



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL CASE**

**NO. 3 OF 2018**

**BETWEEN:**

**REPUBLIC**

**AND**

**SAMUEL MWACHOFI MANDAA**

**R U L I N G**

1. SAMUEL MWACHOFI MWANDAA, the Accused herein has been charged with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code Cap 63 of the Laws of Kenya**. The particulars of the offence are alleged to be that he did on 24th July 2017 AT Sagala Village within Taita Taveta County murdered PAUL MWASHAMBO (hereinafter referred to as "the Deceased"). That means the Accused is charged with unlawfully causing the death of PAUL MWASHAMBO. It is said by the Prosecution that the Deceased's demise was caused by the Defendant by unlawfully assaulting the Deceased on 11th June 2016 at or around 11 am in Sagalla Village, Taveta Sub County, Taita Taveta County. The Information is dated 12th August 2016 and was amended on 12th April 2017.

2. On 2nd November 2016 the Accused was taken to the Coast General Hospital in Mombasa for psychiatric evaluation. He was found fit to plead. On 29th November 2016, the Accused appeared before the Court when the substance of the Charge and every element thereof was read to him and explained in a language that he understands namely, Kiswahili. He stated that it was not true and a plea of not guilty was entered.

3. The Prosecution has presented its case and the Accused has made a submission of no case to answer in compliance with **Section 306 (1)** of the **Criminal Procedure Code**. The Prosecution and the Accused have filed their Written Submissions on 21 June 2018 and 23rd July 2018 respectively.

4. The Particulars or crucial ingredients as described in the Prosecution's Submissions of the offence of murder that the Prosecution must prove are:

- (1) The death of the deceased.
- (2) The death of the deceased was unlawful.
- (3) That the death was caused by the Accused (actus reus)

(4) That in causing death there was malice aforethought on the part of the Accused (mens rea).

5. In the Written Submission filed on behalf of the Accused it is said that "it is a cardinal principle in a Criminal case that the legal onus is always on the prosecution to prove the guilt of an accused person and the standard of proof is beyond reasonable doubt. The Authority relied upon is ***High Court Criminal Case Nairobi Case No 116 of 1990 R -vs- David Rup Nyambura***. That Authority clarifies that in a criminal trial the evidential burden on the Prosecution is to prove its case beyond reasonable doubt. However, although that is correct that at the end of the trial, at this stage, before the Defence has presented its case, the burden on the Prosecution is to demonstrate a prima facie case. The starting point is ***Section 107 (1) of the Evidence Act Cap 80, Laws of Kenya*** which provides that:

***“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.” In addition, the Court must also take account of the fact that once has heard all the evidence, for any findings to be made, the Prosecution must discharge its burden by proving the components of the offence beyond reasonable doubt (Woolmington v DPP [1935] EA 462 at 481).***

5. The Submissions filed on behalf of the Accused submit that the Prosecution must prove its case beyond reasonable doubt, at this stage of the proceedings. They also challenge the evidence before the Court on several grounds.

6. In coming to a decision, the Court must weigh up the evidence presented thus far. The Court has before it the evidence of Mother of the Deceased. She confirmed that the Deceased suffered injuries and that he passed away as a result of the injuries. She said the Deceased was at first being treated for a fractured c vertebra. She also gave direct evidence that the Accused and his brothers visited her. She said in the course of that visit the Accused asked for forgiveness for what he had done on 11th June 2018. At that time the Deceased was still alive. Although the content of the conversation may be hearsay, the fact of the visit is not.

7. It is not disputed that the Deceased was a school boy aged about 17. The eyewitness to the assault was his friend, another school boy Peter Mwanzili who was aged 17 when he gave his evidence. The Submissions for the Defence are that his evidence is either inadmissible or without weight due to his minority. There is no principle known to law that supports that submission per se. It is correct the eye witness was a minor however, the trial court as then constituted formed the view that he understood the seriousness of the matter and his duty to tell the truth. Also that he understood the consequences of not telling the truth. He gave evidence that he was with the Deceased and another friend near Sagalla Health Centre chatting. He said that they had all been classmates. He relates that the Accused approached them and told them to move away from where they were sitting. The Deceased refused to move and that is when the assault took place. Although PW 1 says he and Javan (the other boy) had moved to a safe distance, from that distance he able to see what the Accused did to the Deceased. He admits that he could not hear what was said, at first but they moved closer. The Submissions for the Accused are that from the distance of 15 to 20 feet he could not have seen what transpired. What he says he saw is that the Accused slapped the Deceased several times and then started beating him. Eventually he lifted the Deceased up and threw him on the ground "several times". He says that by that stage they had moved closer. They heard the Deceased asking the Accused to stop. They also saw a doctor from the Health Centre try to intervene but the Accused would not stop. It was said the Accused person was drunk at the time.

8. The injuries the Deceased suffered are several. According to his mother he was diagnosed as having a fractured cervical vertebra ("*the second bone in the neck*" according to PW-2). Unfortunately, the Prosecution has not adduced the medical treatment notes to corroborate that. The cause of death was a different injury, as recorded in the post mortem. In layman's terms the Accused suffered an injury to his head by it being hit against a hard surface/object. The consequence was to cause his brain to bleed and that is how he died. Dr. Uba Hemed (PW-5) who was giving oral evidence in relation to the Post - Mortem Report prepared by the Pathologist explained that at the time of the post-mortem, it was noted that "the deceased had internal injuries". She also explained that there was a scalp haematoma on the left occipital region and a subdural haematoma. In layman's language that meant there was blood in the skull

and blood under the scalp. The cause of death as a consequence of the bleeding/fluid seepage causing intercranial pressure in the brain causing the cardiovascular system to arrest. Under cross-examination PW-5 said that the injuries could have been caused by one blow or several. Although there seems to be little other evidence alluding to the fact, the Investigating Officer in his cross-examination suggests that the Accused person and his family assisted in paying for the medical treatment for the Deceased. The investigating officer was not re-examined on the particulars of that payment nor the reasons given for it. Equally, the Investigating Officer did not bother to obtain either the x-ray nor the explanatory report done on or about 27th June about a month before the demise on 24th July 2016.

9. Although Counsel for the Accused does not expand on the issue in her submissions, within the authority relied upon is a further authority which sets the principle in relation to the evidence of the minor. In ***Haro Guffil Jillo vs Republic 2014 eKLR***, the Court of Appeal said;

*"If the Court proceeds to take unsworn evidence, the accused should not be convicted in the absence of corroborating testimony. There is an exception for sexual offences."*

In this case, the evidence of PW-1 is corroborated. The evidence of the assault is corroborated by firstly the admission into hospital and secondly the post-mortem. The identity of the assailant is corroborated by the evidence of PW-2. Her evidence is that the Accused and members of his family visited her home on 20th June 2016. Therefore after the assault.

10. Counsel for the Prosecution filed her Written Submissions on 23 July 2018. The evidence of the Prosecution witnesses is summarised. In relation to the component of malice aforethought the Prosecution relies on ***Libambula v Republic [2003] KLR 638***, in particular the statement that

*"We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See Section 8 of the Evidence Act Cap 80, Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive, of course may be drawn from the facts, though proof of it is not essential to prove a crime."*

Interesting as it is, that extract bears no relevance to the issue before the Court. The essential component of the offence is mens rea or intention aforethought. That is not the same as motive. Motive may be only a part of the intention.

11. As stated above, the 4 components which must exist are (a) the death of the deceased, (b) that the death of the deceased was unlawful, (c) That the death was caused by the Accused (actus reus) and (d) That in causing death there was malice aforethought on the part of the Accused (mens rea).

12. In this case the Prosecution's Witnesses have established those components by the evidence of their witnesses. In the case of ***Sanjil Chattai v The State [1985] 39 WLR 925*** the Court said :

*"A submission that there is no case to answer may properly be made and upheld:*

*(a) When there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence.*

*(b) When the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it."*

In the circumstances, the Prosecution has established a prima facie case. In the circumstances, the Accused person is placed on his Defence. He will then have an opportunity to put forward and explain why the events that transpired according to the Prosecution do not amount to the offence with which he is charged.

13. Application of No Cause to Answer: Dismissed. Disposition: Accused is put on his Defence.

It is so Ordered,

**FARAH S. M. AMIN**

JUDGE

**Signed Dated and Delivered in Voi on this the 5th day of February 2019.**

In The Presence of :

Court Assistant: Josephat Mavu

Prosecution: Ms Anyumba

Accused/Defendant: Ms Monari