



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 43 OF 2014

REPUBLICPROSECUTOR

VERSUS

EUGINE ODHIAMBO ALEXANDER AMOLLO ACCUSED

JUDGMENT

The accused was charged with Murder contrary to section 203 as read with 204 of the Penal Code. The Information states that on 12th May 2014 at [particulars withheld] Academy, in Kisumu County, he murdered one C A O, Deceased.

The accused pleaded not guilty to the charge.

The court heard that the deceased was among a group of children who were admitted to [particulars withheld] Academy in the month of May 2014. The children were from a place called Vihiga County. It so happened that the proprietor of the school, the accused's mother, hails from Masana and the accused was posted there as an Administrator. The children referred to him as Teacher or Headmaster. The children were admitted to the school on 9th May 2014. On 12th May 2014 they were distributed to their respective classes by a teacher called W. The deceased is said to have been admitted to class 4 then to Nursey as he could not write the word Adila. Teacher W allegedly became impatient and beat the deceased before calling the accused. It is not clear who between W and the accused took the deceased to the accused's office but the next thing the children heard were screams. They went to see what was happening and according to D O (PW2) A K (PW3), the sister of the deceased, and Roseline Kadenge (PW6), the caregiver of the children, the accused hit the deceased on the head with his hand, then kicked him with his boots. The deceased fell on the door and was wounded on the head by a hinge. It is alleged that the accused did not stop at that; that he proceeded to kick the deceased in the belly and to punish him by asking him to do some gardening. That evening the deceased developed a swelling on the head and could not eat.

The next day he was taken to Jaramogi Oginga Odinga Hospital in Kisumu. Three days later he succumbed to what Dr Solomon Sava, PW5, the pathologist who performed the post-mortem on the body of the deceased described as complications arising from severe head injury. The accused was then arrested and subsequently charged with this offence.

The accused made a sworn statement and called six witnesses. He admitted that at the material time he was an administrator at [particulars withheld] Academy. He had five teachers working under him and his responsibility was to ensure that the pupils had stationery, uniform and were well fed. He was also in-charge of Academics. He recalled that the school opened on Monday although the pupils had arrived on a Friday and that there were 57 pupils in total. He was housed in one of the blocks at the school. He

testified that at the time of admission the deceased who was about 14 years old complained he was ill; that he had a fever, headache and loss of appetite. Each pupil was to undergo an interview and so come Monday he left the teachers to take over only to return to a commotion by a boy who claimed to be in class 5 yet he could not even say the alphabet. A teacher called M was threatening to demote him to Nursery. He stated that he disagreed with the teacher and took the boy to his office next to the kitchen. He ordered the boy to kneel down and asked him to explain why he could not even write his own name. According to him the boy looked weak and was arrogant. He therefore decided not to inflict corporal punishment and gave him a 5 kilogrammes bag of maize to plant. When the other pupils saw what he was doing they allegedly accused him of having fun while they were in class and offered to help him. The accused testified that the worst he did to the boy was to pinch him. He stated that later in the evening he even went to buy groceries with him and promised him that he would go to the appropriate class the next day. Come the next day the boy had fever and joint pains and concluding it was malaria the accused took him to Miwani Clinic in the company of 5 other boys who were also unwell. They were all diagnosed with malaria due to change of environment. Despite taking the medication the deceased and another of the boys did not recover and when he informed the proprietor of the school he was advised to take them to Kisumu. The next day the matron took them to Kisumu District Hospital and the deceased was admitted. Two days later he returned to the school in a much better condition. He however refused to take his medicine preferring to take a herbal concoction brought by his parents. He soon improved and his tonsils and appetite got better. Two days later the concoction stopped working and he had to go to the toilet more frequently. This irritated the matron forcing the accused to take him in. He got worse and was admitted to hospital yet again. He stated that the boy's privates were swollen and he was in pain when passing urine. An X-ray was done and he continued improving until he died.

Victor Onyango (DW1), Lorna Abok Ojien (DW2) and Jackson Owino Orwa (DW6) testified that they knew the deceased well as they were from his village. They testified that he was a known delinquent and that immediately prior to going to Adila he had been beaten by his father for stealing Kshs. 200/= shillings and had suffered injuries to his face, mouth, forehead and private parts. They contended that he in fact wore a jacket with a hood to hide his swollen face. He had dropped out of school and was going back after a year. DW2 stated that she was not happy as the deceased was big and was going to be a problem for the other children. The two witnesses disputed that the accused caused the death of the deceased and (DW6) alleged that prior to leaving for Adila the boy was almost lynched but he rescued him.

Paul Onyango Kakedi (DW3) lived at the school. He testified that on 23rd May 2014 the deceased showed him his private parts which were swollen and told him they were getting worse. The deceased told him the accused had left and he felt shy to tell the female teachers. He did it on his behalf and later informed the accused about it and the boy was brought to Kisumu. Three days later he heard the boy had died. He stated that he was away from the school most of the time and never saw the accused beat the child. He stated that the boy had a swollen cheek and this was unusual.

Connie Adhiambo Amolo (DW4), the school's proprietor and benefactor of the children, testified that on the day the children were reporting she sat next to the deceased in the vehicle. He was not taking out his jacket so she inquired if he was sick. He answered in the affirmative. She nevertheless proceeded to take them to the school. She testified that on 16th May she received a call concerning two children who were not well from the accused and that she took them to Kisumu District Hospital. M got better but she remained with C, the deceased, as he was not improving. He in fact asked that the matron bring him the concoction he had received from home. She stayed with him for two days and he seemed to improve and although his stomach was aching he asked to go back to school. She sent him back to the school with the drugs. She testified that the relationship between C and the accused was normal and C's only complaint was that he had been caned by M for taking an extra plate of food. Three days after he returned to school she was informed he needed urgent intervention and she had him brought to Kisumu. She stated that he was in a lot of pain and could not pass urine properly. An x-ray was taken at Jaramogi which revealed he had a hernia and he was admitted but come Monday he died. She told the court that she did not allow corporal punishment and that as far as she was concerned the cause of the deceased's death was hernia that affected his balls. Like DW1 and DW2 she claimed that the boy had a swollen face when he reported to school.

In summing up Mr Indimuli, Advocate for the accused, submitted that to succeed the prosecution must prove the actus reus and the mens rea and in this case that was not done. He stated that the star witness did not identify herself and that the account she gave was a fabrication. He contended that the prosecution's omission to call Winnie was fatal as she was a crucial witness and also because the investigating officer had intimated to court that she may have had a hand in the death of the deceased. He submitted that it is trite that the omission to call such a crucial witness casts doubt on the prosecution's case and the doubt should be resolved in the accused's favour. Mr. Indimuli further submitted that from the evidence of the defence witnesses it was clear that the deceased was a delinquent who had several run ins with the law and had actually been assaulted. He contended that the evidence of the prosecution witnesses did not add up more so that concerning the injury on the head of the deceased. Mr. Indimuli submitted that the prosecution should have exhibited pictures of the lock or the lock itself so as to give this court a feel of the scene. He contended that the reason that was not done was because it would have totally debunked the narrative by the prosecution. Citing **Republic V Simon Mbutia Kimunya [2014]eKLR** Mr. Indimuli submitted that suspicion cannot found a conviction and further that the injuries suffered by the deceased were more likely to have been caused by someone other than the accused. He urged this court to find that the case against the accused was not proved beyond reasonable doubt and acquit him.

Mr. Muia, Prosecution Counsel, preferred to rely on the evidence on record and did not make any submissions.

For a charge of murder to succeed the prosecution must not only prove that the death of the deceased was the result of an unlawful act of the accused (**actus reus**) but that it was of malice aforethought (**mens rea**). The onus of proof is as, in all criminal cases, beyond reasonable doubt.

Having evaluated the evidence by both sides I am satisfied that the accused caused the death of the deceased through an unlawful act. Contrary to the submission of Counsel for the accused Roseline (PW6) was not the star witness. The only thing that made her stand out was the fact that she became a protected witness because of threats to her life. The assault meted out on the deceased by the accused was not witnessed by one but three witnesses. These were Dennis Omondi (PW2), A k (PW2) and Roseline Kadenge (PW6). These witnesses narrated how the accused person upon seeing that the deceased could not write his name or read the alphabet took him to his office and beat him. They testified that in the course of his doing so the deceased fell and banged his head on a hinge on the door thereby sustaining a laceration. These witnesses and the father of the deceased were categorical that the deceased did not have any injuries before this incident. I believed these witnesses. The accused himself admitted **One**, that the pupils were interviewed **Two**, that the deceased could not read and it was desired to take him to the nursery class, **Three** that he got the deceased from the class and took him to his office. It was also his own evidence that he ordered the boy to kneel down and to explain why he could not write. Most important was his admission that he pinched the deceased. He also admitted that he punished the boy and gave him a bag of maize to plant. His own testimony offers corroboration to the three eye witnesses in effect confirming they were truthful and trustworthy.

On the other hand the contrary the defence was inconsistent and contradictory and seemed to have been rehearsed to save the accused's skin. None of the defence witnesses were at the school unlike those of the prosecution. Although they allege the deceased had injuries prior to going to the school they could not agree on the nature and extent of the said injuries. DW1 and DW2 alleged the boy's injuries were inflicted by his own father. DW5 on his part testified that the boy was almost lynched but he rescued him. It is strange that although DW5 claimed he hailed from the same village as the deceased and was the village elder he did not know about the beating the deceased had allegedly received from his father. It is also instructive that although he saw the boy immediately prior to his going to school he did not notice the injuries alluded to by DW1 and DW2. It is my finding that these witnesses were not credible. The reason DW5 did not talk about the injuries alluded to by DW1 and DW2 is that there were no injuries. My finding is confirmed by the evidence of the other two defence witnesses. DW3 and DW4 gave a different account altogether with the former stating that on the day the children arrived in school the boy showed him his swollen privates. DW4 stated that the boy had a hernia. Both their accounts cannot be true. In regard to DW3 whereas he alleges to have informed the accused of the boy's condition the

accused himself did not mention it. Instead he spoke of the deceased's swollen tonsils. His own evidence was that the boy's privates became swollen two days after being discharged from hospital. Had DW3 seen the boy's swollen privates and told the accused he would not have second guessed what was ailing him but would have taken him to hospital for that. My finding is that DW3 did not tell the accused the boy had swollen private parts as he had not seen them. As for the accused's mother DW4 her evidence that she sat next to the deceased in the car and all she noticed was that he was not taking out his jacket is not conceivable. This is a woman who was taking the children to her own school and it is unbelievable that she did not notice the serious injuries on the boy's head and face if any. It is also inconceivable that she could have left such a weak child, as they paint of the deceased, at the school and gone home. My finding is that the only reason she was able to do so was because the child was in good health. Whereas it is never the duty of the accused to prove his innocence in this case it would have helped if DW4 produced the X-ray and prescriptions that were issued to the deceased and which could have proved that the boy died from a hernia. As it is there is no evidence cogent enough to rebut the finding of Dr. Zava (PW5) that the cause of death was complications arising from severe head injury. Indeed Dr. Sava found injuries on the body of the deceased which are consistent with the evidence of the eye witnesses. The assault on the deceased by the accused was unlawful. DW4, the proprietor of the school testified that she did not advocate corporal punishment and indeed such punishment is outlawed in our schools. It is not just cruel but also illegal. I therefore find that the death of the deceased was caused by the unlawful act of the accused person.

Was it with malice aforethought? Malice aforethought is defined as follows in Section 206 of the Penal Code-

“206. 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.”**

The accused's case does not fit any of those definitions. There is no evidence that he had formed an intention to kill the deceased or to occasion him grievous harm. It was also not proved that he had knowledge that the beating could probably cause the death of or grievous harm to the deceased. Still it is an offence to unlawfully cause the death of another. In the premises I find him guilty of manslaughter contrary to Section 202 (as read with Section 205 of the Penal Code and convict him accordingly.

Signed, dated and delivered at Kisumu this 21st day of September 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Kimani for the State

Mr. Indimuli for Accused person

Accused Person

Court Assistant – Serah Sidera