



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 13 OF 2019

REPUBLIC..... PROSECUTOR

VERSUS

1. MOSES ISOKA BARASA ALIAS MWALIMU MUSA

2. PHILIP EKEDI KARANI.....ACCUSED

JUDGMENT

1. Moses Isoka Barasa alias Mwalimu Musa and Philip Ekedo Karani are charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the offence are that on the 5th day of July 2019, at Aturet sub-location, Teso South Sub County of Busia County, jointly with others not before court murdered Stephen Barasa.

3. Some arsonists on an alleged revenge mission, went to the house of the deceased and set it on fire at about 8 p.m. The wife of the deceased and their two children were saved but unfortunately the deceased succumbed and his lifeless body was removed after the fire was quenched. The two accused persons were allegedly heard talking with the deceased at the time of torching of the house. They were therefore charged with the offence.

4. Each accused pleaded an alibi and denied any involvement in the death of the deceased.

5. The issues for determination are:

- a. Whether the accused went to the home of the deceased on the material night;
- b. Whether the alibi defence was displaced;
- c. Whether the accused were involved in the death of the deceased; and
- d. Whether the offence of murder was established against any of the accused.

6. Emily Ashepet (PW1) is the widow of the deceased herein. She narrated how the unfortunate incident occurred. I will quote her verbatim so that a clear picture of the circumstances surrounding the unfortunate happening can be seen. This is what she testified in part:

On 5/7/2019 at 8p.m I was in my house.I was with my husband, the deceased and two children.The children were J aged 7 years and IA aged 4 months.We were in bed but not asleep.I heard people talking from outside.I informed my husband what I had heard.I saw some light over the door.I jumped from bed and raised an alarm.The door was hit loudly.As we raised an alarm, the people outside also raised alarms.One person said that they should torch our house using petrol.My husband called out Ekedo and asked him why they were burning us.A voice from outside said my husband was bad and was going to be taught a lesson.My husband asked Mwalimu Musa why they wanted to burn him and the family.Mwalimu responded that they were tired of his bad habits.My husband also mentioned Ogoo and asked him why he had stolen from him.I knew the three people. I recognized the voice of Baba Ekedo, Mwalimu Musa and Ogoo.Ekedo and my father-in-law are brothers.He is accused 2 in the dock.

7. Two issues arise from her evidence. The first is whether the circumstances were conducive for a positive recognition of the voices she

testified that she identified. The court of Appeal in the case of **Simeon Mbelle vs. Republic [1982] 1KAR 578** held:

In relation to the identification by voice, one it would obviously be necessary to ensure:

(a) That it was the accused person's voice;

(b) That the witness was familiar with it and they recognized it and

(c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

8. The narration by the widow crates an impression that she did not recognize anybody. She relied on the purported recognition by her husband. We are aware that the circumstances were not conducive for any positive identification by voice. My finding so is bolstered by the evidence of IP. Lilian Onsongo (PW3) who testified that the report she received was that the arsonists were unknown and that of PC Joseph Mshambala (PW4) who testified that Ashepet (PW1) informed him that the accused persons saved her and the children. In her statement to the police (PW1), she recorded that her husband recognized the two accused persons. It did not indicate that she recognized anybody.

9. The second issue is whether the arsonists turned to be her rescuers. When she emerged from the house, she must have been in a state of shock to positively identify anybody visually. I am persuaded to believe that she was not in a position to recognize anybody for she was badly injured to an extent that she was admitted in hospital. Indeed in her evidence she said that she did not tell the police that she recognized anybody for she was unwell.

10. Both accused in their defence pleaded an alibi. Moses Isoka Barasa alias Mwalimu Musa (accused 1) contended that he travelled to Nairobi on 4th July 2019 for on the following day he was sorting his NSSF issues. He produced travel documents to support his claim.

11. Reverend Richard Ochola Emojong (DW 5) testified that he taught in the same school with the first accused. He support his claim that on 5th July 2019 he was in Nairobi.

12. Philip Eked Karani (accused 2) on his part contended that he left for his place of work at Moi Teaching and Referral hospital in Eldoret. He left his home at Aturet on 5th July 2019 at 6 a.m. and arrived at about 10 a.m. Later that day he had an issue with one of his tenants and went to report the matter at Kapyemit Police Patrol base. He produced bus ticket and a letter from the police patrol base. He also called Silas Javan (DW4) who supported his claim.

13. The Court of Appeal in the case of **Kiarie vs. Republic [1984] KLR 739** held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.

The prosecution evidence has not in any way displaced the alibi defenses by both accused persons.

14. From the foregoing analysis of the evidence on record, I find that the prosecution has not proved its case against any of the accused for the offence of murder. I accordingly acquit each one of them of the offence of murder. I set each at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 27th day of January, 2021

KIARIE WAWERU KIARIE

JUDGE