



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE (MURDER) NO. 29 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON JUMA RUA.....ACCUSED

J U D G M E N T

1. **Jackson Juma Rua** the accused herein is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 13th day of November, 2013 at Indian Ocean Dabaso Sita area of Gede location, within Kilifi County he murdered **SRC**. The accused denied the charge. He was represented by Mr. Mayaka during the trial.

2. The prosecution called nine witnesses. **SRC** (the deceased) was 11 years old at the time of his death. He lived with his father **RC** (PW4) and brother **FK** aged 12 years (PW3) at Dabaso. On the material day PW3 and his deceased brother joined other friends **BK** (PW1), **MJ** (PW2) and **TJ** (PW5) to go to fishing in the ocean close to their home. At 2.00pm the boys decided to take their catch of the day home.

3. They were intercepted by the accused. He demanded a share of their fish. The children declined. The accused brandished a knife at them. He had an oar or paddle. He ordered the five boys to lie face down in the water. He used the oar to prod or poke them hard on their backs forcing them to take in water. The deceased managed to break free and ran into high waters where he drowned. Meanwhile accused escaped his canoe.

4. Villagers including **Antony Fondo Kalama** (PW6) and **Kitsao Salim** (PW7) ran to the scene upon hearing of the incident. PW1 was rescued and taken to hospital. The deceased however drowned in the deep waters. His body was pulled out and taken to mortuary by police. The post mortem examination confirmed that death was due to cardio-respiratory arrest as a result of drowning. The accused was subsequently arrested and charged.

5. The accused when placed in his defence elected to make an unsworn statement. He described himself as a fisherman residing at Sita Dabaso. He said he went to sea at 6.00am on the material date. In the course of the day he decided to get some water from his canoe. He got a container and poured water from a tap at the shore. He noted some children swimming in the water, their clothes on the beach. The tide was rising so he took his canoe back to the island leaving the group of children swimming. Some people who joined him at the island at 6.00pm brought news that children had drowned in the ocean and that he was involved.

The accused stated that he had not engaged with the children he had seen swimming at all.

6. At the close of defence case counsel for the accused submitted that there was no *mens rea* on the part of the accused and that the victim ran into the high waters. Counsel therefore urged the court to reduce the charge to manslaughter.

7. There is no dispute that the deceased went fishing in the sea with his friends on the material date and that the accused saw the group of children. It is not in dispute that the deceased drowned in the high waters on the said date. The issues in dispute are whether the accused, with malice aforethought occasioned the death in question.

8. The ingredients of the offence of murder are stated in Section 203 of the Penal Code. The three elements are causing death by an unlawful act or omission and with malice aforethought. Malice aforethought is defined in **Section 206 Penal Code** 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 flight or escape from custody of any person who has committed or attempted to commit a felony.

9. The key witnesses against the accused were all minors PW1, 2, 3 and 5. Their testimony was consistent in the description of the events of the fateful afternoon. Their evidence was that the accused accosted them as they made their way home and demanded that they hand over their catch of fish. That further, when they declined, he forced them into the water while wielding a knife and oar in a menacing manner. The accused forced them to lie face down in the waters. In the process PW1 took in water and nearly drowned.

10. The deceased was swept by the high water and drowned as he tried to escape the accused's cruel treatment. The accused fled in a canoe as the children screamed for help. The event occurred in day time. The minors were well familiar to the accused. They referred to him by his name. All of them recalled that the accused had regular a chant as he went round the village: "**kula wire**". The accused does not deny being present at the scene of death at the material day. His evidence is that he did not engage with the children at all. As the minors all gave unsworn evidence, in connection with that aspect, the court must look for corroboration of their story. **See Haro Guffil Jillo –V-R [2014].**

11. In **Eliphaz Muhanji Mutsotso alias Kizito –V- Republic [2014] KLR** the court restated the definition of the term "corroboration" as stated by Denning L J in **Republic –V- Baskerville [1916] 2KB 658** as follows:-

“.....Lord Denning explained the meaning of the term corroboration. He stated that corroboration must be independent testimony which affects the accused by connecting him or tending to connect him with the crime. In other words, it must be evidence which implicates the accused with the crime and which confirms in some material particular not only the evidence that the crime has been committed but that the prisoner committed it”.

12. In **M'Riungu –Vs- Republic [1983] KLR 455** the Court of Appeal stated at pg 463:

“As was stated in Republic –V- Baskerville [1916] 2KB 658 corroboration need not be direct that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.....”

See also **Manilal I Purohit –V-Republic [1942] 9 EACA 58.**

13. In this case corroboration is found in the evidence of the adults PW4, PW6 and PW7 as well as the post mortem examination results. According to PW4, PW1 was carried home by villagers in a bad physical state following the incident. He had taken up a lot of water and had to be escorted to hospital. Although hospital records were not tendered, this evidence is confirmed by PW6 and PW7 who were part of the group of villagers who responded to the children's cries of distress.

14. With regard to PW6, his reference to one 'Jackson' who assisted the rescue of the children cannot point to the accused. By his own evidence the accused was not part of the rescue team. No suggestion was made to PW6 that the name "Jackson" referred to the accused. PW7 in particular helped to take PW1 home and witnessed the removal of the body of the deceased from the water. The post mortem form contains a notation that the deceased's body had a bruise that measured about 3cm x 3cm on the back. This bruise is consistent with the evidence given by the children that the accused used the oar to poke at or prod their backs as they lay face down in the water, at his command.

15. There can be no possible reason for the prosecution witnesses as to bear false testimony against the accused person when other persons must have been on the beach or at the sea, and none was suggested by the accused. Despite the denials contained in accused's defence, his counsel submitted that the accused had no intention of murdering the child and that the charge should be reduced to manslaughter. The account of the children, especially PW2 coincides with accused's own admission that he took a canoe from the shore sailing away from the scene.

16. The accused's action of demanding fish by menaces from the children was unlawful as was his use of brute force intended to subdue the children. By forcing the children into the water and prodding them with an oar, the accused must be deemed to have intended to cause them grievous harm.

That one of the children ran into high waters was a direct consequence of the unlawful action of the accused. There is evident malice aforethought in the proven actions of the accused.

17. Hence the plea that this was a case of manslaughter is misplaced. As an adult person the accused is deemed to intend the consequences of his unlawful action as described by the prosecution witnesses. His defence in my view merely goes to confirm what the witnesses testified and especially that the accused ran away from the scene on a canoe as the children were drowning. His denials cannot be believed. I reject his defence in as far as it claims that he did not engage with the minors. The prosecution has proved beyond reasonable doubt all the elements of the charge of murder against the accused. I find him guilty and convict him as charged.

Written and signed at Naivasha this 13th day of February, 2015.

C. MEOLI

JUDGE

Dated and Delivered at Malindi this 4th day of March, 2015.

S. CHITEMBWE

JUDGE