



**Barasa v Republic (Criminal Appeal 161 of 2018)
[2024] KECA 655 (KLR) (7 June 2024) (Judgment)**

Neutral citation: [2024] KECA 655 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 161 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JUNE 7, 2024**

BETWEEN

JUSTUS MAKOKHA BARASA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment and sentence of the High Court of Kenya at Busia (F. Tuiyott, J.) dated 16th August 2016 in HCCRC No. 14 of 2014)

JUDGMENT

1. Justus Makokha Baraza (the appellant herein) was charged together with others, of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was the prosecution's case that the murder took place on 15th May 2014 at Elukongo sub location at Butula District within Busia County.
2. The appellant pleaded not guilty and the prosecution called eight (8) witnesses in support of its case; whilst the appellant, in his defence, gave sworn testimony. In a judgment dated and delivered on 16th August 2016, the trial court found that the prosecution had proved the case against the appellant; and he was convicted of the charge. Upon consideration of the appellant's mitigation, he was sentenced to death sentence. The appellant, being dissatisfied and aggrieved with both the conviction and sentence, has now appealed to this Court.
3. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a first appeal, this Court is mindful of its duty as was well articulated in Erick Otiemo Arum v Republic [2006] eKLR as follows:

“It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence



adduced and as analysed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e) a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same”

4. The evidence before the trial court was as follows: PW1, Caroline Adhiambo was at her home in Mauko village, when a group of 8 people came running into the compound, yelling and issuing threats; and eventually they attacked Patrick Makokha Opanga, the deceased who was seated outside his house.
5. The appellant (who was the 3rd accused at the trial) hit the deceased with a rungu while the 2nd accused struck him with an axe on the back of his head. PW3 tried to intervene and was injured in the process. PW1 & PW3 then left for Bumala AP camp to lodge a complaint and later to the health center to get medical help. PW1 returned home with the police only to find that the deceased had been taken to a clinic in Bumala and had passed on.
6. She stated that she knew all the attackers, as they were her in-laws including the appellant who is her brother in-law. She confirmed all the people were armed; and attempts by PW3, the deceased’s wife, Evaline Achien’g Opanga, to intervene, resulted in getting her hand cut with the panga; and she fell inside her house.
7. The deceased’s mother, Gestine Makokha, PW2, was at home on the fateful day at 6.00pm; and she witnessed the attack on the deceased. It was her testimony that 8 armed people, three of whom she recognised as her step children, and four as her neighbour’s children, approached their compound, while making noise saying in the Luhya language: “Opanga you will die today”. Her co-wife, Mildred Makokha, was also in the group; and was armed with a rod.
8. PW2 stated that she ran to the deceased who was seated outside; and witnessed the group attacking him; before turning on to her and the appellant person cut her on the head. She noticed that the deceased’s wife, Evalyne, and her other son, Mariko had also been injured. She noticed that the deceased was lying on his stomach, while the appellant continued cutting him. Her further attempts to rescue him from further assault were thwarted as the mob beat her repeatedly. The attackers then left. PW1 and PW3 went to make a report at Bumala police station, whilst PW2 was assisted by a neighbour to take the deceased to Bumala hospital where he succumbed, and was pronounced dead. On cross examination, PW2 stated that there had been a land dispute between her and the co-wife.
9. The evidence of PW3 was more or less similar to that of PW2 in the manner that the attack was executed; that the appellant was the first to attack the deceased with a blunt object (however PW2 said it was a rungu, whilst PW3 said it was a metal rod; that the attackers also assaulted PW2, PW3 and Mariko and they sustained injuries. The record reflects her evidence as follows:

“I heard people screaming. Suddenly Justus reached him and hit him first with a metal rod. My husband asked them what was wrong. Benard from behind then cut my husband’s head. Silas, Clifton and others then descended on him. There were nine assailants in total. Justus also cut him with an axe; the others were hitting him with fimbos.”
10. PW5, APC Shem Ngige was on duty at Bumala police post when at around 7.30 pm a group of people reported that they were attacked by people known to them and three of the reportees had injuries. PW5, in the company of a colleague, then, left for the deceased’s home where they found the deceased had been taken to hospital. PW5 saw the deceased motionless at the hospital. On 18th June 2014, PW5



& APC Kuria, PW7 arrested the appellant at his father's home and on 6th August 2014, the 3rd accused was arrested.

11. The post mortem was conducted by PW6, Dr. Palson Kubuta who noted extensive external injuries on the body with multiple extensive penetrative injuries on the parietal and occipital regions. On the nervous system the deceased had brain substance which was extensively injured by penetrative injuries in the respective lobes that correlated to the parietal and occipital regions. The brain substance was out, and the injuries were caused by forceful penetration. The doctor formed the opinion that cause of death was severe head injury secondary to assault, and that the injuries were very serious.
12. PW8, Sgt Ndaru was the investigating officer. He visited Bumala Health Center where he found 2 injured people. The body of the deceased lay on the corridor of the Health Center, and he took the body to the mortuary. This witness confirmed that the accused persons were arrested on different dates and charged with the offence of murder and that the likely cause of the attack was a family land dispute.
13. In his sworn defence the appellant explained that on 15th May 2014 at around 6pm he had gone to fetch a cow from the river when he was attacked by the deceased who hit him on the shoulder using a metal bar. The appellant then snatched the metal bar and a struggle ensued. He further testified that the deceased's brother, Mariko, joined in and cut the appellant twice on his right hand; the appellant then hit the deceased with the metal bar, and Mariko tried to cut the appellant who then ducked and the blow landed on the head of the deceased. The appellant further testified that PW2 and PW3 joined in the fight armed with a panga and an axe, and they both attempted to assault the appellant but because he ducked they cut each other. The appellant then left the scene; and reported the incident to a village elder named Benedict Ouma. He later learnt of the passing of the deceased.
14. The appellant told the court that there was a land dispute between him and the deceased; that the deceased had destroyed his crops and a formal report was made to the Agriculture Officer who assessed the damage and the report was produced as D. EXH 3.
15. The trial court, having considered the evidence, was satisfied that the ingredients of the offence of murder had been satisfactorily met. The court noted that the fact and cause of death was not in dispute as PW1, PW2 and PW3 confirmed that the deceased was attacked by the persons charged; and the said injuries were also confirmed by the postmortem performed by PW6. The trial court was also satisfied that the testimony of PW1, PW2 and PW3 placed the appellant at the locus in quo at the time the act was committed and was clear that it was the appellant together with his co-accused who committed the unlawful act that caused the deceased's death.
16. The learned trial Judge considered the assertion by the appellant that the deceased attacked him and that his injuries were as a result of "friendly fire", the court found it hard to believe the appellant's version, as the impression was that the appellant hit the deceased once and that the deceased was cut once when Mariko's blow landed on him, yet the post mortem showed multiple injuries, which did not align with the appellant's story of events.
17. The trial court also observed that although the appellant claimed to have reported the attack to a village elder, the said village elder did not testify on his behalf to corroborate the alleged occurrence of events; and also, the fact that the appellant never bothered to report the assault to the police. The court found that from the evidence on record, particularly the evidence of PW1-PW3 regarding the appellant's role in the attack; and the appellant's own admission that he was at the scene; his version of events could not hold.



18. As regards the element of malice aforethought, the learned Judge found that the appellant and his co-accused came into the deceased's compound, attacked him, inflicting multiple severe injuries whose nature disclosed an intention to cause death within the meaning of section 206(a) of the *Penal Code*.
19. The trial court also noted that the existence of a land dispute was the motive for the vicious attack meaning that the attack was premeditated and planned; and that the sheer force left no doubt about the intention of the assailant. Having considered all the evidence in its totality, the trial court found the appellant guilty of the offence as charged and sentenced him to death.
20. In the main memorandum of appeal, the appellant contended that the evidence on record did not prove the offence; that although the fact of death was not in dispute, the prosecution had failed to establish malice aforethought as set out under section 206 of the Penal Code, pointing out that before one can be held criminally liable for the death of another person, it has to be proved beyond reasonable doubt that his act or omission is the sole cause of death; that in any event, the justified exceptions recognized by law in execution of a court finding, are for instance the defence of property or life itself or any person from unlawful violence; the evidence by the prosecution in totality was inconsistent that it would not be possible to ascertain without a doubt that the appellant was the perpetrator of the offence to the exclusion of everyone else.
21. The appellant has subsequently raised 3 grounds in the supplementary memorandum of appeal dated 30th May 2023 as follows:
 - i. The Learned Judge erred in law by lowering the standard of proof to a balance of probability as opposed to beyond reasonable doubt required in a criminal case and convicting the appellant relying on the same.
 - ii. The Learned Judge erred in law and fact by failing to appreciate the rights of the accused person on Article 29 (D) Article 50 (2p) and Article 25 of the *Constitution* while pronouncing itself on sentencing.
 - iii. The Learned Judge erred in fact and law by convicting on the basis of contradicting evidence tendered by the prosecution witnesses and shifting the burden of proof to the accused as opposed to it being on the prosecution.
22. Did the learned trial Judge lower the standard of proof? Was the evidence insufficient to prove the offence of murder? The fact and the cause of death of the deceased person was supported, not just by the evidence of those who saw the deceased as he lay dead, but also a post-mortem conducted on the body, which determined the cause of death as severe head injury secondary to assault. Indeed, the medical evidence disclosed the severity of the injuries inflicted on the deceased as multiple extensive penetrating injuries on the parietal and occipital regions of the head and extensive damage to the brain. The death was not disputed.
23. We now turn to consider whether there was evidence tendered to prove that the death of the deceased person, was the direct consequence of an unlawful act or omission on the part of the appellant, acting jointly with others. Evidence tendered showed that the death of the deceased person was the direct consequence of an unlawful act or omission on the part of the appellant acting jointly with others. There was adequate opportunity for identification as the incident took place about 6.00pm, the incident was not a momentary swift hit and run attack; and all the prosecution witnesses were consistent regarding the identity of the persons very well known to them, who comprised the charging mob that advanced towards the deceased, chanting threats of final demise; that after the brutal attack, while the deceased lay on the ground, the appellant asked "has he died". The evidence squarely placed the appellant at the scene, not to mention that his own evidence confirmed that he was present.



24. As to whether malice aforethought was satisfied, section 206 of the [Penal Code](#) provides that:
Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-
- i. 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;
 - ii. 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;
25. Our own observation is that from the type of weapons used, the repeated brutal assault, the amount of force used to inflict the injuries was so severe as to cause penetrative injuries on the head, ending up in exposing the brain matter; and we concur with the trial court that, the appellant had the intention to cause death or to do grievous harm to the deceased. We agree with the respondent's submissions that the appellant was well aware of his actions and intended the consequences of the said acts, drawing from a similar case of [Ali Salim Babati & another v Republic](#) [2019] eKLR where this Court observed that:
- “.....their vicious attack on the deceased was also a clear indication that they intended the consequences of their actions, that is, the death of the deceased..... Equally, it established malice aforethought on the part of the appellants.
26. We acknowledge that there were some inconsistencies in the evidence of the prosecution witnesses, but also note that the learned Judge was fully alive to this fact, and made the following observation:
- “It is true that there were some inconsistencies in the evidences of PW1, PW2 and PW3. But those inconsistencies were not of such magnitude as to make the evidence of the three witnesses improbable. The aspects that were consistent and corroborative implicated A1 and A3. Their evidence found support in the evidence of PW5, PW6 and PW8. That evidence was sufficient even in the absence of the additional evidence of Mariko. Nothing adverse can be made of the failure of the State to call this one witness. That failure does not dent the strong evidence by the Prosecution.”
27. The evidence was properly evaluated and analysed by the trial court, which applied appropriate legal principles; and we are unable to detect any error in this regard. Consequently, we find that the appellant's conviction for the offence of murder was safe; and we uphold it.
28. At the hearing of this appeal, the appellant concentrated his appeal on sentence alone, on the ground that it was excessive and, secondly, that the death sentence was unconstitutional. This Court also notes that the respondent conceded to the setting aside of the death sentence imposed.
29. With regard to the severity of sentence, we note that section 379 (1)(a) & (b) of the [Criminal Procedure Code](#) provides for this court's jurisdiction to entertain an appeal against sentence from the High Court exercising original jurisdiction.
30. In [Francis Muruatetu & Another v Republic](#), the Supreme Court of Kenya Petition No. 15 & 16 of 2016, [2017] eKLR, [now popularly referred to as Muruatetu 1] gave sentencing guidelines with regard to mitigation before sentencing in murder cases at paragraph 71 as:
- i. Age of the offender,



- ii. Being a first offender,
- iii. Whether the offender pleaded guilty,
- iv. Character and record of the offender,
- v. Commission of the offence in response to gender-based violence,
- vi. Remorsefulness of the offender,
- vii. Any other relevant factor.

In the same case the Supreme Court in regard to the application of mitigation by the accused before sentencing pointed out that:

“it is during mitigation, after conviction and before sentencing, that the offender’s version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or in the converse impose the death penalty.”

31. Subsequently, the respondent, in conceding to interference with the sentence, submits that the record does not reflect the appellant’s plea in mitigation; the respondent is also cognizant of the declaration of the unconstitutionality of the mandatory death sentences in the case of *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae)* [2021] eKLR (Muruatetu 2). Where the Supreme Court was categorical that:

“the decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code.”

32. We take note that there is a pre-sentence report from the Probation Officer, with regard to the appellant giving his then age as 30 years old with five children and is a first offender and his family depends entirely on him and his wife is unemployed; and further that the appellant is remorseful and prays for leniency.
33. This Court acknowledged in *Chai v Republic* (Criminal Appeal 30 of 2020) [2022] KECA 495 (KLR) (1 April 2022)

that the two holdings of the Supreme Court in the Muruatetu case make it very clear and underscores the importance of receiving and considering mitigating circumstances; and also paying regard to the applicable sentencing guidelines, even though the latter are only a guide. To justify the maximum sentence of death, the sentence ruling should have spoken to it, showing in black and white what the court considered. Although in the ruling on sentence, the sentencing court noted that the appellant had presented his mitigation it is apparent that the plea in mitigation did not count much as the learned Judge had this to say:

“As for the 3rd accused, I note that his mitigation is already on record and the same may be used in future by the Advisory Committee on the Power of Mercy in making any recommendations to the President under Article 133 of the *Constitution*. I note that the only sentence available for the offence of murder is death. I therefore sentence the 3 Accused to suffer death in the manner authorized by the law.”

34. The foregoing passage clearly demonstrates that the trial court did not pay regard to the plea in mitigation; and in doing so tied its hands from using its discretion in making an informed decision



with regard to sentencing. We take note that this was an incident involving step siblings, who seemed to have deep seated animosity over a land dispute. It is not lost on us that the group of eight, viciously attacked a member of the family who was completely defenceless. They went ahead to execute their verbalized threats that the deceased had to die. The attack was brutal, and the degree of injuries, so gross, that we are persuaded the circumstances call for a stiff custodial sentence. We have considered these aggravating factors and weighed them against the extenuating factors in the case. While agreeing that based on Muruatetu jurisprudence, that the death sentence is one for setting aside; which we hereby do; we substitute it with a term sentence of thirty years' imprisonment. The upshot is that the appeal against conviction is dismissed while the appeal against sentence succeeds only to the limited extent expressed above.

35. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JUNE, 2024.

HANNAH OKWENGU

JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

