



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 107 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SIMON MBUTHIA KIMUNYA .....ACCUSED**

**JUDGMENT**

Simon Mbuthia Kimunya, the accused herein, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on 7/10/2010, at *[Particulars withheld]*, murdered S K. The accused denied the offence and the case proceeded to full trial. In support of their case, the prosecution called a total of 13 witnesses. Accused was asked to defend himself and he called a total of three witnesses.

The deceased was a pupil at *Particulars withheld*. Five witnesses, that is PW1, E N aged 12 years, PW2 P N aged 11 years, PW3 R W aged 10 years, PW4 P M aged 12 years and PW7 V P K were all pupils at the same school. DW2, A O aged 16 years was also a pupil in the same class as deceased. All witnesses testified on oath after the court conducted voire dire examinations on them and found them to be intelligent enough and understood the meaning of the oath. It is with exception of DW2 who did not understand meaning of oath.

PW1, E, was in same class as the deceased said that they were doing examinations, and during the English examination, a boy by name V (PW7) and K, the deceased, started to play. The accused who was a teacher at the school called them and told them to follow him which they did. He went to another class and got two girls (PW2 and PW3). They went to the staff room and the deceased came back to class laughing saying they had been beaten; that the deceased sat down and after a short while, started to cry and fell down and started forming from the mouth. PW1 is one of the boys who took the deceased outside and the accused with another teacher took the deceased to the staff room. When somebody lifted the deceased so that he could be put on the motor cycle, the deceased started bleeding from the nose. A vehicle took him to hospital and later they learned that he had died.

PW2 P N was then in class V. She also recalled that they were doing examinations on the said date. A classmate by name R (PW3) asked her for a razor and just then, Mr. Kimunya, the accused arrived and said they were making noise. He went to the next class and came out with V and deceased and found her and R making noise and told them all to go the office. They were caned on the hands and told to go back to class. She said each person entered the office at a time was caned and that she left the deceased inside. She only heard of what happened to K.

PW3 reiterated what PW2 said. She said she was the first to be beaten on the hands and went back to class. PW3 was not in the class where V and deceased were. PW4 reiterated what PW1 told the court. He said the two, V (PW7) and the deceased were called out of the office, they came back laughing but soon thereafter, the deceased started to cry and fell. PW4 is one of the people who carried the deceased outside. He saw deceased forming from the mouth and was not talking. When outside, the deceased started to bleed from the nose. A vehicle took him to the hospital and they later learned that K died. PW7, V K reiterated what PW1 and PW4 said that the accused told them to go to the staff room after he found them making noise with deceased. PW7 said he was beaten on the hands; that when they went back to class, K complained of dizziness, fell down and hit his head on a door. That is why he was carried out.

PW5, Teresia Wangui is a teacher at [*Particulars withheld*]. She was aware examinations were being undertaken. At about 11.00 a.m. she went out of staffroom when she saw two boys with the accused and another boy lying on the ground. He had fainted. She saw him start to form from the mouth and then bled from the nose. They took the deceased to a dispensary but could not get help and so took him to Nyahururu where on arrival, they were informed that the child had died.

PW6, R W K is the mother of the deceased. On 7/10/2010, she received a call that her son was very sick at school. She found the child had been taken to Nyahururu and she followed and found that he was already dead. PW6 denied that deceased had any ill health. She was informed that the child was beaten by a teacher. PW8 J M K is an uncle to deceased. He identified the body of the deceased to the doctor for purposes of post mortem on 13/10/2010.

Dr. Ngulungu (PW9) performed the post mortem on the deceased. After examining the deceased, he formed the opinion that the cause of death was subdural haematoma due to violent shaking of the brain. He said that the blood vessels ruptured and that the vessels were very small. He also found the stomach of the deceased to have been very small in size – 2/5 of the normal size. He said that the injury may have been sustained if one hit the head on a hard surface or if he had convulsions. He also found a blood deficiency due to the bleeding.

PW10, Peter Mwangi, of Subukia Health Centre denied having attended to the deceased but his workmate did. PW11, IP Henry Wesonga, the OCS of Subukia Police Station received a report on the death of the deceased, went to interrogate the teachers at the school and recorded their statements. He got information that the accused slapped the students on the head and that is when the child started forming and collapsed. He arrested accused. He produced a report of the Government analyst where some samples taken from deceased's liver and blood were sent for further investigations to find out if there were any toxic substances in the deceased's body but PW13, Stephen Matinde Weibe, the Government analyst, found no toxic subsistence in the liver, stomach and blood samples of the deceased. He produced his report as PEx.5.

PW12, Consolata Nyangendo Mwangi, a nurse at Subukia Health Centre examined the deceased on 7/10/2010. She found no pulse nor was the child breathing and she referred the deceased to the District Hospital. She did not give the deceased any treatment.

In his defence the accused said that he was in school on the said date, 7/10/2010. The children were sitting for examinations. He was supervising Class 5. When outside one class, he saw two boys throwing papers at each other, called them out and told them to go to the office. He also found two girls making noise in the next class. He used a stick to cane them on the hands and they returned to class. About 10.30 a.m., a teacher called him out and it is then he saw other students carrying the deceased out of class. He saw the deceased forming from the mouth; he was taken to Nyahururu by accused and 2 other teachers. At Nyahururu he was declared dead. The accused denied having beaten the child and that for the 26 years he has taught, he has never committed such an act.

DW2, A O M, gave unsworn evidence because he did not seem to understand the meaning of the oath. He was also a pupil in the deceased's class and reiterated what PW1 and PW4 said. He from the time, V and K were found playing, were called out for discipline and that later is when the deceased fell, formed

from the mouth and was taken away to hospital.

DW3, John Waithaka Kabuga is the Head Teacher at *[Particulars withheld]* where the accused was teaching. He was away when the incident occurred. He was only informed of what happened on that day.

I have carefully analysed the evidence of both the prosecution and the defence. It all started with the accused finding some students making noise in Class 5 during examination time. PW1, PW4, PW7 and DW2 were in same class with the deceased. The deceased and (PW7) V were caught making noise and taken to the office for discipline. That was also the fate of PW2 and PW3. That is not in dispute. Even accused admitted it.

According to PW2, PW3 and PW7, when they were ordered by the accused to go to the office, they were disciplined in turn. All of them claim to have been caned on the palm of their hands. According to PW2, each person went into the office alone. Although these 3 witnesses received canes on the hands, it cannot be ascertained with certainty whether accused inflicted the same punishment on the deceased. But then, there is also no reason given by the prosecution why the accused would have inflicted a different punishment on the deceased. Apart from PW3 who seemed to be withholding information because of the manner in which she was hesitant to answer questions, the evidence of the other witnesses who witnessed part of what happened at the office is consistent. Nobody therefore directly witnessed the actual punishment inflicted by the accused on the deceased. But if all others were caned on the hands why would the accused single out the deceased to beat him elsewhere? The evidence against the accused remains circumstantial evidence. The law is clear on when circumstantial evidence can be relied upon to found a conviction. In **Rep. V Kipkering Arap Koske & Another (1949) 16 EACA 15**, the East African Court of Appeal said:-

**“the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”**

In **Peter v R (1952) AC 489**, the court said:-

**“circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another .... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”**

Dr. Ngulungu, upon examining the deceased, found the cause of death to have been subdural haematoma. He said that the injury could have been caused by a blunt object. PW7, who was with the deceased when they were disciplined told the court that after the canning, they went back to class, the deceased claimed to be feeling dizzy, he fell and hit his head on the door. By the time that happened, the deceased had already been punished, had already started crying and feeling dizzy. The question that begs to be answered is whether the dizziness that the deceased felt was as a result of the beating by the accused or was there another condition. But then, might the deceased have sustained the fatal injury as a result of the fall and hitting the head against the door? Both are a possibility. There is therefore the possibility that the deceased may have been injured before the alleged fall or as a result of the fall. The doctor was not able to give a conclusive finding as to when the injury may have been sustained or how it was sustained.

Having considered all the circumstantial evidence, I come to the conclusion that the prosecution has not established that the accused inflicted any injuries on the deceased or that even if he did, the said injury resulted in the deceased’s death. Malice aforethought has also not been proved. In the end, the circumstantial evidence does not irresistibly point to the accused as the one who caused the deceased’s death. It is possible there are other intervening circumstances that may have caused the death.

The upshot is that the accused remains a prime suspect of the offence and suspicion only cannot justify a conviction in a murder case. the threshold in a criminal case is proof beyond any reasonable doubt. There is doubt as to whether the accused caused the injury that caused the deceased’s death. He is

therefore found not guilty of the charge of murder and is hereby acquitted under **Section 322** of the **Criminal Procedure Code**.

**DATED and DELIVERED this 8<sup>th</sup> day of July, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Chirchir for the State

Mr. Gakinya for the accused

Accused present

Kennedy – Court Assistant