**Barisa v Republic (Criminal Appeal 60 of 2022)**
**[2024] KECA 219 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KECA 219 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MALINDI**

**CRIMINAL APPEAL 60 OF 2022**

**MSA MAKHANDIA, AK MURGOR & GV ODUNGA, JJA**

**MARCH 1, 2024**

**BETWEEN**

**ALI SHORE BARISA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the judgment of the High Court of Kenya (Ongeri, J.) dated 7th March, 2017 in Garsen Criminal Case No.1 of 2015)***

## JUDGMENT

1. The appellant was charged with 4 counts of murder contrary to section 203 as read with section 204 of the Penal Code in the High Court of Kenya at Garsen. The particulars of all the counts were that Bawako Maro Hero aka Abawako Haji Maro, and the appellant herein, and the co-accused, Bawako Maro Hero, on 22nd August, 2012 at Riketa Village, Knoe Mansa Location, Tarasaa Division in Tana Delta District of Tana River County, jointly with others not before the court murdered the following four persons, Zeinab Abarufa Galgalo (count 1), Kunu Barisa Della (count 2), Ngabariti Bakari (count 3), and Aligeshi Bakari (count 4).

2. Upon hearing the case, the trial court found the appellant guilty on the 2nd count, and convicted him, but acquitted him of the other counts. The co-accused was however acquitted of all the charges. Upon conviction, he was sentenced to suffer death.

3. The prosecution in a bid to prove its case against the appellant lined a total of 13 witnesses who were all survivors of the attack, save for PW11. They testified albeit in an abridged version as follows; PW1 Galgaro Buya testified that on 22nd August 2012 at 6.00a.m in the morning, he woke up his wife Alima Goda to go and milk the cows. Shortly, his wife ran back into the house and told him that they were under attack. Together with their children, they ran away. He however managed to see and identify

the appellant among the attackers. Indeed, he saw him shoot the 2nd deceased to death. He also tried albeit unsuccessfully to shoot him.

4. According to PW2, Abdulla Sanke, he woke up at 5.00am and went to the mosque. On arrival, he discovered that he had forgotten water. He went back to get it, that is when he saw many people with machetes, rungus and guns. He hid with his two children in a thicket. His wife Raima was cut and she died on the spot. Three of his children were also killed. He further stated that during the attack, cows were killed and homes burnt. He stated that he saw the appellant armed with a gun since it was daylight. He testified further that he knew the appellant prior to the incident as he used to be a fisherman in the village.

5. On his part, PW3, Ido Odo testified that on the material day, Pokomo tribesmen attacked Riketa Village occupied by members of the Orma tribe. He stated that he was awake inside his house when he heard noise and went outside where he saw houses being burnt. That he recognized the appellant among the attackers as he was wearing a black sweater and had tied on his head a red scarf. He further stated that he was able to recognize the appellant as he knew him as a fisherman in the village. That the appellant had a gun and that his wife, child and four other members of his family were killed during the attack.

6. PW4, Hahota Elema's evidence was that on the material day, she was inside her house when her husband Wario Kiiro called her to come out of the house. When she did so, she saw the attackers. She together with her children ran away. She lost her mother-in-law, sister-in-law and also 6 cows, in the attack.

7. PW5, Idi Abaruka Galgalo stated that on the material day, he was woken up by his wife at 6.00 a.m, who told him that the enemies had attacked them. He ran away with his wife and children. He lost his mother, a stepmother, his brother, his sister-in-law and his brother's child in the clashes.

8. PW6, Kadua Woticho stated that at 6.00 a.m, on the same date, she saw the attackers approaching her. They were wearing shirts and shorts and had tied red scarves around their heads. She was able to identify the appellant, as she knew him as a fishmonger in the village.

9. PW7, Elema Igiro Abakothe testified that at 6.30 a.m, while in his cowshed, he saw a group of people approaching the village armed with guns, pangas and machetes. He stated that while hiding in his cowshed he saw the appellant setting his house on fire and shooting to death his father-in-law. He recognized him as he used to see him pass by his house on his way to fishing.

10. PW8, Gow Dido Gow stated that on that day at 6.00 a.m, while lighting fire in his cow shed, he saw the attackers burning houses and killing people. He went to his house and took his wife and child, and hid them in a bush. He further stated that he went back to his house to collect some money he had left behind when he recognized the appellant among the attackers. He stated further that he knew him as he and the other attackers used to come to the village to fish.

11. PW9, Koro Tulubu Godana stated that on the very day at 6.00 a.m, their village was attacked by Pokomo tribesmen. He went on to state that there was sufficient light that enabled him to recognize the appellant as one of the attackers. He stated further that the appellant was wearing a black coat and a black short and that he had tied around his head a red scarf.

12. According to PW10, Ali Aligi Ware, on that day, he heard noises while inside his house and ran outside as he heard people shouting. He further stated that he saw a group of people armed with pangas, machetes and guns.

13. The evidence of PW11, David Siele formerly DCIO in Tana River County during the incident was that there were clashes between Ormas and Pokomo tribes which started on 13th August 2012, when 200 heads of cattle belonging to Ormas were attacked and killed by Pokomos. He stated that he found all houses burnt and collected 56 dead bodies of women, children and men at the scene. He arrested the appellant at Hindi who refused to sign the statement he had recorded and to appear for the identification parade.

14. {PW12, Barisa Buya evidence was that on the material day, he was in his house at Riketa village at 6.00a.m, when he heard screams. He stated that his wife Zeinab Abarufa, 1st deceased was shot dead by the appellant. He also saw the appellant killing an old man called Gabricha. According to PW12, he grew up with the appellant and he knew him well as they used to fish together as well.

15. Lastly, PW13 Wario Igiro Abakote testified that on the material day, he had gone to light fire in his cow shed when they were attacked. He stated that while hiding he saw the appellant killing his uncle Safo and his son Abraham. PW13 further stated that he had known the appellant since childhood.

16. The appellant was found with a case to answer and in his unsworn defence, he stated that he was a fisherman. That when the attack happened he was in Lamu at a place called Mangai fishing but travelled to Hindi where he slept. Jackline Auma, testifying as the appellant's witness, stated that on the material day, she was with the appellant in Mangai in Lamu with her husband Peter Otieno. After evaluating the evidence, Ongeri, J. as already stated, convicted the appellant on the 2nd count but acquitted him on other counts.

17. Aggrieved by the conviction and sentence, the appellant has lodged the instant appeal contending that crucial evidence that pointed to the defence of provocation was disregarded; extenuating factors evident in the case were disregarded; the sentence imposed did not take into account his mitigating factors; the totality of the prosecution evidence pointed to an incident involving a protracted ethnic animosity pitting the tribes in question; malice aforethought was not established; cause of death was not established; and the sentence imposed was not commensurate with the charges levelled against him.

18. In his written submissions, the appellant submitted that PW1 and PW2 had testified that they saw a group of armed men but out of those people, it was only him and Bute Fusi who were arrested and the police did not arrest others mentioned. The appellant asserted that there were no special circumstances for the court to conclude that their identification was positive. Reliance was placed on the case of Peter Ngige Weru vs. Republic App No. 51 of 2006 with regard to his identification. According to the appellant, the evidence regarding his identification was marred with inconsistencies and contradictions. The appellant submitted that no post-mortem report, death certificate or burial permit documents were tabled in evidence to prove the fact of death and cause of the deceased, hence, death was not established. Reliance was placed on the case of Republic vs. Emmanuel Okutoyi Malele [2016] eKLR, Republic vs. Muthui Kilonzo [2012] eKLR and Republic vs. Gasper Ongori Maragia [2011] eKLR for the proposition.

19. According to the appellant, there was no evidence that the attacks on the deceased were deliberate and targeting specific people, and therefore, malice aforethought was not proved. The appellant submitted that being the case, then a lesser charge of manslaughter would have sufficed under section 202 of the Penal Code. The appellant claimed that this was a case of provocation by the adverse party hence the applicability of the defence of self-defence. The appellant submitted that the Supreme Court in the case of Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, had declared the mandatory nature of the death sentence encapsulated in section 204 of the Penal Code unconstitutional to the extent that it deprived courts of their discretion in sentencing. The appellant went on to urge us to review the sentence of death in the event that we uphold his conviction.

20. The respondent opposed the appeal in its entirety through its written submissions in which it stated that the defences of provocation and or self-defence were not available to the appellant as the deceased were unarmed and helpless when they attacked. The respondent asserted that the sentence imposed was commensurate with the crime and the manner it was committed. According to the respondent, the trial court rightly held that there was proof of death by relying on the prosecution's evidence. Some of the witnesses indeed witnessed the deaths and attended their burials. Reliance was placed on the case of Republic vs. Michael Mucheru Gatu (2002) eKLR. The respondent asserted that the appellant had been placed at the scene of crime in possession of a gun that he used to shoot the 2nd deceased. According to the respondent, the evidence was direct and the fact that he used a gun to shoot the deceased, there was no other intent, other than to cause the death of the deceased or at least grievous harm; hence malice aforethought. The respondent in the circumstances urged us to uphold the conviction and sentence.

21. This being a first appeal, the Court has a duty to revisit the evidence that was before the trial court in its entirety, re-evaluate and analyze it and come to its own conclusions. Further, the court has to bear in mind that, unlike the trial court, it did not have the benefit of observing the demeanour of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. See Okeno vs. Republic [1972] EA 32, Eric Onyango Odeng' vs. Republic [2014] eKLR.

22. We have considered the grounds of appeal, the respective submissions, and the record. The only issue for determination in our view is whether the conviction and sentence of the appellant was safe.

23. This is a murder case, in which the prosecution is required to prove four elements in order to find a conviction. These are that the deceased died and its cause; that the death was unlawful; that the accused caused the death and lastly, that the death was caused with malice aforethought. All these ingredients have to be proved by the prosecution beyond any reasonable doubt.

24. On the first issue, the appellant has complained that death and its cause was not proved as there was no postmortem report, death certificate or burial permit that were tendered in evidence to prove the death and or its cause. Neither were the lmams who presided over the burial rites or high ranking Government officials who attended the burial summoned to testify, nor were there photographs of the mass grave where all the deceased were buried tendered in evidence. Thus, there was no evidence whatsoever to show that indeed the deceased had died.

25. This Court grappled with a similar situation in the case of Ndungu vs. Republic [1985] KLR 487. The Court discussed at length the principle that in some cases death can be established without medical evidence and stated thus:

> " Of course, there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a postmortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence, and as supporting evidence of the cause of death. In the circumstances relied on by the prosecution."

The court went on to state:

> " That was in respect of cases where the body is available the court recognized the principle that there are cases where death can be established without a medical evidence. In this case the body itself was not recovered so that it would have been futile (to call medical expert). In our view, in such cases once the evidence, circumstantial or otherwise leaves no doubt in the

mind of the court that death did occur but the body was disposed off in one way or other probably to destroy evidence and defeat justice, a court of law, properly directing its mind to the law and seeking to do justice cannot abdicate its duty to ensure justice."

The Court also cited a paragraph from the New Zealand Court of Appeal decision in Republic vs. Harry (152) NZLR 11. In the case the court stated that:

> "the fact of death is provable by circumstantial evidence notwithstanding that neither the body or trace of the body has been found..."

26. It is clear from the evidence on record that the deceased died as a result of gunshots, cuts with machetes or as a result of being assaulted with rungus. All witnesses and even the appellant himself confirmed that the deceased had either been shot or cut. The only issue here is whether the lack of a post-mortem report, death certificate and burial permit was fatal to the prosecution's case. Based on the above authorities we are satisfied that failure to tender in evidence the said documents was not fatal at all to the prosecution's case. Further, there was an explanation as to why the post-mortem was not conducted on the bodies of the deceased. They were buried on the same day in accordance with Muslim rites as they were all Muslims. We are satisfied that death was proved as required. We therefore agree with the finding of the trial court on the issue.

27. As to the cause of death, the evidence on record points to the deceased having met their deaths at the hands of the attackers who included the appellant. All the prosecution witnesses testified to the fact that their village was attacked and 54 people were killed by either being shot or cut. There can be no doubt as to the cause of death therefore. The witnesses' testimonies were all consistent on this aspect. The trial court came to the same conclusion and we have no reason to depart from that finding.

28. As to whether the appellant caused the death of the deceased, all the witnesses pointed to the appellant as the one who shot some of the deceased with a gun. The appellant was a person well known to the witnesses as he was a fishmonger and or fisherman and he used to be in the village very often. The witnesses testified that the 2nd deceased was shot by a gun which was in the possession of the appellant. This evidence ran through all the other witnesses and was never controverted by the appellant. Therefore, his identification was one of recognition as opposed to the identification of a stranger which is more satisfactory, reassuring and more reliable because it depends upon personal knowledge of the assailant in some form or another. See Anjononi & Others vs. Republic [1980] KLR 59.

29. Lastly, the prosecution was required to prove that the death was caused with malice aforethought on the part of the appellant. Pursuant to section 206 of the Penal Code, malice aforethought is proved in any of the following circumstances:

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

30. It is sufficient to say that the mental element required by section 206 above can be equated to broad guidelines set out in the case of Tubere s/o Ochen vs. Republic [1945] 12 EACA 63:

> " The weapon in possession of the accused while carrying out the intention, the manner in which it was used to strike the human being whether one off blow or violent multiple blows, the conduct of the accused in fleeing from the scene afterwards, the permanency or dangerous severity of the bodily harm and that cumulatively the death of the deceased must ensue from the bodily harm intentionally inflicted."

31. In assessing the weight to be given to intention as an element of murder, the relevant circumstances must be considered whether the appellant foresaw the risk of the voluntary act he was about to carry out against the deceased. Whether the appellant was able to foresee the real or substantial risk and the consequences of targeting the part of the body that may result in the deceased suffering grievous harm. A similar statement of Law was made in the persuasive authority of S. vs. Sigwahla [1967] 4 SA 566 in which the court stated:

> " The expression intention to kill does not in Law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as a dolus eventualis as distinct from dolus directus."

32. In the instant case, the record shows that indeed the appellant with others organized a raid in Riketa village whilst armed with guns, pangas, rungus and machetes. The main aim of that raid was to kill, maim and destroy property, which was indeed actualized as some 54 people died and 66 animals were cut and houses burnt. The attack was meticulously planned and executed. From the evidence on record, there cannot be any other conclusion than that the appellant and the other attackers had a common intention to harm and kill their victims. Their action falls squirrely within the provisions of section 21 of the Penal Code which provides, inter alia, that: "Where 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such nature that that its commission was probable consequence of prosecution of such purpose, each of them is deemed to have committed the offence." (emphasis provided). This is exactly what happened here! We are therefore in agreement with the trial court's finding that indeed there was proof of malice aforethought.

33. The appellant has asserted that this was a case of provocation by the adverse party hence the applicability of the defence of self-defence and or provocation. That there was imminent danger of being attacked by the deceased and other villagers hence their decision to react in that manner was therefore justified. The defence of self-defence is provided for in section 17 of the Penal Code which provides, inter alia:

> " Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."

The said common law principles were spelt out in the case of Palmer vs. Republic [1971] AC 814 in which it was held:

> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be

serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury."

34. This Court in the case of Mokwa vs. Republic [1976–80] 1 KLR 1337, held that:

> " Self-defence is an absolute defence even on a charge of murder unless in the circumstances of the case the accused applied excessive force."

In the case of Mungai vs. Republic [1984] KLR 85, the same Court held:

> " 1. It is a doctrine recognized in East Africa that the excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter – R vs. Ngolaile s/o Lenjaro (1951) 18 EACA 164; R vs. Shaushi (1951) 18 EACA 198.
>
> 2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered – Palmer vs. Reginam [1971] 1 ALL ER 1077."

Under section 207 of the Penal Code, provocation is a defence to murder. That section provides that:

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

35. From the record, there is no evidence that the people who were killed by the appellant and others had attacked them prior to their response. The death of the deceased was not at all connected to any attack that had been carried out in the appellant's village. Further, there was no evidence of imminent danger as alleged by the appellant as those killed were not armed and were helpless. We are satisfied just like the trial court that these defences were not available to the appellant at all. In addition, even if they were, the response and force employed was excessive.

36. As to the failure to consider the appellant's defence of alibi, we are satisfied that the same was considered by the trial court which found that even though was raised too late in the day, it was found not to displace the prosecution evidence. We have gone through the record and agree with the trial court's

finding. Our conclusion is fortified by the decision of the Supreme Court of Uganda, in Festo Androa Asenua vs. Uganda, Cr. App No. 1 of 1998 when it observed:

> " We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."

37. Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed in Ganzi & 2 Others vs. Republic [2005] 1 KLR 52, this Court stated that "where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence..."

38. Weighing the said defence against the prosecution evidence, especially, the fact that nearly all witnesses testified to the fact that they knew the appellant and recognized him in favourable circumstances, it is our view, that the said defence indeed raised no doubts as to the presence of the appellant at the scene of the crime and participation in the commission of the crimes. That alibi was properly displaced by the prosecution evidence. Accordingly, the appeal on conviction fails and is dismissed.

39. On sentence, the appellant submitted that the sentence imposed was harsh and excessive in the circumstances. We note that the appellant's mitigating factors were taken into consideration but still, the trial court went ahead to sentence the appellant to death with the reasoning that, that was the only sentence available. Before this Court, the appellant's submission was that in light of the Supreme Court's decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, the mandatory nature of the death sentence was rendered, and unconstitutional. He urged us that if we were to uphold the conviction, we should at least review the sentence and substitute it with any other sentence. In the aforesaid case, the Supreme Court held, inter alia:

> " The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence contemplated under Article 26(3) of *the Constitution*."

40. In the circumstances, we may have to interfere with the sentence that was imposed by the trial court, as it is no longer mandatory. In so doing, we have to take into consideration the fact that the appellant committed cold-blooded murder of several persons who were defenceless. Having taken into account the appellant's mitigation, we set aside the death sentence that was pronounced against him and substitute therefor with a jail term of forty (40) years imprisonment from 7th March 2017, when he was initially found guilty of the offence and sentenced.

**DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF MARCH, 2024.**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**.....**

**JUDGE OF APPEAL**

**G. V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

I certify that this is a True copy of the original

**Signed**

**DEPUTY REGISTRAR**