

multiple bruises on the head, back, hand, abdominal wall and on the legs. It is the head injury (occipital sub-dural haematoma) that caused the death of the deceased.

The accused's mental status was assessed and he was found fit to plead. He was aged around 19 years. PW7 was the investigating officer. He visited the home of PW1 and removed the body of the deceased to the mortuary. The witness also re-arrested the accused from PW6 and witnessed the post-mortem. He sent the accused for mental assessment.

The accused person in defence denied the offence. He testified that on request of PW1, he accompanied him to pick the deceased from the home of PW4 from 1.00 p.m. On their way back at around 3.30 p.m the accused parted with the deceased and his father. The accused went to his home which is about five (5) kilometres away. PW1 came to the house of accused at around midnight accompanied by his brother. PW1 said his wife was sick and he needed assistance from the accused to take her to hospital. The accused went with PW1 to his house where he found the deceased already dead. The accused denied assaulting the deceased.

PW1 and accused had picked the deceased from his grandmother's home on two occasions. The material day was the third (3rd) time. The mother of deceased PW2 confirmed that her husband PW1 was not happy with the boy's habitual disappearance from home. PW4 and PW5 also corroborated that evidence. As PW1 and the accused escorted the deceased home, there is evidence that he was assaulted. PW5 confirmed that at the time she handed over the deceased to his father (PW1), the boy was in good health. PW2 confirmed that when the boy reached home he was in a poor state of health. He had a swollen head and was in pain. The accused was in the company of the deceased holding him with one hand and a whip on the other. The accused admitted to PW2 that he had beaten the deceased. When the village elder PW6 questioned the accused, he told the witness that PW1 had instructed him (accused) to discipline the child.

The accused handed over to PW3 a piece of broken stick which he said he had used on the deceased. The accused said the stick had broken in the course of disciplining the deceased.

I did not believe the defence of the accused that he parted with PW1 on the way and went to his own home leaving PW1 with the deceased. There is evidence that PW2 saw the accused arrived at her home with the deceased who was in a critical condition. It was not suggested that PW2 had anything to gain by not telling the court the truth. The defence witness (DW2) said he saw accused return to his home at around 5.00 p.m. The journey from the home of PW4 and PW5 started at 3.30 p.m. The home of PW1 was between 1 to 3 kilometres from that of PW4 according too the witnesses. That of accused was 4 to 5 kilometres away from that of PW1. It is possible for a person who is physically fit to walk a distance of about six (6) kilometres in about two (2) hours. The only inference which is supported by evidence is that the accused first escorted deceased home leaving PW1 behind and then he left to go to his own home. None of these witnesses who gave the time of events to the court said they checked their watches or other time gadgets at the material time. Little did they know that the time factor was to become material later. The time given by all of them was estimated or approximated. The accused may have reached his home around 6.00 p.m or later. The events are more of essence here than the time.

The defence in their submissions raised a few issues. It faulted the prosecution for not calling two boys who met PW1 on his way home the material day. The two boys told him they had seen the accused carrying the deceased in his arms as the deceased cried. PW1 talked about this in cross-examination, and it is not known whether PW1 informed the investigating officer about the two boys. In this regard, I am convinced that what matters is not the large number of witnesses but the cogent evidence which is adduced.

About the person who sold the vegetables to PW1, I do not think that it caused any prejudice for PW1 to fail to give his particulars. PW1 explained that he found the vegetables displayed for sale on the road. The discrepancy whether PW1 used the rear or the front door to enter the house when he returned home is not material. On the broken stick, the defence argued that it was designed to strengthen the evidence against accused. I found the witness (PW6) who recovered the stick and testified about it credible. It is the accused himself who gave it the witness and mitigated that PW1 had instructed him to discipline the child.

The evidence in this case against the accused is circumstantial. None of the witnesses saw the accused inflict the injury which resulted in the death of the deceased. However, the facts analysed above point guilt more than innocence at the accused person. The accused person escorted deceased from his grandmother's home to his parent's home. At the time the deceased left, he was in good health but reached home in a state of poor health. He could not walk by himself. On arrival at his parents' home, the

accused was still with the deceased. He supported him by one hand while the other held a whip. PW2 confirmed that the deceased on arrival had a swollen head and bruises all over the body. The deceased died a few hours later of the injuries inflicted on him as confirmed by the doctor.

The accused told PW6 that he was disciplining the child and handed over a piece of broken stick to the witness. PW1 confirmed that the deceased was in the custody of the accused for the last part of the journey from Tunya to his home.

From these facts, I find that the only plausible conclusion that can be made is that the accused was responsible for the death of the deceased. The circumstantial evidence is so clear and overwhelming against the accused person. The defence did not in any way dislodge this cogent evidence. I found the prosecution witness credible. I am satisfied that the prosecution have proved beyond reasonable doubt that the accused person fatally injured the deceased.

The evidence of the doctor shows that the accused inflicted injuries of grave nature to the accused. The head injury which led to internal bleeding brought the life of the deceased to an end. The deceased was a child of tender years only aged eight (8) at the time of his death. The manner in which the accused injured the deceased is evident that he had the intention of killing him. There was no provocation from the deceased. The beating took place on a stretch of about 500 metres between the home of PW1 and the place where the accused parted with the father of the boy. It appears that there was continuous beating which resulted in several injuries. This was not the way a reasonable person would discipline an eight (8) year old child. It is my finding that the evidence on record proves malice aforethought on the part of the accused. I find him guilty of murder and convict him accordingly under section 203 as read with 204 of the Penal Code. The accused is hereby sentenced to death.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 27th day of July 2010 in the presence of the accused, the State Counsel Mr. Ogoti and M/s Luyali for Milimo for the accused.

F. N. MUCHEMI
JUDGE