



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 28 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

BONIFACE BARAZA..... ACCUSED

JUDGMENT

1. Boniface Baraza 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 22nd day of November 2017, at Nambale Township Location within Busia County, murdered Boniface Ekesa.
3. The prosecution case was that the accused suspected the deceased to have had an affair with his wife. He armed himself with a machete and forcefully entered the house of the deceased where he fatally injured him.
4. The accused in his defence contended that when he returned from a journey, he found his wife and the deceased in his (accused's) bed naked and asleep. When he roused them, a struggle ensued between him and the deceased.
5. The issues for determination are:
 - a. Whether the fight between the accused and the deceased was in the house of the accused or that of the deceased;
 - b. Whether the defence of provocation is available to the accused; and
 - c. Whether the offence of murder was established against any of the accused.
6. According to the evidence of Victor Barasa (PW1), he was attracted by some screams at about 7 p.m. He went out to the house of the deceased where the screams were coming from. He found the accused who was armed with a machete and was struggling with the deceased. The deceased was bleeding from the head and the right hand; he was unarmed.
7. The evidence of this witness was supported by that of corporal Geoffrey Jefwa (PW4) who said the incident was in the house of the deceased. After Victor Barasa (PW1) had reported the incident, they rushed to the scene and rescued the deceased from the accused who was still beating him.
8. I therefore find that contrary to the contention by the accused, the incident was in the house of the deceased.
9. Though the accused did not explicitly plead provocation, this is what his defence amounted to. He contended that when he returned home from Awendo, he found his wife and the deceased in his bed naked and were fast asleep. The door was only shut; he pushed to enter. So, what is provocation? Section 208 (1) of the Penal Code defines the term provocation as follows:

The term provocation means and includes, except as hereinafter stated any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

In the case of **Peter King'ori Mwangi & 2 others vs. Republic [2014] eKLR**, the Court of Appeal while addressing provocation as a defence had this to say;

We start from the premises, that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So what is provocation? In the case of Duffy (1949) 1 ALL ER 932; provocation was defined as “some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind ...

In the instant case, the evidence adduced by the prosecution does not support the contention by the accused.

10. The evidence of Victor Barasa (PW1) and that of corporal Geoffrey Jefwa (PW4) not only testified that the scene was in the house of the deceased, but that the door had been broken. PW4 said that when they visited the house of the deceased, they noted signs of struggles and blood.

11. When PW1 went to the scene, he found the accused armed with a machete and the deceased had cut wounds on the head and the hand.

12. I therefore make a finding that the accused did not react to provocation.

13. In the submission, it was contended that since on 22nd November 2017 the accused was in remand custody, he could not be responsible for the death of the deceased. In my view, this is a simplistic argument. Section 215 (1) of the Penal Code is clear on the limitation of time of death in which an accused can be held liable for an action that had caused injuries to the deceased. It provides:

A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.

When this section is read together with section 213 (a) of the Penal Code, this argument is rendered impotent. The section states:

A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases—

a. if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

14. The post mortem report indicate that the cause of death was chemical peritonitis secondary to gall bladder perforation due to blunt abdominal trauma. The evidence of corporal Geoffrey Jefwa (PW4) was supported by this medical finding. He testified that when they arrived at the scene, the accused was using blows and kicks to beat the deceased who had cut wounds as well.

15. For an offence of murder to be proved, malice aforethought must be shown to have existed. In **Black's Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called “abandoned and malignant heart”), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

16. In the instant case, I find that though the accused may have had a genuine belief that his wife had an affair with the deceased, he had time to seek redress without resorting to taking law into his hands. He plotted his action, armed himself with a machete and forcefully entered into the house of the deceased and viciously attacked him. This was premeditated.

17. I therefore, from the foregoing find that the offence of murder has been proved to the required standards. I find him guilty and accordingly convict him.

DELIVERED and SIGNED at BUSIA this 8th day of April, 2020

KIARIE WAWERU KIARIE

JUDGE