



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL CASE NO. 32 OF 2016.

REPUBLIC.....DPP

VERSUS

RONALD BARASA POROKOLO.....ACCUSED.

J U D G E M E N T.

The accused **RONALD BARASA POROKOLO** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya.

The particulars of the offence are that 22nd September, 2016 at Khwiroro village in Kimilili sub-county within Bungoma County murdered **MARGARET NASAMBU MURUNGA**.

PW1 Elisha Polokolo Nyongesa was at his home in the evening when he heard his son the deceased asking for his radio. He told the deceased to go and ask his mother the whereabouts of the radio. The deceased became angry. Elisha left the home and went to his brother Martin's home. While there he heard screams from his homestead. He went there and found Ronald the accused, Protus Waswa, Enock and the deceased Isaac. The accused Ronald, Protus and Enock were beating Isaac. The accused was armed with a jembe, stick and Protus with a panga. He asked the where – about of the mother Margaret Nasambu who was his wife. Accused told him that he (accused) had caned her and she went into the maize farm. He did not see her that day. The next day he went to the house of the deceased where he found her with injuries and unable to speak. She was taken to hospital where she died the same day.

PW2 Enock Wanjala was at his home on 22.9.2016 when he heard Isaac asking his father for a radio. He went there and told him that maybe it is their mother who knows its where about. Isaac went away. At 7 p.m. Margaret Nasambu the deceased passed by his house and went to her house. He then heard screams and went there. He found accused and one Protus beating Isaac. He raised an alarm. He then saw the deceased lying down near his house. He spoke to her and she told him that Barasa and Protus had injured her. He with assistance of wife and child carried deceased to her house. The next day she was taken to hospital where she died while undergoing treatment.

PW3 IN a minor aged 17 years and granddaughter of the deceased was in the house when Isaac asked the deceased about the radio. The deceased told Isaac that she had kept it and would go and get it. The accused Barasa and Protus came and started beating Isaac. The deceased who was in the house came and told them not to assault Isaac. The accused was beating Isaac using a jembe stick. The accused then turned and hit the deceased using the stick. He also hit IN the witness. She screamed. The deceased left the house and fell down in the maize farm. Witness IN ran there and found the deceased lying down complaining of pain on the chest. She went and called Enock and his wife who took her to the house. They bought her drugs but later she died.

On being cross-examined by M/S Natwati, she stated that accused and Protus had come to beat Isaac as he was quarrelling with the deceased. She confirmed that deceased was arbitrating between accused and Isaac when accused hit her with a jembe stick while they were in the house.

PW5 Dr. Wanambisi Caleb Waswa produced the post-mortem report prepared by Dr. Wafula Kesbon who performed the post mortem. He found that the skin on the upper limb was peeling. Upon examination he found blood clots in the peritonea cavity, enlargement of spleen which had been ruptured on the lateral side. He formed opinion that the cause of death was due to rupture of spleen.

On being placed on his defence the accused gave sworn evidence and called one witness. He testified that his father PW 1 Elisha Porokolo informed him that there were people who wanted to kill him. He told accused Ronald to look for Protus and they go to the house of deceased. He and Protus went there and found Isaac screaming. They decided to discipline him. They beat Isaac with sticks. Enock came and they explained to him why they were disciplining Isaac. They then escorted PW 1 Elisha to the house of his other wife Joyce. He then went home. After 2 days he heard deceased had been taken to hospital. He visited her in hospital later she died while undergoing

treatment.

Upon cross-examination by Mr. Tarus for the state, he confirmed there was a fracas on 22.9.2016 at their home over a radio. He denied knowing how the deceased sustained the injuries.

The accused called **DW2 Judith Nabwoba Wanjala** a neighbor who testified that on the material day she heard screams from home of deceased. She found Elisha and his 3 children Protus, Ronald and Isaac quarrelling over a radio. He then saw Ronald the accused beating Isaac as Isaac had threatened the father Elisha. She separated them. She did not see deceased at the home. At 8 pm she heard screams from home of Margaret. She ran there and found Isaac having pushed the deceased to the wall demanding a radio. She tried to separate them with assistance of Metrine the wife of Enock. She then left deceased with Isaac and IN. She went to her house. After 4 days she received information that deceased had died.

M/S. Natwati for the accused filed written submissions. Counsel submitted on two issues;

- a) whether the prosecution established its case beyond reasonable doubt.
- b) Whether it is accused who contributed to the death of deceased or whether the prosecution has established its case beyond reasonable doubt.

Counsel submitted that the prosecution witness gave different versions of what happened. She submitted there is evidence that there were two sets of fight that occurred on that day but some of the prosecution witnesses PW 3 IN only alluded to one fight.

On whether it is accused activities that contributed to the death of the deceased, counsel submitted that: ***“it’s clear that indeed there were two fights and all was because of a missing radio, and it’s true that the accused person also disciplined his younger brother Isaac who wanted to assault PW 1 and it’s also true that during the second fight the accused person was not present. DW2’s evidence collaborated with that one of PW1 whereby they both stated that during the fight PW1 was not there since he had gone to the home of his other wife.*”**

The prosecution even though they had listed one Isaac as one of the prosecution witnesses, they failed to bring him in court, his missing radio was the genesis of all the two fights since from the evidence during the first fight the deceased was not around, she was only present during the second fight and it has been confirmed by the witnesses on record thus PW1, PW2 and PW3 that it’s the deceased who took Isaac’s radio and he was demanding for the same, his testimony in this case was so crucial, since the accused also disciplined him.

It’s true that the deceased was the biological mother of Isaac and PW2 and grandmother to PW3 but she was a step mother to the accused person herein, and therefore PW2 and PW3 could not have said that indeed it’s Isaac who actually assaulted the deceased since she was his mum and thus they used the accused person as a cover-up.

The accused only disciplined Isaac because of his indiscipline actions against PW1 he was only administering discipline and he was not doing that as a payback and thus the accused had no motive to go back and assault the deceased.”

The deceased Margaret Nasambu Murunga is dead is not disputed. Even the accused in his evidence confirms the same. Post-mortem produced confirmed the death and found the cause of death be due to the ruptured spleen. The main issue for determination is whether the prosecution has proved beyond reasonable doubt that it is the action of the accused that caused the death of the deceased with the necessary intention to cause death.

From the evaluation of the witness evidence, it is clear that the deceased Margaret Nasambu was one of the wives of PW1 Elisha Porokolo. It is also evident that the accused Ronald Barasa was a step son of the deceased. It is also clear that there was a quarrel between PW1 Elisha and his son Isaac over a radio. Isaac is the biological son of the deceased Margaret.

From the evidence, it is clear that there were 2 fights on the material day. The first at about 6 p.m. when Isaac asked Elisha (PW1) about the radio and there was an argument where upon Elisha informed accused, Protus and Enock who went to where Isaac was in the house of his mother the deceased where he was also staying. They beat him for the incident with their father but the deceased was not present.

The 2nd fight occurred at around 7.30 – 8 p.m. when PW 1 had left. According to PW 3 IN the accused and Protus came and started assaulting Isaac. This time the deceased was in the house. She intervened and asked them not to beat Isaac. It is then that accused turned on the deceased and hit her with a jembe stick. He also hit her. The deceased then left the house and fell down in a maize farm. She complained of pain on the chest.

The accused in his defence alludes to only one incident where they beat Isaac for the quarrel with their father as a form of discipline. He confirmed that at that time the deceased was not at home. DW 2 Judith Nasibwoba who respondent to the screams on the two occasions testified that during the 1st fight deceased was not there. The 2nd fight in the night was between Isaac and the deceased and it occurred at 8 p.m. She confirmed that Isaac was staying with deceased in the same house and that it is her and Metrine who separated them. In that 2nd incident the accused was not present.

From the evidence the central figure in all these incidences is Isaac. He was the one who had had the quarrel with his father PW 1 over the radio for which the father called accused, Protus and Enock who disciplined him. It is the issue of the loss of radio that was at the centre of all the fracas. PW 3 IN stated that he was the one who was being disciplined by accused when deceased was allegedly hit by accused.

In the 2nd round of fight DW 2 stated that he was the one who was pushing the deceased to the wall when she separated them. He was therefore a crucial witness to the prosecution case. Crucial as that Isaac was to the prosecution case, he was not called as a witness nor any explanation availed as to why he was not called to testify.

In Bukenya & Others -vs- Uganda 1972 E.A 549 the C.A. Appeal for East Africa on addressing itself to this issue states;

- i. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.*
- ii. The court has a right and duty to call witnesses whose evidence appears essential to the just decision of the case.*
- iii. Where the evidence called is very adequate the court may infer that the evidence of the uncalled witnesses had it been tendered now have been adverse to the prosecution.*

The non-calling of Isaac as a witness in this case in my view leaves a gap on the prosecution evidence as to who actually inflicted the injuries on the deceased from which she died. That irresistibly leave this court to find that the prosecution have not established the offence of murder against the accused beyond reasonable doubt.

I therefore find the accused Ronald Barasa Porokolo not guilty of the offence of murder and acquit him under Section 215 of the Criminal Procedure Code.

Accused to be set at liberty unless otherwise lawfully detained.

DATED, DELIVERED AND SIGNED AT BUNGOMA THIS 3RD DAY NOVEMBER, 2021.

S N RIECHI

JUDGE