



**Kibor v Republic (Criminal Appeal 70 of 2018)  
[2022] KECA 1269 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1269 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CRIMINAL APPEAL 70 OF 2018  
PO KIAGE, J MOHAMMED & M NGUGI, JJA  
NOVEMBER 18, 2022**

**BETWEEN**

**ELIJAH CHESIRE KIBOR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Eldoret  
(Ngenye Macharia J.) dated 2nd July, 2013 in H.C.CR. NO. 42 of 2010)*

**JUDGMENT**

1. This appeal arises from the judgment of Ngenye Macharia J (as she then was) in High Court Criminal Case No 42 of 2010. Elijah Chesire Kibor (the appellant), was charged and convicted of the offence of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The information against him stated that on the July 13, 2010 at 1930 hours at Kapchemotin village in Olot Sub-location Marakwet District, Rift Valley province, he murdered Dominic Ruto.
2. The prosecution relied on the evidence of eight (8) witnesses to prove the charge against the appellant.
3. The evidence adduced by the prosecution in the High Court was that on July 13, 2010, the appellant was drunk and was beating his wife, Gladys Chemutai (PW2). The appellant slapped PW2 who screamed and people, among them Elizabeth Talaam Komen, (PW3), Tula Kipkeo Suter (PW5), Magdaline Michael (PW7) and the deceased went to the appellant's home and pleaded with him to stop beating his wife.
4. It was the evidence of PW3, PW5 and PW7 that the appellant started shooting arrows at the people outside his home. PW3 testified that an arrow hit the deceased and he fell down as the rest of the crowd dispersed. The evidence of PW3 was corroborated by PW5 and PW7. The deceased died instantly.



5. Dr Gilbert Cheruiyot (PW6) of Iten Mission Hospital produced the post-mortem report on behalf of Dr Moses Chepkiyeng, (Dr Chepkiyeng) who had conducted the post-mortem examination on the body of the deceased. Dr Chepkiyeng formed the opinion that the deceased had died as a result of excessive blood loss with injury to the spinal cord around the cervical (sic) causing the lungs to collapse leading to cardiac arrest.
6. Chief Inspector Stanley Mutungi, (PW8), the investigating officer, produced an arrowhead which was removed from the deceased's body during the postmortem examination. He testified that the appellant voluntarily surrendered himself to the police in the early hours of the morning after the material night. The appellant appeared to confess that he had shot the deceased the previous night as members of the public wanted to kill him. The appellant recorded his statement at Kapsowar Police Station.
7. When placed on his defence, the appellant gave an unsworn statement and called no witnesses. He stated that on the material night, he had joined a neighbour who had a fundraiser where he drank some local brew; and that when he arrived home, he found that his wife had not arrived from the farm and an argument ensued. The appellant stated that people stormed the house and set it on fire and that he started looking for an escape route. He further stated that he unconsciously picked some arrows and started shooting in the dark to pave way for his escape; that he could not remember if he shot anyone; and that he ran to the bush and came back home at 3:00 a.m. and found people screaming; and that is when he learnt that a neighbor had died. He surrendered to the police and he was thereafter charged.
8. Upon analyzing the evidence before the court, the trial judge found that the offence of murder had been established against the appellant. He was accordingly convicted as charged and sentenced to death, the penalty that the trial court found was then prescribed for the offence of murder.
9. Dissatisfied with the decision, the appellant brings this appeal citing seven (7) grounds of appeal in his amended grounds of appeal. These grounds can be summarized as being: that the learned Judge erred in fact and in law in convicting the appellant without considering: that the offence of murder was not proved beyond reasonable doubt as malice aforethought as per section 206 of the *Penal Code* was not established; that the provisions of section 13(2),(3),(4) and (5) of the *Penal Code* on intoxication were not considered; that his life was in danger at the time of the murder and that he was acting in self defence; that the learned judge erred in: convicting the appellant without having regard to the fact that the cause of death was not established as the postmortem was not conducted by a specialist as required by law; convicting the appellant based on contradictory and insufficient evidence produced by the prosecution witnesses; and convicting the appellant based on a confession that was allegedly recorded but not produced in court as per section 25(1) of the *Evidence Act*.

### **Submissions by Counsel**

10. When the appeal came up for hearing both parties were represented by counsel: Mr Oduor held brief for Mr Mogire Nyamwaya, learned counsel for the appellant while Ms Sakari Miriam Kibiti, from the Office of the Director of Public Prosecutions [ODPP], was present for the respondent.
11. Mr Oduor submitted that the learned judge erred in law and in fact in convicting the appellant without proof that murder occurred; that there was no mens rea established; and that the learned Judge erred when she found that mens rea was established.
12. It was counsel's submission that the learned judge erred in law and in fact in failing to consider section 13 (2), (3), (4) & (5) of the *Penal Code*; that the appellant on the material night was intoxicated; that this particular issue came out in evidence of the witnesses; and that evidence of drunkenness is sufficient to prove intoxication.



13. Counsel further submitted that the learned judge erred in law and in fact by failing to consider that the appellant was acting in self defence when he shot the arrows; that the neighbours burnt his house and they were shooting arrows; that in self defence he shot 3 arrows with no intention of hurting anyone but intended to disperse the crowd; and that the arrows were shot in a bid to escape and not aimed at the deceased.
14. It was counsel's further submission that the trial judge erred in failing to consider that the post-mortem report was not conducted by a specialist as is required by the law; and that Dr Moses Chepking who conducted the post-mortem was a clinical officer and the result therefore cannot be taken into account as evidence against the appellant.
15. Counsel further submitted that the evidence of PW3 and PW5 was contradictory and hence not sufficient to sustain the appellant's conviction; that PW5 testified that the appellant started shooting from inside the house without opening the door while PW3 testified that the appellant opened the door before he started shooting the arrows.
16. Finally, counsel submitted that the learned judge erred by convicting the appellant based on a confession that was allegedly recorded but not produced in court as per section 25(1) of the Evidence Act.
17. Ms Sakari opposed the appeal. Regarding the question whether the appellant possessed malice aforethought, she submitted that he had used arrows as a weapon with the knowledge that it was likely to kill the deceased.
18. Ms Sakari cited the case of *Republic v Tubere S/O Ochen [1945] 12 EACA 63* for the proposition that malice aforethought can be inferred from the nature of weapon used, the part of the body targeted whether vulnerable or not, the manner in which the weapon is used, and the conduct of the accused person before and after the attack.
19. On intoxication as a defence, counsel submitted that the appellant did not produce any evidence to prove that his intoxication was to the extent that it negated mens rea; and that when an accused person raises the defence of intoxication, he should prove that he did not know what transpired. In this case the appellant reported to the police that he had killed a neighbour; and that by his picking arrows when the neighbours came to the house, he knew what he was doing.
20. On self defence, the respondent submitted that all the witnesses testified that the appellant was not attacked; that there was no evidence that the neighbors were armed; that the appellant shot the deceased at the back of his neck; and that there was no evidence that the appellant was acting in self defence. Counsel for the respondent prayed that the appeal on conviction and sentence be dismissed.

## Determination

21. This being a first appeal, this court is obligated to re-evaluate and analyze the facts and evidence that resulted in the decision in the High Court and then arrive at its own decision. In *Okeno v R, [1972] EA 32* the court stated thus:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R [1957] EA 336*) and to the appellate court's own decision on the evidence.

The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantital M Ruwala v R, [1957] EA 57*). It is not the function of a first appellate court



merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness."

22. We have perused the record of appeal, submissions by counsel and the law. The issues for determination are whether the prosecution case against the appellant was proved beyond reasonable doubt; whether the appellant's defence of intoxication and self defence were sufficient and whether this court should exercise its discretion and interfere with the death sentence imposed on the appellant.

23. Section 203 of the *Penal Code* provides as follows:

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."

Section 206 of the same *code* defines what malice aforethought is. It provides as follows:

"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;
- 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." [Emphasis supplied].

24. For a conviction for the offence of murder to be sustained, the prosecution must prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought.

25. Did the prosecution, by the evidence of their eight witnesses, prove that the appellant when he shot the fatal arrows, had any of the intentions enumerated in section 206 of the *Penal Code*? When he released the arrow, quite clearly, he should have known that they might kill, or cause grievous harm to somebody. On this account, the terms of the definition of malice aforethought in section 206(a) and (b) would be covered; but would he have been actuated by the "intent to commit a felony"?

26. The appellant raises the defence of self-defence: that he acted as he did in a bid to defend himself.

Section 17 of the *Penal Code* provides:

"17. 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."



27. The Common Law position on the issue of self-defence was recognized by this Court in *Abmed Mohammed Omar & 5 Others V R, CR. No 414 of 2012 [2014] eKLR* as having been stated in the English case of *DPP V Morgan, [1975] 2 ALL ER 347* that the essential element of self-defence is that the accused believed that he was being attacked or in imminent danger of being attacked but this belief should be based on reasonable grounds.
28. It is acknowledged that the case of *DPP v Morgan (supra)* was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one.
29. Section 17 of the *Penal Code* subjects criminal responsibility for use of force in the defence of person or property to the principles of English common law, except where there are express provisions to the contrary in the code or any other law in operation in Kenya.
30. By applying the subjective test and in taking the particular circumstances of this case, this court is not satisfied that the appellant acted in self-defence. From the facts of this case, there is no evidence that the neighbours were armed or presented a threat to the appellant or his property. The neighbours simply pleaded with him to stop beating his wife. PW3 testified that when she and her husband (the deceased) returned to the appellant's house, they pleaded with the appellant to open the door and stop beating his wife so that they could sort out the dispute the following morning. The evidence on record therefore does not support the appellant's allegation that he felt threatened. The actions of the appellant went over and above what would be described as reasonable apprehension of danger. The defence of self-defence does not therefore come to the aid of the appellant.
31. The appellant also raised the defence of intoxication. Intoxication has been provided for as a defence to a criminal charge under section 13 of the *Penal Code* which provides as follows:

“ 13.

- (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
- (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –
  - a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
  - b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
- (3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this code and of the *Criminal Procedure Code* relating to insanity shall apply.
- (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any



intention, specific or otherwise, in the absence of which he would not be guilty of the offence

- (5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs. [Emphasis supplied].

32. In this case, the appellant stated that he joined a friend for a fundraiser where he drank some local brew. He did not state how much local brew he imbibed. The extent of his drunkenness, if at all, was not established. Was the appellant so intoxicated as to be unable to form the required malice aforethought necessary to sustain a murder charge? The appellant stated that he went home and collected their animals from the field at 6.00 p.m while his wife arrived at 6.30 p.m. The appellant also recalls picking arrows and shooting in the dark allegedly to pave way for his escape. Chief Inspector Stanley Mutungi, the Investigating Officer (PW8) also testified that when the accused arrived at the Police Station, he appeared to confess that he had shot the deceased. Were these the actions of a person who did not know what he was doing? We think not. The appellant was still cognizant enough to know what he was doing and to realize what he had done. The intention to cause grievous harm can be inferred from his actions. Accordingly, we reject the defence of intoxication.
33. The appellant claimed that the learned Judge erred in law in convicting him based on contradictory and insufficient evidence produced by the prosecution witnesses. It is true that there were discrepancies in the evidence of PW5 on one hand and that of PW3 as to whether the appellant shot the deceased while inside the house or while outside his house. However, the contradictions were not so material as to prejudice the appellant or weaken the prosecution case. The fact of the matter was that the deceased died as a result of an arrow shot and the appellant was the only person in the house besides his wife who testified that the appellant was beating her and neighbours (including the deceased) had come to her aid. No-one else other than the appellant could have shot the deceased. The appellant moreover expressly admitted to having shot the fatal arrow.
34. This Court in *Joseph Maina Mwangi v Republic CA No 73 of 1992* held that:
- “In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 3 & 2 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”
35. We find that the trial court correctly held that there were minor and inconsequential discrepancies that did not go to the root of the prosecution case and the trial court was right in treating them as such. In the end, we are in agreement with the trial court that the appellant, with malice aforethought, was responsible for the death of the deceased.
36. Accordingly, we find that the trial court rightly convicted the appellant for the offence of murder. In the result, the appeal has no merit and is dismissed in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**P O KIAGE**

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**JUDGE OF APPEAL**

**J MOHAMMED**

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**JUDGE OF APPEAL MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

