



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 25 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

WILBERFORCE BARAZA.....ACCUSED

JUDGMENT

1. **Wilberforce Baraza** 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 night of 1st day of November 2016, at **Bukhalalire** sub-location, in **Butula** District of **Busia** County, murdered **Patrick Omondi Oduor**.
3. The prosecution case was that on the 1st day of November 2016, the accused went to the house of Everlyn Okwero Okaka (PW2) and threatened to beat the deceased after declaring that one day he was going to kill him. Everlyn intervened and the two left her house. Shortly thereafter she learnt that the accused had beaten the deceased badly. He was taken to hospital but succumbed to the injuries.
4. In his defence the accused denied the offence and pleaded an alibi.
5. The issues for determination are:
 - a) Whether there is evidence to place the accused at the scene of the incident that claimed the life of the deceased;
 - b) Whether the alibi of the accused holds;
 - c) Whether it was proved that the accused inflicted the fatal injuries to the deceased; and
 - d) Whether the offence of murder was established.
6. In her evidence Everlyn Okwero Okaka (PW2) testified that on the fateful evening she had two visitors at about 7 p.m. The deceased arrived first and was shortly followed by the accused. In his defence the accused contended that after returning from his land at about 5 P.m. he never left his home. When an accused person pleads an alibi, he has no burden of establishing that his alibi is true. All he has to

do is to create doubt as to the strength of the case for the prosecution. In the case of **Uganda vs. Sebyala & Others [1969] EA 204**, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in **Criminal Appeal No. 12D 68 of 1969** where his lordship observed:

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

Closer home the Court of appeal in the case of **Kiarie v. R. (1984) KLR 739, 740** 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.

7. The evidence of Hellen Mbinya (PW6) is that at about 8 p.m., she heard the accused being warned by his mother about fighting. The evidence of this witness and that of Everlyn Okwero Okaka (PW2) place the accused at the scene of the incident. This is in spite of the evidence of Gladys Kwena (PW4), his mother. This witness was declared a hostile witness. A hostile witness was described in the case of **In Coles vs. Coles, (1866) L.R. 1P. &D. 70, 71**, Sir J.P. Wilde as follows:

A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.

A hostile witness is treated with caution and the weight given to his evidence is negligible. This however will depend on the circumstances of each case. The evidence of such a witness is weighed against the evidence on record. In the case of **Alowo vs. Republic [1972] EA 324** the Court of Appeal said of a hostile witness:

The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.

After evaluating her evidence and her statement to the police taken together with the evidence on record, I make a finding that she [PW4] changed her mind in an attempt to rescue her son. The alibi defence of the accused has been displaced by the evidence on record and he has been placed at the scene of the incident at the time of the alleged offence.

8. There is no direct evidence as to how the deceased sustained the fatal injuries. What we have at our disposal is mainly circumstantial evidence. In the case of **Republic vs. Kipkering arap Koskei & Another 16 EACA 135**, the Court of Appeal held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

In the instant case, I will endeavour to establish whether there is sufficient evidence to infer guilt of the accused.

When the accused found the deceased at the house of Everlyn Okwero Okaka (PW2), he told him that he was going to one day, kill him. He then held him by the collar but for the intervention of this witness. After he had entered into her house, he declined to sit down after he had been offered a seat. This evidence demonstrates that the accused harboured some animosity towards the deceased whatever the cause.

9. After the deceased left PW2's house, the accused followed him shortly. The evidence of Hellen Mbinya (PW6) was that at about 8 p.m., she heard a loud bang. She then heard the mother of accused telling him:

Baraza I have warned you severally to stop fighting when you are drunk.

When she went out, she found the deceased lying unconscious.

It is worth noting that these are close relatives and she must have recognized the voice of the person she identified as the mother of the accused.

10. Boniface Otieno Ogutu (PW 3) testified that when they arrived where the deceased was lying after he was beaten, the mother of the accused told them that it was the accused who had beaten him. This is in spite of Gladys Kwena's (PW 4) evidence in court. I have already made a finding that the change of her evidence was tailored to help the accused.

11. The evidence of Fredrick Musingo Omondi (PW1) is that at about 4 a.m., the deceased gained consciousness and asked him to take him to answer a call of nature. When he asked him who beat him, he said it was Baraza.

12. From the foregoing analysis, I find that there is sufficient evidence on record to prove beyond reasonable doubts that it was the accused who inflicted the fatal injuries to the deceased.

13. In order to establish the offence of murder, the prosecution must prove that an accused person charged with murder had malice aforethought. This is the requisite mens rea for the offence of murder. On malice aforethought section 206 of the Penal Code 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.

In the house of Everlyn Okwero Okaka (PW2), the accused declared that he was going to kill the deceased. He held him by the collar but for intervention of this witness. When Dr. Hillary Kiplagat (PW8) performed a post mortem on the body of the deceased, he found that the 3rd, 5th, and 6th ribs on the left side were fractured. The cause of death was due to excessive bleeding. The declaration by the accused and the nature of the injuries sustained established that the accused had the requisite mens rea.

14. The upshot of the foregoing analysis of the evidence on record, is that the prosecution has proved the offence of murder against the accused beyond any reasonable doubts. I find him guilty and accordingly convict him of the offence.

DELIVERED and SIGNED at BUSIA this 30th day of April, 2019

KIARIE WAWERU KIARIE

JUDGE