Osore alias Meroka v Republic (Criminal Appeal 342 of 2019)
[2025] KECA 1625 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1625 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 342 OF 2019

MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA

OCTOBER 3, 2025

BETWEEN

JOSEPH MOKAYA OSORE ALIAS MEROKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nyamira, (Maina, J.) dated 28{{^th}} March, 2019 in HCCRC NO. 45 of 2015)

JUDGMENT

1. This is an appeal against the judgment of Maina J. delivered on 28th March, 2019, in the High Court of Kenya at Nyamira in Criminal Case No. 45 of 2015. The appellant, Joseph Mogaka Osore, alias Meroka, was charged, tried, convicted and sentenced to 30 years in prison on the information of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the information were that on 29th July, 2014, at Bonyamagere village in Nyamira North District, within Nyamira County, the appellant unlawfully caused the death of Mayenga Kirungu, ("the deceased").

2. The appellant denied the information and the case proceeded to full trial.

3. The prosecution presented seven witnesses to prove its case.

   Phillip Scorpion Nyaribo, (PW1), on the night of 29th July, 2014, whilst in his house heard members of the public shouting "mwizi, mwizi" (thief, thief). He rushed to the scene which was in the appellant's homestead and found the deceased tied with a mosquito net, surrounded by a crowd, including the appellant. He was joined thereat by Kennedy Burrujara (PW3), a village elder and Charles Mong'are Sabena (PW4), a fellow villager. When they asked what the deceased had stolen, no one provided an answer. Instead, the appellant claimed that the deceased had sauntered into his homestead with the intention to steal. The deceased, however, explained that he was drunk and had mistakenly entered the homestead thinking that it was the home of Yunia Nyangata Kerongo (PW2) and Julius Kerongo, his

kin. PW1 and PW3 together with other members of the public who included the appellant decided to take the deceased to his kin's home to counter check his story.

4. Upon arrival, a few people entered the deceased's kin homestead while PW1, the appellant and a few other villagers were left outside guarding the deceased. It was then that the appellant suddenly pulled out a panga and slashed the deceased, killing him instantly. The appellant then fled the scene. By the time PW3 came back with PW2 to the place where he had left the deceased and others, it was too late as the deceased had already been killed. Although PW2 indeed identified the deceased as his relative. The incident was immediately reported to Magwagwa Police Station and shortly afterwards a team of police officers led by Corporal Antony Mureithi, (PW6) arrived at the scene and evacuated the body to Nyamira District Hospital Mortuary.

5. On 4th August 2014, Dr Hudson Onguti (PW5) performed a Post Mortem on the body of the deceased and formed the opinion that the cause of death was bleeding from major vessels in the neck due to a deep cut wound. Further investigations revealed that the appellant had escaped to Kapsoit area in Kericho County after the incident, where he was hiding. Acting on intelligence gathered from local informants, police officers from Kapsoit police station in collaboration with members of the public managed to arrest the appellant. The appellant was subsequently ferried back to Nyamira County, and formally charged for the murder of the deceased.

6. Put on his defence, the appellant elected to give unsworn statement without calling any witnesses. It was his defence that on the date of the alleged incident, he was lumbering timber in Kericho County. He categorically denied knowing the deceased and refuted any involvement in the events leading to his death. He further stated that he was unaware of the charges against him until his arrest.

7. After reviewing the evidence by both the prosecution and defence, the trial court dismissed the appellant's alibi, finding it unconvincing. The trial court also found the testimony of PW1, PW3, and PW4 credible and determined that PW1 had positively identified the appellant at the scene of crime, given their familial connection and proximity during the incident.

8. The trial court also concluded that the appellant had unlawfully killed the deceased by slashing him while his hands were tied. Malice aforethought was manifested by the use of a dangerous and lethal weapon, panga to inflict lethal injuries. His flight from the scene did not help matters at all as it was indicative of his guilt. The trial court therefore, held that the prosecution had proved its case beyond reasonable doubt, leading to a conviction for murder, and subsequent thereto a sentence of 30 years imprisonment.

9. The appellant challenged this conviction and sentence in this Court on seventeen grounds but which can easily be condensed into about seven. He complains that the trial court erred in finding that: the prosecution had proved its case against him beyond reasonable doubt; his identification was foolproof; the key prosecution witnesses were credible; the trial court wrongly inferred his guilt from his flight from the scene; the admission of the postmortem report was in error since, its authenticity was questionable, certain and crucial witnesses were not called, and that his alibi defence was dismissed without proper analysis.

10. The appeal was canvassed by way of written submissions only.

    When called out, Mr Odhiambo. D, learned counsel appeared for the appellant whereas Ms Kiptanui, learned Prosecution counsel appeared for the respondent.

11. Mr. Odhiambo submitted that the trial court erred in concluding that the prosecution had proved its case beyond reasonable doubt, despite the prevailing conditions at the time of the incident being unfavorable for proper and reliable identification of the appellant. He argued that the trial court failed

to scrutinize the evidence of PW1, the sole identifying witness, in accordance with the principles set out in the case of Maitanyi v. Republic [1986] eKLR, where this Court held that identification of a suspect under difficult conditions must be carefully examined alongside other evidence to eliminate the possibility of error and or mistaken identification. Counsel further relied on the case of Simon Materu Munialu v Republic [2007] eKLR, in which it was held that convictions based solely on identification, particularly at night or under challenging circumstances, require heightened scrutiny by the trial court.

12. Counsel submitted that the trial court failed to properly assess the credibility of the evidence of PW1, PW3, and PW4, considering the material inconsistencies in their testimonies which rendered the conviction unsafe. For this proposition counsel relied on the case Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR, where the Court held that a witness's credibility is determined by the consistency and reliability of their testimony. He further contended that the trial court erroneously inferred the appellant's guilt from his alleged flight from the scene of crime without sufficient evidentiary support.

13. Turning to failure to call key witnesses, counsel relied on the case of Republic v Felix Kanila Pula [2016] eKLR, to submit that the prosecution must present all necessary witnesses to establish the truth, even if their evidence may be inconsistent with their case. Counsel pointed out that one, Yobesh, a minor mentioned in the proceedings ought to have been summoned to testify as well as the investigating officer.

14. Additionally, counsel challenged the admissibility of the postmortem report, arguing that only a copy was produced without the prosecution providing a sufficient basis for the absence of the original document. He relied on the case of Sofie Feis Caroline Lwangu v Benson Wafula Ndote [2021] eKLR, where the Court held that when the original document is unavailable, a proper foundation must be laid before secondary evidence is admitted. He further submitted that the testimony of PW5, who presented the postmortem report, was inadmissible since no sufficient basis was laid for the absence of the doctor who authored the report. He also cited the case of Sibo Makovo v Republic [1997] eKLR, in which it was held that expert reports must be produced by their makers unless a proper foundation is established for the exception of the rule. In conclusion, the appellant urged us to find that the appeal has merit and allow it in its entirety.

15. In response, Ms Kiptanui submitted that the trial court properly convicted the appellant based on credible and sufficient evidence. That the trial court was justified in relying on the testimony of a single identifying witness, as there is no legal bar to convicting an accused person based on such evidence, provided the court warns itself of the risks and dangers involved. She cited the case of Mohamed Boru Guyo v Republic [2022] eKLR, for the proposition. Counsel further relied on the case of Chila v Republic (1967) E.A 722, for the proposition that a court may convict on uncorroborated testimony of a single identifying witness if it is satisfied that the evidence is credible.

16. Counsel submitted that the trial court properly scrutinized the evidence and found that PW1 positively identified the appellant, given their familiarity and proximity during the incident. She argued that the obtaining conditions at the time of the incident allowed for positive identification, as the appellant was seen restraining the deceased before attacking him. Counsel maintained that the trial court carefully evaluated the circumstances and correctly concluded that the appellant was the assailant.

17. Regarding the credibility of the evidence of PW1, PW3, and PW4, counsel submitted that the trial court did not doubt their evidence. Counsel contended that discrepancies in witness testimonies were inevitable, but only material inconsistencies that create doubt as to the guilt of the accused should affect the prosecution's case. Counsel relied on the case of John Nyaga Njuki & 4 Others v Republic Cr. App. No. 160 of 2000, to assert that minor discrepancies do not vitiate an otherwise proved case.

Counsel further argued that the failure to call Yobesh, a minor mentioned in the proceedings, did not weaken the prosecution's case, citing the case of Bukenya & Others v Uganda [1972] EA 549, for the proposition that the prosecution is only required to call witnesses sufficient to prove its case.

18. Counsel went on to submit that the absence of the evidence of the investigating officer did not affect the prosecution's case. as the witness who testified in his place was familiar with his handwriting and signature. The investigating officer's role was limited to recording statements and arresting the appellant, and his absence was not fatal to the prosecution's case therefor. The respondent relied on the case of S.C v Republic [2018] eKLR, in which it was held that the absence of an investigating officer's evidence does not necessarily weaken the prosecution's case unless his testimony is crucial in linking the accused to the crime.

19. On the admissibility of the postmortem report, counsel submitted that the absence of the original document does not render the proceedings a nullity. That PW5, who testified on behalf of the doctor who conducted the post mortem, had worked with him for five years and was familiar with his signature. In this case the document maker was unavailable and or his presence could not be procured without undue delay and expense. That errors in the postmortem report regarding the deceased's name are curable under Section 382 of the Criminal Procedure Code, emphasizing that an innocent life was lost and the perpetrator known.

20. We have subjected the evidence tendered in the trial court to fresh and exhaustive evaluation as expected of us courtesy of the celebrated case of Okeno v Republic [1972] EA 32. We are also cognizant of the fact that a court of appeal will not normally interfere with findings of fact made by the trial court unless they are based on no evidence, or are based on a misapprehension of the evidence, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings it did See Chemagong v Republic [1984] KLR 611.

21. In reappraising the evidence however, the first appellate court has to appreciate that it did not have the advantage that the trial court had of hearing and seeing the witnesses as they testified and therefore hampered in matters of appreciation of demeanor of witnesses.

22. Having considered the record in its entirety and in particular the grounds of appeal only one issue presents itself for our determination; whether the evidence adduced before the trial court adequately established the offence of murder against the appellant.

23. The offence of murder is defined under Section 203 of the Penal Code in terms that any person who, with malice aforethought, causes the death of another by an unlawful act or omission is guilty of murder. To secure a conviction for murder therefore, the prosecution is obliged prove three essential ingredients beyond reasonable doubt: the death of the deceased and its cause, the identity of the perpetrator, and malice aforethought by the perpetrator in causing the death. In the instant case, the postmortem report presented by PW5, confirmed the death of the deceased. It was proved that the deceased suffered deep cut wounds to the neck, leading to excessive bleeding and death. The cause of death was determined to be severe hemorrhage from major vessels in the neck. This evidence was corroborated by eyewitness accounts from PW1, PW3, and PW4, who saw the deceased bleeding profusely after being slashed by the appellant in their presence and soon thereafter died on the spot. This Court in Republic v Cheboi Kipkoech [2021] eKLR held that a postmortem report is crucial in proving death, and where it aligns with witness testimony, it sufficiently establishes the first ingredient of murder. Based on this, we are satisfied just like the trial court that the death of the deceased and its cause was firmly proved.

24. The second ingredient requires proof that the appellant committed the unlawful act whether by commission or omission that directly caused the death of the deceased. The appellant assails his alleged

identification on the grounds that it was by a single witness at night and therefore under difficult circumstances. He sought comfort in the case of Maitanyi v. Republic (supra). The identification of the appellant was never in doubt as the sequence of events commenced from his house. However, and contrary to the claim by the appellant that he was identified only by PW1, he was infact also identified by PW3 and PW4. He was not a stranger in the neighbourhood and was a person well known to the above witnesses. He spent a lot of time with these witnesses in close proximity. These witnesses were attracted by the commotion emanating from the appellant's homestead. They went to check only to find the appellant having tied up the deceased's with a mosquito net. They then moved with him to the homestead of PW2 where eventually the appellant hacked the deceased to death. The witnesses knew the appellant as a fellow villager and all these events were happening whilst they were in close proximity. With all this background how can the appellant claim that his identification was doubtful, mistaken or in error?

25. The final ingredient, malice aforethought, is the distinguishing factor between murder and manslaughter. Section 206 of the Penal Code defines malice aforethought and gives various scenarios that justifies inference of malice aforethought. In our case, what is applicable is an intention to cause death or grievous harm, knowledge that the act would likely cause death, or an unlawful act committed with reckless abandon and disregard for human life. In this case, evidence abound that the appellant restrained the deceased by tying his hands, but later slashed him with a panga on the neck when totally unprovoked. The intention was therefore clear, either kill the deceased or at least cause him grievous harm. Further in the case of Nzuki v Republic [1993] KLR 171, this Court held that malice aforethought can also be inferred from the nature of the weapon used, the manner in which it was used, the severity of the injuries inflicted and the conduct of the accused before, during and after the incident. In this case, the appellant used a panga, a dangerous and lethal weapon, inflicted deep cuts on the deceased's neck and mouth, areas highly vulnerable to fatal injuries. The attack was sudden and unprovoked, indicating an intention to cause grievous harm or death. Additionally, the appellant's flight from the scene further supports the presence of malice aforethought, as it is an indication of his guilt and premeditation. Based on these facts and legal precedents, we are persuaded as indeed the trial court was, that malice aforethought was sufficiently established.

26. On the whole, we are satisfied that the prosecution successfully proved all the ingredients of the information of murder against the appellant beyond reasonable doubt. Accordingly, the conviction was in our view, properly entered against the appellant by the trial court.

27. The appellant however, contends that the trial court failed to properly assess the credibility of the evidence of PW1, PW3, and PW4, given that the trial was commenced by a different judge and concluded by another. According to the appellant, the latter judge did not have the benefit of hearing or observing those witnesses as they testified firsthand. His assessment of demeanor and credibility of the witnesses was thereby hampered to the detriment of the appellant. This Court in the case of Ahmed Mohammed Noor v Abdi Aziz Osman (supra) held that a witness's credibility is determined by the consistency and reliability of their testimony. We are satisfied that the credibility of PW1, PW3, and PW4 was properly assessed by the trial court, as their testimonies remained consistent, reliable, and corroborative of the material facts of the case. Accordingly, we find no reason to interfere with the trial court's findings on their credibility.

28. The trial court inferred guilt from the appellant's flight from the scene. However, the appellant argues that this inference was not supported by sufficient evidence. This Court in the case of Tei v Republic [2020] eKLR stated that while flight may be considered as circumstantial evidence, it must be weighed alongside other factors. In this appeal, the appellant's flight from the scene, coupled with the direct eyewitness testimony and the nature of the attack, strengthens the inference of culpability.

Accordingly, we are satisfied that the trial court did not err in considering the appellant's flight as part of the circumstantial evidence supporting his culpability if the other evidence is holistically considered.

29. The appellant also challenged the admissibility of the postmortem report, arguing that only a copy was produced without a proper foundation for the absence of the original document being laid. This Court in Sofie Feis Caroline Lwangu v Benson Wafula Ndote (supra), held that when the original document is unavailable, a proper foundation must be laid before secondary evidence is admitted. Additionally, in Sibo Makovo v Republic (supra), the Court held that evidentiary documents prepared by experts must be tendered in evidence by their makers unless a proper foundation is established for the exception.

30. Having carefully considered the appellant's challenge we are satisfied that while the original document postmortem report was not produced, the prosecution laid a sufficient foundation for the admission of the secondary evidence. The doctor who conducted the postmortem was unavailable as he had proceeded overseas for further studies and could not therefore be easily availed. We are only too aware that the evidence of a document maker can be tendered by another person under specific circumstances outlined in Section 69 of the *Evidence Act*, primarily when the document maker is unavailable or when the document is a public document. The *Evidence Act* dictates how the documents are proved, including the use of primary and secondary evidence. In any event, the death and its cause of the deceased was never in dispute. Accordingly, we are satisfied that the trial court did not err in admitting the postmortem report under the circumstances, and the appellant's challenge on this ground is without merit.

31. The appellant argues that the trial court wrongly dismissed his alibi defence without proper consideration. This Court in the case of Kiarie v Republic [1984] eKLR held that an accused person does not bear the burden of proving an alibi; rather, the prosecution must disprove it beyond reasonable doubt. Again, in the case of Wangombe v Republic [1989] eKLR, this Court reiterated that an alibi must be considered in the light of all evidence presented. Having carefully re- evaluated the appellant's alibi, we are satisfied that the trial court properly considered it before dismissing it. The prosecution presented compelling evidence placing him at the scene of the crime through the testimonies of PW1, PW3, and PW4. Their accounts remained consistent and credible. The prosecution therefore successfully rebutted the appellant's alibi.

32. Lastly, was the question of failure to call one, Yobesh, a minor who was at the scene of crime as well as the investigating officer to testify. On this one, we agree with the submissions by counsel for the respondent that the failure to call Yobesh, , did not weaken the prosecution's case. PW1, PW3 and PW4 who were at the scene with Yobesh had already testified at length as to what transpired at the scene. The evidence of Yobesh would not have added anything new but mere superfluity. As stated in Bukenya & Others v Uganda (supra), the prosecution is only required to call witnesses sufficient to prove its case and this is what happened here! As regards the absence of the evidence of the investigating officer, we are also satisfied that it did not affect the prosecution's case. From the evidence on record the investigating officer's role in any event, was limited to recording statements and arresting the appellant, and absence of his evidence was not fatal to the prosecution's case therefor! Further in the case of S.C v Republic (supra), it was emphatically held that the absence of an investigating officer's evidence does not necessarily weaken the prosecution's case unless his testimony is crucial in linking the accused to the crime. This was not the case here!

33. Ultimately, we find the appeal devoid of merit and accordingly dismiss it in its entirety.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF OCTOBER, 2025.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.