



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 7 OF 2018

REPUBLIC.....PROSECUTION

-VERSUS-

JMN.....ACCUSED

JUDGMENT

1. **JMN**, the accused herein, is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on the 5th day of February 2018 in Kilungu sub-county within Makueni County, he murdered **MK**. The accused pleaded not guilty to the offence and the case proceeded to full hearing with the prosecution calling nine witnesses.

2. A summary of the evidence is that at the material time, the accused, the deceased and three other minors namely **PW1 - MMC**, **PW2 - EK** and **PW3 - WM** were all classmates at [particulars withheld] primary school.

3. **PW1 MMC** is the deceased's sister. She testified that on the morning of 5th February 2018, she saw the accused with a stick in class placed under his desk. At 11.00am, the accused beat the deceased with the said stick and the deceased reported him to the teacher. That evening while they were going home from school together with their other brother – (**PW2**), she saw the accused hit the deceased again on the waist with the stick. Thereafter, the accused pushed the deceased causing him to fall down and hit his head on a stone. She saw them well since they were less than 10 meters behind them.

4. When they got home, she told their mother (**PW4**) that the deceased, who complained of being in pain, had been beaten by the accused. She also told **PW4** that the accused had formed a habit of beating the deceased. On two occasions while leaving school, including the material day after beating the deceased in class, she had heard the accused saying that he would kill. She said she has never collided with the accused.

5. In cross examination, she stated that the deceased was not the accused person's nearest desk mate. Whenever they had a problem in class, they would report to the teacher on duty. She saw the deceased talking to their teacher after being beaten in class but the teacher did not take away the stick. The accused hit the deceased with the same stick that evening. She however did not report the incident or the threat to kill to the teacher. She confirmed that the deceased had an eye problem and could not see well.

6. In re-examination, she said that she did not report the accused's actions because she feared that he would beat her too.

7. **PW2 – (EK)** the deceased's brother gave evidence similar to that of **PW1**. He added that the accused had been hiding the stick which was one foot long and about three inches wide at a road within the school. He said the deceased got injured after being hit and he started crying as the accused ran away with his stick. They did not chase after him. The accused had also beaten the deceased earlier that day at around 1.00pm when they were eating. He was reported to the teacher who punished him.

8. In cross examination, **PW2** stated that he never saw the accused carrying any weapon. The deceased was bleeding on the waist where he had been hit. **PW1**, him and **PW3** carried the deceased up to home after the incident. They found their mum – (**PW4**) at home and told her that the deceased had been beaten but did not tell her that he had fallen and hit his head. They also did not report the incident to the school.

9. **PW3 (WM)** also gave a similar account. He added that the accused hit the deceased with a piece of wood measuring about 12 feet and 3 inches as the deceased carried water while climbing a steep slope. **PW1**, **PW2** and him were able to see since they were walking behind the deceased. The three of them carried the deceased home. He had heard the accused saying he would kill the deceased while in class. However, he did not tell anyone about the incident.

10. In cross examination, **PW3** stated that a teacher known as madam M witnessed the incident that evening and told him, **PW1** and **PW2** to go and report it at school the next day. They reported the incident to their headmaster Mr. K. He added that the accused had the habit of beating the deceased whenever he came to school and he was once sent away from school for beating the deceased. He also confirmed that the accused had the piece of wood that he used to hit the deceased in class but he never reported as the accused had threatened to beat him

too.

11. PW4, JMK the deceased's mother, testified that the deceased was the last one to arrive home on the material day. He told her that he had a headache. On 6th February 2018, she took him to Kyanga dispensary then to Muthungu hospital. The deceased had difficulty walking. He told her that the accused had beaten him with a piece of wood.

12. Upon being x-rayed, she was informed that the deceased had a back injury. They went back to the hospital on 7th, 8th and 9th February 2018 but there was no improvement. The deceased died on 12th February 2018 on their way to hospital. Nobody had ever reported to her about the deceased being beaten by the accused.

13. In cross examination, she stated that the deceased arrived home while limping but had no visible injuries. The x-ray was taken on the deceased's back because he complained of pain on the back and leg. On 6th February 2018, PW1 and PW2 told her that the deceased had been beaten by the accused who had also threatened him prior to 5th February 2018.

14. She said she had never been called to school over the same. The doctor had asked her to buy a belt for the deceased's back injury. The deceased developed a breathing problem on the day that he died and that is why they were rushing him to hospital.

15. PW5, DK a grandfather to the deceased, testified that on 8th February 2018, his daughter (PW4) called him and informed him that the deceased was sick. He went to their home and found him very sick. They took him to hospital and were told to buy a belt for his back. Thereafter, he went with the deceased to his home but his condition deteriorated which led to his death. He told PW4 to go and report the death of the deceased at Kilome police station.

16. PW6, PKM the deceased's father, testified that on the material day at 5.00pm, his wife (PW4) called him and informed him that the deceased had been beaten by the accused while on his way from school. He advised PW4 to take him to the hospital, and he died one week later. He went home and witnessed the post mortem which showed that the deceased had been injured on the head and spinal cord.

17. In cross examination, he stated that the deceased had told him that the accused had offended him before although he confirmed that he did not mention the accused's name in his statement. He also confirmed that the deceased had an eye problem but he was not blind.

18. PW7, Bernard Nzymi Kioko the assistant chief of Mutani sub-location, testified that on 7th February 2018, PW4 called and told him that the deceased had been referred to Mutungu hospital from Kyanga dispensary but she had no money. That evening, PW4 passed by his home and informed him that she had been asked by the doctor to buy a belt for the deceased, whom she had left at her parents' home. PW7 spoke to the doctor and requested him to assist PW4 as she had no money.

19. On 9th February 2018 as they were going to the hospital, PW5 called them and told them to go to his home where the deceased was. On reaching there, they found that the deceased had died on the way to the hospital. He called the deputy OCS who came and took the body to the mortuary. He later learnt that it was the accused who had assaulted the deceased although he had never heard of any report regarding that.

20. PW8, Dr. Patrick Kihuu of Kilungu sub-county hospital is the one who conducted a postmortem on the deceased on 16th February 2018 at the facility's mortuary. No bruises were noted externally. Internally, there was subdural hemorrhage on back of head 5*6cm, the skull had no fractures, spinal column ligaments L4-L5 were injured. L4 had a fracture while all other systems were normal. He concluded that the cause of death was severe head injury caused by a blunt force injury consistent with a fall. He produced the post mortem report as "EXB1".

21. In cross examination he stated that he was not told of any medical history of those injuries but had that been done, he would have followed it up. He also stated that the bleeding on the head can lead to cardiac arrest depending on which area is bleeding. Further, he confirmed that there was a direct blunt trauma on the spinal cord but it was not the direct cause of death.

22. PW9, No 59531 corporal Bernard Muasya formerly of DCIO Kilungu was the investigating officer. He testified that PW6 reported the deceased's death at Kilome police station on 12th February 2018. They visited the scene at Kisayane village in Kilungu and recorded statements from witnesses. They arrested the accused on 16th February 2018 and had him charged.

23. He established that there was no bad blood between the accused and the deceased and confirmed that no assault report had been made at the station. Further, that they did not take photographs or draw any sketch plan of the scene due to the time taken before a report was made.

24. In cross examination, he stated that they were not given any treatment documents of the deceased. He also confirmed that the school management was never told of any quarrel between the deceased and the accused. He opined that this issue was taken lightly because the families of the accused and the deceased knew each other.

25. In his sworn defence, the accused testified that he had schooled with the deceased for three years. They were neither friends nor enemies and they sat far apart in class.

26. It was his testimony that on 5th February 2018, they left school for home at 5.30pm. They were many since they were both standard 6 and 7 pupils. He was with his friend MM of standard seven as they went home and they walked ahead of the deceased who was in the company of PW1 and PW2. The deceased went to get water at the school borehole. PW4 had gone to their class and told the deceased to go and fetch water after classes. They heard her saying so because she spoke out loudly.

27. He stated that the borehole was down a slope which had ditches and big stones. He saw the deceased going to the borehole to fetch water

with his close friend PW3. He denied having any stick at any point in time on that day or beating the deceased who was bigger than him in size. He arrived home at 6.00pm. The next day, he went to school but the deceased never came. He did not think much of it because the deceased was used to absenting himself from school because of his eye problem.

28. However, this time round, the deceased never returned and three days later, he overheard the deceased's siblings saying that he had beaten him. He was later arrested by the police over the deceased's death. He denied killing or ever fighting the deceased. He stated that he had been in that school for six years and had never been disciplined nor sent home over bad conduct or indiscipline.

29. In cross examination, he stated that his friend MM walked with him up to home but he was not calling him as a witness.

30. After the close of the defence case counsel for both parties filed written submissions.

31. Mr. Muriuki learned counsel for the prosecution submitted that the evidence of PW1, PW2 and PW3 point to the guilt of the accused. He argued that PW8's evidence that the cause of death was due to severe head injury perfectly corroborated the evidence of the three witnesses. He stated that there was consistent evidence from PW4 and PW6 that the deceased did not have an underlying medical condition or prevailing illness prior to 5th February 2018.

32. Further, he pointed out that the evidence of PW6 regarding the results of the post-mortem which he witnessed was also consistent with that of PW8. It was his view that all the prosecution witnesses have been able to demonstrate that the deceased's health changed drastically after the events of 5th February 2018. It was thus his submission that the accused was the sole cause of the deceased's death.

33. Counsel further contended that the accused having been present throughout the hearing only to state in his defence that he was with MM at the alleged time of the incident casts doubt on the credibility of his defence. He questioned why the accused never called the said MM to corroborate his evidence if at all he was being honest. Mr. Kihara also argued that the accused's statement that PW4 went to their class and told the deceased to go and fetch water from the school borehole after school is illogical and is neither here nor there.

34. Further, counsel argued that the accused merely denied being involved in the death of the deceased in his defence and failed to challenge the prosecution evidence which overwhelmingly pointed to his guilt. In his view therefore, the prosecution proved beyond all reasonable doubt that the accused is guilty of murder.

35. In his written submissions, Mr. Mathenge for the accused summarized the evidence on record. He questioned why PW1, PW2 and PW3 did not report the alleged incident of the evening of 5th February 2018 between the deceased and the accused to either their parents or the school authorities for any appropriate action to be taken against the accused person. Counsel submitted that the medical report tendered in evidence corroborated the accused person's sworn evidence that he did not kill the deceased.

36. Mr. Mathenge further argued that it is apparent that the accused was wrongly charged because the prosecution witnesses did not establish the necessary *mens rea* on the part of the accused. Counsel urged the court to acquit the accused of the murder charge forthwith since the same has not been proved beyond reasonable doubt.

Analysis and Determination

37. Upon carefully considering the prosecution's evidence against the defence by the accused, it is my view that the main issue for consideration by this court is whether the prosecution proved beyond reasonable doubt that the accused is guilty of murder.

38. According to **Section 203** of the **Penal Code**, the offence of murder is committed when **any person who of malice aforethought causes the death of another person by an unlawful act or omission.**

39. In order to prove a charge of murder, the prosecution must therefore establish the following elements:-

- i. The fact and cause of death of the deceased.
- ii. *Actus reus*: that the accused caused the death of the deceased through an unlawful act or omission.
- iii. *Mens rea*: that the accused had malice aforethought or intention to cause harm or kill.

a. The fact and cause of death

40. From the evidence on record, there is no doubt that the deceased died on 12th February 2018 while being taken to the hospital. According to the postmortem report (EXB1) produced in evidence by PW8, the cause of death was severe head injury caused by a blunt force injury consistent with a fall. PW8 stated that there was an internal subdural hemorrhage on the back of the deceased's head although the skull had no fractures. The death of the deceased and the cause thereof has therefore been proved beyond reasonable doubt.

b. Whether the accused caused the death of the deceased

41. As to whether the accused caused the death of the deceased, the prosecution called three eye witnesses namely PW1, PW2 and PW3. There was consistent, corroborative and reliable evidence from the three aforementioned witnesses that on the evening of 5th February 2018 while they were going home from school, they saw the accused hit the deceased on the waist with a piece of wood and then pushed him

down a slope. The deceased fell down as a result and hit his head on a stone.

42. The evidence of the three witnesses is corroborated by PW4 who stated that the deceased complained of a headache that evening and when she took him to the hospital the following day, he informed her that he had been hit by the accused with a piece of wood. It is further clear from the evidence on record that the deceased never recovered from the said injury.

43. In my view, PW8's evidence that the deceased died as a result of a severe head injury lends credence to the eye witnesses' account that the deceased hit his head on a stone after being pushed by the accused herein as well as the resulting headache. Further, PW8's evidence that bleeding on the head can lead to cardiac arrest gives credence to PW4's statement that the deceased developed breathing problems and that is why they were rushing him to hospital but he died on the way.

44. In his defence, the accused denies that he hit the deceased that evening. He alleges that he went home in the company of his friend MM and they were walking ahead of the deceased and his siblings PW1 and PW2. Notably however, the accused did not deem it fit to call his said friend to corroborate his testimony so as to disassociate him with the eye witnesses' alleged accounts. Further, the accused alleges that he thought the deceased did not return to school due to his eye problem since this had happened severally before. In my view however, this defence is incredible and farfetched because no evidence was presented in court to support this statement. There is no evidence showing why PW1 – PW3 would gang up to lie against the accused.

45. In the circumstances, I am convinced that the prosecution has proved that the accused pushed the deceased to the ground as a result of which the deceased got an internal injury on the head that led to his death.

c. Whether the accused had malice aforethought or intention to cause harm or kill

46. The next question is whether the accused had malice aforethought and/or whether his action was premeditated. **Section 206** of the **Penal Code** provides the circumstances which constitute malice aforethought as follows:

“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 fight or escape from custody of any person who has committed or attempted to commit a felony.”

47. Malice aforethought may be express or implied. It is express if it is proved that there was a clear intention to cause death unlawfully (**see Beckford v R [1988] AC 130**). It is implied if it is proved that the accused had an intention to cause *grievous bodily harm* or if it is shown that the accused knew that there was a *serious risk* that death or grievous bodily harm could result from his act or omission (**see DPP v Smith [1961] AC 290**).

48. In the instant case, PW1 alleged that the accused had formed a habit of beating up the deceased whenever he came to school and that she had reported that to PW4. PW3 supported this statement and added that the accused was once sent away from school because of that. PW6 also alleged that the deceased had told him that the accused had offended him before. However, PW4 denied ever being informed about the deceased being beaten by the accused prior to the unfortunate incident that led to his death.

49. Further, both PW1 and PW3 allege that they had heard the accused saying that he would kill the deceased. However, from the evidence on record, it is clear that this was never reported to the relevant authorities. PW4 stated in cross examination that she had never been called to school over the alleged threats to the deceased by the accused. PW9 confirmed that during the investigations, he established that there was no bad blood between the deceased and the accused. He also confirmed that the school management was never told by them of any quarrel between the two boys.

50. In my view, whereas it is unfortunate that an innocent life was lost due to the actions of the accused which were completely uncalled for and bearing in mind that there was no bad blood between them, I do not find that the intention of the accused was to kill the deceased. The accused may have wanted to punish the deceased for whatever reasons but did not act with the intention of killing him.

51. In the circumstances, the offence of murder which the accused has been charged with cannot be sustained. However, the evidence adduced by the prosecution has established beyond reasonable doubt that the fall by the deceased after the beating and push by the accused caused the injury that led to his death. The circumstances reveal an offence of manslaughter contrary to Section 202 of the Penal Code.

52. **Section 179** of the **Criminal Procedure Code** empowers a court to convict an accused for an offence he is not charged with in the following circumstances: -

“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which

constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

53. In ***James Maina Njogu v. Republic [2004] eKLR***, the Court of Appeal observed as follows regarding Section 179 of the Criminal Procedure Code:

“It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the “remaining particulars are not proved”, the “remaining particulars” being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence.”

54. Based on the above findings, I hereby reduce the charge of murder to manslaughter and convict the accused of the said lesser charge contrary to Section 202 as read with Section 205 of the Penal Code.

Orders accordingly.

SIGNED AND DATED THIS 24TH DAY OF FEBRUARY 2021 AT MILIMANI NAIROBI.

H. I. Ong’udi

JUDGE

Delivered by:

George Dulu

JUDGE

AT MAKUENI THIS 4TH DAY OF MARCH, 2021 IN OPEN COURT.