



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

**(CORAM: KWACH, TUNOI & SHAH, JJ.A.)
CRIMINAL APPEAL NO. 50 OF 2000**

BETWEEN

RONALD MWASUNGIA NGUTA

SALIM MWAKE LUGE APPELLANTS

AND

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

This is a second appeal by two appellants, namely, Ronald Mwasungia Nguta and Salim Mwake Luge, against their conviction of manslaughter contrary to section 202 of the Penal Code as read with section 205 thereof. The two appellants were convicted of the said offence on 10th February, 1999 and each of them was sentenced to serve a term of imprisonment of seven (7) years. Both of them appealed against conviction and sentence to the High Court. The High Court (Waki J) dismissed their appeals, against conviction but reduced the term of imprisonment to five years. It is against that judgment, dated 26th November, 1999, that both the appellants have appealed to this Court.

The facts leading up to the conviction are that on 7th February 1997 one Laban Kinoi (Kinoi) was with the second appellant, one Masai, Mwakima and the victim Patrick Konde Kinoi (hereinafter referred to as "the deceased") and was asked if he knew anything about a sewing machine belonging to the first appellant which had been reported stolen. Both Kinoi and the deceased were taken to the first appellant who was at the material time a teacher at Kirumbi Primary School in Sagala Location in Taita Taveta District, Coast Province. According to Kinoi, the first appellant, on seeing the two young men, that is the deceased and Kinoi, started beating both of them. The deceased was beaten by the first appellant, the said Masai and the second appellant. Eventually Kinoi was released but the rest of the group kept on beating the deceased. The deceased was allegedly dumped in the bush whilst still alive where he was found by his brother. He was unable to walk. He was taken to Sagala Health Centre but was transferred from there to Voi Hospital where he died on 9th February, 1999. The evidence of the deceased's mother, Patience Chao Njola (Patience)(PW1) is that she found the deceased at Voi Hospital and that the first appellant was present at that time at Voi Hospital. The first appellant told Patience that the deceased was beaten up by his brothers.

The deceased who was still conscious told his mother that he was beaten up by the two appellants, one Granton Kondi (who was the second accused in the Magistrate's Court) and two other persons who were not teachers at Kirumbi Primary School.

We have already set out the substance of Kinoi's evidence. Mwakima Joan (Joan) told the learned magistrate that on 6th February, 1997 when he was at his home at Sagala at about 11:00 p.m. Masai and the second appellant came for the deceased and took him away accusing him of having stolen the first appellant's sewing machine. Joan followed them and saw the second appellant and Masai beating up the deceased with a "rungu" - a club. The deceased was taken to the first appellant. He was ordered to produce the sewing machine. All this was in the face of averment by both Kinoi and the deceased that they had nothing to do with the theft of the sewing machine. At one stage in the proceedings Joan did say that the deceased had admitted having hidden the sewing machine at Masai's home. The deceased was beaten up despite the fact that he could not walk.

Joyce Musa Mwasome (Mwasome) (PW5) saw four persons beating up the deceased. They were the first appellant, the second appellant, Masai and probably Joan. The deceased asked her to give him some water to drink and she obliged. When, later, Mwasome saw the deceased at Voi Hospital the deceased reiterated the beatings up he received.

Jedida Grace Mwangunde (PW6) met the deceased whilst she was on her way to Voi on 7th February, 1997 at about 7:30 a.m. The deceased was with the two appellants, Masai and Joan. The deceased told her he was beaten up by those people.

The deceased's uncle, Peter Konde Kioi (PW7) saw the deceased being carried to Voi Hospital and on inquiry he was informed that the deceased had been beaten up by the appellants and the original second accused in the Magistrate's court. He stated in answer to a question by the first appellant that he (the first appellant) told him that he had beaten up the deceased.

The reason why we have set out the summary of evidence of all relevant witnesses is that the two appellants have totally denied having had anything to do with the deceased. The first appellant stated in his defence that he only saw the deceased at Voi Police Station whereas the second appellant stated in his defence that he was arrested on 27th July, 1997 and charged, wrongly, on 5th August, 1997. This defence of the second appellant was discredited by the second appellant himself when he told this Court that he was present when the deceased was apprehended for the alleged theft of the sewing machine.

The learned trial magistrate believed the evidence as regards the beatings received by the deceased as narrated by Joan. He said:

"The evidence of PW4 a fellow suspect with the

deceased is the pivotal point in this case. He is the eye witness who was subject (sic) to senseless beatings by the accused persons. He said that the first accused (the first appellant) had a rungu which he used to beat him and the deceased. He said that the three accused beat the deceased until he was unable to walk. PW4 saw the accused who were armed with sticks and rungus. These are eye witnesses whose evidence has not been challenged. On corroboration, the evidence of the prosecution is highly corroborated. Each witness saw the accused persons unleash terror to the deceased. This evidence is further fortified by the evidence of PW10 (Hezron Nguna Mwanyesi) who produced the stick the third accused (the second appellant) went to the police station, claiming that the stick is the one which he used to beat the deceased. In his opinion, the doctor said that the injuries on the deceased were caused by a blunt object which corroborates the witnesses' evidence that the accused were armed with rungus and sticks."

We must point out that the record of the magistrate's court refers to PW9 (P.C. Charles Nabiswa) as having recovered a 'rungu' or 'stick'. Reference to PW10 is an obvious typographical error.

The first appellate court considered and re-evaluated the evidence before the magistrate's court in some considerable detail as it was indeed bound to do. The learned Judge (Waki, J) said after re-evaluating the

evidence:

"The learned trial Magistrate analysed the entire evidence and believed the prosecution witnesses particularly, PW3, Laban and PW4 - Mwakima, who were eye witnesses. She was in no doubt that the Appellants who were well known to the prosecution witnesses who testified they had seen them assault the deceased did in fact do so The fatal blow according to Dr. Kimani was caused by a blunt object. Witnesses who testified mentioned several such objects. It was clear to the trial Magistrate that the Appellants had the intention of meting out instant "Justice" (more of an injustice) to the deceased on the pretext that he had stolen Nguta's property."

We find no misdirections in the judgment of the superior court. This is a second appeal and we see no point of law which could have been canvassed. The appeal is unmeritorious and is dismissed. It is so ordered.

Dated and delivered at Mombasa this 17th day of January, 2001.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR