



**Republic v Wasilwa (Criminal Case 7 of 2019)
[2023] KEHC 24294 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 7 OF 2019
AC MRIMA, J
OCTOBER 31, 2023**

BETWEEN

REPUBLIC STATE

AND

KEVIN BARASA WASILWA ACCUSED

JUDGMENT

Introduction

1. The accused herein, Kevin Barasa Wasilwa, was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence were that on 16th October 2018 at Nabeki village Chepchoina Location in Endebes Sub-County within Trans Nzoia County, he murdered Nicholas Papako Etyang (hereinafter referred to as ‘the deceased’).
2. When the accused was arraigned before this Court, he pleaded not guilty to the offence. He was tried. The hearing of the prosecution’s case was partly conducted before Hon. Chemitei, J where the first three witnesses testified. The rest of the evidence was recorded before yours truly. After the close of the prosecution’s case, this Court found that a prima facie case had been established to, and placed the accused on his defence.
3. The accused gave a sworn testimony and did not call any witnesses.

The trial:

4. The prosecution line up seven witnesses to prove the information against the accused. Its case was that one Salim Asto who testified as PW3 ran a business in Chembai area. He sold a local alcoholic drink popularly known as ‘chang’aa’. The business joint was, at times, also referred to as Mama Selina Asto’s place. The joint comprised of a house where the revelers were usually inside as they partook of their drinks.



5. The evening of 25th October, 2018 was just a normal one. Everything went on as planned. PW3 was at his business place, as usual. Hours went by and his customers trickled in and out. At around 10:00pm, there were around six people in the house. They were PW3, one Peter Kibunguti Wekesa (testified as PW2), one Jonathan Wanjala Wekesa (testified as PW4), the accused, one Prisca Barasa alias Ekijo who was the wife to the accused (did not testify) and the deceased. They were all drinking.
6. The deceased had been accompanied by PW2, a longtime friend and a boda boda rider, to PW3's place. They had arrived at around 9:00pm.
7. The wife to the accused then asked the deceased to buy her some alcohol. The deceased declined that he did not have any money. The conversation between the deceased and the accused's wife seemed to have angered the accused. The accused confronted and quarreled the deceased wanting to know why he was engaging with his wife. A scuffle ensued between the two.
8. PW3 and PW4 intervened to separate them, but they were unsuccessful. They two pushed one another and went outside the house. PW3 stood at the door of his house and watched whereas the rest of the people also followed the two outside. There was ample moonlight and visibility outside PW3's house was quite clear.
9. The accused then left while still very angry. Shortly, about 5 minutes later, the accused returned while armed with a wooden club/rungu. The accused quarreled PW2 as well and suddenly hit him with the club on the face. PW2 lost a tooth and sensing danger he fled and never returned.
10. The accused, then wearing gumboots, bent and pulled a knife from the shoes. He held it in his hand. It was a sharp long knife. The deceased, PW3 and PW4 saw the knife. PW4 stood next to the accused. The deceased pleaded with the accused not to harm him and sought for forgiveness.
11. The accused jumped over towards the deceased and stabbed him with the knife in the chest. The deceased cried in a loud voice that the accused had stabbed him with a knife. PW4 was so shaken and knew that hell had broken loose. He fled. PW3 screamed for help, but no one came to their rescue.
12. The accused and his wife also left. About 10 minutes later, a brother to the deceased one Dany (not a witness) appeared riding a motor cycle and ferried the deceased to hospital. PW3 returned into his house and slept. He was called by Dany and informed that the deceased had passed on.
13. PW2 and PW4 received the news of the death of the deceased the following morning.
14. The matter was reported to the Endebes Police Station. No. 98356 PC Nashon Gikonyo and other officers visited the scene. He drew a sketch map and he eventually became the investigating officer in the matter.
15. Investigations proceeded where witness statements were recorded. A post mortem examination on the body of the deceased was conducted at the Kitale Nursing Home Mortuary on 31st October, 2018 by PW6 Dr. Alex Wanyonyi Barasa. The body was identified by Simon Omukule Baabako (testified as PW1) and Silas Omukule (testified as PW5) prior to the autopsy.
16. The deceased was of a normal physique and the body was well preserved. PW6 observed the body of the deceased. It had a bruise on the forehead about 2cm in diameter, a penetrating stab wound in the right chest wall on the fifth intercostal space. Internally, the stab wound had punctured the right lung and the diaphragm. It also lacerated the liver.



17. PW6 formed the opinion that the deceased died as a result of severe haemothorax secondary to penetrating stab wound due to assault. He filled in the Post Mortem Report which he produced in evidence.
18. On completion of investigations, the investigation officer recommended that the accused be charged with the information of murder. However, since the accused was at large, the police kept on searching for him. The accused was arrested in Kitale town around four months after the incident by members of public and handed over to the police.
19. The accused was taken for mental assessment where he was found fit to stand trial. Her was subsequently charged. The evidence of the investigating officer was tendered by a colleague No. 111445 PC Okoth Kennedy, as PW7, since the investigator was attending an official training at the Kiganjo Police Training School and he was likely to be there for a while.
20. After close of the prosecution's case, the Court found that the accused had a case to answer. He was placed on his defence.
21. In his sworn testimony, the accused recalled that he went to PW3's place for a drink with wife. He later realized that PW2 and PW4 were secretly engaging his wife. That, he pushed them, got hold of his wife and left. He emphasized that he never fought with any one at PW3's place. He was surprised to be arrested in 2019 with allegations of killing the deceased while he had all along been at his home. He affirmed that he never disappeared from his home.
22. After close of the defence case, parties filed written submissions.
23. Through his submissions, the accused contended that the prosecution failed to discharge its burden of proof. He further contended that the charge sheet was defective for bearing a different date when the offence was allegedly committed which was at variance with the evidence. Several decisions were referred to. The accused argued that, with such state of affairs, he ought to be acquitted.
24. The prosecution filed its submissions as well. It countermanded that it had discharged its burden of proof to the required standard to establish that the accused murdered the deceased. It urged this Court to find the accused culpable as charged.

Analysis:

25. In criminal cases, for the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. The Court of Appeal at Nyeri in Criminal Appeal No. 352 of 2012 *Anthony Ndegwa Ngari v Republic* [2014] eKLR, summed up the elements of the offence of murder as follows: -
 - (a) the death of the deceased occurred;
 - (b) that the accused committed the unlawful act which caused the death of the deceased; and
 - (c) that the accused had malice aforethought.
26. This discussion shall now endeavor to interrogate the above ingredients against the evidence on record.

The death of the deceased:

27. There are several ways in which the death of a person may be proved. In some instances, deaths may be presumed. (See Section 118A of the *Evidence Act*, Cap. 80 of the Laws of Kenya).



28. In this case, the death of the deceased is not in doubt. It was proved in two ways. First, there are several witnesses who vouched that they saw the deceased dead. They include PW1 and PW5 who identified the body of the deceased prior to the autopsy being carried out by PW6.
29. The second way in which the death of the deceased was proved was through the evidence of PW6, a Medical Doctor who conducted the autopsy on the body of the deceased.
30. PW6 concluded that the cause of death of the deceased was severe haemothorax secondary to penetrating stab wound due to assault.
31. This Court, therefore, finds and hold that the death of the deceased and the cause thereof were proved to the required standard.

Whether the accused committed the unlawful act which caused the death of the deceased:

32. Three witnesses vouched for the culpability of the accused. They were PW2, PW3 and PW4. They all knew the deceased as well as the accused. PW2 was a close friend of the deceased. PW4 came from the same neighbourhood with PW2, PW3, the deceased and the accused. PW3 ran a drinking house for the local brew where PW2, PW4, the accused, the deceased and many more others were his customers.
33. The three testified to the fact that although the incident took place at night, there was ample moonlight and their visibility was not hindered or at all. The evidence of PW2, PW3 and PW4 was well corroborated and congruent. It also withstood cross-examination. The possibility of the three witnesses failing to recognize the assailant at the scene are quite remote.
34. The accused also gave his account of what transpired. Although he admitted being at the scene, he held that he differed with PW2 and PW4 over his wife and left with her without fighting any of them or at all. He denied stabbing the deceased.
35. The events as put forth by the accused do not outweigh the prosecution's version on how the deceased met his death. Whereas the prosecution's evidence was well corroborated, the defence was not. Therefore, this Court finds favour with the position as proffered by the State.
36. The Court now holds that in all probabilities, it is the accused who stabbed the deceased with a knife in his chest thereby inflicting the fatal injuries.

Whether there was malice aforethought:

37. The Court will now consider whether the accused acted with malice aforethought in injuring and killing the deceased.
38. Section 206 of the *Penal Code* defines 'malice aforethought' as follows: -

206. 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.

39. The Court of Appeal has also dealt with the issue of malice aforethought on several occasions.

40. In *Joseph Kimani Njau v Republic* (2014) eKLR, the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in *Nzuki v Republic* (1993) KLR 171, held as follows: -

Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -

- i. The intention to cause death;
- ii. The intention to cause grievous bodily harm;
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See *Hyman v Director of Public Prosecutions* (1975) AC 55". (emphasis added).

41. Malice aforethought can be established expressly or by inferences to be drawn from the facts and circumstances before Court. The East African Court of Appeal explicated the circumstances in which malice aforethought can be inferred in the case of *Republic v Tubere s/o Ochen* [1945] 12 EACA 63 as follows: -

- a. The nature of the weapon used; whether lethal or not;
- b. The part of the body targeted; whether vulnerable or not;
- c. The manner in which the weapon is used; whether repeatedly or not;
- d. The conduct of the accused before, during and after the attack.

42. In this case, the accused hit PW2 with a club on the face, but stabbed the deceased with a knife on the chest. He was quite clear on his intentions. Whereas he did not wish to cause any fatal injuries to PW2, he so wanted to kill the deceased. The change of the items used in assaulting PW2 and the deceased within such a short span of time cements the intention. The accused would not even care to hear the plea of forgiveness tendered by the deceased who had long surrendered.



43. Further, the chest is such a critical part of the human anatomy. It houses extremely vital organs without which one cannot survive. It, therefore, goes beyond any peradventure that once the chest is perforated, then chances of injuring the delicate organs inside is eminent and that can lead to outright death. The forceful rapture of the chest running through to the lung and diaphragm was a sure way of sending the deceased to the grave.
44. The accused must have purposed to do harm to the deceased. The manner of execution of the mission was very deliberate and targeted. The accused aimed the chest; a vital and delicate organ, with all his might.
45. By considering the cumulative actions of the accused in the manner he executed the killing, it is without any shred of doubt that the accused purposed to kill the deceased.
46. The prosecution, therefore, proved malice aforethought in this case.
47. Therefore, all the ingredients of the offence of murder were proved in this case.
48. There was, however, the issue of the defectivity of the information. The same will be considered hereunder.

The defectivity of the Information:

49. As stated elsewhere above, the defectivity was mounted on the ground that the particulars in the information bore a different date of the offence compared to what was tendered in evidence.
50. It is true that the particulars in the information stated that the offence was committed on 16th October, 2018 whereas the witnesses testified to the incident having taken place on 25th October, 2018.
51. The issue of defectivity of charge sheets and informations has been a continuous subject of consideration by Courts.
52. Article 50(2)(b) and (n) of *the Constitution* provides as follows: -
 - (2) Every accused person has the right to a fair trial, which includes the right-
 - (b) to be presumed innocent until the contrary is proved;
 - (n) not to be tried convicted for an act or omission that at the time it was committed or omitted was not –
 - i) an offence in Kenya; or
 - ii) a crime under international law
53. Section 134 of the *Criminal Procedure Code* (hereinafter referred to as ‘the CPC’) provides as follows: -

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.
54. Courts, in considering what constitutes a defective charge, have variously emphasized on the need to ensure that the accused is not prejudiced.



55. The then East Africa Court of Appeal in *Yosefu and Another -v- Uganda* (1960) E.A. 236 held as follows: -

The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc., in contravention of the Act.

56. In *Nyamai Musyoka v. Republic* (2014) eKLR, the Court of Appeal expressed itself as follows: -

The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect... (emphasis added).

57. And, in *Sigilani -v- R* (2004) 2 KLR 480, it was held that: -

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

58. The Black's Law Dictionary defines 'defective' as follows: -

Lacking in some particular which is essential to the completeness, legal sufficiency, or security of the object spoken of.....

59. The Court of Appeal had an occasion to extensively consider the import of a discrepancy between the date of offence in the charge and the date of the offence as tendered in evidence. That was in *Obedi Kilonzo Kevevo v Republic* [2015] eKLR where the Court rendered itself thus: -

We have perused the record and have seen that the charge sheet indicates that the date of the offence was on 10/2/2013 while the facts of the case as read out by the prosecutor refer to 9/2/2013 as the date of the offense. The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of *JMA v. Republic* (2009) KLR 671, it was held inter alia that:

“It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.”

Applying this principle to the rival arguments of the parties, we are satisfied in the instant case that this was an omission and discrepancy which did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result of the difference in dates. The errors on the dates cannot make the charge sheet defective or the conviction a nullity. This defect is therefore curable under Section 382 of the *Criminal Procedure Code* which provides;

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint,



summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

The above statutory curative position is also replicated in Section 214(2) of CPC which provides that:

“...variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.”

We are therefore of the considered view that the discrepancy on the dates as contained in the charge sheet and as contained in the facts read out to the appellant did not occasion a miscarriage of justice.

60. As rightfully settled by the Court of Appeal, the test in determining whether a charge is defective is a substantive approach as opposed to being formalistic.
61. Therefore, if on examination of a charge or information, a Court is satisfied that the offence is stated and the particulars rendered such that the accused can understand what he/she is facing before Court and in a manner that enables him/her to adequately prepare for a defence, then such a charge cannot be faulted on defectivity. That position will not change even if a wrong section of the law has been cited on the charge.
62. Applying the above to this case, the Appellant was charged with the offence of murder of the deceased. Save for the date appearing in the particulars, the rest of the particulars were not flouted. The evidence was clear on the date and the Appellant through Counsel examined extensively on the same. It was, hence, apparent that the accused vehemently challenged the allegation that he killed the deceased. That was at the heart of the information.
63. This Court now finds and hold that the discrepancy did not occasion any miscarriage of justice on the accused.

Disposition:

64. Deriving from the foregoing, this Court finds and hold that the prosecution proved its case on the charge of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
65. The accused herein, Kevin Barasa Wasilwa, is accordingly convicted of murder pursuant to Section 322(2) of the Criminal Procedure Code.
66. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE



Judgment delivered virtually and in the presence of:

Mr. Gemenet, Learned Counsel for the Accused.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Regina/Chemutai – Court Assistants.

