



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Masime, Cockar, & Muli, JJ.A.)

CRIMINAL APPEAL NO. 119 OF 1990

BETWEEN

1. IHA SHUME

2. IHA TOYA

3. NGOMA RONGOMA

4. MWARUNYA SHUME

5. SHUME RONGOMA.....APPLICANTS

AND

REPUBLIC.....RESPOND ENT

(Appeal from a judgment of the High Court of Kenya

at Mombasa (Mr. Justice J.F. Shields) dated 19th August,1990,

in

H.C.CR.A. NO. 95, 96, 97, 103 & 104 OF 1990)

JUDGMENT OF THE COURT

This is an appeal against the summary rejection of the appellants' first appeal by the superior court (Shields, J.) under section 352(2) of the Criminal Procedure Code. The five appellants and the deceased are all members of one family; the first, third and 5th appellants are all brothers of the deceased; the fourth and fifth appellants are their nephews and the second appellant is their grandson. The five appellants, (and a sixth person, who was acquitted at the trial) were charged with the offence of manslaughter contrary to section 205 of the Penal Code. They denied the charge and the case proceeded to trial at the end of which they were convicted as charged and sentenced to six years imprisonment.

The prosecution case was as follows. A relative of the appellants called Punya Rongoma was on 24th November, 1986 up a palm tree tapping "mnazi" when he fell down and died. His funeral was held on the next day and many people attended his burial and gathered at his home on the succeeding days. Among the mourners who so attended the funeral was Muzungu Mtenzi (the deceased). According to Elvis

Shume Mzungu (PW1) he did not arrive for the funeral until 10.00 a.m. on 27th November, 1986 as he is an assistant pipe fitter with the Ministry of Water and was stationed at Changamwe in Mombasa. When he arrived at the funeral he found many people including his father, the deceased.

At about 12.00 noon PW1 saw Mwarunya shume (who was the first accused) arrive at the scene and tell the deceased that the deceased had taken the appellant's hen and slaughtered it to make charms whereby to prevent the mourners from beating him on allegations that he had killed Runya Rongoma by witchcraft. The said appellant then picked up a long of a palm tree branch and struck the deceased on the head with it. The fifth, fourth, sixth, third and second accused in that order thereupon set upon the deceased beating him with sticks. The deceased, who all this time appears to have been seated, stood up and ran to his house 30 - 35 metres away and as he did so was pursued by his assailants who stood outside the house. While inside his house the deceased changed his clothes and then emerged with a small panga and began chasing the appellants with it; soon, however, the appellants stood their ground and resumed assaulting him with the sticks. After while the appellants returned to the funeral and told those present to go and pick up the deceased, PW1 on going to where his father was found him dead.

The testimony of PW1 was corroborated by the deceased's elder brother Shuma Mtenzi (PW2) who was present during the assault on the deceased. PW2 said that he saw the deceased arrive at the funeral about 12.30 p.m. carrying his chair and sat down. Within ten minutes he saw the fifth accused hit the deceased with a stick; then the sixth and fourth accused held the deceased by the neck and the second accused held him by the throat. The witness intervened and told the assailants to stop struggling with the deceased and they left him. The deceased then stood up and walked to his house. Then the first accused turned on the witness and struck him five times on the back while the fifth accused hit him five times on the ear causing him to fall down unconscious.

These two witnesses were the only eye witnesses called by the prosecution; they were cross-examined at length by learned counsel for the defence but their evidence remained unshaken.

Inspector of Police Samuel Ochoki (PW5) and P.C. Boniface Wanjala (PW4) visited the scene of the offence and noticed that the deceased's body had fractures on the head; they also saw several pieces of wood around the body and a small panga nearby; the pieces of wood and the panga were produced in evidence. The injuries inflicted upon the deceased were serious and according to Dr. Hussein (PW6) who carried out the postmortem examination caused the death.

Learned defence counsel for the accused appears at first to have challenged the identification of the appellants as the assailants of the deceased; however later his line of cross examination and submissions was that the death was caused because the appellants believed that the deceased had caused the death of Runya Rongoma who, it will be remembered, had fallen off a palm tree while tapping mnazi. Indeed in the home made grounds of appeal which were filed by the appellants to the superior court it is the belief in witchcraft which mainly features.

The learned trial magistrate carefully analysed and evaluated the evidence before him; he was satisfied that the appellants were at the scene and were identified in broad daylight by credible and competent witnesses as the assailants of the deceased; in the event he found the appellants guilty beyond reasonable doubt of the offence charged. We have carefully considered each appellants' grounds of appeal to the superior court; like the first appellant judge we are of the view that those grounds of appeal do not raise any reasonable ground for complaint. Accordingly we are satisfied that the learned first appellate judge was right in rejecting the first appeals and we order them to be dismissed.

Dated and delivered at Mombasa this 26th day of July, 1991.

J.R.O. MASIME

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JUDGE OF APPEAL

A.M. COCKAR

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JUDGE OF APPEAL

M.G. MULI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR