



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL CASE No 3 of 2016

BETWEEN:

THE REPUBLIC

AND

SAMUEL MWACHOFI MWANDAA

J U D G M E N T

1. The Accused herein, SAMUEL MWACHOFI MWANDAA, 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 that the Accused murdered the Deceased on 24th July 2016. Section 203 of the Penal Code provides that:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

2. In summary the Prosecution’s case is that on 11th June 2016, at around 1600 the Accused assaulted a child called Paul Mwashambo (“the Deceased”). The injuries caused were so severe as to result in the death of the Deceased on 24th day of July 2016. At the time of the assault the Deceased was about 16 years of age. The particulars of the offence are alleged to be that the Accused; “On the 24th day of July 2016 at Sagala Village, within Taita Taveta County murdered Paul Mwashambo”. In her Opening Submissions State Counsel for the Prosecution, submitted that this was no ordinary murder but that the cause of death was an attack by the Accused on the Deceased which was an unprovoked act.

3. The Accused person was certified as fit to plead by Dr Wangombe on 2nd November 2016. On 29th November 2016 he appeared before the Court and pleaded not guilty. The Court heard oral evidence from [5] prosecution witnesses namely PW-1: Peter Mwanzili, the eye witness; PW-2 the mother of the Deceased; PW- Corporal Anthony Ngala, the Arresting Officer; PW-4 The Investigating Officer PC Stanley Kirui who took over from PC Mugo when he was injured and PW-5 the doctor who conducted the post-mortem. In his Defence, the Accused gave sworn testimony but did not call any witnesses to support his evidence.

4. The Charge is for murder and therefore, the Prosecution must prove beyond reasonable doubt, that the Accused committed an unlawful act with malice aforethought. **Section 206** of the **Penal Code** defines malice aforethought thus:

“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 cause 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 harm is caused or not or by the wish that it may not be caused;

(c) an intent to commit a felony...”.

5. The Court heard the evidence of PW-1 who was a Child aged 17 at the time he gave evidence and 16 at the time of the alleged assault. This Court (differently constituted) held a voire dire and was satisfied that the witness understood the need to tell the truth and the consequences of failing to do so. PW-1 gave evidence that he was with the Deceased on the date of the assault and witnessed the assault that took place on 11th June 2016 at about 4.00 pm. By way of identification evidence, he said he knew the deceased. The Deceased was his friend they came from the same village namely Shoroni Village in Sagalla. He said he was sitting down chatting with Paul and another friend called Javan. They had previously attended the same school and had been classmates at Mlolo Primary School. He said that they were

sitting on a culvert near the road. He said that they were the only ones who used to sit there. He told the Court that on the day in question the Accused approached the group of friends. PW-1 said he knew the Assailant. He was known as Samuel to them. That is how he was described by Paul when he told his mother of the assault. The Witness said he knew the Accused came from a different village near Sagalla Health Centre and he used to see him at Sagalla Shopping Centre. He also identified the Accused in the Dock as Samuel.

6. PW-1 told the Court that when the assailant approached the group of friends, he was walking along the road and he started shouting at them to move away from where they were seated. He clarified that Javan and PW-1 were sitting on the culvert and the Deceased was sitting at "the mouth of the culvert". When the Accused approached them, Peter and Javan ran away, presumably in fear. The Deceased did not. He stayed seated. The Deceased had told his Mother he was speaking on his phone at the time. The Witness said that he and Javan ran way to a distance of 15-20 metres from where they could see what transpired. That is challenged by the Defence. The evidence is that the Accused headed for the Deceased. When he got him he started slapping him. PW-1 said that they could see the Accused slapping and beating the Deceased. The evidence of the Investigating Officer refers to mention of beating with a stick. That was not pursued by the Prosecution, nor does it form part of the evidence on oath. From their position they did not hear any conversation between the two. The Deceased fell down. PW-1 says they moved closer to about 5 metres away and they saw the Accused repeatedly lift the Deceased and drop him on the ground. The Witness said the action was repeated several times. The ground was a hard surface. The Witness told the Court that he saw Paul trying to stand up and from the closer position they also heard Paul inform Samuel that he was hurting him. That did not deter the Accused, the Witness says. That is corroborated by the Deceased's statements to his Mother. A doctor from Sagalla Centre was said to have intervened to stop the assault, to no avail. The Investigating Officer makes no mention of such a witness being interviewed. The Witness said "*the doctor ... came and tried to stop Samuel but he would not stop*". Eventually the Accused did stop and then went away. There is no mention of the Accused taking any interest whatsoever in the subsequent welfare of the Deceased at the time.

7. The Witness listed the injuries that he observed the Deceased to have suffered at the time. He said, he was still conscious but he had bruises on his hands and legs. He was bleeding from his hands, legs and left side of the forehead. The Deceased said he was in pain and that he felt like his back was being pulled. In addition, the Deceased lost his phone and they were unable to find it. On the advice of another neighbor who was passing by the two friends took the Deceased to the Hospital. They said his health deteriorated and he was not able to leave his home. He passed away shortly thereafter. The Deceased was taken to Sagalla Health Centre but the Prosecution and/or the Investigating Officer did not bother to produce treatment notes.

8. As to the demeanour of the Accused the Witness said, he did not know why Samuel beat Paul. He observed that Samuel was drunk and he saw him talking loudly. He was not aware of any disagreements between the Accused and the Deceased. Under cross examination, PW-1 confirmed that Samuel was old, he had a wife and children. He said Samuel came towards them out of the blue. He repeated that his evidence of Samuel picking up and dropping Paul was the truth and he was lifted to about a metre height before being dropped to the ground. The area was rough and had a mixture of cement and rubble. The Witness stated that he was frightened of the Accused Assailant. Prior to the assault Paul was neither weak nor unwell. Nor did he have a "bent neck" as asserted in cross-examination, the witness said.

9. The Prosecution called PW-2, Eunice Paul mother of Deceased. The Deceased was her youngest child. She told the Court she was very attached to him. She told the Court that he had to stop school and undertake electrical studies because she could not afford to send him to secondary school. She said that on 11th June 2016 at around 1630 she received a telephone call from a neighbor called Mukhaji who told her that Paul had been injured and he was on the way to the hospital. Paul was taken to Sagalla Health Centre. She says when she arrived there Paul and his two friends had already arrived. She saw that Paul had injuries on his face and hand and he had a lot of dust in the middle of his head. The witness related what the Deceased had told her. He said; he was beaten by Samuel Kamodo as the Accused is known. She said that he was sitting on the culvert when Samuel approached him and started beating him for no reason. He said he was with Peter and Javan. Paul told his mother that he had asked Samuel to stop and forgive him if he had done something wrong. He said he was speaking on his phone when Samuel approached. Samuel took his phone and did not return it to him. Paul told his mother that Samuel threw him on the ground and then stamped on him about 8 times before he left.

10. PW-2 tells the Court the outcome of Paul's first consultation with the doctor. The doctor is said to have observed the bruises on the head and face and given Paul some painkillers.

11. PW-2 told the Court that the following day 12th June 2016, the Accused and his two brothers visited the Deceased's home. He returned Paul's phone and confirmed that it was not damaged. He asked for forgiveness from the Deceased and his Mother. She said she found it difficult to forgive him and therefore did not forgive him. The witness then listed the treatment that Paul received. She said that he was taken to Moi Referral Hospital. He was subjected to various interventions including an x-ray and physiotherapy including having to purchase a collar for his neck. He did not improve and was moved from Voi to Mombasa – Coast General Hospital also referred to as Makadara. Despite all the treatment, the Deceased passed away on 24th July 2016. PW-2 told the Court she was left distraught by her loss. PW-2 told the Court that the diagnosis was that Paul had a problem with his neck and that the "second bone" in his neck was broken. This Court takes that to mean that his Axis vertebra was fractured by reason of the assault committed by the Accused. Under cross-examination PW-2 repeated that there was no grudge between her family and the Accused. She also said that Paul did not drink alcohol. She also repeated that Paul did not have a problem with his neck, being bent or otherwise until after the assault. She also confirmed that she reported the matter to the Police after Paul passed away. However, the evidence of the Investigating Officer is that the assault had been reported earlier but the Police only took action after being informed Paul had died.

12. The Court heard from the Arresting Officer, PW-3 and the Investigating Officer PC Stanley Kirui. The Investigating Officer informed the Court that the original incident had been reported to the Police on 21st July 2016 as an assault. He stated that from the time of the assault the Deceased's condition was deteriorating. The Investigating Officer interviewed Peter and Javan and they related the Accused approached the Children berating them and they ran away. They told the officer the accused had a stick. Also that he beat the Deceased and repeatedly lifted him and dropped him down as a result he suffered injuries and died. The Children said the Accused was drunk at the time. At the time, the Accused told the investigating officer that he paid the medical expenses for the Deceased in Sagalla Health Centre and Moi Hospital Voi. The Investigating Officer stated the Mother never mentioned that in her interview. Further she was not cross examined on the point. No evidence was produced by the Accused to demonstrate that he made any payments whatsoever. In fact the Accused now says such payment was never made. Under cross-examination PW-4 stated that the previous Investigating Officer, PC Mugo had interviewed the Deceased prior to his death, he was informed of the beating, including with a stick and then how Paul was lifted and thrown down several

times. The Investigating Officer formed the view that it was possible for the Accused to manage that bearing in mind the relative size and strength of the two.

13. Subsequently, on 29th July 2016 a post mortem was carried out. The final Prosecution Witness was Dr Uba Hemed. She was a medical doctor. She says she was the author of the Post Mortem Report. She introduced her report into evidence. She said the Deceased was 16 years of age and of good nutrition, normal built and height of one hundred and sixty five centimetres. In the post mortem there are no external injuries recorded. This Court notes that about 6 weeks had elapsed between the assault and the death of the Deceased. The cause of death is recorded as sub-dural haematoma and scalp hematoma, left occipital region. In short the Deceased suffered such severe head injuries that his scalp was bruised the was bleeding in the brain. The increased pressure in the brain resulted in respiratory failure.

14. The Accused, in his Defence gave oral testimony. He admitted that on the day in question he came across the three Children. He denies the assault and suggests two ran away and the Deceased fell over because he was surprised by the Accused, thereby raising the suggestion of accidental injury. He made no mention of the fact that he either paid or offered to pay the medical expenses of the Deceased. The Accused admits he had been drinking alcohol for several hours between the time he left work and the time he came across the Deceased and his friends. He wants the Court to believe that he had been drinking only moderately not excessively. He says that he saw three people looking down at their phone. He was concerned about what they were looking at so he crept up on them. They were so engrossed that they did not see him. When he got close one fell down and the other two ran away. He states the date was 10th June 2016 at about 1530, however he then says he left the Club at 1800. He said he had a parental concern for them. The eye witness states that the Accused was shouting at them from a distance, they saw him and formed the conclusion he was drunk. In the circumstances a story about a grown man sneaking up on a group of nervous teenagers is implausible in the extreme. The Accused's own evidence detracts from the suggestion of parental concern.

15. The Accused says he knew the Deceased and his mother by sight and to say hello to. He admits that he heard one of Paul's friends say Paul was hurt. He admits lifting him but says he was assisting him and they both fell. He did not point to any injuries he himself suffered as a consequence. He says he had to get Peter and Javan to help Paul. He does not say he helped him. He said that the height of the culvert was 1.5 feet above the witness box. He said he found the phone after the boys left to take Paul to the hospital. He said that the next morning he looked through the phone and found it contained pornographical images. Therefore he decided to speak to the parents about that. The next day he visited the home of the Deceased and returned phone. He denies that he was accompanied by his brothers. He denied paying the Deceased's medical expenses. He says that he was arrested on 24th July 2016 but was not informed of the Charge until about 1 ½ months later. However the information is dated 12th August 2016 and the matter was before the Court on 16th August 2016. Towards the end of his evidence, the Accused stated that the Deceased had said his injuries were minor and he did not need to go to hospital.

16. The Parties were directed to present their closing submissions by filing written submission which they did. The Court has considered them carefully. Both start by setting out the particulars of the Offence. The death of the Deceased was proved by the post mortem report. The cause of death was confirmed to be a consequence of the injuries suffered. The Written Submissions on behalf of the Accused remind the Court that it must be satisfied beyond reasonable doubt that those injuries were caused by the Accused.

17. The Accused's first challenge is to the evidence of PW-1. It is said that at the time of giving his evidence, PW-1 was a child and the evidence was not corroborated. *Section 124 of the Evidence Act, Cap 80* provides; "124. Corroboration required in criminal cases Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

18. Therefore, looking at the evidence of PW-1. He states categorically that the Deceased was assaulted by the Accused and repeatedly pick up and thrown to the ground. That is what he said to the Investigating Officer and that is what he told the Court. Is that corroborated? The answer must be yes. The Deceased told his mother he had been attacked by the Accused. He describes the attack. The description was consistent with the evidence of PW-1. Under Section 33 of the Evidence Act Cap 80

"Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"

In the circumstances, the evidence of the assault is corroborated. It is corroborated by the evidence of what the Deceased told his Mother. Which is consistent with what he told the Investigating Officer. It is corroborated by the bruising and other injuries observed by the Mother (PW-2). The Accused himself admits to part of the interaction. He admits he came across the Children. He denies any assault and suggests that their injuries were self inflicted because they were surprised and/or frightened by him. The evidence of PW-1 is further corroborated by the seriousness of the injuries. There was bruising on the scalp as well as the brain hemorrhage. The extent of the injuries is further corroborated by the evidence of PW-2 when she says that Paul was bruised on his face and hands. Also that he was prescribed with pain killers. That prescription corroborates pain and therefore injury. The record does not show whether the Investigating Officer bothered to interview the doctor who attempted to intervene nor the neighbor who telephoned Paul's mother.

18. The Accused raises a number of Defences. Firstly, he states that he did not beat the Deceased whether with his hands or a stick. He accepts that the Accused fell but that was accidental he says. He sought to demonstrate he had no ill will towards the Deceased by saying he paid his medical expenses. That proved not to be the case when he gave sworn testimony. He suggests he was provoked by the conduct of the Children, however, there is no evidence whatsoever that they had any interaction with him before the alleged assault. His Advocate sought to suggest that the Deceased had been drinking, that proved to be untrue. He states that he approached the boys by creeping up on them out of parental concern, yet he did not ensure that an injured child was taken to hospital. He did not say what he saw at that point in time, to raise concern requiring his intervention. He admits he took and retained the missing phone until the next day, claiming he saw pornography on the phone when he was looking at it on his own after the assault. Earlier in the proceedings in the course of cross-examination, Defence Counsel suggested that Paul's neck was already bent. That was repeatedly put to witnesses and repeatedly denied. Although it may explain the fractured vertebra, it does not explain the bleeding in the skull and scalp. In the circumstances, the evidence of the Accused was inconsistent and implausible.

19. In the circumstances, and for the reasons set out above, this Court is satisfied beyond reasonable doubt that the Accused caused the injuries complained of and set out in the post-mortem as suffered by Paul. The Court is satisfied that Paul suffered greatly as a result. The Court is equally satisfied that the perpetrator who injured Paul was the Accused. The Court is further satisfied beyond reasonable doubt that the Accused was not provoked. Further, the Accused had no locus nor entitlement to chastise the child of another from a different village. The Accused was drunk. That does not provide a defence. This Court is satisfied that the conduct of the Accused was so frightening that it cause Peter and Javan to run away leaving them helpless to come to the aid of the Deceased. For those reasons this Court is satisfied that the Accused did assault the Deceased and that he did so with the intention to cause grievous bodily harm. This Court is satisfied beyond reasonable doubt that the Accused intended to cause physical harm to the Deceased which is demonstrated by the repeated nature of the assault and the seriousness of the injuries. It is apparent that the Deceased was in great pain as a consequence of his injuries thereafter the Accused left without offering any assistance, notwithstanding the parental role he attributes to himself and expects the Court to believe. In the circumstances, he also falls within the intention described in Section 206 (a) and (b). For those reasons, this Court finds the Accused guilty of murder.

Order accordingly.

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at Voi on this the 16th day of December 2019

In the Presence of:

Court Assistant: Josephat Mavu

Prosecution: Ms Mukangu

Accused: in person

SENTENCE

1. Moving onto the issue of sentence. One of the options available to this Court is to call for a pre-sentence report. However this Court takes cognisance of the pre-bail report. It is noted that the Probation Officer did not take the slightest care in preparing his report. He failed to appreciate that the victim hailed from a different village from the perpetrator. He failed to interview anyone from that village. He failed to interview the Children who stated they were frightened of or by the Accused. Therefore, repeating the exercise would be a waste of precious resources.

2. It is clear to this Court that the facts, investigation and prosecution of this case predetermined their deliberations without completing their investigations. This is a case where an adult who is wealthier is deemed to be within his right to beat a stranger's child to death simply because he can offer money to pay for medical expenses. The Police and Prosecution have thus failed this child and the more vulnerable members of this Community. It is clear the Investigating Officer lost interest in the investigation when he was told of a payment – which in fact was never made. That is evident from his criticism of the Mother when he says she never mentioned the payment.

3. In light of the inequality between the perpetrator and the victim and the fact the Accused has shown no remorse, this Court finds that a custodial sentence is appropriate. The Court is conscious that it has a wide discretion on sentencing starting with the death penalty, however this Court is not convinced that is the most appropriate in these circumstances, sad as they are. The Accused is hereby sentence to serve 20 years imprisonment. In addition, the Perpetrator is ordered to pay compensation to Ms Eunice Paul, the mother of the Deceased. A quantum in line with the Fatal Accidents Act and the Law Reform Act is appropriate. Therefore, the Perpetrator is ordered to pay the sum of KShs 500,000/= for pain and suffering and KShs. 100,000/= for loss of expectation of life. 600,000/=.

4. The Accused is entitled to appeal within 14 days of today.

Order accordingly.

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at Voi on this the 16th day of December 2019

In the Presence of:

Court Assistant: Josephat Mavu

Prosecution: Ms Mukangu

Accused: in person