REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 17 OF 2018

REPUBLIC…….PROSECUTOR

VERSUS

DAVID KATANA MRENJE……..…….…….…….….ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Ms. Ruttoh advocate for the accused persons

R U L I N G

David Katana Mrenje the accused herein, was charged and tried before this Court for the offence of murder contrary to Section 203 and 204 of the Penal Code. In brief, it was alleged that on the 13.9.2018 at Mnagoni Village the accused murdered **MJ**, a juvenile aged ten (10) years.

Ms. Ruttoh argued the accused defence before the Court while **Mr. Mwangi,** prosecution counsel prosecuted the accused for the alleged crime. In order to discharge the burden of proof of beyond reasonable doubt, the prosecution relied in support of the charge on the following witnesses. **(PW1) – JN** testified as a fellow schoolmate with the deceased. He gave a description of the events surrounding the canning of the deceased by the accused on 13.9.2018. In his explanation, the deceased apparently arrived late in school together with other students namely, **SH** and **(PW2) KJ.** According to **(PW1),** upon arrival of the deceased in school beyond the scheduled time, accused stepped out of class, picked a cane and use it to inflict punishment against them for that misconduct. On being shown the cane, **(PW1)** identified it positively as the weapon used to beat the deceased targeted at the buttocks. That was also the evidence given by **(PW2)** who happened to be at the scene with **(PW1)** where the incident occurred.

(PW3) – JK, the father to the deceased testified that he learnt of the beatings by the accused against the deceased. He therefore followed up the issue with the school headmaster to find out the circumstances upon which such serious harm had to be inflicted upon the deceased. In the meantime, **(PW3)** told the Court that the deceased prior to his death proceeded with treatment. It was at that juncture even, the accused assisted the family with Kshs.6,000/= towards meeting the medical expense. Unfortunately, **(PW3)** stated before Court that the deceased never recovered as expected but did succumb to death.

In the same trial **(PW4) – Gideon** testified as a fellow teacher with the accused at [Particulars Withheld] Primary School. He acknowledged knowing the deceased as one of the students at that school having joined in 2017. **(PW4)** pointed out that he was in receipt of a complaint from **(PW3)** that accused had beaten the deceased and as a result he is unable to attend class. As a school **(PW4)** stated that an internal investigations was initiated to find out under what circumstances the deceased was beaten by the accused. As the inquiry was going on with the involvement of other agencies like the police and the locational Chief, the deceased was reported to have passed on allegedly from the effect of the beatings. According to **(PW4)** the matter, was therefore escalated to the police to look into the entire issue.

Starting with the complaint made by the father of the deceased next was the evidence of **Stephen Garama** an Assistant Chief who told the Court as having received a report from the clan-elder on the death of the deceased. On the part of **(PW6) – Kadogo Maisha**, on 30.9.2018 while at his shop, the father of the deceased **(PW3)** sought financial assistance to help him provide medical treatment to the deceased. It is also clear from **(PW6)** that the issue of the accused compensating the family for his wrongful act came up. The negotiations culminated into an agreement in which the accused was to pay some Kshs.6,000/= towards the treatment of the deceased. That agreement was admitted in evidence as an exhibit.

(PW7) – Cpl. Ketayi stated on oath that he is a document examiner expert. In regard to this case **(PW7)** told the Court that he had been asked by the investigating officer to examine the handwriting of the accused in the questioned document marked **AA**. This was done against

the backdrop of the known handwriting of the accused on analysis he formed the opinion that there cannot be any doubt on the author of the questioned document and the known handwriting of the deceased. The forensic report dated 8.10.2018 was presented in evidence as an exhibit together with the forwarding exhibit Memo from the investigating officer.

(PW9) – Then there was he evidence of **Senior Sgt. Wanjala** of Ganze Police Station. His evidence dealt with the nature of the investigations carried out to establish culpability of the accused. This was through the recording of witness statements, subjecting the body of the deceased to a postmortem examination and also by visiting the scene of the alleged crime being [Particulars Withheld] Primary School in which he was in attendance on the material day. Further, **(PW9)** alluded to the fact of existence of an agreement entered into between the accused and the deceased father on compensation and form of reconciliation for the harm inflicted to the deceased. All in all **(PW9)** told the Court that from the investigations it was recommended that the accused be charged with the offence of murder of the deceased.

Finally, the prosecution summoned forensic evidence which was tendered by the Chief Government Pathologist **Dr. Johansen Oduor (PW10).** In his capacity as a pathologist, **(PW10)** performed a postmortem examination on that body of the deceased on 11.10.2018 and his conclusion upon the examination of the body was that all systems were with normal range save for raised intracranial pressure, shallow sulci, cerebellar tonsilar. With all those positive findings, he formed the opinion that features of brain edema was consistent with the cause of death being pneumonia.

At the conclusion of the prosecution evidence, Learned prosecution counsel **Mr. Mwangi** submitted that nevertheless the accused canning of the deceased was the root cause of the death and therefore a *primafacie* case has been established to warrant him to be called upon to answer the charge.

The task of this Court given that line of submissions is to analyze the quantum and quanlity of the evidence adduced by the prosecution within the scope of Section 306 of the Criminal Procedure Code.

Determination

What is at stake is the notion of the burden of proof, which is vested with the prosecution at all material times to disapprove the innocence of the accused. Weight is therefore accorded the extent of proof on criminal culpability of *menreas* and *actus reus* of that charge facing the accused. The analysis involves, first, an examination of the allocation of obligations to introduce evidence and to prove particular material facts that establish an offence in the charge. Second, a determination of the degree to which those facts have been proved to the highest standard of proof of beyond reasonable doubt. The Law as per Section 107 (1) of the evidence articulates the burden of proof in the following language:

> ***"Whoever desires any Court to give Judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."***

Similarly, Section 108 also states that the burden of proof in a suit or proceeding lies on that person who would fail, if no evidence at all were given on either side. To secure a conviction for murder contrary to Section 203 of the Penal Code, the prosecution must prove all elements of the offence beyond reasonable doubt that is:

> ***(a). The death of the deceased.***
>
> ***(b). That his death was unlawful and inexcusable or and unjustified.***
>
> ***(c). That in causing death the perpetrator (s) was or were actuated with malice aforethought.***
>
> ***(d). That cogent and credible evidence exist which squarely places the accused/offender at the scene of the crime.***

The first two elements comprise the *actus reus* (guilty act) whereas the third is the element of *mensrea* (the guilty mind of the accused and knowledge that death would ensue from the unlawful acts targeted at the deceased).

In terms of Section 306 of the Criminal Procedure Code, there are two considerations to be made by the Court. First, whether given the anatomy of direct and or circumstantial evidence at the close of the evidence in support of the charge it appears to the Court that specific elements outlined to that particular charge have been sufficiently proven to exist. If the answer is the affirmative then a *primafacie case* is made.

Secondly, if upon taking all the evidence at its highest and at its lowest, the Court finds that none of the elements of the offence exist to hold the accused culpable then the continuation of the case ought to be terminated. In this regard a motion of a no case to answer carries the day to warrant the Court to dismiss the charge with a subsequent order of an acquittal or discharge. The test on these two doctrinal principles is well founded and stated by **Lord Parker CJ** in **Practice Direction (Submissions of no case {1962} 1 WLR 227)** as follows:

> ***"A submission that there is no case to answer may properly be made and upheld: (a). When there has been no evidence to prove an essential element in the alleged offence. (b). When the evidence adduced by the prosecution has been so credited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it. Apart, from these two situations, a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it… if, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal if compelled to do so, would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convince. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."***

On a motion of no to answer this is in harmony with the constitutional right on presumption of innocence which the prosecution has failed to reverse and any subsequent proceedings should be considered as voidable. The wisdom of the Court in its interpretive approach of Section 306 of the Criminal Procedure Code is to rationalize the application of the principle of a *primafacie case* in our criminal justice system. In order to strike a balance between the burden bearer to ensure guilty of an accused person and to protect the same accused persons from wrongly being placed on the defence to answer unproven allegations. That is the basis upon which the term *primafacie case* was coached as that decisive case made out by the prosecution sufficient to call upon the accused person to defend himself. It is clear, from the jurisprudence surrounding the question that arises in terms of Section 306 of the Criminal Procedure Code on a primafacie case and a motion of no case to answer, courts should not confuse the textual and purposes of their application. There are predetermined definitions contained in the provisions and the case Law enumeration of certain features. The Supreme Court of Nigeria in **Onagoruwa v State {1993} 7 NWLR 49** approached the distinctions as follows:

> ***"The terms 'no case submission and primafacie go together in the administration of justice. They do not however go together like Siamese twins. As a matter of Law, there is no blood relationship between them. They are rather enemies, fighting each other in opposing directions with a view to devouring each other. They are enemies perpetually at war with each other. They never see eye to eye. They speak two different and distinct language in opposition of each other. As a matter of Law and fact, two different persons in the criminal justice system are involved in calling the courts attention to them. While the accused person submits to the court that he has no case to answer, the prosecution makes the contrary submissions that a primafacie case is made out against the accused and that he should be called upon to make his defence."***

From the above principles in respect of this charge of murder the prosecution has the burden to lead evidence in support of the facts in issue which pertain to the material elements of the offence as defined under Section 203 of the Penal Code. The right to presumption of innocence under Article 50 (2) (a) of the Constitution entitles and compels the prosecution to bear the primary burden in respect of the evidence touching on matters of the charge.

As far as the constitution is concerned, the prosecution loses the case if it fails to discharge its evidence burden to disapprove the innocence of the accused person. In such a case, the Court has no option but to rule in favor of the accused implicit upon a motion of no case to answer and therefore acquitting him or her of any wrongdoing.

In the strict sense once the prosecution discharges the burden of proof it raises the bar for the accused to respond to the allegations with some rebuttal evidence necessary to qualify non-participation with the commission of the crime. These interplay between the burdens of proof to demonstrate existence of a *primafacie case* and on the other hand a motion of no case to answer must be purposively determined in a criminal trial at the close of the prosecution case.

Here there is no midway for Judges and Magistrates to draw a distinction to avoid shifting of the burden of proof to the accused person. In deciding the question, the Court should have regard to the constitutional right of the accused to remain silent, and not to testify during the proceedings **(See Article 50 (2) (1) and the right to refuse to give self-incriminating evidence) (See also Article 50 (2) (h) of the Constitution).**

In the specific circumstances and adhering to the principles in **R v Galbraith {1981} 1 WLR** guidance which bears the true position on these issues as stated by **Lord Lane** in the following passage conceptualizes how to stay faithful within the bounds of the Law on the burden of proof and the import of evidence to prove existence of a fact. His Lordship observed thus:

> ***"How then should a Judge approach a submission of no case? (1). If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty the judge will of course stop the case. (2) the difficulty arises where there is some evidence but it is of a tenuous character for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a). where the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a Jury properly directed could not properly convict upon it, it is his duty, upon a submission being made to stop the case (b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which go generally speaking within the province of the jury and where on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusions that the defendant is guilty, then, the Judge should allow the matter to be tried by the Jury, (in our case to proceed further for the accused to state his defence). There will of course as always in this branch of the Law, be borderline cases. They can safely be left to the discretion of the Judge."***

Therefore, an earnest examination of the charge and evidence by the prosecution is pertinent at this stage. The background of the case is that on 13.9.2018 the deceased and other students arrived late at [Particulars Withheld] Primary School. The accused person as one of the teachers at that school administered corporal punishment as part of the disciplinary measure to abhor the misconduct of attending school past the set timeline. This incident was witnessed by **(PW2)** being one of the students in that same school. It is alleged by **(PW3)** the father to the deceased that soon thereafter he started developing ill health. This necessitated **(PW3)** to take him for a medical examination with a possibility of receiving appropriate treatment for the ailment. It is clear and apparent that the deceased condition worsened whereupon he died.

On 20.9.2018, the accused person was later to be arrested and accordingly charged with the offence of murder of the deceased traceable to the act of canning on the 13.9.2018. The accused has maintained innocence through the trial that he controverted in anyway in causing the death of the deceased. At the close of the prosecution, Learned counsel **Ms. Ruttoh** for the accused is vehemently opposed on any adverse findings of a *primafacie case* against the accused person.

So given that contestation what is the position of this Court. First, from the material evidence it is not in doubt that the deceased by the name **MJ** is dead. He died at the tender age of ten (10) years and prior to that tragic occurrence he was a student at [Particulars Withheld] Primary School. Admittedly, this element is proven from the evidence of the father **(PW3)** as corroborated with the testimony of **Dr. Johansen, (PW10)** the Chief Government Pathologist as indicative in his postmortem examination report dated 11.10.2018.

The next critical ingredient to a murder charge is that of the prosecution proving the death of the deceased to be unlawfully caused. It goes without saying that under Article 26 of the Constitution, the right to life of every person within the Republic of Kenya is protected. It stands to be claimed by all citizens and residents of Kenya. It is particularly worthy of note that Section 203 of the Penal Code uses the words unlawful. This is an indication that every homicide is presumed to be unlawful unless its excusable or authorized by Law. Generally, any criminal offence is an unlawful act founded on criminality of the accused. This therefore involves the physical elements of the accused conduct set in motion to commit the crime. The unlawfulness element imports either the voluntary or involuntary acts of omission, **where** on the part of the accused the culpable homicide in Section 203 of the Code, is where a person causes the death of another human being while engaging in unlawful acts of assault, administering poison or by means of other acts or omissions likely to occasion that unjustified death. There is therefore the minimum threshold of foreseeability that in assaulting the victim, death would result as the outcome of the unlawful act. In a murder charge proof of death and the cause of it is essential. In the case of **Rex v Kimbugwe s/o Nyogoh & others {1936} 3 EACA 129, Kishunto Ole Sololo v R CACRA No. 70 of 1995, R v Cheya {1973} EA 500** the Courts held interalia that:

> ***"It is the cause of death which often links the accused to the death of the deceased and the cause of the deceased's death is crucial to the conviction of the accused person."***

In **Cheya case (supra)** the Court observed:

> ***"that the fact of death and the cause of it could be established otherwise than by medical evidence."***

That means besides prove of death by medical evidence its admissible to prove death by way of circumstantial evidence produced and depended upon cogent and credible evidence of witnesses.

The only one question presented to the Court for determination is whether the accused felonious act of canning was the proximate cause of the deceased death. It is trite under Section 213 of the Penal Code that although a person's act may not be the direct cause of death he will be held responsible for all consequences of which his conduct was the proximate cause. The difficulty only arises in determining the proximate cause because of the varying interpretations which have been given to the concept depending on specific facts of the case.

The Learned author **Miller** in his book **Criminal Law 83 1934 and Mclanghin on Proximate Cause (39 Hav L. Rev 149)** made the following commentaries:

> ***"Proximate cause is composed of two elements first, the element of causation connecting the actor's conduct with the consequences and second, the element of a determination of the limits of responsibility to be placed upon the actor for the consequences of his or her act."***

The new element of causation is a question of fact to be determined by the Court upon consideration of many factors and the justice of the decision.

In the instant case, it's the narratology of the prosecution from the evidence of **(PW1)** and **(PW2)** that the genealogy of the deceased death is traceable to that cruel and degrading punishment meted out by the accused person. As a matter of fact, this is the construction that the prosecution gave the strength of their case in analyzing the propriety of the canning within the scope of Section 213 of the Penal Code, unfortunately, it is not clear from the evidence of **(PW1)** and **(PW2)** as to the gravity of injuries inflicted on the buttocks of the deceased. It's just acknowledged that the accused using the exhibited cane applied it to the buttocks to instill discipline as a measure of punishment for the declared breach of the school rules. The Court was never given the advantage of the treatment notes and diagnostic undertaken by the primary health care providers who saw the deceased at that earliest opportunity. Yes, the Court was told that following the canning, the deceased submitted himself to a proper medical treatment however in spite of that he passed on in relation with the injuries suffered.

The question then arises whether the deceased did indeed die of the corporal punishment and or assaults by means of instruments used by the accused or totally from an independent cause. The reasoning behind this is the fact of an autopsy report on the deceased body by **Dr. Johansen** who indicated that, at the time of his death, he had underlying condition of pneumonia. **Dr. Johansen** found significant raised intracranial pressure within the nervous system and conclusively ruled out any proximate cause of the death to be the canning of the deceased. The toxicology report by the Government analyst dated 23.4.2019 was also non-responsive following presentation of the evidence by the **Dr. Johansen.** It does limit the prosecution closing remarks and arguments that the deceased cause of death was the punishment inflicted by the accused.

From critical perspective of the facts and the evidence, there is reasonable doubt that the acts of the accused were the proximate cause of the death of the deceased. There is a clear defence the death of the deceased was a later independent intervening ill-health of an attack of pneumonia which could not reasonably be associated with the canning and injury inflicted upon the deceased as noted from the postmortem report. Simply, there is no evidence that the deceased failure to access special medical treatment superseded the accused's act of canning and therefore was the cause of death. The facts of this case must be viewed in light of the doctrine on proximate and intervening cause, which makes it clear that pneumonia was an independent intervening act of the deceased death. Interestingly, where one is alleged to have unlawfully inflicted injuries upon another person calculated to endanger or destroy life, it must be shown that the unlawful act or omission was the sole cause of death. It is debatable whether the fact of canning by the accused should go as far as replacing a duly considered pathologist opinion on the cause of death of the deceased. The point here is the cause of death is the main process that brought about the death of the deceased. It is the main thing and the main finding. The contributing factor is sort of a may be if you want to call it a minor event, that would not have contributed to the cause of death or added to it or complicated it.

In short I am satisfied that there is insufficient evidence to show that the deceased canning was the proximate cause of his death. The element of unlawful acts or omission stands unproven by the prosecution.

The other element also critical with the unlawful acts is that of malice aforethought. Malice aforethought being a mental element is provided

for under Section 206 of the Penal Code. The Court in consideration of this element has to endeavor to determine through evidence

(a). An intention to cause the death of another human being.

(b). An intention to cause grievous harm to another.

(c). Knowledge that the act or omissions will cause death.

(d). Intent to commit a felony.

(e). Intention to facilitate the escape from custody of a person who has committed a felony.

The Court has considered the features which manifest malice aforethought like the nature of the weapon, the injuries inflicted, parts of the body targeted, the conduct of the accused before, during and after the incident. None of it brings the facts of the case within the ambit of Section 206 of the Penal Code. **(See also the cases of Rex v Tubere s/o Ochen {1945} 12 EACA 63, Ernest Asami Bwire Abanga alias Onyango v R CACRA No. 32 of 1990, Moms Aluoch v R CACRA No. 47 of 1996).**

From the evidence of **(PW1)- (PW10)** there is inconclusive and inconsistency in the evidence with the charge and particulars of it for the Court to draw an inference of malice aforethought. The direct evidence by **(PW1)** and **(PW2)** on the corporal punishment by itself fails the test of an intention to cause the death of the deceased or an intention to cause grievous harm resulting in the death of the deceased. There is no credible direct or circumstantial evidence to prove malice aforethought to the crime of the alleged murder. In that scope, the prosecution also fails to pass the hurdle as an essential element for the offence of murder contrary to Section 203 of the Penal Code.

For the purposes of identification, there is no dispute that on account of the accused involvement in administering corporal punishment upon the deceased on 13.9.2018 alongside other late comers outside the scheduled time by the school. In the result the case of **Anjononi v R {1976-80} 1 KLR 156** gives credence on the materiality and admissibility of recognition evidence of the accused. The accused being a teacher to the deceased, demonstrates that identification was based on prior knowledge of the witnesses. Consequently, in this case only the fact of death and identification is responsive to the allegations against the accused. The test of the key determinants like unlawful act of omission and malice aforethought remain non-responsive to establish a *primafacie case* to entitle the prosecution to proceed with the case further to the defence stage.

It is my finding that a motion of no case to answer in consonant with the principles in **Galbraith guidelines (supra)** constitutes the textual and factual approach for the Court to stop any further proceedings against the accused. The charge of murder contrary to Section 203 and 204 be and is hereby dismissed. As a consequence, the accused shall be set free indeed and be at liberty unless otherwise lawfully held.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 and DISPATCHED via email ON 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The Accused person

2. Mr. Mwangi for DPP