



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT BUNGOMA  
CRIMINAL CASE 12 OF 2007**

REPUBLIC.....PROSECUTOR

~VRS~

**PETER BARASA**

JOB MULIRO.....ACCUSED

**JUDGMENT**

The accused persons Peter Barasa and Job Muliro are charged with murder contrary to section 203 as read with 204 of the Penal Code. It is alleged in the information that on the 23<sup>rd</sup> February 2006 at Chepkui Village in Bungoma District, they jointly murdered Josephat Cheseto Masai. Both accused persons pleaded not guilty to the charge.

The prosecution called seven (7) witnesses in this case. PW1 Nancy Chebet was a niece of the deceased. She testified that on the material day, she was walking home with the deceased from Lwakhakha market around 7.00 p.m. The deceased had bought shop goods and was carrying them with him. On reaching at a bridge at Namundi river, the first accused emerged and hit the deceased. The 1<sup>st</sup> accused then tripped the deceased using his leg. The deceased fell from the stream. The second accused joined the 1<sup>st</sup> accused and both assaulted the deceased. PW1 ran home and informed the wife and other relatives. The deceased was helped to reach home and was later admitted to hospital where he died a month later.

PW2 was the wife of the deceased. She told the court that she was informed by PW1 of what had happened. She rushed to the scene and removed him from there. The deceased told her that he had been assaulted by the two accused persons who also robbed him of the shop goods he had.

PW3 Benson Kiboi testified that he learnt the deceased had been assaulted on the 24/2/2006. He was in his house in such a critical condition that he could not raise his arms. The deceased told his brother PW3 that he had been assaulted by Peter Barasa and Job Muliro. The matter was reported at Lwakhakha Police Station. The deceased was taken to Bungoma District where he was admitted for a period of one

month. He died as the family were preparing to take him to Moi Teaching & Referral Hospital.

PW4 Benjamin Cheseto is the father of the deceased. He saw the deceased after the incident and learnt from him that the deceased had been assaulted by Baraza and Muliro.

PW6 investigated the robbery and assault report at Lwakhakha Police Post. He arrested the two accused persons and charged them with robbery with violence. It was the same witness who recorded the statement of deceased while he was admitted at Bungoma District Hospital. The accused persons were first charged with robbery with violence. The charges were withdrawn after the deceased died. They were then charged with murder in this case.

PW5, Dr. Otindo produced the postmortem form where Dr. Alwanga had performed the postmortem. The doctor found that the deceased had a fracture on the 3<sup>rd</sup> cervical spine which injured the spinal nerves. Due to immobility and long confinement, the deceased developed bedsores on the buttocks with severe bacterial infection. The cause of death was cardio respiratory failure secondary septicemia due to chronic bedsores as a result of the cervical spinal injury.

The medical examination forms in respect of the accused persons showed that both were adults and were mentally fit to plead.

The accused persons gave sworn statements of defence. The first accused Peter Barasa said that on the material day, he met the deceased and PW1 on his way from Lwakhakha market. Both walked towards home together since deceased was his neighbour. The deceased was staggering and on reaching the bridge of Namundi river, the deceased slipped and fell into the water. PW1 rushed to call the wife of the deceased leaving the first accused at the scene. The accused looked for someone to help him remove the deceased from the water but in vain. The first accused said he pulled the deceased out of water. He then left him there and went his way. The deceased was later helped by relatives to his house 300 metres away. He denied assaulting the deceased.

The second accused Job Muliro denied the offence. He said he was not at the scene at the material time. He had gone for treatment at Sirisia Health Centre from 21/02/2006 to 23/02/2006. He stayed with his sister DW3 until 25/02/2006 when he left for home. He produced the treatment record in defence. The 2<sup>nd</sup> accused called his sister DW3 who supported his story that he was being treated at Sirisia Health Centre from 21/02/2006. DW2 said his brother left Sirisia on 23/02/2006.

In this case, PW1 was the only eye witness who said that she saw the 1<sup>st</sup> accused emerge and hit the deceased before he tripped him with his leg causing him to fall into the water from the bridge. The first accused was joined by the 2<sup>nd</sup> accused. When PW1 left the scene to go and call the wife of the deceased, she left the two accused still beating the deceased. The deceased talked to PW2, PW3 and PW4 and told them that he had been assaulted by the two accused persons. PW1 said she knew both accused persons because they were neighbours. The first accused in his defence said that the deceased was drunk and staggering. He further said that the deceased slipped and fell in the water. The deceased may have taken liquor but he was not drunk to the extent of staggering and falling. The deceased had walked on his own from Lwakhakha market which was said to be about two (2) kilometers away from his home. If the fall was accidental, it would be expected that the first accused would have teamed up with PW1 to remove the deceased from the water. On the contrary, he ordered PW1 to leave the scene. She obeyed and went to call the relatives from home. I did not believe the defence of the 1<sup>st</sup> accused on the accidental fall story and on his denial that he assaulted the deceased.

The only truth he talked in his defence and which is corroborated by PW2's evidence is that he pulled the deceased out of the water and left him there. The accused and his accomplices disappeared before the relatives arrived at the scene. This conduct is attributable to a feeling of guilt. If he was innocent, he would have waited for the deceased's relatives to come so that he assists them to take the deceased to hospital or to his home.

The second accused gave an alibi that he was at Sirisia at his sister's place as he attended treatment at Sirisia Health Centre from 21/02/2006 to 25/02/2006. His sister DW3 said that the 2<sup>nd</sup> accused left Sirisia on 23/02/2006 after completing treatment. The deceased was assaulted at 7.00 p.m in the evening at Lwakhakha which is about 15 kilometres from Sirisia. The 2<sup>nd</sup> accused could had the opportunity to travel to Lwakhakha and join his brother in the commission of the offence. His witness confirmed that accused left Sirisia on 23/02/2006 and not on 25/02/2006 as the accused said in his defence. The accused produced a treatment record from Sirisia Sub-District Hospital showing he was treated for malaria on 21/2/2006. He again attended hospital on 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup> and 25<sup>th</sup> February 2006. On close scrutiny of the treatment record, I make some observations:

**a) *That the record of the first visit looks genuine. The notes are professionally***

*done and well organized. It bears the official stamp of the hospital.*

- b) That the date of 21/2/2006 has been erased on the part of the month and substituted with February that, "2". It is hard to know which month it was before erasure.*
- c) That the notes of 22/2/2006, 23/02/2006 and 24/02/2006 have dates erased in the same place for the month. The month was erased and replaced with "2" to mean February.*
- d) The notes of 23<sup>rd</sup> and 24<sup>th</sup> was noted that the patient had made marked improvement. It does not therefore make sense why the patient went back on 25<sup>th</sup> and was given four types of drugs including antibiotic namely "amoxil."*

The accused could not explain during cross-examination the logic behind the extended treatment up to 25<sup>th</sup> after marked improvement had been noted. DW3 contradicted the 2<sup>nd</sup> accused when she said treatment ended on 23<sup>rd</sup> and not 25<sup>th</sup>. According to DW3 the accused returned home on 23<sup>rd</sup>. The offence was committed on 25<sup>th</sup> February, 2006. The treatment record is in my opinion a forgery that was designed to exonerate the accused in these proceedings. The contradictions in his defence are major and are outwitted by the prosecution's evidence.

It is noted that the deceased lived for about 30 days after the attack. PW6 recorded his statement on 4/3/2006 as he was undergoing treatment at Bungoma District Hospital. The statement was produced in evidence. The relevant part reads:

***"I was going home from Lwakhakha in the company of Nancy Chebet. We reached at Namudi River Bridge. One person appeared from the side of the footpath and slided me and I fell down the bridge. I identified him as Peter Barasa alias Tosh. Also one known as Robert Muliro (his brother) came with him down the bridge, and beat me all over the body..... and pulled my private parts."***

The deceased's statement corroborates the evidence of PW1 in all material particulars including how PW1 was chased away from the scene. The deceased told his wife (PW2) his brother (PW3) and father PW4 how he was assaulted. He gave the names of the two accused persons to the witnesses as the culprits. PW1 was chased by the first accused from the scene as soon as the deceased was pushed and fell into the river. This explains why PW1 did not witness the part played by the second accused since she had left the scene. The second accused came to the scene after his brother had pushed the deceased down the bridge. The deceased himself confirms that the two accused came down to where he lay under the bridge and jointly assaulted him. The deceased sustained the cervical spine fracture as a result of the fall

and the beating. This led him being confined in hospital where he developed chronic bed sores which led to his death.

I am satisfied that the prosecution have proved beyond any reasonable doubt that the two accused persons jointly committed the act which caused the death of the deceased after 30 days. The time of death falls within the one (1) year and a day as stipulated under section 213 of the Penal Code. The two accused persons are therefore responsible for the death of the deceased.

The next issue for determination is whether the two accused person had *mens rea* when they carried out the said unlawful act. PW6 investigated the case and charged the two accused with robbery with violence. The deceased complained that his shopping items bought at Lwakhakha were stolen in the course of the assault. It was after the deceased died that the robbery charges were withdrawn against the two accused persons. The two accused had not differed or quarreled with the deceased. They suddenly appeared from the side of the footpath and attacked the deceased as he walked home. All this evidence put together does not disclose malice aforethought on the part of the two accused persons. It is evident that the motive of the attack was to inflict injury on the deceased but not to kill him. Unfortunately the injuries inflicted on him led to his death. It is my finding that the prosecution have not established malice aforethought against the two accused persons. The evidence before me proves that the two accused persons unlawfully killed the deceased. I find them guilty of a lesser offence of manslaughter contrary to section 202 as read with 205 of the Penal Code and convict them accordingly.

**F. N. MUCHEMI**  
**JUDGE**

Dated, delivered and signed at Bungoma this 29<sup>th</sup> day of June, 2010.  
In the presence of the two accused persons, their counsel Mr. Milimo for Watangah and the State Counsel Mrs. Leting.