



**Republic v Barasa (Criminal Case E024 of 2023)
[2024] KEHC 16055 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E024 OF 2023
WM MUSYOKA, J
DECEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

AUGUSTINE MASINDE BARASA ACCUSED

RULING

1. The accused, Augustine Masinde Barasa, faces a murder charge. It is alleged that, on 10th November 2023, at Buyofu Location, Nambale Sub-County, within Busia County, he murdered Benson Wabwire, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya. He denied the charges, and a trial ensued, where 3 witnesses testified.
2. PW1, Monica Makokha Barasa, was the grandmother of the deceased, and the mother of the accused. She was allegedly told by the accused, on 11th October 2023, that the deceased had been killed. She saw his body lying under a tree outside the family compound. The body had an injury on the neck. She said that she did not know what caused the death, nor who killed the deceased. PW2, Stephen Masinde Barasa, was an uncle of the deceased, and a brother of the accused. He was not present when the deceased was killed, but was alerted to the scene when he heard screams from PW1. He noted that the accused had a stab wound on the left side of the neck. He said that he did not know what caused the death.
3. PW3, Dr. Dida Demase, a medical officer, performed a post-mortem on the body of the deceased. The body had a stab wound on the neck. He opined that the neck injury caused massive haemorrhage, leading to the death.
4. PW3 was the last witness. He testified on 19th March 2024. The next hearing was scheduled for 6th May 2024, on which date the matter did not proceed, as the prosecution did not have witnesses. The matter was adjourned to 4th June 2024, when the matter did not proceed, as the court was not sitting. 2nd July



2024 was allocated as the next hearing date, but the hearing did not happen as the court did not sit. The next hearing was fixed for 30th July 2024, when the hearing did not take off as the prosecution did not have witnesses. The matter was adjourned to 2nd October 2024, and that was marked as a last adjournment. On 2nd October 2024, the matter did not proceed as the prosecution had no witnesses. The matter was adjourned, despite the last adjournment order, but that order was reiterated. It was put off to 27th November 2024. On 27th November 2024, the prosecution had no witnesses, and sought an adjournment, which was denied, whereupon the prosecution closed its case.

5. The parties chose not to submit on a case to answer.
6. The elements, for the offence of murder, are proof of the death, the cause of it, the involvement of the accused in the causation, and the fact that the accused caused the death with malice aforethought.
7. On the death, there is ample proof that the deceased died. PW1 and PW2, who were his relatives, testified to seeing his dead body, lying at the scene. PW3 conducted post-mortem on the dead body of the deceased.
8. On the cause of death, the evidence of the medical officer, PW3, was that the body had a stab wound on the neck. He opined that the neck injury caused the deceased to bleed to his death.
9. On the role of the accused in the causation, the available evidence does not place the accused at the scene at the time of the killing. None of the witnesses were present when the killing happened, and PW1 and PW2 testified that they did not know how the deceased died. PW1 did not speculate as whether the accused had any role in the death, while PW2 alluded to some differences between the accused and the deceased, who were son and father, respectively, over sale of soil.
10. So, did the accused have any role in the causation? Did he have any role in the infliction of the injuries that caused the death? None of the witnesses connected the accused to the fatal injuries suffered by the deceased. PW1 appeared to suggest that since it was the accused who alerted her to the death, he might have known something about it, while PW2 alluded to the differences. However, both stated that they did not witness the killing. No evidence was led to connect the accused to the death. No circumstantial evidence was adduced either, pointing to the accused as the person who killed, or caused the death of the deceased.
11. The last consideration should be whether the accused caused that death with malice aforethought. What constitutes malice aforethought is defined in section 206 of the *Penal Code*. One, it is a direct intention to cause death, usually signified by a verbal expression of a desire to kill. Two, it is an intention to cause grievous harm, or to cause a bad injury, which results in death. This is usually inferred from the circumstances. Three, it is knowledge that the act causing death could cause death, or grievous harm, but the perpetrator is indifferent to the consequences. Four, it is an intention to commit a felony, such as assault or battery or whichever. These four would suffice for the purposes of this discussion.
12. The question then is, were the injuries inflicted on the deceased so inflicted with an intention to kill him, or with an intention to cause to him a bad injury, or were they caused recklessly and indifferently, or was the intention to commit some sort of felony? The killer blow was the stab wound to the neck, which cause the massive blood loss, leading to the death. An injury to the blood vessels leading to the head could prove fatal, given that blood flows through the neck to the head, and the inability of blood to reach the head, which houses the brain, would cause death. An injury to that area or region of the body, must have been calculated and intended to cause death, or to cause a very bad injury. I am persuaded that the death must have been caused with malice aforethought.



13. None of the witnesses, presented by the prosecution, were present when the injuries were inflicted. PW1 and PW2 saw the deceased after he had already died. The deceased died before he could give a narration, to the witnesses, of what had transpired. The case is, therefore, built on circumstantial evidence. It is trite that circumstantial evidence must inexorably point to the guilt of the accused, for there to be a conviction founded on it.
14. Is that the case here? No. There was no evidence placing the accused at the scene where and when the fatal injuries happened. Secondly, there was some evidence that the deceased and the accused were seen together earlier the previous day, but no evidence placed them together on the fateful evening, or towards the time when the deceased died, in the neighbourhood of where his body was found, to create a circumstance that would point to the complicity or culpability of the accused. Thirdly, and finally, no forensics were presented connecting the accused to the death. Overall, there was no evidence, whatsoever, to connect the accused to the death of the deceased, for it to be said that he caused the death with malice aforethought.
15. Was a prima facie case, established against the accused person, to warrant his being put on his defence? On account of what I have discussed above, I find no evidence upon which he could be called upon to account. The prosecution case has fallen short, of establishing a prima facie case, to enable me find and hold that the accused has a case to answer, and to put him on his defence.
16. The consequence, of the above finding and holding, is that I hereby find the accused not guilty of the offence of the murder of Benson Wabwire, contrary to section 203, as read with section 204, of the *Penal Code*, and I hereby acquit him, under section 306(1) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya. The accused shall be set free from prison custody, should he be still on remand, unless he is otherwise lawfully held. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 19TH DAY OF DECEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Chepkonga and Mr. Onanda, instructed by the Director of Public Prosecutions, for the State.

Mr. James Were, Advocate for the accused person.

