



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 2 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

AMOS KIBET MAKAN.....ACCUSED

JUDGMENT

The accused Kibet Makan was charged with offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya. Particulars of offence are that; On the 23rd day of January 2017, at Chebaibi village, Kibuk Sub-location, in Mt. Elgon Sub-County, within Bungoma County murdered EKK.

The accused pleaded not guilty to the Charge. The prosecution case is that on 22.1.2017 Pw3 BR a pupil at [particulars withheld] Primary School was with the deceased EKK and one JK at 5 p.m. looking after cattle. While there a lorry carrying stones came which deceased had boarded. Accused was also in the lorry. The Accused told deceased to alight from the lorry. The deceased alighted but still continued to follow the lorry and accused told me that he will beat deceased.

On 23.1.2017 the deceased was going to school and was ahead of B (Pw3). The accused then followed deceased who, on seeing accused started running away. The accused went to the side and lay ambush. When deceased started walking back, accused hit the deceased with a stone and he fell down. The witness ran to school and informed the Headmaster who came to the scene and found deceased had been taken away to Hospital. On being Cross – Examined this witness testified that on the previous day the deceased had poured sand on accused and abused him.

Pw4 AC who was with Pw3 testified that she saw accused follow the deceased and hit him with a stone. The deceased fell down. The accused then took tree branches and continued beating the deceased. The matter was reported to the school and boda boda riders came and took him to Hospital where he died.

Pw5 David Magudi Mikat the Headmaster on [particulars withheld] Primary School was at the School when he received information that a pupil had been beaten and was lying on the road. He went to the scene but found he had been taken to Hospital.

Pw1 SK the mother of the deceased testified that she prepared the deceased to go to school at 6 a.m. and he left. Shortly after deceased had left a boda boda rider came and informed her that her son the deceased had fallen sick. She went there and found deceased lying down. She observed him and saw he had an injury on the head and nose. She took him to Kapsokwony Health Centre where he was pronounced dead on arrival. Pw2 BN the father of the deceased received information that his son had been attacked and taken to Hospital. He went there and found he had died.

Pw6 Dr. Haron Ombongi produced a Post Mortem form Signed by Dr. Wafula who performed the Post Mortem. He had found the deceased had bruises on the forehead. Laceration on cheek, swelling of scalp measuring 4cm by 3cm. Upon opening he found a depressed skull fracture and swelling on right temporal region. He formed opinion that cause of death was due to severe head injury.

The accused gave sworn evidence. He stated that on 23.1.2017 I was on a lorry loading luggage when deceased came to climb on the lorry. He restrained him and the deceased fell down. He continued with his journey. He was then later arrested on the same day at Kapsokwony. He stated he did not hit him with a stone or stick.

Upon conclusion of the hearing Mr. Were for accused filed written submissions. Counsel submitted that the Prosecution evidence does not support the charge of murder. He submits that even if we were to accept the prosecution evidence, it will only show that accused threw a stone at deceased in anger which hit him on the head. He urged this court to find that only an offence of manslaughter had been established.

The prosecution for charge of murder must by evidence prove all the ingredients of this offence which are;

1) The fact and cause of death of the deceased;

2) existence of malice aforethought or mens rea and

3) the unlawful act or omission on the part of the accused the actus reus that caused the death.

4) That it is the accused who inflicted the injury.

In this case there is evidence by Pw6 that the deceased died as a result of severe injury to the head. Therefore, the fact of death and cause of death was confirmed by the production of the Post Mortem report. It is therefore clear the fact that deceased died is not in issue.

The main issue which remains for determination is whether the severe head injury was caused by the accused. Pw3 BR testified that the previous day on 22.1.2017 the accused and the deceased had an argument that day when accused told the deceased to alight from a vehicle. He swore that if he met the deceased he would beat him. The next day on 23.1.2017 the deceased while going to school saw accused and perhaps fearful of the threats issued by accused started running away. The accused then hid in a bush and when deceased came back hit him with a stone and fell down. Pw4 AC who was also going to school testified that she saw the deceased upon seeing the accused, started running away. The accused then followed him and hit him with a stone.

The accused in his defence in explaining the incident testified that he had only restrained the deceased from a vehicle where he was and deceased fell down. He was later arrested on the same day.

It is therefore clear from the evidence of the accused that he was at the scene; secondly, he met the deceased on the material day. He only contends that he only restrained the deceased from climbing on the vehicle and he fell down. The witnesses present Pw3 and Pw5 however testified that they saw accused hit the deceased with a stone on the head. The hitting of the stone on the head of the deceased is consistent with the fracture of the skull which caused the death of the deceased. I am therefore satisfied that it is accused who deliberately inflicted the injuries on the deceased.

Mr. Were for accused urged this court in his submissions that there was evidence that the accused did not have the intention to kill or cause grievous harm. He submits that the accused threw a stone at deceased in anger which unfortunately hit him on the head. He urged the court to consider the alleged murder weapon and circumstance of the offence to find that accused was guilty of Manslaughter and not Murder.

Section 207 of the Penal Code provides;

207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

There is evidence that the accused and deceased had an argument over a vehicle. Indeed Pw3 testified that the deceased had poured dust on the accused and also abused the accused. This led to the accused threatening to beat him if he finds him. This explains why the deceased on seeing the accused started running away. These circumstances would in my view show accused's anger towards the deceased on account of the abuse and pouring of sand on him. For these reasons I find that this is a case where provocation was established.

I therefore under Section 207 of the Penal Code find that an offence of manslaughter Contrary to Section 202 as read together with Section 205 of the Penal Code has been proved against the accused. I therefore find accused guilty of the offence of Manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

Dated at Bungoma this 12th day of November, 2019.

S.N. RIECHI

JUDGE