



**Republic v Wasilwa (Criminal Case 32 of 2019)
[2022] KEHC 11677 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 11677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 32 OF 2019**

SN RIECHI, J

JUNE 21, 2022

BETWEEN

REPUBLIC PROSECUTION

AND

HENRY MWELU WASILWA ACCUSED

JUDGMENT

- 1 The accused Henry Mwelu Wasilwa 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 Henry Mwelu Wasilwa on the night of the 8th and 9th day of September, 2019 at Mayanja Kibuke village in Bumula Sub-county within Bungoma County murdered Kenneth Wahaya Baraza.
- 3 The case for prosecution is that on September 9, 2019 PW1 Mary Wekesa Wanyiere who is a neighbour of the accused was in her house when at around 1 a.m. she heard screams from the home of accused. She and Salome Nabwire went there. On arrival they found accused's house locked. They stood outside talking. Accused then opened the door. She then saw the deceased sitting next to the door and was bleeding from the head. They advised accused to leave the deceased alone and went away.
- 4 On being cross-examined by Kapten for accused she stated that at the home of accused she saw 3 men in the house, accused, deceased and one Wamboka. She stated that she was with Nekesa, Salome, Nabwire and Irine Nyongesa.
- 5 PW2 Salome Nyukuri testified that she accompanied Mary Nekesa (PW2) to the home of accused from where there were screams. On arrival at accused's home she saw accused beating a person who was in the house. She noticed that it was accused's wife who was screaming. They urged accused to stop beating him but he did not stop.



- 6 PW3 Florence Nanjala Nyongesa also heard screams from accused's house. She went there and from the electric light saw accused beating a person who was seated down. She pleaded with accused to stop beating him but he refused. She went back to her house. He knew deceased as a person staying with accused.
- 7 PW4 Felix Mukebi Wanjala testified how on material day he accompanied accused to Roselida who was selling alcohol and bought alcohol for Kshs 100. They drunk and later accused told him police were looking for him. He then went to accused's house where they found deceased had died.
- 8 PW6 Hellen Mwajuma testified that she received information that Mwalimu (accused) had killed his worker called Kenneth. She went there and found deceased in a house where bricks were kept. She went and informed the relatives of the deceased.
- 9 PW7 Chrispus Wanyonyi Makokha the chief received information of murder. He went to the home of accused and found deceased in a smaller room. He informed the police who came and took away the body. In cross-examination by Kaptan for accused he stated that he was told that the deceased had attempted to break into the house.
- 10 PW9 Samwel Wamboka Lusobio met accused on September 8, 2019 and accused invited him to a house opening ceremony. He went there and there were about 6 people. At 9 p.m. the 3 others left leaving him, accused and his wife. While in the house he saw a person attempting to enter the house. He screamed. Accused heard the screams and chased the person while shouting thief. People came and together with accused deceased was brought into the house. He urged accused not to beat him and they decided to take him to Mayanja police station. On the way accused said they should leave deceased on the road. They left him on the road. The next day he was informed deceased was dead.
- 11 On being cross examined by Kaptan for accused he stated that there was a party drunk alcohol. He stated that deceased attempted to enter the house through a gap between the wall and the roof. He confirmed he saw accused beating the deceased in the house. He stated he did not see who beat deceased outside the house as it was dark. He denied that he participated in beating the deceased.
- 12 PW12 NO. 56337 PC Charles Ongera received a report of murder on September 9, 2019 at 10 a.m. He proceeded to the scene with other officers. At the scene they found the deceased in the house of accused which was not occupied. The body was in a bed room and they saw blood stains on the clothes of the deceased. The scene was processed and photographs taken. They took the body to the mortuary. They took a T-shirt, Red Jumper and Maroon jumper which were blood stained. They also took soil sample, tyre and accused's blood sample and forwarded them to Government analyst.
- 13 PW13 Dalmas Kibet Chesang a Government analyst produced a report prepared by Mr. Langat his colleague. Mr. Langat received:
1. Blood sample of Henry Wasilwa accused.
 2. Blood sample from Kenneth Barasa Wakhaya deceased.
 3. Long sleeved red jumper
 4. Long sleeved red T-shirt.
 5. Short sleeved cream T-shirt.
 6. Soil sample.
 7. A piece of motor vehicle tyre



8. White sack.
- We were requested to check the present and origin of blood stains form the exhibits.
- 14 After analysis the finding were:
- a) DNA from blood stains on jumper, T-shirt, soil, piece of tyre and the sack match the DNA profile of Kenneth Barasa Deceased.
 - b) DNA Profile from blood stains on T-shirt, matched that of Henry Wasilwa the accused.
- 15 **PW5 Dr. Haron Ombongi** who performed the post mortem on body of deceased testified that on examination he found deceased had 2 cut wounds on skull measuring 8cm and 3 cm. multiple bruises on lower limp, rupture of the gall bladder and massive subdural haemhorage. He formed opinion that the cause of death was severe injury inflicted using both blunt and sharp objects.
- 16 The accused upon being put on his defence gave sworn evidence. He testified that deceased worked for him as a labourer for 1 ½ months then left in June 2019. On September 8, 2019 he had visitors in his house for house warming party. The visitors were Benard Wafula, Eunice Naliaka, Samwel Busokio and Vincent Chetembe, Brian Khisa and the accused’s wife.
- 17 At 11 p.m. he heard noise from outside and on going outside he saw people holding a person whom he did not recognize. The people said they were taking the person to police. He then went back to sleep. The next day he met police officers who asked him to follow them. They went to the house of his first wife where they found deceased lying down in a pool of blood. He was arrested and taken to Bumala police station.
- 18 On being cross examined by M/s Omondi for state, he testified that the people who were holding the person were the ones who were in the party. He confirmed that his wife Jacinta had refused to come to testify in his defence because she is afraid. He stated that he knew the deceased as his worker and had sacked him and paid him Kshs 1000 he owed him later.
- 19 Mr. Kaptan for the accused, filed written submission. He submitted that there is evidence that there were several people in the accused’s compound and that they are the ones who administered mob injustice to the deceased. He urged the court to disregard the Government analyst Report as the samples were not obtained from the accused.
- 20 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.”***
- 21 In a charge of murder the prosecution must prove the following ingredients of the offence.
- a. The fact and cause of death.
 - b. The unlawful act or omission causing the death
 - c. That it is accused who caused the unlawful act or omission or inflicted the injuries that caused the death of deceased.
 - d. That the accused committed the unlawful act with malice aforethought.
- 22 On fact and cause of death, **PW5 Dr. Haron Ombangi** testified that on examining the body he found the deceased had 2 cut wounds in the skull, rupture of the spleen and massive sub-dural bleeding. He



formed opinion that cause of death was due to assault. His evidence therefore confirmed not only the fact of death but also the cause of the same which he found to have been due to severe injury inflicted on the deceased.

- 23 On who inflicted the injuries on the deceased from which he died, **PW1 Mary Nekesa Wanyira** testified that upon responding to the screams she went to the house of accused where she found deceased bleeding from the head after accused had opened the door. She urged the accused to leave the deceased alone. PW2 Salome Nyukuri testified that when she arrived at house of accused, she saw accused beating the deceased and accused's wife was the one screaming.
- 24 **PW3 Florence Nanjala Nyongesa** ran to the house of accused when she heard screams and on arrival saw accused beating a person who was in the sitting room. She was able to identify them from the electronic light in the room. **PW9 Samwel Wamboka Lusobio** who was with the accused in the house testified that people apprehended the deceased after attempting to break into the house. They decided to take him to Mayanja police station but on the way accused decided to leave him on the road. When the deceased was brought into the house he saw accused beating him and he urged the accused to stop.
- 25 The accused's defence is that he did not beat the deceased on the material day. He however confirmed that he was at his house where he was having a party with his friends including **PW9 Samwel Wamboka Lusobio**. This was among the witnesses who testified that he saw the accused assault the deceased who had been alleged to have tried to break into the house. These witnesses PW1 Mary, PW2 Salome, PW3 Florence, PW9 Samwel all testified that they saw accused beating the deceased on the material night and was bleeding from the injuries. These are the injuries from which he died. I am therefore satisfied that accused is the person who inflicted the injuries on the deceased.
- 26 Though the accused does not admit it, PW2 Samwel who was in the party in accused's house testified that he had seen deceased trying to enter the house and they suspected him to be a thief. When deceased was apprehended is when the accused started beating him and he sustained the injuries. There is evidence that deceased was accused's employee who had left employment. His presence at the party and attempt to enter the house was a source of provocation to the accused who thought he had come to steal.
- 27 I am therefore satisfied that accused did commit the offence under provocation. Provocation is defined in section 208 *Penal Code* as:

Section 208.

1. The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
2. When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
3. A lawful act is not provocation to any person for an assault.



4. An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.
5. An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

28 Section 207 [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 After considering all the evidence I am satisfied that the prosecution has proved a charge of manslaughter against accused beyond reasonable doubt. I therefore find accused Henry Mwelu Wasilwa guilty of the offence of manslaughter contrary section 203 as read with section 205 of the [Penal Code](#) and convict him accordingly.

DATED AT BUNGOMA THIS 21ST DAY OF JUNE, 2022

S.N RIECHI

JUDGE

