

IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA
CRIMINAL JURISDICTION
CRIMINAL SESSIONS CASE NO. 34 OF 2020
THE REPUBLIC
VERSUS
JOHN ^S/O EZEBIUS @ MWANISAWA

JUDGEMENT

Date of Last Order: 10th December 2021

Date of Judgement: 14th December 2021

NDUNGURU, J

Accused person, John Ezebius @ Mwanisawa, stands charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 RE 2019 (hereinafter referred to as the "Penal Code"). it is alleged that on 24th day of October 2019 at Kianda village within Sumbawanga District in Rukwa Region, did murder one Florence John @ Mwanisawa (hereinafter referred to as "the deceased").

When the charge or information of murder was read over and properly explained to him. He pleaded not guilty to the offence, and thus plea of not guilty was entered, hence full trial.

During the trial of this case, Mr. John Kabengula, the learned State Attorney assisted by Ms. Marietha Magutta, the learned State Attorney represented the Republic; whereas, the accused person was represented by Mr. Charles Kasuku, the learned advocate.

To drive home the allegation levelled against the accused person, the republic brought a total of six witnesses namely Francisco Chapanga, who testified as prosecution witness No. 1 (PW1), Damas Chapanga as PW2, Emmanuel Mwanisawa as PW3, Edifas Suwi as PW4, G 7156 D/CPL Ally as PW5, Adelina Mwakyala Liaison testified as PW6. The prosecution also tendered a cautioned statement and postmortem examination report as exhibit P1 and P2 respectively.

Upon the closure of prosecution case, defence case opened after it was found that the prime facie case has been established against accused person; thus, requires him to give his defence story. In disapproving the prosecution allegation levelled against him, accused person testified as DW1. He neither called a witness to testify on his favour nor tendered exhibit. The summary of prosecution testimonies is as hereunder;

PW1, Francisco Chapanga a resident of Kianda village, Sumbawanga District informed this court that on 25/10/2019 at noon

hrs he was with Edgar Chapanga went to fish at Nyinaluzi river. While finishing there came Florence Mwanisawa calling them from the river. They got out of the river; he also was coming to fish. He joined them. He said he wanted to drink water as he felt thirst. He told him to go to drink where the water is running because the place was deep. He went to drink water.

PW1 went on asserting that he asked him are you sick why you want to drink water? He replied he was not feeling good, as the previous day (saying yesterday) he was beaten by his father and his father has forced him to come for fishing. He told them that his father did beat him at the chest. He thereafter told them he is going back home. They told him let us continue fishing he denied telling them that they will find him at home. He said he is not feeling well they will meet him at home. He left going home, leaving them continue fishing. Having finished fishing they went back home. They passed at the home of Florence they met his father and mother they asked them if Florence had arrived at home, they said he is not, he is dogging/escaping school. They then went home.

It was PW1 further story that on 29/10/2019 in the morning, his father told him that Florence has never returned home. He went to Edgar, his brother and told him that Florence has never returned home

since that day when they were fishing. His father mobilized the villagers to look for Florence around the farms. They never found him on that date.

PW1 went on telling this court that next date on 30/10/2019 the villagers were summoned (ilipigwa mbiu) mobilized again and started looking for him. They divided into three groups. They went to different directions. One group found Florence. They were called to the scene. At the scene he saw him lying down and started decomposing. The head and face had started decomposing. He was dead. Only the skull (fuvu) was seen. He identified Florence due to the clothes he had on the day they met at the river fishing. He was in uniform on 25/10/2019. The leaders came there then burial process started.

When cross-examined by Mr Kasuku he replied that on the material date they went to fish at Nyinaluzi river. He was with Edgar his brother. He said the deceased was schooling at Kianda Primary School. He did not know the distance from home to the place Florence was found. He was found along the way home. But far from home.

He replied that Florence had no wounds when came for fishing. Florence drank water. They went back home at about 07.00pm, there was still light. They got few fish. When they came back, they passed

through the home of Florence. They were living in one Mtaa (cell). He is a standard seven leaver. Florence was young to them.

He further replied though he and Edgar were the last to be with the deceased but they are not the ones who killed him. The body was discovered on 30/10/2019 near Itela village. Itela village is at the East. The body was discovered at noon. Approximately at 03.00pm. He and Edgar were in one group. The body was found at the open area. He did not know why the people who were passing all the days never saw the body.

When re-examined he stated that Florence was calling them brothers. They were in good relation.

PW2, Damas Chapanga, a Peasant resident of Kianda village, Sumbawanga District testified that in 2019 he was living at Kianda village dealing with farming. Also, he was a ten-cell leader. His duty was to maintain peace and tranquility of the cell and protect citizen and their properties. He held the position for two years.

PW2 testified that on 29/10/2019 in the morning there came Anna d/o Mwanisawa reported the disappearance of Florence Mwanisawa who disappeared on 25/10/2019. He went to the parents and started looking at the cells Mitaa but did not find him. On 30/10/2019 they went on looking for him in the farms along the way to Itela village. While they

went on looking for him one of the groups as they were in group discovered the body of Florence. He was dead.

PW2 further told this court that the group which discovered the body informed others, the people gathered where the body was found. The body had already decayed/decomposed. They came to know it is the body of Florence due to the clothes he had, as he knew the clothes. Then VEO reported the matter to police. The police officers came at the scene immediately. The police did their investigation procedures, and then they were allowed to bury the body.

When cross-examined by Mr Kasuku he replied that he is still a leader (ten cell) also a neighbor of the family of the deceased. The deceased was in a uniform short and grey sweater. The body was discovered on 30/10/2019 at about 10.00am.

On further cross examination he replied that he informed VEO and VEO informed the police. The police officers arrived at the scene at 00.30 noon. He was present at the scene but did not see exactly what they did. The police then handed over the body to the relatives it was at about 01.00pm and burial ceremony was done at 03pm. The accused was arrested on 30/10/2019. He was among the people who were looking for Florence. The accused was arrested while he was at the

burial activities. However, he did not know where the accused was arrested.

PW3, Emmanuel Mwanisawa a peasant resident of Kianda village, Sumbawanga District testified that on 26/10/2019 he was informed that their child Florence has disappeared. He said Florence is a child of his brother John Mwanisawa. He was informed by Luis Maembe. Having got information he went to his brother to verify that information.

PW3 further testified that he met his sister-in-law the wife of his brother one Gista Changalamka, who told him that it was the 3rd day Florence was not found at home. He told her let them keep on looking for him because he used to escape school might be he has hidden somewhere. His father told him that he had come from Iltela village to look for Florence but didn't find him. On 29/10/2019 in the evening he was at Kianda pombe shop his sister-in-law came and said Florence is not yet found. He found VEO and told him to assist to mobilize the people (villagers) for the purpose of looking for him starting with those children who were with Florence. It was Fransisco and his fellow.

PW3 stated that Fransisco and his fellow said when they were fishing Florence told them that he was not feeling well he then left saying he is going home while leaving Fransisco and his fellow fishing.

On 30/10/2019 in the morning he was at Kianda village. They gathered and started looking for the deceased starting with along Nyinaluzi river where they were fishing. He said the water was little. They then divided into group. Others went along the river and others along the way to Kianda village. At about 700 meters, the body was found at the farms at the border village of Itela. The body was decomposed. He identified him due to the clothes and shoes he had. He went to report to the office of VEO. VEO did not come at the scene he remained at the office. VEO informed the police who came to the scene with a medical officer. The accused was at Iteta village where he went to look for Florence.

When cross-examined by Mr Kasuku PW3 replied that on 26/10/2019 when he got information, he went to Itela with his sister-in-law who said it is the 3rd day the child is not found. The body was found at the farms at the borders of Itela village. It was at the open place. The body was revealed at 09.30am. He stated that the way they were told by the children that it was where the deceased headed. Helped them to discover the deceased. The body was discovered lying at the cultivated farm.

On further cross examination PW3 told this court that the police arrived at about 01.pm. They called them to witness when the medical

officer was investigating the body. The process of investigating the body took almost 5 minutes. By then the father of the deceased had gone home to prepare the funeral.

They buried the body at about 03.30pm. Immediately after the burial activities the accused and the children who were with the deceased were arrested and sent to Kaengesa police station.

That on 31/10/2019 PW3 he went to Kaengesa police station to record his statement. Having recorded his statement, he was released. On 31/10/2019 the police came with the accused and those children at the village. These children were released by the police while took the accused back to the police station.

Upon re-examined by Ms Maguta PW3 replied that on the material date he had a mobile phone which he used to look the time; he said to be present in all processes as the relative of the deceased.

PW4, Edifasi Suwi, a resident of Kianda village, Sumbawanga District testified that in 2019 he was VEO of Kianda at Kaengesa "A" and that on 29/10/2019 at evening hours he was at Kianda village at "Kilabuni" area. While there he heard Emmanuel Mwanisawa and John Mwaniasawa, talking John Mwanisawa (accused) was telling Emmanuel on the disappearance at home of the child one Florence Mwanisawa.

PW4 went on asserting that he called Emmanuel Mwanisawa and told him to tell him what was the story Emmanuel said, his brother told him that the child has disappeared at home. It was the third day by then. He said that it was due to bad relationship between John (accused) and the child. It appeared that John did beat the child.

He told them to keep on looking for him. Then Emmanuel said the child disappeared on 24/10/2019. His father looked for him on 25/10/2019 at Itela village but did not see him.

PW4 said on 30/10/2019 at about 09.30 he was in the office. Emmanuel Mwanisawa told him that they have found a dead body of the child near Itela village at the farms. Some of the parts like ears and eyes were already consumed by insects.

Emmanuel gave him the information in the office. He reported the matter at Kaengesa police station. The police came to his office and went to the scene of crime. He was left in the office. He remained in the office as he had other duties.

When cross-examined by Mr Kasuku he replied that he did not go to the scene. He was the one who reported to the Kaengesa police. The police officers arrived at his office about 11.00am by vehicle. There was one police from Kaengesa and the other from Laela. From Laela to

Kaengesa by vehicle it takes about 1 hour. He has forgotten the actual number of police who came. Thereafter, he did not know what went on.

The accused was arrested alone on the very date. At the village office the police station interrogated John Mwanisawa (accused), his wife and him. The police recorded statements of the people who were at the scene at his office. The police then left with Emmanuel Mwanisawa.

PW5, G. 7156 D/CPL Ally, a Police Officer at Laela Police Station testified that on 30/10/2019 in the evening he was at Laela police station. While in the office he was assigned the duty to interrogate John Ezebius Mwanisawa who was facing murder offence. By then John was in the police lockup. He went to the charge room to take out the accused for interrogation. He took him to the investigation room, they were three, himself, the accused and two police officers who were doing their work.

He introduced himself to him and informed him the charge he is facing, he told him he has the right to have relative, friend or advocate when giving his statement. The statement which can be used as evidence against him in court. The accused was willing to give his statement and he opted to give it while alone. He then recorded his statement gave him the right to read or be read to him. He read and confirmed to be correct and he signed.

PW5 tendered the statement made by the accused and was admitted in court as exhibit P1.

When cross-examined by Mr Kasuku he replied that he was the one who recorded the statement of the accused.

He went to Kianda village to record the statements of the witnesses. He further stated that according to the arresting officer D CPL Revocatus the accused having arrived at Kaengesa police station was immediately sent to Laela police station. Kianda – Kaengesa is estimate to be 12km. The distance from Kaengesa to Laela is almost 50km, plus that from Kianda makes a total of 65km, he said that was estimation. From Kaengesa to Laela the police vehicle was used.

PW6, Adelina Mwakyala Laison, a Medical Officer at Isesa Dispensary Sumbawanga District by then stationed at Kianda Dispensary testified that on 30/10/2019 she was at Kianda Dispensary on duty. At about 000 noon there came police officer Revocatus and requested her to accompany him to the scene of crime where there was a dead body found at the border area of Kianda and Itela village. At the scene they met some people while the body was lying down covered. The relative identified the body to be of one Florence Mwanisawa, they permitted her to conduct post mortem examination.

It was her story that she uncovered the body and examined and found the part of the body was attached by wild animals, the head had no skin, no eyes no ears no lower jaw and part of the leg were consumed by wild animals. The body was swollen. He said that was external investigation. She then removed the shirt and found a wound at the chest at the left side, the wound showed that he was attacked/hatted by a blunt object. She saw blackest color meaning that he had bled internally. She stated that internal bleeding was the cause of death. The wound was approximately to have been caused three to four days ago. She further stated that the place where the body was beaten by object started decomposing. The postmortem report she prepared was tendered in evidence as exhibit P2.

When cross-examined by Mr Kasuku she replied that the wound had caused internal bleedings. The wound had burst. She said the clothes were intact. The shirt had to blood stains. She stated that the wound got burst when the body was decaying. The wound showed the length of the beating. PW6 stated that swelling of body was a result of decomposition process.

The court having found that, the prosecution has sufficiently established a case against accused person to require him to make his defence, the accused person was called to defend himself and he

elected to testify under oath. He testified as DW1. He neither called witness to testify in his favour nor tender exhibit. The summary of his evidence is as hereunder;

DW1, John Ezebius Mwanisawa, a Peasant and a resident of Kianda village Sumbawanga District testified that on the date of arrest since morning they were looking for Florence who had disappeared. They discovered him dead. They took the dead body home. It was on 30/10/2019. He did not remember exactly the date he was arrested. He said Florence went to fish with his fellow at Nyinaluzi river which is between Itela village and Kianda village from then he did not come back. His fellows were from the family of Chapanga. He has forgotten their names.

DW1 went on telling this court that after burial activities he was called by police officer to the office of VEO. While at the office VEO told him that he was suspected to have killed Florence Mwanisawa his child. VEO said he has no mandate to settle it, but he DW1 has to accompany with police officers to the police station. He was taken to kaengesa police post.

He stated that at Kaengesa police station he denied to have killed his son. Then he was sent to Laela police station. He recorded the statement at Laela on the date he arrived. It was about 01pm.

DW1 further testified that having noted that the child had not returned, he informed his relatives and started looking for him to his relatives, later after three days he reported to VEO for further assistance of looking for him.

He told the court that his child had the behavior of escaping schooling and he had good relation with the deceased. He denied to have involved in any way in killing his child.

When cross-examined by Mr Kasuku he replied that when the deceased left with his fellows for fishing, he was not at home. He denied to have any dispute with the family of Chapanga. They are his neighbor and they lived peacefully.

When defence case was closed, both the state attorney and the learned advocate for the republic and accused person respectively were given audience to address the court on final submissions. They all opted to submit oral submission.

The learned defence counsel. Mr. Charles Kasuku submitted that as per the prosecution evidence there is no any prosecution witness who testified direct on the involvement of the accused in murdering the deceased. The evidence is more less hearsay. Nobody saw the accused killing Florence Mwanisawa. All the witness he said either repeats what

they heard from PW2. The hearsay evidence as per **Section 62 of Tanzania Evidence Act**, Cap 6 RE 2019 (TEA) need to be corroborated by independent evidence. Hearsay evidence cannot corroborate another evidence which need corroboration See. **Mkubwa Said Omary V. S.M.Z [1992] TLR 365.**

Further, he submitted, the evidence of PW5 the witness who tendered cautioned statement, the said statement is not worth to be trusted, as it was rubbed and has different dates: it has alteration.

He referred the case of **Mashaka Masala @ Ezekiel V. Republic**, Criminal Appeal No. 33 of 2021 HC (Unreported). Page 9.

It was defense counsel contention that the said alterations were not acknowledged by signing at the place altered. That when PW5 was cross examined she had nothing useful to state. That he was instructed to record the statement at Laela police station. But said he arrived the scene and then at Kaengesa police station. When examined on the faults in the statement he said there was no difference.

The defence counsel said when DW1 testifying said he attended a night at Kaengesa and next date he was sent to Laela. As in the statement it is said that he offered the statement on 30/11/2019 not on 31/11/2021. Taking such difference, it means there is a doubt on

whether the statement was taken on time. The other doubt is on alternatives here in court. The third doubt is on hearsay evidence which has not been corroborated.

In criminal cases, the burden to prove the case lies with the prosecution side. In the case at hand, the defence side is of the firm view that the case has not been proved to the required case. Thus, it is not safe for the court to convict the accused in such doubtful evidence.

Mr. Kasuku argued that there is no dispute that Florence is dead. Life cannot go back to him. Still the life of the accused is in jeopardy if found guilty. Thus, he invited the court to look this matter diligently. Because the prosecution has failed to prove the case to the standard. He argued the accused be acquitted.

On the other side, Mr. John Kabengula learned State Attorney submitted that the case against the accused person has been proved beyond reasonable doubt. That it is quite clear that nobody witnessed the event. However, he said there is evidence of the guys who they were fishing. The witness said the deceased was beaten by the accused person a day before.

Further, the deceased told the boys at the fishing that he was bean by the accused on his chest. PW1 had no reason to state lies against the accused person.

When examined in chief, and in re-examination the accused said he has no grudge with the family of Chapanga. Thus, his evidence is credible because he had no reasons to tell lie against accused. That the evidence is corroborated by the evidence in the statement of the accused, which the accused said to have recorded willingly.

He was of the view that what the counsel is telling the court to be a short coming in the statement of the accused (alterations) does not go to the root of the case. The alterations were human error. DW1 does not deny the fact that he was arrested and sent to Laela police station. The accused is not aware on the date he was arrested. That human errors cannot water down the said statement. That the evidence of PW5 was very clear, that apart from going to the scene at the evening he was assigned to record the accused statement. The DW1 testified that he was interrogated at Laela police station.

The prosecution is satisfied that it has discharged its duty of proving the case beyond reasonable doubt. That the errors in the statement does not go to the root of the case. That PW1's evidence was corroborated by the cautioned statement of the accused. He submitted that the case has been proved, thus the accused be found guilty.

After thoroughly going through prosecution and defence case I summed up to court assessors who thereafter gave respective opinions.

Ms. Salome Kapele and Mr. Patrick Wanyama, lady and gentleman assessors respectively who sat with me in the trial of this case had similar opinion. They both opined to me to find the accused person guilty of the offence facing him; whereas, Ms. Edina Kiasile, lady assessor entered a verdict of not guilty against the accused person of the offence facing him, as charged.

The main issues before this court are essential three for the determination of the case at hand.

- (i) whether the deceased child one Florence John alleged to have died is actually dead, if the answer is in affirmative,*
- (ii) whether the accused person John Ezebius Mwanisawa, is responsible for the death of his son Florence John,*
- (iii) whether his action was actuated with malice aforethought.*

To start with the first issue, it is evident from the evidence of PW1, PW2, PW3 and PW6, that all these witnesses visited the area of scene and saw the dead body of Florence John lying down in the farms near the Itela village. PW1, PW2 and PW3 identified the body to be of Florence John. Also, the medical officer accompanied with D CPL Revocatus conducted post mortem examination at the area of scene.

The medical officer through post mortem report (Exh. "P2") established that the cause of death was due to internal bleeding as a result of being hit by blunt object on the chest. The medical officer further stated that the dead body had no head skin, hair, nose, tongue, ear, lower jaw and wound appears on the neck and left leg. There is no any other piece of evidence which disputes with the above assertion/ proposition. Thus, the deceased, Florence John is actually dead.

Another matter, which is not disputed is that the accused person is the deceased's father and also the care taker of the deceased. Further, there is no dispute that the accused was living with the deceased under one roof.

As pointed above, the testimony reveals that the death of the deceased Florence John was unnatural, the second issue raised whether it is the accused person who killed the deceased.

From the evidence on record as far as the cause of death of the deceased, is contained in the post mortem examination report (Exh. P2). The report, Exh. "P2" reveals that the cause of death is due to internal bleeding due to being hit by blunt object on the chest.

According the totality of the prosecution testimony, none of the witnesses testified to have seen the accused person assaulting the

deceased which resulted to his death. The accused is only connected with the death of the deceased by the testimony of a witness who heard the deceased before he was later found dead and as well the accused statement before the police officer.

It is a principle of law that for the court to find the accused person guilty of the offence of murder the available evidence must link the accused person with the said death. See the Case of **Mohamed Said Matula versus Republic** [1995] TLR 3.

The first link begins with the evidence of PW1, which is to the effect that the deceased Florence John once complained before him and his fellow one Edgar Chapanga on 25/10/2019 at noon time while they were fishing at Nyinaluzi river within the village of Kianda. PW1 stated that the deceased complained that he was not feeling good as previous day (yesterday) was beaten by his father at the chest. PW1 said the deceased uttered that statement before them when he went for fishing at Nyinaluzi river. Thereafter, the deceased departed from them saying he is going back home at kianda village; however, after finishing fishing PW1 and his fellow upon went back home they passed at the home of the deceased but did not find him. He said the deceased did not reach home until he was later found dead on 30/10/2019. PW1 found the body of Florence John lying down at farms area near Itela village. With this

narration, I have no reason to doubt his testimony. He gave a plausible explanation as to what he heard from the deceased at the material. That the deceased was not feeling good due to being beaten by his father at the chest. His evidence is reliable and deserves credence as per the case of **Goodluck Kyando versus Republic**, [2006] TLR 363, also **Edson Simon Mwombeki versus Republic**, Criminal Appeal No. 94 of 2016. He had no reason to tell lies given the fact that they were living in harmony with the deceased family.

Additionally, there was undisputed evidence that the deceased's death was due to internal bleeding. The Exh "P2" reveals that the cause of death was due to internal bleeding as a result of being hit on the chest by blunt object.

Another incriminating evidence which prosecution case centre is an accused cautioned statement (Exh "P1"). PW5 told this court that he interrogated and recorded statement of the accused at Laela Police station on 30/10/2019. In his respective defence, the accused person admitted to have been recorded his statement before the police officer at Laela Police Station.

Now the test to determine whether a confession statement made by the accused was involuntary is provided under **section 27 (3) of**

the Evidence Act, [supra]. The test is to the effect that a statement shall be regarded as involuntary where the court believes that it is obtained by any threat, promise, or other prejudice held by any member of the police officer to whom it was made or by any member of the police or other person in authority. See **Michael Mgowole & Another versus Republic**, Criminal Appeal No. 205 of 2017.

In this case, no threat, promise or any kind of intimidation was asserted by the accused in both examination in chief and in defence. That implies the statement made by the accused was voluntarily made.

Further, the statement as contained in Exh. "P1" describes the circumstances in which the accused person admonished the deceased. The narration speaks of the reasons for the beating, the manner of beating and the weapon used to hit the deceased on the chest on material date 24/10/2019.

The circumstances described in the statement do not give any reasonable doubt as to the voluntariness of the confession. In that regard, the confession made by the accused was voluntary as containing nothing but the truth of what transpired between the accused and the deceased before the happening of the sad event. That the accused

person assaulted the deceased by hitting him on the chest with a hammer.

However, the defence counsel. Mr. Charles Kasuku disputed Exh. "P1" as it is tainted with alterations not acknowledged by author and the actual date the accused offered his statement is not clear whether 30/10/ 2019 or 31/10/2019.

My scrutiny of the Exh. P1 discloses that all places that were signed from front page to the last page were dated 30/10/2019. The date 31/10/2019 as appears within the last statement of the accused written by the author PW5 was I think slip of the pen, human error as rightly argued by the prosecution counsel, Mr. John Kabengula. As regards alteration, also my serious glance on it shows no alterations that goes to the root of the document. The arguments are therefore devoid of merit.

Back to the Exh. "P2" again, PW6 went further to tell the court that apart from internal bleeding as a cause of death as result of being hit by blunt object on the chest, she further told the court that the parts of deceased body were consumed by wild animals as the dead body was found with no head skin, neck skin, eyes, hair, nose, tongue, ear and lower jaw, also left leg was consumed by wild animals (had a wound).

Further to that all witnesses PW1, PW2, PW3 testified that they went to the scene at the material date 30/10/2019 and found the deceased body lying down in the farm area in a state of decomposition, while some of the parts of his body were lacking. They all identified the deceased body to be of Florence John by the clothes he worn. PW3 in his testimony said that the deceased body was found almost at about 700 meters along the way to Kianda village from Nyinaluzi river where they were fishing.

With the foregoing chain of evidence, the prosecution needs this court to believe and find that the chain of events being unbroken thus the accused be circumstantially found responsible with the death of the deceased. Should myself prepared to do so? The Court of Appeal in the case of **David Meikoki versus Republic**, Criminal Appeal No. 388 of 2013, unreported observed thus;

"The principle of the law in cases where conviction is founded on circumstantial evidence the evidence must be irresistible to the commission of the offence by somebody else other than the accused. In other words, the circumstantial evidence must eliminate the possibility of somebody else committing the offence".

The available evidence shows that the deceased body was found dead on 30/10/2019 at the farms area near Itela village. That is almost six days passed from the date he complained for not feeling good to his fellow's fishers at Nyinaluzi river on 25/10/2019. Further to that, the evidence of PW3 Emmanuel Mwanisawa testified that the body of Florence John was found almost 700 meters in estimate away from Nyinaluzi River where he lastly appeared to his fellows. The fact that PW6 a Medical Officer opined in her examination report that parts of the dead body of Florence John were consumed, suggests there is likelihood the deceased was attacked by wild animals on his way back home at Kianda on material date of 25/10/2019.

However, I find that had wild animals attacked the deceased while alive and consumed parts of his body, PW6 a Medical Officer would have found blood stains on the clothes of the deceased and the clothes being found torn out. Again, in her report (Exh "P2") PW5 further opined that she found the clothes of the deceased were intact and had no blood stains. That implies the deceased first met his untimely death before he was consumed by wild animals.

Without prejudice of what I have found herein above, as per cautioned statement which was admitted as Exh. "P1" the accused admonished the deceased by hitting on the chest using a hammer

(nyundo). Further, the fact that PW6 opined that the clothes of the deceased body was intact and had neither torn out nor blood stains on it there is also likelihood that on material date 25/10/2019 on his way back home at Kianda village from Nyinaluzi village the deceased fainted and eventually lost life due to severe pain he suffocated from chest pain. Consequently, his body might have been attacked by the wild animals thereafter.

Even if PW1's evidence required corroboration to support conviction, still I find the cause of death explained in Exh. "P1" and the plausible explanation of the accused in Exh. "P2" as to the reason behind for admonishing the deceased and the manner of admonishing the deceased and his justification of using even a hammer (nyundo) in inflicting punishment corroborates his evidence.

All in all, as herein discussed above it is my strong view that the evidence in this case is that the accused hit the deceased with a hammer (nyundo) resulted to the death of the deceased due to internal bleeding which is the actual cause of death as per Exh. "P2."

John Ezebius Mwanisawa (DW1) the accused gave his narration of testimony denying to kill the deceased. He denied involvement in any way in killing his child. The defence evidence to my view failed to cast

any reasonable doubt to the prosecution case, however, it is a principle of law that an accused person cannot be convicted basing on weakness of his defence.

Having found the prosecution evidence credible, I find that my efforts to connect the chain of events so that I draw an inference as to guiltiness of the accused person proves successfully. That the prosecution proved the case to the required standard. That the accused person killed the deceased.

I concur with the Lady and Gentleman assessors who opined that the accused person be found guilty of the offence charged with and I differ with the Lady assessors who opined that the accused person not guilty of the offence charged with.

The remaining issue is whether he did so with malice aforethought.

It is trite law that malice may be construed from the amount of force the assailant applied to the victim and parts of the body the attack was directed. See the case of **Enock Kipela versus Republic**, Criminal Appeal No. 150 of 1994, unreported and **Mosses Michael alias Tall versus Republic** [1994] TLR 195. In **Enock Kipela's** case the Court of Appeal observed that;

Usually, an attacker will not declare to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: -

- (1) the type and size of the weapon if any used in the attack;*
- (2) the amount of force applied in the assault;*
- (3) the part or parts of the body the blows were directed at or inflicted on;*
- (4) the number of blows, although one blow may, depending upon the facts of the particular case be sufficient for this purpose;*
- (5) the kind of injuries inflicted;*
- (6) the attacker's utterances if any; made before, during or after the killing and the conduct of the attacker before and after the killing.*

Admittedly, in this case at hand the accused person was not an attacker. He stood in the shoes of the deceased's parent admonishing the deceased for not responsible to the duties assigned. DW1 in his cautioned statement he explained that he did punish the deceased upon his neglect to perform domestic duties at home. Thus, the accused was not an attacker as referred to in the case of **Enock Kipela versus Republic**, but a provider and a care taker of the deceased one Florence John.

It is my strong view that using a hammer to punish a child was very unreasonable, however he did so with an intention to admonish a child as a parent.

Am in doubtfully if the accused person did intend to kill his son with malice aforethought as per section 196 of the Penal Code. The prosecution also did not describe how big the hammer (nyundo) was. Short of that, I will give the benefit of doubt to the accused that it was of a normal size.

Again, the conduct of the accused after knowing the disappearance of the deceased his son is consistence with his innocence. The accused first informed his relatives of the disappearance of the deceased and he took part in finding of him along with other villagers.

Having scrutinized above, it is a principle of law that where the court is in doubt as regards the intention of the accused to kill the deceased should proceed to convict with the offence of manslaughter. In the case of **Augustino Kaganya, Athanas Nyamoga and William Mwanyenje versus Republic** [1994] TLR 17, it was observed thus;

"In a charge of murder, only where it is doubtful on the evidence that the accused intended to kill or cause grievous harm to the deceased will the court give the benefit of doubt

to the accused and find him guilty, not of murder, but of manslaughter."

In my considered view, the accused person had no intention as a parent to cause death or grievous harm to the deceased. I, therefore, find the accused person John Ezebius Mwanisawa caused death of Florence John Mwanisawa without malice aforethought. Consequently, I find John Ezebius Mwanisawa guilty and convict him of the offence of manslaughter under section 195 and 198 of the Penal Code, Cap 16 RE 2019.




D. B. NDUNGURU

JUDGE

15/ 12/ 2021

Date - 14.12.2021

Coram - Hon. D. B. Ndunguru - J

For Republic - Mr. John Kabengula Assisted by Ms. Magutta State Attorney

For Accused - Mr. John Kasuku d/counsel

Accused - Present

Interpreter Miss Zuhura Jabir, English into Kiswahili and vice versa
Judge's Legal Assistant Mr. Shija Alex Mdadila.

ASSESSORS:

1. Salome Kapele
2. Edina Kiasile – Present
3. Patrick Wanyama

Mr. Kabengula – State Attorney: The case is for judgment we are read.

Mr. Charles Kasuku – Defence Counsel: We are read for judgment.

Court: Judgment delivered in the presence of Mr. John Kabengula assisted by Ms. Magutta State Attorneys, Mr. Charles Kasuku defence counsel, accused and the assessors.

Sgd: D.B. Ndunguru

Judge

14.12.2021

PRE SENTENCE HEARING

Ms. Magutta – State Attorney: My lord we don't have criminal record of the accused but we pray he be sentenced according to the law.

Mr. Charles Kasuku – Defence Counsel: My lord, the accused is the first offender as submitted by the prosecution.

My lord the accused is the father of the deceased, the accused was punishing the deceased as a parent on good faith.

The accused has been in remand prison for two years now he deserves consideration.

The accused has family and some of the children are still young they depend on him and they have missed love and affectionate for two years.

We pray the accused be punished leniently.

SENTENCE

During pre-sentence hearing, the prosecution and the defence counsel being officers of the court were given opportunity to address the court on the seriousness of the offence and on the sentence appropriate for the accused person.

The learned State Attorney submitted that there is no previous criminal record but yet still the accused be punished/sentenced according to the law.

Mr. Charles Kasuku defence counsel was of the submission that accused is the first offender. That the accused did not intend to kill the deceased, as a parent he was punishing him on good faith. That the accused have children who still depend on him

Further that the accused has stayed in remand prison for a period of two years. That needs a consideration when punishing

Having heard from the counsels this court has the following to say. The offence of Manslaughter is a creature of the statute. The offence is created under section 195 of and the sentence is provided under section 198 of the Penal Code (Cap 16 RE 2019).

The maximum sentence provided is life imprisonment. The minimum is non. The court has discretion to reduce the above state sentence from life imprisonment to non-depending some factors to be taken into consideration.

From the aggravating and mitigating factors submitted, I have considered the seriousness of the offence to be low level because the death was caused by recklessness or negligence on the part of the accused. It was caused by reasonable chastisement by the parent/guardian

The accused had shown remorse for going around looking for the deceased I have further taken into account personal circumstances of the accused that is he is old enough (51), he has family depending on him, the level of seriousness of the offence being low and time he has spent in remand custody, he deserves leniency of the court. Having so said, I hereby discharge the accused on the condition not to commit any criminal offence for a period of 12 months from today.



A handwritten signature in blue ink, appearing to read "D.B. Ndunguru".

D.B. NDUNGURU

JUDGE

14.12.2021