



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL CASE NO. 25 OF 2018**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**KEVIN BARASA ..... ACCUSED**

**JUDGMENT**

1. **Kevin Barasa** is 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 16<sup>th</sup> day of October 2018, at **Busijo** village **Samia** sub County of **Busia** County, murdered **Bernard Were**.
3. The accused and his wife had parted ways. His former wife is called Alice Nabwire Barasa (PW1). When he called her and issued threats, she invited the deceased who was her sister's boyfriend for advice. The accused found them behind a house where they were sharing the recording of the threats. The accused stabbed the deceased with a knife. He later succumbed to the injuries and died.
4. Kevin Barasa, the accused, denied the offence and pleaded an alibi.
5. The issues for determination are:
  - a. Whether the accused went to the scene where the deceased was fatally stabbed;
  - b. Whether the accused was the one who stabbed the deceased; and
  - c. Whether the offence of murder was established.
6. The incident that claimed the life of the deceased occurred at night. According to the evidence of Alice Nabwire Barasa (PW1), it was after she had received a threatening call from the accused.
7. According to her evidence the accused called her and asked her why she had refused to return their two children to him. When she did not respond to him, he went on to ask her why she had blacklisted him. When she told him that she was not the only girl in Kenya he threatened to kill her. At the time of their conversation with the accused, she said she was recording the conversation. This is when she called the deceased and reported to him the threats.
8. The deceased went to her home and called her behind her grandmother's house. She gave him her phone where she had recorded the conversation with the accused. This is where the accused found them. She said there was moonlight though not very bright.
9. When the accused approached her and held her by the shoulder, she raised an alarm. The deceased asked him whether he had gone to fulfill his threats. He turned to the deceased and stabbed him with a knife. He boarded his motorcycle and fled.
10. The accused pleaded an alibi. He testified that on the material night he was attending to his shop until 8 p.m. when he retired to his home. He denied ever calling his former wife.
11. When an accused has pleaded an alibi, he does not assume the burden of proving the same. This was held by the Court of Appeal in the case of **Kiarie vs. Republic [1984] KLR** where the Court of Appeal 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 sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.**

In the instant case I will endeavor to find whether the alibi taken together with the evidence on record raises reasonable doubts which can be resolved in favour of the accused.

12. The accused was well known to his estranged wife (PW1). Although there was little light as testified to, the evidence on record was that there was close contact with her when he held her shoulder. In addition to the visual recognition, there was evidence that before he stabbed the deceased, he talked to him and asked him what he had gone to do there. I therefore find that this witness was able to recognize the accused from the voice in addition to the visual recognition. This was possible from their stint of cohabitation.

13. It would appear the deceased knew the accused. The evidence of Alice Nabwire Barasa (PW1) was that when the accused attempted to grab her by the shoulders, the deceased intervened and enquired whether he had gone to fulfill the threats he had made to her. This was in reference to the phone call she had purportedly received from the accused and the deceased was listening to the recording. The issue of mistaken identity did not therefore arise.

14. I therefore find that the alibi defence of the accused was displaced by the evidence on record. He was at the scene of the offence.

15. The evidence of Alice Nabwire Barasa (PW1) was that when the deceased intervened as the accused wanted to attack her, he stabbed him once with a knife. The medical evidence by Dr. Stephen Angira (PW2) confirmed that there was only one stab wound. Though it was submitted that Alice Nabwire Barasa (PW1) testified falsely against the accused to revenge, the same was not borne out by the evidence on record. The conduct of the accused of fleeing from home further bolstered the prosecution evidence that he was the perpetrator.

16. In his defence, the accused said on the material day he was running his shop. He was however later arrested in Bondo on what he claimed was his fishing business. According to the prosecution he was arrested on 16.11. 2018 but the accused testified that he was arrested on 16.10.2018. If we go by the date given by the accused, one wonders how he was transformed from a shopkeeper to a fisherman overnight. In his defence he never described himself as a fisherman as well as a shopkeeper. This therefore means he ran away from home after the incident. It bolsters the evidence of corporal Pius Rono (PW6) who testified that the accused went into hiding after the incident.

17. I therefore find that it was the accused who fatally stabbed the deceased.

18. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

**The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called "abandoned and malignant heart"), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).**

19. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

**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.**

20. There was evidence that the accused had called Alice Nabwire Barasa (PW1) and threatened to kill her. PW1 testified that she had recorded the threats in her phone. According to her evidence, this is what the deceased was listening before he was stabbed. The prosecution did not however produce this recording for the court to appreciate whether it was a threat to kill or this was the interpretation given to the disagreement by PW1. Had it been produced it would have assisted the court in making a finding on whether malice aforethought was established.

21. There is no doubt that the accused and PW1 had previously cohabited as husband and wife. It would appear that they had not fully resolved their issues. This can therefore explain why he was calling her. It would appear also that PW1 and the deceased may have been engaged in a clandestine affair. This explains why they opted to meet behind a house. Though no evidence was adduced towards this end I am persuaded to believe that the accused may have acted out of jealousy.

22. I find therefore, that the prosecution has not proved the offence of murder against the accused. However, the prosecution has proved

beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit the accused of the charge of murder. I find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

**DELIVERED and SIGNED at BUSIA this 23<sup>rd</sup> day of January, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**