental as the deceased himself may not have been aware that his conduct could occasion the sudden burst. Having come to the above conclusion I see no need to delve into the element of malice afore thought.

31. In light of the foregoing it is my finding that the charge against the accused person was not proved beyond reasonable doubt and in the premises I find him not guilty of the offence of murder and acquit him.

32. The accused shall be set at liberty forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 14TH DAY OF OCTOBER, 2021.

E.N. MAINA

JUDGE