Makasi v Republic (Criminal Appeal E004 of 2022) [2024] KECA 743 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 743 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E004 OF 2022

F SICHALE, FA OCHIENG & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

ABRAHAM SINDANI MAKASI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Bungoma (S.N. Riechi, J.) delivered and dated 30th July 2021inHCCR No. 13 of 2016)

JUDGMENT

1. The appellant, Abraham Sindani Makasi, was charged, tried and convicted by the High Court in respect to the murder of Evans Wafula Wafukho contrary to section 203 as read with 204 of the *Penal Code*. The information stated that he committed the offence on 8th May 2016 at around 8.00 pm within Wanambwa Village, Sitabicha Sub-Location, Malakisi Location in Bungoma West Sub-County within Bungoma County. At the conclusion of the trial, the appellant was found guilty, convicted and sentenced to serve 15 years imprisonment.

2. The appellant is now before us dissatisfied with the judgment of the trial Court on 9 grounds which we summarize as follows: that the appellant's defence was not considered by the learned Judge; that the prosecution case was not proved beyond reasonable doubt; that the evidence on record was marred by glaring disparities, untruthfulness and contradictions; and that the appellant's mitigation was not considered resulting in the imposition of a harsh and excessive sentence.

3. At trial, the prosecution called 12 witnesses in support of its case against the appellant. Erick Khisa Lumbuku (PW1) testified that on the material day, he saw the deceased who informed him that he was headed to the appellant's home to pay some debt. A few hours later, he heard screams emanating from the direction of the appellant's home and rushed there alongside Collins Likumbo and Richard Nabiswa. On arrival at the appellant's home, they did not find anyone and decided to head towards the

direction of the screams where they found the deceased lying in a pool of blood near his brother's house while bleeding from cut wounds on his nose and lips. The deceased complained about his money. The deceased was then taken to the hospital. PW1, alongside others, went back to the appellant's home where they found a lot of blood inside his house.

4. Edward Makokha Matumbani (PW2) testified that he was a village elder and that on the material day, he was woken by Jonathan and Oscar who informed him that Mary Wasike was looking for him and that the appellant was assaulting the deceased. He left for the scene but on the way, he saw a group of people heading towards Jonathan's home from the appellant's place. He rushed to Jonathan's place and found the deceased had been injured on the face and chest. The deceased was later taken to the hospital using Jonathan's vehicle. He then reported the matter to the Assistant Chief and upon returning to the scene, the police and the area chief had already arrived.

5. Simon Wakhungu Wamanani (PW3) on his part testified that he was a member of "Nyumba Kumi" and that on the material day,he was informed by Edward Wanjala that there was a problem at the appellant's house. They proceeded to the appellant's house where they found the appellant and the deceased inside the house. Upon knocking on the door, the appellant declined to open the door and instead threatened to harm them. They, nevertheless, forced the door open and saw the appellant armed with a machete, a club and a knife. A tin lamp was on inside the house. The appellant ran away while the deceased remained lying in a pool of blood. They then escorted the deceased to a vehicle which took him to the hospital.

6. Dr. Haron Ombongi (PW4) presented the postmortem report on behalf of Dr. Raymond indicating that postmortem on the body of the deceased was conducted on 8th May 2016. The findings were that the deceased had stab wounds on the right and left shoulders, the left arm and the right leg. He had a swelling behind the chest and a fracture on the 4th rib with a wound at the back of his head. It was determined that the deceased had died as a result of severe injury to the head and chest.

7. Salome Nerima Kewino (PW5) testified that on the material day, she, alongside PW3 and PW6, proceeded to the appellant's house where upon knocking the door, the appellant informed them that the deceased was a thug. They heard the deceased cry and say that he was dying. PW5 testified that PW3 hit the door open and the appellant threatened to kill them. She raised alarm and that is when the appellant took off. She saw the appellant with a machete and club.

8. Martin Wangila (PW6) on his part corroborated the testimony of PW3 and PW5 in all material particulars.

9. Protus Kisa (PW7) testified that he was the area Senior Chief and that on the material day, he received a call from the village elder informing him of the incident. He proceeded to the scene and found a crowd at the appellant's home while both the appellant and the deceased were nowhere to be seen.

10. Protus Juma Wafula (PW8), the area Assistant Chief recalled that on the material day, he was informed of the incident by a village elder and he relayed the same information to the Chief.

11. On his part, Peter Wanjala (PW9) testified that he went to the appellant's house upon being prompted by screams emanating therefrom. On arrival, he noticed the deceased lying down only dressed in his inner pants and with multiple injuries. He was among those who took the deceased to Bungoma Hospital where he was pronounced dead on arrival. He also identified the body for postmortem purposes.

12. Jimi Muchukuli Namunane (PW10) was also at Bungoma Hospital mortuary on 12th May 2016 to identify the body of his deceased uncle to the pathologist for postmortem.

13. Richard Kimutai Langat (PW11) was a government analyst who had received exhibits for forensic analysis. He concluded that exhibit B3 (appellant's T-shirt) contained the appellant's DNA. He also concluded that exhibits B4 (appellant's trouser) and CI (debris of dry mud) were stained with the deceased's blood and also had the deceased's DNA sample which had been provided as B5.

14. Senior Sergeant Selina Ayabei testified as PW12 giving a highlight of what transpired during her investigations up to the point of arraigning the appellant in the High Court.

15. In his defence the appellant denied committing the offence stating that he had purchased land from the deceased's father and that on the material day, he was attacked at his home. This prompted him to run for his life to the nearby AP Camp where he spent the night. He testified that PW1 had sold him land and that he had lied about what transpired and denied ever being found with the deceased.

16. This appeal came up for hearing on the Court's virtual platform on 5th December 2023. Learned counsel Mr. Kosgey appeared for the appellant while learned counsel Ms. Kiptoo appeared for the respondent. The advocates for the parties made brief oral highlights and sought to rely on their written submissions.

17. Through his undated submissions, Mr. Kosgey submitted that the trial Court erred in not considering the appellant's defence. Counsel relied on section 17 of the *Penal Code* and the decisions in *Ahmed Mohammed Omar & 5 others v. Republic* [2014] eKLR, *Roba Galma Wario v. Republic* [2015] eKLR and *Nzuki v. Republic* [1993] KLR 171 and submitted that the defence of self-defence is a valid defence which was available to the appellant in the circumstance of this case. According to counsel, malice aforethought was not established. Stressing his argument that the appellant acted in the defence of self and his property, counsel submitted that although the law generally abhors the use of force or violence, there are instances when a person is justified in using a reasonable amount of force if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it. According to counsel, the appellant was in the circumstances of this case, within his rights, to use force to defend himself and it was immaterial that the force used led to the death of the deceased.

18. Counsel additionally asserted that the trial Court did not appreciate that the appellant had been attacked by a group of people and that the evidence did not point to him as the assailant of the deceased as the deceased was part of the gang. Counsel urged that the evidence presented by the prosecution did not discharge the burden of proof to the required standard hence the appellant's conviction could not be sustained. Counsel consequently urged us to allow the appeal asserting that the appellant was entitled to an acquittal having successfully demonstrated that he acted in self-defence.

19. In opposition to the appeal, Ms. Kiptoo relied on the submissions dated 20th December 2022. She asserted that the trial Court considered the appellant's defence and correctly discounted it. Counsel referred to *Sawe v Republic* [2003] KLR 364 and submitted that the factors to be considered before an accused person can be convicted on circumstantial evidence had been established. Rejecting the appellant's allegation that PW1 framed him, counsel submitted that there were no glaring discrepancies between the evidence of PW1 and that of the other witnesses. Ms. Kiptoo pointed to the nature of injuries inflicted on the deceased, in support of the submission that the appellant had malice aforethought. In response to the appellant's challenge to sentence, counsel submitted that the trial Judge took into consideration the appellant's mitigation before passing the sentence and this Court should therefore not alter the sentence. Counsel consequently urged us to dismiss the appeal as the trial Court's judgment was correct, sound and proper.

20. This being a first appeal, our jurisdiction as provided under section 379(1) of the *Criminal Procedure Code* encompass both matters of law and fact. Our role is akin to a retrial where we review the

whole record and independently consider the evidence adduced at the trial in order to reach our own conclusion. The manner of exercising our jurisdiction has been reiterated in numerous decisions, including *Dickson Mwangi Munene & another v Republic* [2014] eKLR, where it was stated that:

> "This being a first appeal, this Court is obliged to re-evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor."

21. In discharge of our mandate, we have reviewed the record of appeal and considered the submissions of counsel for the parties. In our view, the issue for determination is whether the appellant's conviction was backed by the evidence on record and, if so, whether the appellant has established grounds for our interference with the sentence.

22. In determining whether the appellant was properly convicted, the issue that comes to the fore is the adequacy of the evidence adduced against the appellant. The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The provisions state that:

> "203. Murder
>
> Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.
>
> 204. Punishment of murder
>
> Any person convicted of murder shall be sentenced to death."

23. A reading of section 203 clearly indicates that for a charge of murder to be established, the prosecution must first prove the fact and cause of death of the deceased person. Secondly, the evidence should demonstrate that the accused person contributed to the deceased's death through an unlawful act or omission. Finally, it must be proved that the accused person had malice aforethought in causing the deceased's death. These ingredients were aptly stated in *Roba Galma Wario v Republic* [2015] eKLR as follows:

> "For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

24. The starting point then is the determination of the question as to whether the fact of death was established. PW9 and PW10 were relatives of the deceased. They testified that they identified the body of the deceased to the pathologist who conducted postmortem. Further, PW4 testified that the body of the deceased had stab wounds on the right and left shoulders, the left arm and the right leg. He had a swelling behind the chest and a fracture on the 4th rib with a wound at the back of his head. The pathologist formed the opinion that the death was caused by severe injury to the head and chest.

25. The next issue would be whether the appellant caused the death of the deceased. In this case, no witness testified as having seen the appellant injure the deceased. The prosecution's case was therefore anchored on circumstantial evidence. As has been held in numerous decisions of this Court, the guilt of an accused person can be inferred from consideration of either direct evidence or circumstantial evidence. Any set of evidence, whether circumstantial or direct would serve the same purpose. Just like direct evidence, circumstantial evidence presents the Court with a set of facts which form a chain so strong as

to eradicate any doubt of an accused person's innocence in respect to the offence charged. The evidence must therefore point to the accused person and no one else as the person who killed the deceased. For instance, in *Joan Chebichii Sawe v. Republic* [2003] eKLR, the Court while considering the conditions to be met before circumstantial evidence can be used to convict an accused person stated that:

> "In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

26. In this case, PW3 and PW5 who were members of "Nyumba Kumi" and PW6, a village elder, went to the appellant's house and found him having locked himself with the deceased inside the house. The deceased was crying for help. They forced the door open amidst threats of attack from the appellant. Upon opening the door, the appellant was found wielding a machete, a club and a knife. The appellant had a tin lamp while PW3 and PW6 had a solar lamp. All the lamps were on. It was their evidence that the appellant then took off leaving behind the deceased lying in a pool of blood. PW1 on his part testified that he saw the deceased earlier that evening who told him that he was headed to the appellant's place. He further stated that after the deceased had been taken to hospital, he went back to the appellant's house where he saw blood. There is also the evidence of PW11 who conducted forensic analysis on soil samples from the appellant's house as well as the appellant's T-shirt and trousers and cross-matched the DNA samples from these items to the deceased's blood sample. He concluded that those exhibits were stained with the deceased's blood.

27. The foregoing evidence leads to the conclusion that the deceased was assaulted at the appellant's house. Additionally, the deceased's blood found on the appellant's trousers confirms that it was the appellant and no one else who was with the deceased inside the appellant's house. The logical conclusion is that it was actually the appellant and nobody else who inflicted the fatal injuries on the deceased. Indeed, the appellant did not deny being in his house at the material time. His story is that he was attacked by a group of people who wanted to take his money. He additionally claimed that there was a grudge between him and PW1 who had sold him the land he was living on. His evidence cannot, however, hold in the face of the evidence of independent witnesses like PW3, PW5 and PW6. PW3 and PW5 were members of "Nyumba Kumi" and the term "Nyumba Kumi" is defined in the First Edition of the National Police Service's Community Policing Information Booklet published in 2017 as "a strategy of anchoring Community Policing at the household level or any other generic cluster." These witnesses were members of a community grouping whose sole aim was to ensure that security was maintained in their village. This may explain their prompt response to the alarm that was raised by the deceased. PW6 on the other hand introduced himself as a village elder. The testimony of these three witnesses injects credibility to testimony of PW1 who stated he went to the appellant's home twice; before and after the deceased was taken to the hospital. On the first occasion, he did not find the gang the appellant talked of. When he returned to the home of the appellant with other persons, he saw blood on the floor of the appellant's house. Similarly, PW3, PW5 and PW6 did not mention seeing anybody else apart from the deceased when they visited the scene before the appellant took off. In our view, the torching of the appellant's house as testified to by PW7, PW8 and PW12 occurred after the deceased had succumbed and not before. The appellant's evidence of an alleged attack is therefore unsupported by the evidence on record. It is therefore our conclusion that the evidence on record pointed to no other person than the appellant as the one who caused the deceased's death.

28. The next issue is whether the appellant had a preconceived intention of ending the deceased's life. This issue leads us to a consideration of the appellant's claim that he acted in self- defence. In response to questions put to him during his cross- examination, the appellant stated that on the material evening thugs attacked him in a bid to steal Kshs. 440,000 which he had made from his business and he hit one of them with his fist.

29. We acknowledge that section 17 of the [*Penal Code*] does indeed allow a person to act in defence of person or property by providing that:

> " Subject to any express provision of 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."

30. This defence was discussed in [*Victor Nthiga Kiruthu & Another v Republic*] [2017] eKLR as follows:

> "On the first issue, the approach we take is to fully associate ourselves with the principle in *Mungai versus Republic* [1984] KLR 85, as approved in *Joseph Muriuki versus Republic* [2016] eKLR, that the defence of self defence is known to law and where it is raised and the circumstances exist to show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is serious enough to cause loss of control, then it is merged into provocation and the inference of malice is rebutted and the offence if disclosed will be one of manslaughter."

31. The Court went ahead to state the applicable principles as follows:

> " The principles that have emerged from these and other authorities are as follows: -
>
> i. Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

iii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

iv. The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

v. What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case."

32. It is therefore apparent that for an accused person to successfully invoke the defence of self-defence, the circumstances must be sufficient to establish, at least, an imminent danger. The force deployed by an accused in the circumstances must be reasonable and proportionate to repel the attack. In this case, PW3, PW5 and PW6 testified that the appellant had a machete, a club and a knife. The deceased had already been subdued and was nursing stab wounds on the right and left shoulders, the left arm and

the right leg, swelling behind the chest, a fracture on the 4th rib and a wound at the back of his head. When PW3, PW5 and PW6 knocked the door, the appellant threatened them with violence. It cannot be said that the appellant was under imminent threat of attack by the deceased as the appellant was already in control of the events. Indeed, the appellant in his own evidence stated that he only hit the deceased with his fist. That could not have resulted in the fatal injuries sustained by the deceased. From these circumstances, the appellant was not a man defending himself. The deceased had no weapon and therefore the force deployed was more than necessary to prevent an attack, if any. The appellant's plea that he acted in self-defence cannot be believed and we reject this argument.

33. We go back to the question as to whether the appellant had malice aforethought. It is not in doubt that malice aforethought can be construed from the circumstances leading to the death in question. In *Paul Muigai Ndungi v. Republic* [2011] eKLR it was held that:

> "More particularly, malice aforethought is deemed established by the evidence proving an intention to cause death of or to do grievous harm to any person."

34. Similarly, in *Morris Aluoch v Republic* [1997] eKLR it was stated that:

> " If repeated blows inflicted the injury then malice aforethought could well be presumed…"

35. In the appeal before us, the nature of the multiple injuries inflicted by the appellant on the sensitive parts of the deceased's body portrays the appellant as a man who was out to terminate the life of the deceased. That the appellant was intent on completing his mission was confirmed by the fact that the first responders had to force open the door in order to rescue the deceased. The appellant's actions as already described therefore confirm the appellant's intention to cause the death of or to do grievous harm to the deceased. This is one of the ingredients of malice aforethought found in section 206 of the *Penal Code*. In the end, we find that the prosecution proved all the elements of the offence of murder. The appeal against conviction is therefore without merit and is hereby dismissed.

36. The remaining issue is that of the sentence imposed on the appellant. Although the appellant's counsel did not submit on the issue, one of the appellant's grounds of appeal is that the trial Court did not consider his mitigation hence the sentence handed down was harsh and excessive in the circumstances. As an appellate court, our interference with the trial court's discretion on sentencing is only warranted if, the trial court overlooked a material factor, took into consideration irrelevant factors, acted on wrong legal principles in arriving at the sentence, or the sentence is manifestly excessive. This statement of the law is found in *Bernard Kimani Gacheru v. Republic* [2002] eKLR where it was held that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

37. We have reviewed the sentencing proceedings that took place on 30th July 2021. In sentencing the appellant, the learned Judge stated that:

> "The Court has taken into account fact with accused as first offender (sic). It has also taken into account the mitigation. The Court notes accused has been in custody for 5 years since 2016. However, the offence is serious. Accused is sentenced to fifteen (15) years imprisonment."

It is therefore clear that the trial Court took into consideration the relevant factors that ought to be considered when sentencing a convict. Specifically, the trial Judge took into consideration the appellant's mitigation and the fact that he was in custody for 5 years during the trial. In the circumstances, the appellant's claim that his mitigation was not considered is therefore not supported by the record. The sentence is also legal. There is thus no reason placed before us that can make us interfere with the exercise of discretion by the learned Judge. Like the appeal against conviction, we similarly find the appeal against sentence to be without merit and we dismiss it.

38. The upshot of the foregoing is that this appeal lacks merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU ON THIS 21ST DAY OF JUNE, 2024

F. SICHALE

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR