



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Barasa (Criminal Case E018 of 2023)
[2025] KEHC 311 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 311 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E018 OF 2023
WM MUSYOKA, J
JANUARY 24, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

SHADRACK MOSES BARASA ACCUSED

JUDGMENT

1. The accused, Shadrack Moses Barasa, faces a murder charge. It is alleged that, on 26th July 2023, at Kosera Village, Kamunoit Sub-Location, Amukura Location, Teso South Sub-County, within Busia County, he murdered Willimina Nafula Ochokolo, contrary to section 203, as read with section 204, of the Penal Code, Cap 63, Laws of Kenya. He denied the charges, and a trial ensued, where 8 witnesses testified.
2. PW1, Victor Ekwede Barasa, was the widower of the deceased, Willimina Nafula Ochokolo. He was at the farm, when some boys came to inform him that a house at his home had been burnt to the ground. He went to the scene but did not find both the accused and the deceased. Whereupon he went out looking for the accused. He traced him at a neighbouring home, drinking tea. He and the accused then went out to make a report to the authorities. The police came and doused the ashes with water. The ashes settled, and they discovered the body of the deceased covered by the debris. The body was removed, to the Kocholia mortuary. The accused was then arrested and locked up. PW1 mentioned that the accused had previously quarrelled with the deceased, on 25th January 2023, over cattle. PW2, Charles Barasa, was the boy who made the report of the burning house to PW1, upon being sent by the accused, who followed them to where PW1 was.
3. PW3, Selfa Adeke Akwede, a relative of both the accused and the deceased, was alerted about the burning of the house by the accused. She went to the scene, and inspected it, but she did not see anyone. She retreated to her home, where she had tea with her husband and the accused. PW1 then came at that stage. The local authorities, liguru, arrived, and the accused suggested that the deceased could have



- been burnt in the fire. Whereupon, they went to the scene, and looked more closely, and saw something that looked like the body of a person. They identified it as the body of the deceased. The police later came and arrested the accused.
4. PW4, Frankline Barasa Ochokolo, was a son of the deceased and a brother of the accused. He testified about a disagreement over crops belonging to the deceased, that were being destroyed by cattle belonging to the accused. He said that the accused was very bitter upon hearing that and had threatened to kill the deceased and to burn all the houses in the compound. Early the next morning, on 26th July 2023, he, PW4, was informed by a Joseph Barasa, that the accused was near their gate at 5.00 AM. PW4 went out and found the accused at the gate, who walked away without doing anything. PW4 thereafter went to school, only to learn later, after coming back from school, that their kitchen had burnt down, and their mother had died in that fire incident. He said that he did not know the person that lit the fire that consumed the kitchen.
 5. PW5, Francis Oketch, a medical officer, performed a post-mortem on the body of the deceased. He described the body as having been extensively burnt, to extent that it could not be said whether it was of a male or female. He talked of decomposition as having started, and the body being burnt beyond recognition. He noted a fracture on the head. He formed the opinion that the cause of death was the severe head injury, due to assault. He opined that the person was perhaps hit first, and the body burnt to destroy evidence. He stated that, although the body was extensively burnt, the burns on the head were superficial, hence the injuries on the head were easily noticeable. He said that there was no cut wound on the head, but a blunt trauma, from which he could not tell whether it was caused by a person.
 6. PW6, Salvin Cheruto Katukoi, was an analyst from the government laboratories. He explained that the police had presented him with a rungu and a cartilage from the deceased, to conduct a deoxyribonucleic acid (DNA) test, on the rungu and the cartilage, to ascertain whether the blood on the rungu matched the DNA profile generated from the cartilage. He stated that after doing the relevant tests he concluded that the DNA profile, generated from the bloodstains on the rungu, matched the DNA profile generated from the cartilage sample extracted from the deceased.
 7. PW7, No. 89977 Police Constable Harrison Kazungu, was the investigating officer. A report of an arson had been made. He went to the scene, and recovered a body, and arrested a suspect. His investigations established that the accused and the deceased had had a quarrel the previous night, threats had been made. A bloodstained rungu was recovered from the house of the accused, in the presence of PW1. He said that the accused was not present when the rungu was allegedly retrieved, and the said rungu was not dusted for fingerprints. He stated that he did not participate in the retrieval of the body from the burnt-out house, as it had been removed by the time he got into the scene. PW8, No. 109245 Police Constable Shem Aoko, produced photographs that had been taken at the scene, by an undisclosed person, but that had been given to him by PW7 for processing.
 8. I put the accused on his defence, on 20th September 2024. He testified on oath, on 26th November 2024, and called no witnesses. He conducted his defence in person. His initial Advocate, Ms. Sibika, had left Busia, and the Advocate who replaced her, Mr. Ouma, had skipped court several times, when the matter came up for defence hearing. On 9th October 2024, the accused requested to be allowed to conduct his own defence, at the next hearing, should his Advocate be unavailable.
 9. He testified that on 25th July 2023, in the evening, he had heard noises from the house of the deceased and PW1. They were quarrelling, and he did not go to the scene, as he had a history of disagreement with PW1, which ended up in court. He stated that at 10.00 AM on 26th July 2023, he met boys, who informed him that a house within his parents' compound had been burnt down. He looked in that direction, but he did not go to the scene, on account of the poor relationships that he had with his



folks. Instead he went to his aunt, PW3, and asked her whether what the boys had informed him was true. He and PW3 then went to the scene and established that the house had burnt down. They did not see anyone at the scene. He then sent the boys to go and inform PW1, and he followed them. When he asked PW1 about what had transpired, PW1 told him to leave alone issues that did not concern him. He was the one who went to report to the village elder. A report was later made to the local Assistant Chief, who directed that a report be made to the police. The police came, and disturbed the ashes, and the remains of the deceased were found. The body was retrieved, but he was thereafter arrested. He asserted that he had moved out of the home, and the person in charge of the houses within the compound was his father, PW1. He denied having any dispute with the deceased. He asserted that he never used to go to that boma, hence the story that he was there early in the morning of 26th July 2023, was a fabrication. He also denied owning any livestock. He also wondered how the prosecution presented a rungu, which had not been dusted for fingerprints.

10. The prosecution has filed written submissions. It is argued that the recorded evidence, particularly from PW2, PW3 and PW4, pointed to the accused as the perpetrator of the crime. Section 206 of the Criminal Procedure Code and Republic vs. Tubere s/o Ochen [1945] 12 EACA 63 are cited on what constitutes malice aforethought.
11. The elements, for the offence of murder, are proof of the death, the cause of it, the involvement of the accused in the causation, and the fact that the accused caused the death with malice aforethought.
12. On the death, there is ample proof that the deceased died. PW1 and PW3, who were his relatives, testified to seeing the dead body of the deceased, in the burnt-out house. PW5 conducted post-mortem on the dead body of the deceased.
13. On the cause of death, the medical officer of health, PW5, testified that the body had a blunt head fracture, leading him to opine that the head injury caused the death.
14. On the role of the accused in the causation, there is no direct evidence of the involvement of the accused in the causation of the death, for none of the prosecution witnesses attested to seeing or witnessing him cause the fatal injury on the deceased. The available evidence is circumstantial, based on 2 pieces of evidence, the alleged quarrel or disagreement between the accused and the deceased the previous day or night, and the bloodstained rungu allegedly recovered from his house.
15. So, did the accused have any role in the causation? Did he have any role in the infliction of the injuries that caused the death? The testimonies by PW1 and PW4 were geared towards establishing a motive on the part of the accused for killing his mother, the deceased. It was alleged that the accused had cattle, which were eating crops, specifically cassava, according to PW1, belonging to the deceased. The 2 disagreed, and the accused issued threats to kill and burn houses. So, when a house turned out burnt down, and the deceased dead in that house, it followed, according to PW1 and PW4, the accused had carried out his threats of the previous day or night.
16. Should PW1 and PW4 be believed? It emerged that there was bad blood within the family. PW1 and the accused did not get along well. Indeed, the accused had been prosecuted, following some incident in 2020, which ended up with him being placed on probation, and PW3 testified to attempting to get the 2 to reconcile. According to the accused, PW1 did not consider him to be a member of his family. Apparently, the accused left the family compound after the 2020 incident and resided away. PW4 and the accused did not get along also, although siblings, and, according to PW4, the accused was jealous that PW1 was catering for his education, but not that of the accused, hence the hatred. PW1 and PW3, although close family members, given that PW3 is a wife of a brother of PW1, also did not get along, on account of undisclosed differences. PW1 and the deceased did not also get along, for unclear reasons, and the 2 lived in separate houses, according to PW1.



17. The testimonies by PW1 and PW4 were that the accused moved out of home, and lived in his own compound, and never used to come home. That being the case, the 2 witnesses ought to have gone on to explain the circumstances under which the accused happened to be home on the night of 25th July 2023, when he allegedly had that disagreement with the deceased, in their presence. Under what circumstances was he at home on that one day just before the deceased died if he never used to come home. Secondly, PW1 was clear that that alleged disagreement happened in the presence of 3 of them, the accused, the deceased and PW1. There was no mention of the presence of PW4 and his sister. PW4 testified that he and his sister were also present. Those inconsistencies ought to go into the credibility of the testimonies.
18. Regarding the bloodstained rungu, the same was allegedly retrieved from the house of the accused person, by PW7. At the time of the recovery, the accused was not present. The person who was present was PW1, with whom the accused did not get along well. This bit of evidence, the retrieval of the bloodstained rungu, which PW6 testified had the blood of the deceased on it, would be the most incriminating bit of evidence against the accused person. For it would link him to the crime, for why would a rungu with the blood of the deceased be doing in his house, if he had nothing to do with her death.
19. There are several concerns about that rungu. The first is about this piece of evidence being retrieved or collected, from the alleged house of the accused person, in his absence. There are protocols about collection of incriminating evidence from the premises of a suspect. The same ought to be done in the presence of the suspect, in order to give credence to the whole exercise, and to avoid or dispel the perception that the evidence was planted on the suspect. In the instant case, the presence of the accused would have been critical to establish that the house, from which the piece of evidence was allegedly retrieved, belonged to the accused. He was not present during the exercise, to confirm to the detectives that the house, from which they were retrieving the evidence was in fact his, and to, secondly, confirm that that piece of evidence is actually retrieved from that house.
20. As indicated above, the evidence of the alleged retrieval of the bloody rungu from the house of the accused was critical, as it is the only material that would point to the complicity of the accused person in the crime. PW7 was not a member of the family of the accused and the deceased. He did not testify to have been familiar with that family prior to the incident, and the configuration of its homestead or compound, to be able to determine, without assistance of family members, which of the houses in the compound belonged to the accused, and which did not. He testified that he requested PW1 to take him round the compound to collect evidence, and he was taken round, and recovered the rungu from the house of the accused person within the same compound. What I find curious is that PW1, despite the critical importance of that recovery, did not testify on that rungu. He did not talk about seeing any bloodstained rungu, leave alone assisting PW7 recover it. Equally important, PW1, who allegedly helped PW7 recover the rungu from 1 of the houses in the compound, had testified that the accused had moved out of the compound or boma, after the 2020 incident, something which PW4 confirmed. So, where exactly was the rungu recovered from? Was it from a house of the accused within the compound or boma of PW1, from which he had moved out, or was it from the house that he had moved into after he moved out of the boma of PW1?
21. Equally critical is the fact that PW1 and the deceased were not on good terms, as they were not even occupying the same house, as a married couple is expected to. No one testified to seeing the accused and the deceased together or in proximity on 26th July 2023, when she was allegedly killed. None of the witnesses put them together. PW4 alleged to have had seen the accused at their gate at dawn, but the house was not burnt at that time. PW1 testified to seeing the deceased and talking to her on the morning of 26th July 2023, before he left for the farm, and he did not testify to have had seen the accused



- person at the scene at the time. For all practical purposes, PW1 was the last person to have been with the deceased before the house was reported to be burning, or to have burnt out or down.
22. The combination of the bad relations between PW1 and the deceased, and the fact that PW1 testified to having been with the deceased that morning, before she turned up dead, would suggest that PW1 was also a suspect. The evidence around the recovery of the bloodstained rungu should have been handled in a more circumspect manner. PW7 ought to have adopted a more open-minded approach to his investigations, given the bad blood within the family, for anyone who had bad blood with the deceased was her potential killer, and PW7 ought not have allowed himself to be led by the hand of PW1, who he should have treated as a suspect, in much the same way that he treated the accused person.
 23. The conclusion, I draw, therefore, from these facts, is that there is insufficient evidence that the accused person had any role in the causation, of the death of the deceased. The circumstantial evidence, allegedly arising from his alleged disagreement with the deceased, and the alleged recovery of the rungu from his house, is very weak, for purposes of supporting a case for the conviction of the accused, for the reasons that I have discussed above. The standard of proof in criminal cases is that the prosecution must establish its case against an accused person beyond reasonable doubt, and that for a conviction to be founded on circumstantial evidence, the evidence of the incriminating circumstances must inexorably point to the accused person. I do not have evidence, before me, beyond reasonable doubt, that the accused herein killed the deceased, and the circumstantial evidence, presented by the prosecution, to support the charge, does not inexorably point to guilt on the part of the accused. The whole case is founded on suspicion, and it is trite that suspicion, alone, without more, however strong it may be, cannot be a basis upon which to convict.
 24. The last consideration should be whether the accused caused that death with malice aforethought. What constitutes malice aforethought is defined in section 206 of the Penal Code. One, it is a direct intention to cause death, usually signified by a verbal expression of a desire to kill. Two, it is an intention to cause grievous harm, or to cause a bad injury, which results in death. This is usually inferred from the circumstances. Three, it is knowledge that the act causing death could cause death, or grievous harm, but the perpetrator is indifferent to the consequences. Four, it is an intention to commit a felony, such as assault or battery or whichever. These four would suffice for the purposes of this discussion.
 25. The question then is, were the injuries inflicted on the deceased so inflicted with an intention to kill her, or with an intention to cause to her a bad injury, or were they caused recklessly and indifferently, or was the intention to commit some sort of felony? The killer blow was the fracture to the head, which led to bleeding into the brain, according to PW5. There is ample case law that an injury caused to the skull, which houses a vital organ, the brain, would be deemed, should it cause death, to have been so inflicted with the intention of causing death. The injury in this case was to the head, which houses the skull. A blow, to that area or region of the body, must have been calculated and intended to cause death, or to cause a very bad injury. I am persuaded that the death was caused with malice aforethought.
 26. None of the witnesses, presented by the prosecution, were present when the injuries were inflicted. PW1 and PW3 saw the deceased after she had already expired. The deceased died before she could give a narration, to anyone, of what had transpired. The case is, therefore, built on circumstantial evidence, as I have indicated above. It is trite that circumstantial evidence must inexorably or irresistibly point to the guilt of the accused, for there to be a conviction founded on it. Is that the case here? No. There was no evidence placing the accused at the scene where and when the fatal injuries happened. Secondly, and as discussed above, the circumstantial evidence, based on the alleged differences between the accused and the deceased, the alleged threats uttered by the accused towards the deceased, and the alleged finding of the bloodstained rungu at the house of the accused, did not inexorably or irresistibly point to the accused person having committed the heinous crime, for there were other possible links that



the police did not pursue or investigate. It could be that the investigations were not exhaustively done, or the prosecution was not properly mounted. Overall, therefore, there is no evidence, whatsoever, to inexorably or irresistibly connect the accused to the death of the deceased, for it to be said that he caused the death with malice aforethought.

27. In the end, it is my finding and holding that the offence of murder has not been sufficiently proved, against the accused person herein, and I do hereby find him not guilty, and acquit him, under section 322 of the Criminal Procedure Code, Cap 75, Laws of Kenya, of the murder of Willimina Nafula Ochokolo, contrary to section 203, as read with section 204, of the Penal Code. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 24TH DAY OF JANUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Chepkonga and Mr. Onanda, instructed by the Director of Public Prosecutions, for the State.

Ms. Sibika and Mr. Ouma, Advocates for the accused person.

