



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 5 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

LEONARD OWINO BARASA.....ACCUSED

JUDGMENT

1. **Leonard Owino 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 night of 25th and 26th day of January 2015, at **Sidende West** village **Sidende** sub-Location of **Busia** County, murdered **Anthony Namukonga Kafwa**.
3. The prosecution case was that the accused found the deceased stealing his vegetables. He fatally hit him with a hoe.
4. **Leonard Owino Barasa**, the accused, in his defence contended that the deceased was killed by a mob that responded to the alarm he raised. He denied any involvement in the murder.
5. The issues for determination are:
 - a) Whether the deceased was killed by a mob or by the accused;
 - b) If the accused was the one who inflicted the fatal injuries, whether he had any justification; and
 - c) Whether the offence of murder was established.
6. Both the prosecution and the accused admit there was an incident of vegetable theft at about 1 a.m. Their point of departure is whether the deceased was killed by the mob that responded to the alarm that was raised or whether it was the accused who inflicted the fatal injuries.
7. Patrick Sikaha Kapara (PW1) a village elder testified that at about 1 a.m. the accused went and woke him up. He reported that he had found the deceased stealing his vegetables and hit him with a hoe. He had a hoe. The evidence of Erick Osundwa (PW7) was to the same effect. When he accompanied the accused to the scene, he found Anthony dead. He saw some vegetables at the scene.
8. When Danson Kafwa Kafwa (PW3) who is the father of the deceased went to the scene, he testified that he saw some vegetables in a black paper bag. This is what Fredrick Ouma (PW5) testified to.
9. The accused in his defence contended that when he went out to answer a call of nature at night, while checking on his livestock, he saw a spotlight in his vegetable garden. He raised an alarm and some people responded. He heard screams coming from the area where there were vegetables. He went there and some people on seeing him ran away. He found the deceased lying down. He went to report to the village elder. In short, the accused blamed the people who responded to his alarm for the death of the deceased herein.
10. Of the two versions on how the deceased met his death, that of the prosecution is convincing for the following reasons:
 - a) The village elder had no reasons to testify falsely against the accused. It was never suggested that that was not what transpired.
 - b) There was no evidence that explained how members of public knew why he was raising an alarm other than the version tendered by the prosecution.

11. Section 17 of the Penal Code states that:

Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

The English Common Law was considered in the case in the case of **Robert Kinuthia Mungai v Republic (1982 – 88) 1 KAR 611** the Court of Appeal said:

.... we think, in view of the earlier East African cases we have considered, and the more recent English decision in R v SHANNON Crim. LR 438 1980, that, the true interpretation of the judgment of the privy Council in PALMER v R is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered.

In the instant case, the accused was protecting his property though it is clear he used excessive force. This therefore reduces the offence from that of murder to manslaughter.

12. From the foregoing analysis of the evidence on record, I find the accused guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and accordingly convict him.

DELIVERED and SIGNED at BUSIA this 26th day of November, 2019

KIARIE WAWERU KIARIE

JUDGE