



**Republic v Barasa (Criminal Case 15 of 2019)
[2024] KEHC 15277 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL CASE 15 OF 2019
RPV WENDOH, J
NOVEMBER 13, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

YUSUF SHAKILO BARASA ACCUSED

JUDGMENT

1. Yusuf Shakilo Barasa faces a charge of Murder contrary to section 203 as read with Section 204 of the Penal Code.
2. The particulars of the charge are that on the night of 16/11/2019 at Kamelei in West Pokot South Sub County, murdered Irene Nambuya.
3. PW1 John Baraza Sululu, a Carpenter in Kamelei, is an older brother of the accused, while the deceased was his sister-in-law, being wife of the accused. PW1 recalled that on 16/11/2019 about 11.00p.m. he was in his house with his family when the accused knocked on their door, called him by name. He opened for accused after putting on the solar light; that accused entered the house and fainted. He ran to call his neighbours, Miriam and Musaka, they carried the accused outside and did first aid; that when accused came to, and on being asked what had happened, told him that the wife and the children were dead. PW1 sent Miriam and Musaka to go find out and came back to report that only the wife was dead. They then reported to AP camp and police came and arrested accused. He went to accused's house on 17/11/2019. He said that accused lived with the wife and two children. He stated that accused had drunk but was not very drunk.
4. PW2 Polycarp Kweyu Lutta is a Government Chemist based in Kisumu. On 21/5/2020, he prepared a report in regard to exhibits submitted to him by P.C Evans Weguda being a yellow/black coloured T-shirt, a pair of khaki long trousers and blood sample of Irene Nambuya (stains).



5. He was requested to determine the genetic relationship between the items submitted. He said that the T-shirt and pair of trousers were moderately stained with blood of human origin from which he generated DNA profiles which he compared with the deceased blood and they matched.
He produced the report as P.Exh.2.
6. PW3 Doctor. Vincent Omondi Omollo of Kapenguria County Referral hospital conducted post mortem on the body of the deceased and produced the post mortem report as P.exh. No. 3. On examination, he found the deceased with blood-stained clothing, bruising around the buttocks, both legs, face especially left side and forehead was swollen, bruises on left side of the abdomen, bleeding in chest cavity, lung had fluids bleeding beneath the scalp bleeding between scalp and brain tissue-subdural bleeding. The Doctor formed the opinion that the cause of death was due to internal bleeding in the chest cavity and brain. Secondary to trauma on outside of the affected areas caused by blunt trauma. He took a blood sample from deceased for further investigation. The Doctor denied that a fall by a drunk person would have caused such injuries but that a lot of force must have been used to inflict the injuries.
7. PW4 PC Geoffrey Nandasaba, formerly of Kemelei Anti stock theft Unit (ASTU) camp recalled that on 16/11/2018 he was at the camp when Godfrey Musaka reported that a lady had been killed by the husband. They proceeded to the scene and found a woman lying on the floor covered in a Masai sheet and was bleeding from nose and mouth. They found the suspect at the brother's house; that the police from Kabichbich took away the body. PW4 said that when they went to the house they found things scattered and that of an earthen stove (jiko) was broken and there seemed to have been a fight. He denied seeing any injuries on the accused.
8. PW5 Cpl. Sabian Odongo recalled that on 17/11/2019, he received a Murder report from DCIO West Pokot. He was directed to proceed to Kemelei Area with PC Kaguthi and Sikolia where they found the deceased's body lying on the floor. By then, accused had been arrested. He took photographs of the scene and removed the body to Kapenguria Referral Hospital mortuary. He took accused to Kapenguria police station. He found accused in blood-stained clothes which he took possession of and they were forwarded to the Government Chemist -Kisumu for analysis. He produced in court the accused's clothes – yellow T-shirt American khaki, pair of trousers 1(a) & (b)
9. After close of the prosecution case, accused was called upon to defend himself. Accused opted to give a sworn statement in his defence. He denied murdering his wife; that on 16/11/2019, he was in the bar upto 11.00p.m. having left work at 5.00p.m.; that his house was about seventy (70) metres from the club; that he went to John's house at about 11.00p.m. and informed him that he had reached his house and found his wife and children had died. After that, he found himself at police station. He said that when he arrived at the gate of the house, he saw the door open and it was dark; that he lit the torch on his phone and saw the wife on the floor with the children; that he tried to lift her up but he noticed she was bleeding from the nose and put her down; that is when he went to John's house to inform him of what had happened; that blood spilled on his clothes when he lifted the deceased; that he found things scattered in the house. He denied that he had any neighbours next to his house but the closest was his brother, John (PW1)
10. Though he claimed to have been in the bar which had many customers, accused could not recall the name of the bar nor was he able to call any witness from the said bar.
11. Mr. Ndinyo, Counsel for the accused, filed written submissions. He submitted that the prosecution failed to prove beyond doubt that the accused caused the death or that he possessed Malice



aforethought. What was not in dispute is the death of the deceased. He urged the court to acquit the accused.

12. Mr. Majale did not file any submissions on behalf of the Respondent.
13. In criminal matters, the legal burden rests on the prosecution to prove the case beyond reasonable doubt. The term ‘beyond reasonable doubt’ has been defined in a number of decisions, the leading being *Woolmington V. the DPP (1935) AC 485 3 ALL ER 373* where the court stated that proof ‘beyond reasonable doubt’ is not proof to the hilt. The court stated as follows;

“That degree is well settled. It needs not reach certainty; but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

See also *Cr.A 44/2015 Republic V. Joshua Koikai Sitaya (Kajiado)*.

14. The prosecution therefore has the duty to discharge the said burden and at no time will it shift to the accused.
15. In a murder charge like the one accused faces, the prosecution has to establish the following ingredients beyond reasonable doubt;
 1. The death of the deceased;
 2. That accused committed the unlawful act or omission that caused the death;
 3. That the accused possessed malice aforethought

Death of Accused;

16. It is an undisputed fact that accused died on 16/11/2019. The accused claims to have been the first at the scene where the deceased’s body was found. PW3, the doctor who performed the Post Mortem on the deceased alluded to the serious injuries found on the deceased’s body and found that the cause of death was massive bleeding in the chest cavity and brain. From the Doctor’s examination the deceased could not have been injured from a fall or self-inflicted injuries but that a lot of force was used to inflict them. No doubt these injuries were inflicted by another person.

The next question is who inflicted the injuries

Whether accused caused the death;

17. Nobody witnessed the assault on the deceased and eventual death. This case entirely rests on circumstantial evidence. Where a case turns on circumstantial evidence alone, the court has the duty to examine the evidence intently. In the case of *Abang’a alias Onyango V. Republic CR.A 32/1990*, the Court of Appeal set out three (3) tests to be satisfied before a court can found a conviction on circumstantial evidence. The Court of Appeal said;

It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i). the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;



- ii). those circumstances should be of a definite tendency, unerringly pointing towards guilt of the accused;
 - iii). the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”
18. Circumstantial evidence has been said to be the best evidence.
19. In *Republic V. Taylor Weaver and Donovan* (1928) 21 CR.C 20, the court said;
- Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances when by intensified examination, is capable of proving a proposition with accuracy of mathematics”
20. Though circumstantial evidence is the best evidence, it must be taken with outmost caution. In *Teper V. Republic* (1952) AC Pg. 489, the court said
- Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence, to be sure that there are no co-existing circumstances which could weaken or destroy the evidence”.
21. The accused person raised an alibi defence, that he was at a bar till 11.00 p.m. only to come home and find the wife dead. Even when an accused raises an alibi defence, the burden of proving the truth or falsity of the defence does not shift to him but remains with the prosecution. In the case of *Victor Mwendwa Mulinge V. Republic* (2014) e KLR the Court of Appeal in addressing alibi defence stated this;
- It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see *Karanja v. R*, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”
22. In *Ssentale V. Uganda* (1968) EA 365, the Ugandan Court of Appeal held that the prosecution always bears the burden of disproving an alibi and proving the appellant’s guilt.
23. The accused raised the alibi for the first time in his defence. In my view it is an afterthought. He had been before this court since 2019 and at no time had he alluded to the alibi
24. In the instant case, the only evidence that connects accused with the murder is the presence of deceased’s blood on his trousers and T-shirt. However, he has offered an explanation that he lifted the body to find out what had happened to the deceased and that is when the blood may have gone on to his clothes. Without any other direct or circumstantial evidence to support the presence of the deceased blood on accused’s clothes, I find that the circumstantial evidence is too weak to point at accused as the culprit. Unfortunately, those who would have been witnesses were said to have moved away and all we have is very strong suspicion that accused murdered his wife and pretended to have found her dead. Suspicion, however strong cannot be the basis for a conviction. The circumstantial evidence does not unerringly point to the accused as the culprit. In that regard, there is still doubt as to who the murderer



is and that doubt must be resolved in favour of the accused. Accused is hereby acquitted of the charge of murder under section 322(1) of the CPC and is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, SIGNED AND DELIVERED AT KAPENGURIA THIS 13TH DAY OF NOVEMBER, 2024

R. WENDOH.

JUDGE

Judgment delivered virtually in the presence of

Mr. Majale for the State – present

Mr. Ndinyo for accused – present

Accused – present

Court Assistant - Juma/Hellen

