



REPUBLIC OF KENYA



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**Makokha v Republic (Criminal Appeal 31 of 2019)
[2022] KECA 506 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 506 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 31 OF 2019
PO KIAGE, M NGUGI & F TUIYOTT, JJA
APRIL 28, 2022**

BETWEEN

PASCAL WILLIAM MAKOKHA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment and orders of the High Court of Kenya at Busia (Kiarie J) dated 20th February 2019 in High Court in High Court Criminal Case No. 20 of 2015)

JUDGMENT

1. The appellant, Pascal William Makokha, is currently serving a death sentence for the murder of his brother and nephew. The information against him charged him with two counts of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence in count I were that on the 31st day of July 2015 at Seka village, Kisoko sub-location of Busia County, he murdered Fredrick Lehja Ongango Obilo Asiya. At count II, the information against the appellant was that on the same day, place and time, he murdered Geoffrey Obilo Asiya.
2. The appellant was aggrieved by both his conviction and sentence and he has filed the present appeal in which he raises some 19 grounds of appeal in his Amended Memorandum of Appeal dated 14th April, 2019. In summary, the appellant challenges the decision of the trial court on the grounds that it erred in law and fact in: convicting him on contradictory evidence; relying on the evidence of witnesses who had an interest in the matter to convict him; convicting him on evidence which had not been proved beyond reasonable doubt; convicting him on the Judge's own observation of the scene and which was not part of the evidence before him; dismissing his defence that he acted in self-defence; shifting the burden of proof to him; and disregarding his defence of provocation.
3. He also contends that the trial court erred in: convicting him on circumstantial, hearsay and contradictory evidence; failing to make a finding on the existence of a land and boundary dispute



between the appellant and the deceased; and failing to give reasons for disbelieving the appellant's version of events. He asks this Court to allow his appeal, quash his conviction and sentence and set him at liberty.

4. This is a first appeal from the decision of the High Court. Accordingly, we are required, under section 379 of the *Criminal Procedure Code* and as was pronounced in *Okeno v. R* [1972] EA 32, to re-evaluate the evidence before the trial court and reach our own conclusion. We are under a duty, in so doing, to bear in mind that unlike the trial court, we have neither seen nor heard the witnesses, and make due allowance for this.
5. The prosecution case against the appellant was presented through 9 witnesses and was as follows. At around 9.30 a.m. on 31st July, 2015, PW1, Nelson Asiya, was tethering animals with his uncle, Geoffrey Asiya the deceased in count II. Suddenly, some two people who were employees of the appellant came and killed Geoffrey. One had a club with which he hit Geoffrey several times while the second, who was armed with a machete, cut him twice. As he was being attacked, Geoffrey was screaming loudly for his father, PW1's grandfather, Frederick, the deceased in count I. When Frederick arrived at the scene, the appellant shot Geoffrey. PW1 saw the appellant shoot once at Frederick and also hit him with the club that the appellant was carrying.
6. Liwin Asiya (PW2), Geoffrey's daughter, had been sent home from school on the material day to fetch her parents. At the gate to her home, she met the appellant, who was also her grandfather, holding a small black gun. The appellant told her that he was going to kill her father. She went and told her grandmother, Ruth Obilo (PW3) then went up the hill where she found two men beating her father with clubs. She saw the appellant arrive at the scene and she ran away upon seeing him. She then heard three gunshots. She ran and found three men who were making bricks and informed them that her father was being beaten, and they went back to the scene with her.
7. Ruth Obilo (PW3) confirmed that on the material day, her granddaughter, Liwin (PW2) ran to her home and informed her that the appellant, her brother in law, had stated that he was going to kill her son, Geoffrey, with a pistol that he was holding, and that he was also holding a club. She met the appellant at her gate, allowed him to pass, then followed him. She also informed her daughter, Nakhabi, that the appellant was going to kill Geoffrey and the two of them followed the appellant up the hill.
8. On the way, they heard gunshots and arrived to find the appellant sitting on a stone and Frederick's body on the ground near him. She saw the appellant shoot her husband, Frederick, and she also saw her son, Geoffrey, being carried on a bicycle as he was being taken to hospital. Her husband and the appellant had quarrelled over land in the past, but on the material day, the dispute was over some firewood that Geoffrey had cut.
9. PW4, Emily Lumumba, was tilling Frederick's land with one Lucy Juma when she heard someone cutting firewood. She saw two men, the appellant's workers, attack Geoffrey with clubs as he was going to tether his cows. One had a club while the other had a machete. One of the workers cut Geoffrey with the machete while the other hit him on the head with a club. PW4 also saw the appellant hit Geoffrey on the head with a club and shoot him with the pistol. She also saw the appellant shoot Frederick when he arrived at the scene. When PW4 screamed, the appellant turned his pistol towards her, so she retreated and went to raise the alarm, and many people went to the scene.
10. Lucy Adhiambo (PW5) was with PW4 on the material day. She confirmed PW4's testimony that two young men, the appellant's workers, had attacked Geoffrey with a club and machete. She saw the two men raise Geoffrey to his feet and the appellant hit him with a club. She was afraid to get closer to the scene but she heard three gunshots a short while after Frederick's arrival at the scene.



11. PW6, Celestine Knight, also saw two men armed with clubs, who were the appellant's workers, following Geoffrey. She ran to the scene with her mother in law, (PW3), then returned to her home to call her husband, one Thomas Asiya. She then took a motor cycle and went to report the incident to the police. On the way back to the scene accompanied by police officers, she met the appellant who was in his motor vehicle. The appellant dropped the pistol which was taken by the police, and he was arrested.
12. The post mortem on the bodies of the deceased were carried out and the reports produced by PW8, Dr. Sande Charo. He noted that Geoffrey's body had a penetrating wound on the right deltoid muscle (shoulder) and a cut wound on the left arm, as well as a swollen face with multiple scalp swellings. He further noted that the deceased had a collapsed right lung with a bullet (lodged) on the right upper lobe, and massive haemothorax on the right lung. The deceased also had a ruptured descending arch of the aorta. In Dr. Charo's opinion, Geoffrey's death was caused by massive bleeding due to a ruptured descending arch of the aorta secondary to penetrating trauma, with the probable cause being a gun shot.
13. Upon performing the post mortem on Fredrick, Dr. Charo noted that he had a broken right humerus, a penetrating wound on the right chest wall, and a massive right haemoperitonium or massive collection of blood, a collapsed right lung, and a penetrating wound on the middle lobe of the lung. Dr. Charo formed the opinion that the cause of death was massive bleeding in the pleural or chest cavity secondary to penetrating chest trauma, with the probable cause being a gun shot.
14. PW9 No. xxxxx Sgt Guracha Gufu visited the scene upon receipt of the shooting report. On the way to the scene, he met the appellant in his vehicle at the Kisoko weighbridge. The appellant was holding a Taurus pistol serial number TFU 72287 in his right hand. The appellant held the pistol legally, with a certificate issued on 20th December 2012. PW9 disarmed him and handed him over to other officers who took him to the Busia Police Station while PW9 proceeded to the scene.
15. At the scene, PW9 did not find that any of the appellant's trees had been cut. He found only a heap of dry firewood. He recovered two used cartridges which were taken for analysis. The analysis was done by PW7, Inspector Reuben Kiptum Bett. Bett had examined the Taurus pistol, five rounds of ammunition and fired cartridges and confirmed that the pistol and rounds of ammunition were capable of being fired.
16. When placed on his defence, the appellant gave a sworn statement and called three witnesses. In his statement, he narrated a tale of bad blood between him and his brother, Frederick, over land. He testified that he had previously received threats to his life. On the material day, he went to stop Geoffrey from cutting down his trees, and Geoffrey and two other men surrounded him. He sensed danger, so he fired into the air as he retreated. He shot both Frederick and Geoffrey on the hand when they attempted to cut him with machetes, then he went home with his workers, took his vehicle and went to report the incident to the police.
17. DW2, Robert Chinungo, a grandson of the appellant, testified that he was on the appellant's land harvesting maize with two other people. He found Geoffrey cutting down trees and he went and informed the appellant. The appellant told him he was going to talk to Geoffrey's parents, and that DW2 should go and work on another part of the appellant's land. Later, DW2 heard people raising the alarm and on going to the scene, he found that one of the people with Geoffrey had hit the appellant with a stick. DW2 supported the appellant's testimony that Geoffrey had cut him with a machete and so the appellant had shot him in the hand. The appellant had also shot Frederick in the hand when he attempted to pick up a machete and cut him.



18. The third defence witness, Leonard Wesonga Busuru, was a neighbor of the deceased and the appellant. He alleged that on the 28th July of a year that he could not remember, Frederick had told him while they were drinking chang'aa that he was going to decide who, between him and the appellant, was going to live or die. A few days later, DW3 had heard an alarm being raised from Frederick's home and found that the appellant had shot his brother and nephew.
19. The parties filed written submissions which were highlighted by their Learned Counsel, Mr. Magina and Mr. Dola Indidis for the appellant, and Ms. Lokorio for the respondent.
20. In highlighting the appellant's submissions dated 27th September 2021, Mr. Magina submitted that this Court should consider whether all the elements of the offence of murder were established. There was no malice aforethought established, and the aim of the appellant in shooting the deceased was to disarm them. According to Mr. Magina, the appellant's shots were directed at the arms of the victims and not any other part of the body. Further, while the appellant was sorry for the death of his brother and nephew, he had acted in self-defence. His conduct was not that of a person who intended to cause death as he had offered to take the deceased to hospital. Mr. Magina submitted further that there was a land dispute between the appellant and the deceased; that the court had made its decision on the basis of a site visit, which was interference with the scene of crime and the site visit should have been used in favour of the appellant.
21. In the written submissions, while referring to the provisions of section 203 of the Penal Code, the appellant submitted that the central ingredients of the offence of murder are malice aforethought and unlawful act or omission on the part of the accused. The act of killing had been established. What was in dispute was the unlawfulness of the act and whether the act was committed with malice aforethought. The appellant's submission was that the last limb was not established. The appellant maintained that he shot the deceased on the hands with the intention of disarming them. He had then gone home to get his vehicle to take them to the hospital.
22. The appellant further submitted that the trial court had departed from the consensus built from the testimonies of the witnesses and had based his findings on his observations of the crime scene, yet he had visited the scene of crime two years after the incident. As the trial court had found, there were underlying land disputes between the appellant and the deceased, and the scene of crime was on the land demarcated for the appellant. The trial court had sought to shift the burden of proof to him instead of placing it where it lay-with the respondent-when he failed to consider the fact that there was a land dispute between the appellant and the deceased emanating from an inheritance dispute.
23. The trial court had also failed, in the appellant's view, to ask the appellant to make a statement in mitigation after finding him guilty of the offence of murder, which could have helped to lessen the sentence. He asked this Court to consider that he is almost 80 years old and a first offender, and the offence was committed on his land. He regrets his mistake, his health has deteriorated while in prison as he has undergone two surgeries within one year, and he has learnt his lesson and wishes to be given a chance to mend relations with the family of the deceased and his entire family.
24. Ms. Lokorio for the respondent submitted that all the ingredients of the offence of murder set out under section 206 of the Penal Code had been established. She relied on the decision in *Republic vs Tubere S/O Ochen* [1945] 12 EACA to submit that malice could be inferred from the conduct of the appellant. Ms. Lokorio noted that the evidence of PW2, which was corroborated by that of PW3, was that the appellant was holding a pistol when he went to the scene. As a firearm holder, he was trained and knew that the Taurus pistol he went with to confront the deceased had no safety catch. In the respondent's view, these were the actions of a man intent on committing cold-blooded murder. The respondent observed that the post mortem conducted on both the deceased persons showed that the



cause of death was massive bleeding secondary to penetrating trauma and the probable cause was a gun shot.

25. As for who caused the deaths, the respondent submitted that the appellant was positively identified through recognition by the witnesses at the crime scene, three of whom were close relatives and neighbours of the appellant. Further, the offence happened in broad daylight at around 9:00 a.m. There was therefore no doubt as to the positive identification of the appellant. The respondent therefore urged the court to dismiss the appeal on conviction.
26. Regarding sentence, Ms. Lokorio noted that the trial court had taken the appellant's mitigation, which was that he was a retired engineer and was advanced in age. The respondent had no objection to the appellant being re-sentenced on the basis of the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR.
27. In his submissions in reply, Mr. Magina asked the Court to consider whether the appellant, in shooting his brother and nephew, intended to disarm or kill, his submission being that the appellant's intention was to disarm. He submitted further that the appellant was not given an opportunity to mitigate.
28. We have considered the appellant's grounds of appeal against the record of the trial court, as well as the respective submissions of the parties. The appellant's appeal revolves around four main planks. First, whether there was sufficient evidence to support his conviction. The second limb relates to his contention that the court ignored his evidence that he acted in self defence and ignored his defence of provocation. The third limb entails his contention that the trial court shifted the burden of proof to him and failed to give reasons for disbelieving his version of events; and finally, for failing to give him an opportunity to mitigate. These limbs are closely intertwined, and we shall therefore consider them simultaneously.
29. We begin by observing that there is no dispute about the death of the deceased and the cause of their death. Nor is there a dispute regarding the identity of the person who fired the fatal shots, the appellant having readily conceded that he did, his assertion being that he shot them in the hands in self-defence, or as a result of provocation. The post mortem reports show that the deceased died from massive haemorrhage secondary to gunshot wounds. Of note from these reports is that Geoffrey's body had a collapsed right lung with a bullet lodged in the right upper lobe, and massive haemothorax on the right lung. The deceased also had a ruptured descending arch of aorta. Frederick had a penetrating wound on the right chest wall, and a massive right haemoperitonium or massive collection of blood, a collapsed right lung, and a penetrating wound on the middle lobe of the lung.
30. The issues that arise for consideration are whether the evidence before the trial court was insufficient to lead to a conviction; whether the appellant acted in self-defence; and whether the shooting of the deceased was a result of provocation. The testimony of PW2, Liwin, who had been sent home from school to fetch her parents, was that she met the appellant carrying a pistol. He informed her that he was going to kill her father.
31. Ruth Obilo, PW3, who had been informed by PW2 that the appellant was going to kill her father, met the appellant at the gate to her compound and noted that he was carrying a pistol. She followed him to the scene and saw him shoot her husband, Frederick. She also saw her son, Geoffrey, who had also been shot, being carried on a bicycle as he was being taken to hospital. PW4, Emily Lumumba and PW5, Lucy Adhiambo, corroborated the evidence of PW2 and PW3. PW4 went close to the scene and witnessed the shooting. PW5 was afraid to get close, but she also saw the appellant with the pistol, and heard the shots. In addressing itself to the evidence, the trial court observed that Emily Lumumba and Lucy Adhiambo were independent witnesses. Unlike PW2 and PW3, they were not members of



the family of the deceased and the appellant, and were therefore independent and untainted by the family feud.

32. The trial court also found that the defence of self-defence was unavailable to the appellant. It noted that even though he had claimed that he had been injured by the deceased, there was no evidence to support his claim. The trial court also considered the appellant's claim that he acted out of provocation, and dismissed it.
33. Having considered the evidence and the finding of the trial court, we are satisfied that the evidence presented by the prosecution was clear and consistent, and was sufficient to support the conviction of the appellant. It was direct evidence, presented by eye witnesses who were present when the appellant shot the deceased. The events leading to the deaths of the deceased took place in broad daylight, within the land that the appellant shared with his brother, and in respect of which, according to the appellant, there was a land dispute. Contrary to the appellant's assertion, the evidence was neither circumstantial, nor was it hearsay.
34. Is there any merit in the contention by the appellant that the trial court erred in relying on the evidence of witnesses who had an interest in the matter? We think not. The offence charged in this matter occurred early in the morning, within a home setting. The victims of the offence were father and son, a brother and nephew of the appellant. The scene was the land which both the deceased, Frederick, and the appellant had inherited from their father, and over which the appellant submits there was a land dispute. In those circumstances, it is not unusual for the witnesses to be members of one family. However, in this case, as the trial court noted, there were two independent witnesses, Emily (PW4) and Lucy (PW5), who were present and saw the appellant with the pistol, and in the case of Emily, saw the appellant shoot the deceased.
35. Was the defence of provocation available to the appellant? Section 207 of the Penal Code states as follows:
 207. Killing on provocation
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.
36. Section 208 of the Penal Code defines 'provocation' as follows:
 - (1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
 - (2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

...



37. In the case of *Peter King'ori Mwangi & 2 others v Republic* [2014] eKLR this Court stated as follows with respect to the defence of provocation:

“We start from the premises (sic), that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So what is provocation? In the case of *Duffy* [1949] I ALL ER 932; provocation was defined as “some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...” (Emphasis ours).

38. In advancing his defence of provocation, the appellant alleged that he had received death threats through text messages, though he did not know the sender. Further, that a trench had been dug in the road leading to his home, and his nephew, Geoffrey, had passed by and had not assisted him. He also had DW3 testify that Frederick had threatened, while he and DW3 were imbibing chang'aa, to kill the appellant. None of these claims, however, amount to ‘provocation’ as known in law. As the trial court found, given the facts of the case, the defence of provocation was not available to the appellant.

39. We are satisfied that the trial court correctly reached the conclusion that the appellant was guilty of the offence of murder. The ingredients of the offence had been established. The death of the deceased was not in dispute, nor was the cause of death. Regarding the third element- that the appellant acted with malice aforethought- we are satisfied that the facts establish that the appellant acted with malice aforethought as defined in section 206 of the *Penal Code*:

“Malice aforethought shall be deemed to be established by evidence proving any one or more 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...

40. The appellant went to confront the deceased while armed with a pistol. He and his henchmen attacked the deceased with clubs and pangas, while he shot the two of them, the post mortem showing that they were shot in the chest. Contrary to the appellant’s contention, there was no evidence that the deceased were armed, or that they attacked the appellant. The nature of the injuries sustained by the deceased which led to their deaths showed that the appellant intended to cause their death or grievous harm, or was indifferent as to whether his actions would cause their death or grievous harm. In *Republic vs Tubere S/O Ochen* [1945] 12 EACA 63 the court observed that in determining whether malice aforethought has been established the following elements should be considered:

“The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab wound or multiple injuries; the conduct of the accused before, during and after the incident.”



41. In the submissions filed by his Learned Counsel, the appellant asks us to consider the ‘angle’ of entry of the bullets into the bodies of the deceased to bolster his contention that he did not intend to kill them as he shot them in the arms. We note that in his defence, he alleged that he shot them in the hands. The fact that he went to the scene while armed with a firearm and a club; and that he shot two people, one of whom had already been attacked with a club and a machete; that he hit his brother with a club before shooting him in the chest, was a clear indication that he was intent on murder. The elements of malice aforethought had been established, and we find no basis for faulting the trial court in the conclusion that it reached, upon analysis of the evidence, as follows:

“ 23. Liwin Asiya (PW2) a twelve years old girl testified that on the material day, she had been sent home from school to call her parents. She met with the accused who is her grandfather at his gate. He had what she described as “a small black gun”. She greeted him. After responding to the greetings, he told her that he was going to kill her father. She ran and reported to her grandmother, Ruth Obilo (PW3). This is what her grandmother testified to.

24. When Ruth Obilo (PW3) was informed about the threats, she said she called her daughter in law, Nakhabi. They ran towards the hill and when they reached close to the scene, they heard gunshots. The evidence of Ruth Obilo (PW3) corroborated that of Liwin Asiya (PW2). I therefore make a finding that the prosecution has established beyond any reasonable doubts that the accused committed the two offences with malice aforethought.”

42. The appellant has faulted the trial court for not finding that there was a land dispute between him and his deceased brother, Frederick. What we understand the appellant to be suggesting is that the fact that there was a land dispute is, somehow, an excuse or justification for his act. We have heard it argued often enough in litigation before us that the issue of land is ‘emotive’; that somehow, land is such a precious commodity that it is enough to justify brother turning against brother and neighbour against neighbour. This is a belief we do not subscribe to, and that we hope that as a society, we shall stop deluding ourselves about. At any rate, in our view, it does not and cannot justify murder. Nor, contrary to the appellant’s arguments, can the cutting down of trees justify depriving a woman and her children of a husband, father, and son in one fell swoop.

43. The upshot of our findings above is that the appellant’s appeal against conviction is without merit, and it is hereby dismissed.

44. Regarding sentence, the appellant has contended that the trial court did not consider his mitigation in arriving at his sentence, and the record bears this out. We accordingly remit the matter to the High Court to consider his mitigation and sentence him upon consideration of the guidelines set out in the case of *Francis Karioko Muruatetu & Another v Republic (supra)*. We direct that the matter be placed for mention before the High Court in Busia within fourteen (14) days of the date hereof for purposes of fixing a date for an expeditious re-sentencing hearing

45. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL, 2022.

P. O. KIAGE

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JUDGE OF APPEAL



MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

