



**Republic v Andriano (Criminal Case 4 of 2015)  
[2022] KEHC 10772 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10772 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL CASE 4 OF 2015**

**SN RIECHI, J**

**MAY 26, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BEATRICE NASIMIYU ANDRIANO ..... ACCUSED**

**JUDGMENT**

- 1 The accused BEATRICE NASIMIYU ANDRIANO is charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
- 2 The particulars of the offence are that BEATRICE NASIMIYU ANDRIANO on the 3<sup>rd</sup> day of February 2015 at Nangili village, in Bungoma Central District within Bungoma County murdered ANDRIANO SIMIYU JOHN.
- 3 The case for prosecution is that the deceased Andriano Simiyu John was the husband of the accused. On 3.2.2015, PW1 Makokha Antony Juma the assistant chief of Buraka sub-location was at his home when he received a call from Alice Situma the village elder who reported to him that deceased had been murdered. He went to the scene and viewed the body. He informed the chief Paul Ilonge who reported to police. Police came with the chief and investigations commence. The accused who was the wife of accused and brother were interrogated. A neighbor Ronald Mukoye informed them that he had heard screams from home of deceased and ran there. He found deceased beating accused with a piece of firewood. He separated them and left deceased lying outside. He was then called by children who informed him deceased had died.
- 4 PW2 Ronald Barasa Lukoye testified that on 3.2.2015 at 9.30 a.m. he was at his home when he heard screams from home of deceased. He ran there and found the deceased beating his wife the accused at the kitchen. He separated them and left.



- 6 At about 1.15 p.m he was called by children who informed him deceased had died. He went there and confirmed the same. Police were informed and came to the scene.
- 7 PW3 Alice Namutibo Sifunya the clan elder of Nangili A' village was at her home on 3.2.2015 when at 1 p.m. James Barasa informed her that deceased had died. She accompanied Jones to the scene and informed the assistant chief. She observed the deceased and saw he had a cut wound at back of head. Accused came to the scene and was arrested by police.
- 8 PW4 Janet Toili was at her home at 1 p.m. when she heard screams from home of deceased who was her brother in-law. She went there and found many people. She saw the deceased lying down. His wife the accused was not present. Later accused came and said deceased had injured her hand and she saw accused had injuries on her hand.
- 9 PW6 F.N 70430 P.C Isaac Churongany the investigating officer visited the scene and found deceased outside the house dead. He observed the body and saw he had a cut wound at the back of head. He received information from Ronald (PW2) that deceased had fought with his wife the deceased at 10 a.m. She interrogated the deceased's wife the accused who confirmed they had fought and had gone to hospital.
- 10 PW7 Dr. Wanambisi Caleb Watta produced a post mortem report prepared by Dr. Kosgei who performed the post mortem. His findings were that the deceased had lacerations on back of head, bruises below the left ear, and bruises on right elbow. He had a fracture of bone below the skull, severed cervical code around the neck, and a cut wound on bone of the head. He formed opinion that the cause of death was neurogenic shock due to spinal cord compression due to fracture of cervical code.
- 12 The accused on being put on her defence gave sworn evidence. She testified that the deceased worked as a watchman. On 3.2.2015 she was in the kitchen preparing tea when deceased came and asked her why she (accused) had gone to threaten her co-wife with a panga. Accused denied doing so. He then started beating her. The grandchildren who were present screamed and Ronald Barasa (PW2) came and separated them. She was injured on her right hand which sustained a fracture. She left the deceased with Ronald and she went to the dispensary for treatment. When she came back she was informed deceased had died. She was arrested by police and later charged with present offence.
- 13 The accused called DW2 Charity Nanjala Simiyu a minor who testified that the deceased was her grandfather and accused was grandmother. On the material day she saw the deceased assaulting the accused. She screamed and Ronald came and separated them. The accused then went to hospital leaving deceased lying down. They went to play and when they went to ask deceased for matchbox he did not respond. They called Ronald (PW2) who came and informed them deceased had died.
- 13 Mr. Wamalwa Simiyu for accused filed written submissions. He submitted that the prosecution called evidence which proved the fact of death and cause of death. On whether it is accused who caused the injuries on deceased causing the death, he submitted that there was no direct evidence and that the prosecution relied on circumstantial evidence. He submitted that the accused was arrested on suspicion of killing the deceased because they fought in the morning and no evidence adduced to show she inflicted the injuries and therefore is not guilty.
- 14 The accused is charged with the offence of murder contrary to section 203 of the penal code. Section 203 provides.

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



- 15 The elements of the offence of murder which the prosecution must prove beyond reasonable doubt are
- a. The death of the deceased.
  - b. The unlawful cause of death
  - c. That in causing death the accused committed it with malice aforethought.
  - d. That there is direct or circumstantial evidence placing the accused at the scene of the crime.
- 16 In *Anthony Ndewa Ngauri –vs- Republic* (2014) eKLR the Court of Appeal sitting in Nyeri held:
- “For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:
- a. The death of the deceased and the cause of that death.
  - b. That the accused committed the unlawful act which caused the death of the deceased.
  - c. The accused had the malice aforethought.”
- 17 PW7 Dr. Wanambisi Caleb Watta produced a post mortem report which showed that the deceased sustained a fractured bone below the skull, severed cervical code and a cut wound on the back of the head. He formed opinion that cause of death was due to neurogenic shock due to spinal code compression as a result of fracture of the cervical code. He confirmed the fact and cause of death. Who caused the fracture of the cervical code?
- 18 PW2 Ronald Barasa Lukoye testified on how he heard screams from the home of deceased and went there. He found the deceased assaulting the accused and separated them. After separating them he left and was later informed the deceased had died.
- 19 The accused in explaining what transpired that day between her and deceased testified...
- “I was seated behind the fireplace. He came and asked me why I was going after my co-wife with a panga. I asked him when did I do that. Before I could answer back he jumped on me and stated beating me. As he was beating me up the 2 children came and started screaming. As they screamed, their grandfather Ronald Barasa (PW2) came to the scene and separated us. I was beaten and my left hand was fractured. When Ronald came and asked deceased why he was beating me he said it was because of romours. Ronald urged him to leave me. He left me and went to make bricks. I entered the main house to look for money I had kept there to go for treatment. I told Ronald that I was going to hospital. He told me to go and we will talk when I come back. I left deceased with Ronald at 9 a.m. and I went to the dispensary.”
- 20 From the accused’s defence she confirmed that there was a fight between her and the deceased, where she sustained injuries and sought treatment. After they were separated the deceased remained at home at the back of the house where the lay down and later found to have died. The doctor confirmed that he died from injuries inflicted on him.
- 21 DW2 Charity Nanjala Simiyu confirmed that when at 1 pm she went to ask deceased where the matchbox was, they found him still lying there and not responding. They called Ronald (PW2) who confirmed that deceased was dead. There is no evidence that the deceased sustained injuries from any



- other source other than during the fight with the accused. The fight was between accused and deceased only and I find that it is accused who inflicted the injuries on the deceased from which he died.
- 22 The accused in her defence testified that she was in the kitchen when deceased started assaulting her over information he had received that accused had threatened his other wife with a panga. As a result, they started fighting necessitating the grandchildren screaming attracting the attending on Ronald (PW2) to come and separate them. Accused testified that she too sustained injuries from which she sought medical attention. She reported the matter of assault to police who issued her with a P3 form. DW2 Charity Nanjala also confirmed that accused went to hospital for treatment.
- 23 From the evidence therefore there is ....that the accused inflicted the injuries during a fight where the accused also sustained injuries.
24. The accused in her defence appears to raise the defence of self-defence and provocation. Mwau –vs- Republic (1980) KLR 127 the Court of Appeal held: “The burden of proof remains on the state throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, or self-defence the burden of prove does not shift to the accused. Instead the prosecution must negate the defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence.”
- 25 The accused maintains in her evidence that it is deceased who started beating her. She appears to suggest that she was provoked by deceased action and acted in self defence.
- 26 The law is very clear that every homicide is unlawful unless authorized by law or excusable under the law See *Sharm Pal Singh [1962] EA 13*, see also *Guzambizi Wesonga v Republic [1948] 15 EACA 63* where the court held: “Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in *Republic v James Njenga* defence of property.”
- 27 In his submissions the accused’s counsel sought to set up the defence of self-defence and referred to the English authorities establishing principles that: “*It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do what is reasonably necessary*”

*Those principles have been clearly elucidated in persuasive English authorities See: Palmer v Republic [1971] AC 814 and Republic v Mcinnes 55 Cr. Appeal 551 where the Privy Council and the Court of Appeal respectively stated as follows: “It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon particular facts and circumstances. Some attacks may be serious and dangerous, others may not be. If then is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then in a mediate defensive action may be necessary. If the moment is out of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. That may be no longer any link with a necessity of disproved, in which case as a defence it is rejected. In a homicide case this circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be out of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary*



*to constitute the crime of murder was lacking then the matter would be left to the jury”.\*\**  
**Republic vs James Njengi Njoroge 2019 eKLR.**

28 Section 207 of the Penal Code provides:

***207. 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.***

29 I have considered the whole evidence. I find that though accused was charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the prosecution has proved the charge of manslaughter contrary to Section 202 of the Penal Code. I therefore find the accused **BEATRICE NASIMIYU ANDRIANO** guilty of the offence of manslaughter contrary to Section 202 of the Penal Code and convict her accordingly.

**DATED AT BUNGOMA THIS 26<sup>TH</sup> DAY OF MAY, 2022**

**S.N RIECHI**

**JUDGE**

