



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Barasa (Criminal Case 23 of 2019)  
[2023] KEHC 3493 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3493 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 23 OF 2019**

**WM MUSYOKA, J**

**APRIL 28, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**LUKA EZEKIEL BARASA ALIAS SIPWECHÉ ..... ACCUSED**

**JUDGMENT**

1. 7 witnesses testified in this matter. 4 of them witnessed the assault on the deceased, Isaac Barasa, by the accused, Luka Ezekiel Barasa alias Sipweche. PW1, Haron Barasa Shibweche, was among the people who responded to an incident where the accused had set his father's house on fire, and was beating the father. In the cause of arresting the situation, PW1 saw the accused hit the deceased on the head with a panga. The deceased died in the course of being taken to hospital by PW1 and others. PW2, Jotham Kofia Barasa, was part of the many people who had responded to the incident at the home of the accused. He witnessed as the accused cut the deceased on the head, as the deceased came to his rescue. PW3, Ayub Barasa, was also in the rescue party, the accused cut him on the head, at about the same time that the deceased was cut on the head. He did not personally witness the assault on the deceased. The incident played out at the home of PW4, David Ikoyi Imbiakha, and the deceased, PW1, PW2 and PW3 were around that home, where the accused was holding PW4 hostage in his house. The deceased was among those who came to the rescue, and PW4 was able to see him being cut on the head by the accused. PW5, Reuben Barasa Shibweche, was also at the scene, and witnessed as the deceased was cut on the head by the accused. PW6, Dr. Dixon Mchana Mwaludindi, was the pathologist, who conducted an autopsy on the body of the deceased. The cause of death was a penetrating head injury, following sharp force trauma, following assault. PW7, No 60638 Police Corporal Wilson Wanyonyi Nyongesa, was the investigating officer.
2. I put the accused on his defence. He denied cutting the deceased with a *panga*.



3. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.
4. On whether the deceased died, I have the evidence of both PW1 and PW5. The deceased died as PW1 took him to hospital. PW5 identified the body of the deceased to PW6, for post-mortem purposes. PW6 carried out an autopsy on the body of the deceased. The cause of death was said to be penetrating head injury secondary to assault with a sharp object, which was consistent with a cut with a *panga*. The cause of death was linked to the accused, by PW1, PW2, PW4 and PW5, all who testified to seeing the assault happen. There is overwhelming evidence that it was the accused, who caused the head injury on the deceased, which led to his death.
5. The only contentious issue is whether the act by the accused was with malice aforethought.
6. Malice aforethought is defined in section 206 of the [Penal Code](#). Section 206(b) states:

“Malice aforethought

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.”
7. Under section 206, malice aforethought is to be inferred where there is an intent to cause death or to cause grievous harm, or the knowledge that the act causing death could cause death or grievous harm, or an intent to commit a felony, or an intention to facilitate escape from lawful custody of a person and in the process a death is caused.
  8. Was there malice aforethought? I believe there was. The injury was on the head. The accused targeted a most vital organ of the body. The injury inflicted was bad enough to cause death within a fairly short period of time, for the deceased died as he was being rushed to hospital, according to PW1. The person who aimed at the head of the deceased intended to cause his death, and a person who used enough force to cause a death almost instantaneously, must have intended to cause the death, or a grievous injury, all of which are evidence of existence of malice aforethought.
  9. In view of everything stated above, I do hereby, find the accused herein, Luka Ezekiel Barasa alias Sipweche, guilty of the offence of the murder of Isaac Barasa, contrary to section 203 of the [Penal Code](#), as read with section 204 thereof, and I convict him accordingly, under section 322 of the [Criminal Procedure Code](#), Cap, 75, Laws of Kenya. For the purpose of sentencing, I hereby direct the Kakamega County Director of Probation and Aftercare Services to assess the antecedents of the accused person, and to get the views of the family of the deceased, and the community, and to file a report thereon within 30 days.



**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS  
28<sup>TH</sup> DAY OF APRIL 2023**

**WM MUSYOKA**

**JUDGE**

**Mr Erick Zalo, Court Assistant.**

**Appearances**

**Ms Kagai, instructed by the Director of Public Prosecutions, for the Republic.**

**Mr Mulama, Advocate for the accused person.**

