



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 18 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JEREMIAH ODHIAMBO BARASA.....ACCUSED

JUDGMENT

1. **Jeremiah Odhiambo Barasa** 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 7th day of August 2017, at **Nangoga** village, **Mudoma** sub-location of **Busia** County, murdered **Elizabeth Barasa Khakai**.
3. On the material day, the prosecution alleges that after a disagreement with the deceased, the accused doused her with a liquid and set her ablaze. She later succumbed to the injuries.
4. In his defence the accused contended that at the time of the incident he was not at home.
5. The issues for determination are:
 - a) Whether it was the accused was at home when the incident occurred.
 - b) Whether the accused was involved in setting the deceased ablaze; and
 - c) Whether the offence of murder was established.
6. According to the evidence of **Enoch Wandera (PW4)**, **Erick Barasa (PW5)** and **Brigit Akinyi (PW6)** who are the children of the deceased and the accused, their father was at home on the fateful night at the time the incident occurred. PW4 testified that when he arrived home from school at about 7 p.m. he found both his parents at home. **Erick Barasa (PW5)** on his part testified that at about 9 p.m. the accused called for their assistance for their mother had set herself on fire while **(PW6)** testified that the accused was at home at the time of the incident. From the evidence on record, I make a finding that the accused was at home when the incident occurred.
7. The evidence of **Enoch Wandera (PW4)**, alluded to a disagreement between his parents over a cow that the deceased had sold without consulting the accused. This was not elaborated and the court was only left to speculate that there was a disagreement and that that was the motive. The evidence of this witness was that at about 8.p.m. the accused shouted for help and alleged that the deceased had burnt herself. This witness was declared a hostile witness. In **Coles vs. Coles, (1866) L.R. 1P. &D. 70, 71**, Sir J.P. Wilde described a hostile witness as follows:

A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court.

In **Batala vs. Uganda [1974] E.A. 402** the Court of Appeal for Eastern Africa at page 405 said:

The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight.

In the instant case I will try to find what weight to attach to the evidence of this witness.

8. When this witness was cross-examined, he conceded that in his statement to the police he had recorded that when the deceased was screaming, the accused was armed with a slasher and he prevented them from going near the deceased. He also recorded that the accused told him that he was the next victim to die. His statement to the police was that the deceased said that it was the accused who poured paraffin on her and set her on fire. This witness therefore gave two versions of the incident. In the first version, the accused alleged that the deceased set herself on fire and in the second the deceased said the accused was the one who set her on fire.

9. The evidence of **Erick Barasa (PW5)** was that when they responded to the alarm, the accused told them that the deceased had set herself on fire. This is what he had recorded in his statement with the police.

10. **Brigit Akinyi (PW6)**, gave two versions of the incident. In her evidence in-chief, she narrated in details how she saw her father return home with two bottles of petrol. He then doused the deceased with the petrol and set her ablaze. During cross examination, she conceded that she had recorded in her statement with the police that she was woken up by her mother's screams when she was asking for help after she was already on fire. This therefore means that this witness is unreliable and that she deliberately lied either to the court or to the police.

11. From the evidence of these family members, we cannot be able to know what really transpired. This was further complicated by the reaction of the deceased when she interacted with other independent witnesses. The evidence of **Angeline Okumu (PW2)** who is the village elder, was that when she visited the deceased, she did not tell her the cause of the burns. In his evidence, **Silas Juma Oduori (PW3)** who is the area assistant chief, is that initially the deceased declined to tell him what had happened. When she was informed that he was the area assistant chief, she implicated the accused. I want to assume she knew her area assistant chief. The question that went unanswered from the evidence is why she was hesitant. Is there a possibility that she was hesitant for she had set herself ablaze? This fact could have been clarified had **Enoch Wandera (PW4)** not given two contradicting versions of the incident.

12. The prosecution evidence on record is contradictory in many aspects and no conviction can be founded on it. The offence of murder has not therefore been proved against the accused. I accordingly acquit him of the offence of murder and set him free unless if otherwise lawfully held.

DELIVERED AND SIGNED AT BUSIA THIS 17TH DAY OF SEPTEMBER, 2019

KIARIE WAWERU KIARIE

JUDGE