REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 26 OF 2015

REPUBLIC. …….....……..…. PROSECUTOR

VERSUS

KENNEDY WAMALWA BARASA ……..…….…… ACCUSED

J U D G M E N T

The Accused **Kennedy Wamalwa Barasa** is charged with the offence of Murder Contrary to Section 203 of the Penal Code.

The particulars of offence are that on the 28th day of June, 2013 at Nalondo village in Bungoma South District within Bungoma County murdered **George Masinde Murunga.**

The prosecution case is that on 28.6.2013 **PW6 Anne Kusimba Masinde** the wife of the deceased George Masinde Murunga was at her house with her husband the deceased, at 7 p.m. she was seated at the kitchen verandah. While taking water to deceased she saw 5 people who were armed with weapons. One was armed with a rifle, 2 were armed with clubs, one with a panga and another with an axe. They covered their faces with Marvin. They ordered her to lie down. She started screaming running to the sitting room where deceased was. They followed her and hit her with a rungu (club). She fell down. The deceased asked what was happening and they cut him with an axe on the head. They took the deceased to the guest room. Those who remained with her demanded money. She told them she did not have money and offered to give them her ATM card and Pin but they refused. They took her to the bedroom where they injured her eye. They then left. She went out screaming and her children who were in the kitchen told her the door had been bolted from outside. She ran to the home of Richard and then heard Peter screaming. She went to her home and was informed that deceased had been killed. He recognized the person who was in front as Leonard who has already been dealt with. She did not identify accused.

PW8 Vivian Masinde a niece of the deceased was at the home when she heard people enter the Kitchen and ordered her to lie down. After a short while she heard her aunt Anne (PW6) screaming and asking for help. She could not get out and the door was locked from outside. After a short time, PW6 opened the door for them and informed them that thugs had attacked them. They saw deceased had been killed and Peter went to police to report. She testified that on 27.6.2013 a person had come to their home to request for a place to sleep alleging that he was being chased by thugs and they allowed him to sleep.

PW10 Peter Murunga Nabelisia the grandson of the deceased was with Nixon, Gideon and Agnes in the kitchen house at the deceased's home when people ordered them to lie down. The people then locked the door form outside. He heard screams from the grandmother Anne. They would not go out as they had been locked inside. He then heard people running away. Anne came and opened for them. He then called a neighbor and together they went and reported to the police at Nalondo AP camp. When he came back he saw the deceased had been killed.

PW1 George Wanjala Khaemba the brother of the deceased on 28.6.2013 he received information that deceased had been killed. He went there and confirmed the same to be true. While at home of deceased he received information that the suspect was admitted at Kitale hospital. The suspect was one Taliban with whom deceased had a land dispute. The accused is the son of Taliban the suspect. Taliban was later charged with murder of the deceased.

PW9 Lewis Matara Wafula a bodaboda rider on 27.6.2013 at 7.30 p.m. he carried a passenger from Kimili to Nalondo. The passenger stopped him and went to a home where he picked a mobile phone. They started coming back and reaching near a river the passenger told him to stop. He noticed 3 other people who refused to move out of the road. The passenger then held him. He sensed danger and he escaped leaving the motor cycle with them. He ran to a home he saw light and explained what had happened. The owner of the home allowed him to sleep at his home. He left the next day. Later his motor cycle was taken to Kimilili by a person called Ali.

PW4 Protas Itege Wamukota testified that on 28.6. 2013 he received the motor cycle KMCU 137F from the person he knows as Ali who is accused who told him Lewis had left it on the road. He took custody of the motor cycle and later gave it to Lewis.

PW5 Bernard Chepkwony a superintend of police on 28.6.2013 at 8.30 p.m. received information of the murder of deceased. He went to the scene and confirmed deceased had been killed by a gang of 5 people. He commenced investigation. One Lewis informed him of what had happened and accused became a suspect because his father had along standing land dispute with the deceased. The father was called Nyongesa Mamati who at that time was admitted in hospital. He was arrested and charged with the offence in Bungoma HCCR 18 of 2013.

All this time the accused went underground. Police however found his mobile No. 0718283624 which he abandoned and started using 0732835215. They traced him to Isinya in Kajiado. He was arrested and brought to Bungoma. They sought for and received call records from the mobile phone company. An analysis of the call data showed accused was communicating with his father Nyongesa Malati. He produced the call record as Exh 2 A, B. The call data placed him close to the scene of the murder. His statement under inquiry was recorded in what gave crucial leads.

PW13 Dr. Haron Ombagi produced a post mortem report prepared by **Dr. Raymond Pamba** who performed the post mortem. He found deceased had lacerations on back of the head, and anterior neck. Upon opening the body, he found skull fracture with bleeding. He formed opinion that cause of death was due to severe head injury secondary to force head trauma.

The accused upon being placed on his defence gave sworn evidence. He testified that on 27.5.2013 at 4 p.m. he left his palce of abode at Kimilili and went to visit his father at Nalondo. He was using a bodaboda. He was at his father's home at 7 p.m. and stayed for 15 minutes. He was carried as pillion passenger on the bodaboda on the way back when the rider saw police officers and abandoned the motor cycle and ran away. He took the motor cycle to Kimilili stage and handed it over to the stage chairman. He was later arrested and charged with the present offence.

Ms Wakoli for the accused filed written submissions. Counsel submitted that the prosecution did not tender any eye witnesses to the offence, that none of the witnesses testified that they saw accused at the scene and therefore there is no evidence for accused to be convicted of the offence. Counsel cited the decision in **R-Vs James Ogwang Alicho & Another (2018) eKLR** in support of her submission.

That the deceased George Masinde Murunga died as a result of attack at his home on material day is not in dispute. **PW13 Dr. Haron Ombangi** produced a post-mortem performed by his colleague which showed that deceased died as a result of skull fracture inflicted by blunt force.

Who inflicted the injuries from which the deceased died?

PW1 George Wanjala Khaemba testified that when the offence occurred he was at his home in Trans Nzoia and heard the news over the radio. He testified that the accused is the son of Taliban who was charged with the murder of the deceased. He stated he does not know why accused is in court.

PW2 Andrew Wafula only identified the body to the doctor who performed the post mortem. PW3 Richard Masinde only joined P W2 in identifying the body of deceased. PW4 Protus Ituge Wamkota testified how he received a motor cycle from accused which belonged to one Lewis. Accused explained to him that he was with Lewis but Lewis had escaped when they met a group of people and left the motor cycle Reg. No. KMCU 137 F with accused. When Lewis came on 28.6.2015 he gave him the motor cycle.

PW6 Anne Kusimba Masinde the wife of deceased testified how they were attacked but stated that she did not identify the accused as among the attackers. She however had seen and identified one Lenard with a rifle and has been dealt with. PW8 Vivian Masinde a niece of the deceased was at home when the attack occurred. She and Peter were in the Kitchen house where they were locked and only came out and found deceased had been killed.

PW9 Lewis Matara Wafula testified how on 27.6.2013 he got a customer who wanted to be taken to Bukoli. He carried the customer at 7.30 p.m. in his motor cycle Reg. No. KMCE 337F. On reaching Bukoli the customer told him they go to Nalondo. He went and on arrival he asked him to go to a certain path. They went and on the way met 3 people. The customer then held Lewis. He sensed danger and jumped out of the motor cycle and escaped. He ran to the home of deceased where he sought for accommodation. Deceased allowed him and he slept. The next day he went to his home. He later was informed the owner of the home he sept in had been killed. He did not know the customer he had carried well and cannot identify him. He however confirmed his motor cycle was later brought to Kimilili.

PW10 Peter Murunga Nabelesie who was in the kitchen house with Vivian testified how they were locked in the kitchen and heard thugs outside when he came out they found deceased had been killed. He reported to the police station. He testified that he did not see the people who inflicted the wounds on deceased. PW11 Sylvester Kwoba Osiruma the Chief Sirare Location testified that deceased and accused's father Nyongesa Mamati had a land dispute which had lasted for over one year as the deceased had bought land form Nyongesa Mamati.

PW5 No. 231293 Bernard Chepkwony a Superintendent of police received a report of the murder of deceased and commenced investigations. He established hat the deceased had a long standing land dispute with the Nyongesa Mamati the father of accused. They also received information that accused had been ferried by Lewis to that area. They traced mobile phone data on NO. 0718283624 belonging to accused. They arrested Nyongesa Mamati accused's father and was charged in Bungoma HCCR 18/2013. They established from the mobile call data that accused was in constant communication with his father and was close to the scene of the murder. Accused gave evidence for the prosecution in HCCR 18/2013 and was under witness protection.

The accused in his defence readily admits having been carried by Lewis on his boda boda to Nalonda and Lewis on seeing police officers jumped off the motor cycle and left it there. He took the motor cycle and gave it to the chairman of the Kimilili stage. This occurred on 27.5.2013 and deceased was killed on the night of 28.6.2013. None of the 12 witnesses called by the prosecution testified that they saw accused as among the people who attacked the deceased. Indeed PW6 Anne Kusimba Masinde the wife of the deceased testified that she did not see the accused.

PW8, Vivian and PW10 Peter who were at the home did not identify accused as one of the people who killed the deceased. The evidence of PW5 Benard Chepkowny, is that the accused is the son of Nyongesa Mamati who had a land dispute with the deceased and as a suspect of the murder and charged in H.C.CR 18/2013. He confirmed that the accused as a witness in that case and that the Nyongesa Mamati was convicted. He connected the accused with the offence by the mobile call data records which showed he was in communication with his father. While that can be true, none of the witnesses saw accused attacking the deceased and causing the injuries from which he died.

I therefore find that the prosecution has not proved its case against the accused on a charge of murder contrary to Section 203 beyond reasonable doubt. I find the accused Kennedy Wamalwa Barasa not guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and acquit him under Section 215 C.P.C.

Accused Kennedy Wamalwa Barasa be set at liberty unless otherwise lawfully detained.

Dated, signed and delivered at Bungoma this 10th day November, 2021.

S N RIECHI

JUDGE