



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 13 OF 2019

THE REPUBLIC.....PROSECUTOR

=VRS=

BMS ALIAS HEADBOY.....ACCUSED

JUDGEMENT

The accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence as set out in the information are that on 3rd July 2019 at Kibirichi village in Masaba North Sub-county within Nyamira County the accused murdered AMOS MOKAYA.

The accused pleaded not guilty to the charge.

Briefly the prosecution's case is that on the material day at about 10am the deceased and his friend AJ (Pw1) were playing truant. Initially when they met they went and played at the home of the deceased before moving to the home of Pw1. It was there that they stumbled upon the accused who they commonly referred to as Headboy, carrying a television set. According to Pw1 the accused was coming from the direction of "Director's" house which was about 100 metres from his (Pw1's) home. Pw1 stated that the accused approached them and told Amos (the deceased) to accompany him to the latrine as he wanted to give him something to keep for him. Pw1 alleged that the accused then asked him to go fetch something for him at the fence of Director's compound but because the accused did not specify what it was he was to collect he did not go. The accused then left with the deceased to the latrine which was about 50 metres from where they were. Pw1 stated that he observed the deceased entering the latrine with the accused but ran away and hid behind some trees when he saw the accused grab the deceased by the neck with one hand. Pw1 stated that the accused had a phone in the other hand and that he hid a distance of roughly fifty metres away. He stated that when he hid behind the trees he could no longer see what was happening at the latrine. He remained in the woods for a while then ran to their house and hid in the ceiling. Asked why he went to hide he stated that it was because of fear of being killed by Headboy – the accused. He stated that he hid in the ceiling for a long time before he went out through a window. According to him there was nobody else at home. When he got out of the house he went to the toilet/latrine to look for the deceased. There was nobody there but when he peeped into the latrine through a crack on the wall he saw a leg. He ran off and told the deceased's mother Beatrice Kwamboka Nyamora (Pw9) that the deceased had been killed and thrown into the toilet and he had seen his leg. They went back to the toilet with her and when she saw it was true she started screaming. Her screams attracted people and soon a crowd gathered at the latrine. Among those who went to the scene were a neighbour Stephen Nyakundi (Pw2) and Assistant Chief Moses Onyango Onsare (Pw5) both of who confirmed that they indeed saw a child's body in the pit latrine and although at first they could not identify whose it was because it was submerged in the faeces they did so when police officers retrieved it from the pit and cleaned it with water. Pw5 testified that the body had injuries on the head and that he identified it as that of Amos. He stated that while at the scene he inquired if anybody might have witnessed the occurrence and was referred to J (Pw1) who told him that Amos was killed by Headboy (the accused). He immediately sent Pw2 to look for the accused. Pw2 enlisted the assistance of a fellow villager Peter Onyango Omwenga (Pw3) and using Pw3's motor cycle they tracked the accused to Keroka and when he alighted from a vehicle he had boarded at Birongo they apprehended him and took him to Keroka Police Station.

Police officers IP Marucha (Pw8) of Scenes of Crime Nyamira County and Sgt. David Muriithi (Pw10) of DCI Nyamira who is the investigating officer in this case, had by then arrived at the scene and had with the help of members of the public pulled the body out of the pit. The deceased's mother identified the body and after (Pw8) had taken photographs of the body and conducted the other necessary preliminaries they carried the body to Gucha Hospital Mortuary. Thereafter Sgt. Muriithi (Pw10) recorded statements from the witnesses.

On 9th July 2019 Naftali Onsinyo Okore (Pw6) an uncle of the deceased identified the body to Dr. Morebu Peter Momanyi (Pw4) who conducted a post mortem and opined that the cause of death was: -

- 1. Severe injury due to blunt injury and trauma to the head.**
- 2. Asphyxia due to manual strangulation.**

Pw4 outlined the injuries on the body as bruises on the anterior neck, crashed trachea and thyroid gland, penetrating injury on the occipital region measuring 2 x 2 cm and global haematoma on the back of the head with a hole measuring 2 x 2 cm from which blood was oozing. The investigating officer also interrogated Pamela Nyanchama Mochache from whose house it was alleged the accused had been seen by Pw1 carrying a television set. She testified in this case as Pw7 and she confirmed that on the material day she had returned to her house from the school at 10.30am and noticed that her television set was not in its usual place. The television set was among the exhibits that were produced in evidence. After collecting all the evidence, Sgt. Muriithi (Pw10) charged the accused with this offence.

The accused was represented by Mr. Kaba Advocate. When this court put him on his defence he elected to give evidence on oath and to call one other witness. He testified that he is a Form 3 student at [particulars withheld] Secondary School; that on the material day he had gone to school at 7 am but was chased away because he was not in school uniform. He stated that he went home and was given money by his mother to buy uniform at Birongo. He stated that as he was purchasing the uniform one David Nyakiongora told him that the uniform there was of poor quality. He stated that the said David Nyakiongora invited him to board his motor cycle so he could go buy the uniform in Keroka but on arrival at Keroka he told him he would make uniform at the police station. He stated that when they arrived at the police station David shooed him to a bench and asked him for the money he would have bought uniform with. He then told him (accused) that the person who had killed Amos was dressed in red. He testified that he stayed at the police station for a week and then he was taken to the hospital but nothing was done there. After that he was taken back to the police station and was told to record a statement. He alleged that David Nyakiongora said he (accused) was a foolish child and recorded a statement to the effect that he (accused) had killed someone. He contended that David Nyakiongora gave evidence in this case. In cross examination he stated that he left for Birongo at 7.30am aboard a motor cycle and got there at 8am. He also stated that he knew the deceased as his father had purchased a parcel of land near the deceased's home. He also stated that he knew J (Pw1) although there was no kinship between them. He contended that he used to see Pw1 on the road and at the river where they fetch water. He alleged to have last seen Amos on 4th June when he went to his father's parcel of land. He further stated that David did not disclose why he was arresting him. He also stated that he had seen David at the tea buying centre the previous week and that he knew Pamela (Pw7) used to live in David's house. He however stated that although he knew her house he had never been there. His mother TNS (Dw1) testified that on 3rd July 2019 at 7am she sent him to Keroka to buy uniform.

The issues for determination and which the prosecution was required to prove beyond reasonable doubt are:

- a. **The death of the deceased and its cause.**
- b. **That the death was as a result of the unlawful act of the accused.**
- c. **That the same was actuated by malice aforethought.**

The **death of the deceased is not in dispute**. All the witnesses who saw the body retrieved from the pit latrine on 3rd July 2019 confirmed to this court that it was the body of the deceased. Among those witnesses were his mother (Pw9) and uncle Naftali Onsinyo (Pw6) who identified the body to Dr. Morebu (Pw4) for purposes of post mortem. The evidence of Pw9 and Pw6 puts to rest the identity of the child found dead in the pit latrine and proves the fact of death of the deceased.

The police officers IP Marucha (Pw8) and Sgt. David Muriithi (Pw10) confirmed that the body was retrieved from the pit latrine. These two are independent witnesses who had no interest in lying to the court and therefore I believed them. They testified that after pulling out the body they took it to Gucha Hospital Mortuary to await a post mortem. Pw8 produced photographs which he took at the scene and which corroborates the evidence of the civilian witnesses. Dr. Morebu (Pw4) performed a post mortem on the body of the deceased roughly a week after the body was pulled out from the latrine. He noted injuries on the body among them a crashed trachea and thyroid gland, a penetrating injury on the occipital region measuring 2 x 2cm and a global haematoma on the head with a hole measuring 2 x 2 cm with blood oozing from the site. This made him to conclude that the cause of death was severe head injury due to blunt force and trauma and asphyxia due to strangulation. It is clear from this opinion that the deceased was assaulted and strangled before being thrown into the pit latrine. I find therefore that the cause of death was by a human hand and by an unlawful act as there is no evidence to demonstrate the deceased provoked the attacker who then acted in self-defence.

The **next issue for determination is whether the death was by an unlawful act of the accused**. The case against the accused revolves around the testimony of JA a twelve-year-old who gave unsworn evidence. It was his evidence that he saw the accused person lead the deceased to the pit latrine and even saw him hold the deceased by the neck. According to him this happened upon them stumbling upon the accused person who had come from the direction of "Director's" house carrying a television. Pw1 stated that there was nobody else in that homestead hence inferring that whatever happened in the pit latrine must have been done by the accused. He stated that out of fear he hid initially in the woods and afterwards in the ceiling of their house. Apart from seeing the accused leading the deceased to the toilet he stated that he saw him hold the deceased by the neck with one hand. It is instructive that he did not state that he saw the accused strangling or killing the deceased. In fact, his evidence was that when he hid behind the trees he could no longer see what was happening. The evidence against the accused is therefore circumstantial and also evidence of a single identifying witness.

The principles regarding evidence of a single witness are settled. In the case of **Maitanyi v Republic [1986] KLR 198** the Court of Appeal reiterated these principles when it held: -

"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the

court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

I have carefully considered the evidence of J (Pw1) in light of the above test and I am satisfied that he positively identified the accused person as the assailant. Firstly, it was 10 o'clock in the morning hence in broad daylight. Secondly, Pw1 knew the accused person very well, a fact which the accused himself conceded. Thirdly, they had a brief conversation with the accused person when he asked him (Pw1) to get something for him from Director's house and this gave him the opportunity to see him even more clearly. Fourthly, Pw1's evidence finds corroboration in other evidence. For instance, his evidence that the accused emerged from the direction of Director's house with a television set was corroborated by the evidence of Pamela (Pw7) who the accused conceded resided in Director's house. Pw7 testified that when she went back to her house from the school at about 10.30am she noticed that her television was not in its usual place meaning that it must have been moved. Although the television was not put to Pw1 in court so that he could identify it, Pw7 positively identified it in court and I am positive therefore that there is proof beyond reasonable doubt that it had been taken from her house by the accused person and that Pw1's evidence that he saw the accused with a television is credible and trustworthy. I am satisfied that although Pw1 is a child and gave unsworn evidence, he positively identified the accused person. Pw9 (the deceased's mother) confirmed that she was the first person he reported the occurrence to and that he told her that it was the accused who had killed the deceased. All the other witnesses testified that he mentioned the name of the accused at the very onset. The Assistant Chief (Pw5) in fact sent out people to go after the accused and there is evidence from Pw3 and Pw5 that they pursued him and caught up with him at Keroka a few hours later. In his defence the accused admitted that he was arrested in Keroka. His reason for having gone there is however suspect and is not convincing at all. If he indeed had gone to purchase uniform, then it was not at 7am as at that time he alleges to have been in school. Moreover, his testimony differed with that of his mother regarding the exact place she had told him to go buy uniform. Pw2 and Pw6 stated that they first heard that he had gone to Birongo but when they went there they learnt he had boarded a vehicle to take him to Keroka. They gave credible evidence that they followed the vehicle and when it dropped him they apprehended him and took him to the police station. He too gave evidence to that effect and so I believe them and find it a fact that his trip to Keroka was to flee the scene but not buy uniform. Pw1 clearly knew what he had seen and was not afraid to disclose it and I find his evidence reliable. I am also satisfied that the circumstances favoured a positive identification and there is no possibility he was mistaken.

As for the evidence being circumstantial because the witness (Pw1) did not actually see the accused killing the deceased I find the fact that the accused was the one that led the deceased to the pit latrine and the fact that there was nobody else in that homestead save for him and the two boys coupled with his fleeing to Keroka point irresistibly to him as the killer. These facts are incompatible with his innocence and are incapable of any other reasonable hypothesis than that of his guilt and I find that the fact of him being the killer was proved beyond reasonable doubt bearing in mind the case of **Miller v Minister of Pensions [1947] 2 ALLER 372 – 373** where it was stated: -

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law could fail to protect the community if it admitted fanciful possibilities to deflect (defeat?) the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of court it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

On the issue of malice aforethought the court heard that the deceased died as a result of a severe injury to the head due to blunt trauma and lack of air due to strangulation. It is evident from the cause of death that the accused first assaulted and strangled the deceased then threw him into the pit latrine. This clearly is evidence that he had an intention to kill the deceased. The circumstances from which malice aforethought may be established are set out in Section 206 of the Penal Code and this case fits those circumstances. I find therefore that the case against the accused person was proved beyond reasonable doubt. I find him guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

Signed, dated and delivered in Kisii Main Prison this 30th day of April 2020.

E. N. MAINA

JUDGE