



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL 51, 53 & 56 OF 1999**

**RONALD MWASUNGIA NGUTA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL 53 OF 1999**

**GRANTON KONDI .....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**AND**

**CRIMINAL APPEAL NO. 56 OF 1999**

**SALIM MWAEKE LUGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....REPPONENT**

**(From the original Chief Magistrate's Criminal case No. 3572 of1997 before B. Maloba- Senior Resident Magistrate at Mombasa).**

**J U D G E M E N T:**

Appeal Nos, 51/99, 53/99 and 56/99 were on application by theState and without objection from the Appellants consolidated andheard together. -They arose from the same trial before Mombasa Senior Resident Magistrate in which the Appellant in 51/99 was the1st Accused (hereinafter Nguta), the

Appellant in 53/99 was the 2nd Accused (Kondi) and the Appellant in 56/99 was the 3rd Accused (Luge), They all faced and were tried on the charge of Manslaughter where it was alleged that they jointly with others not before court, on the night of 6th/7th February 1997 at Mangombe Village of Sagala Location, Taita Taveta, unlawfully killed one PATRICK KONDI KINOI. They were all convicted and sentenced to serve 7 years imprisonment each. They were unrepresented at the trial. Nguta drew up 9 grounds of Appeal to challenge the conviction and sentence. He also argued them in person as drawn. In summary he contended that the sentence was excessive in all the circumstances and the incident was an unfortunate accident arising in the course of the Appellant's duties.

Luge also drew up, 8 grounds and relied on them as drawn. He reiterated that it was an unfortunate accident and the sentence was excessive in all the circumstances. Kondi however instructed an Advocate, Mr. Wanyonyi who drew up a petition advancing 7 grounds of Appeal. He argued them *seriatim*. They, may be reproduced:

"1) The Learned Magistrate erred in law and in fact in convicting the Appellant solely on the evidence of a dying declaration.

2) The Learned magistrate erred in law and in fact in failing to find that the allegations against the Appellant by PW 1 and PW 2 were hearsay and inadmissible.

3) The Learned magistrate erred in law in failing to make a finding that the deceased was in the company of the 1st, 3rd accused and others not

3) before the court and that the 2nd accused was not the one who caused the death of the deceased. The cause of death was a head injury caused by a blunt object.

4) The learned Magistrate erred in law and in fact in stating that PW 4's evidence is the pivotal point. PW 4's evidence against the Appellant is untenable in the circumstances.

5) The learned Magistrate misdirected herself in relying on the evidence on PW 9 who claims to have talked to the Appellant without recording a cautionary statement.

6) The learned Magistrate erred in law and in fact in convicting the accused persons on contradictory evidence of the prosecution witnesses and of events that took place in darkness and at night.

7) That the sentence of seven (7) years imprisonment was excessive considering the circumstances of the case".

The facts are fairly straightforward. Nguta and Kondi were teachers in a local school in Sagala location. Luge was not a teacher. There was a third teacher and two members of the public who were also suspects but were not charged. The deceased was a 20 year old boy who was in Std. 8 *in school*.

On 6.2.97, Nguta received information that his house had been broken into and his sewing machine and radio were stolen. He sought permission from the headmaster, Kondi, and went home. He confirmed the information and reported to the chief.

On the same day at about 11 p.m. Luge in the company of one Masai went to the home of One Mwakima Joan (Mwakima) (PW4) who was staying with his brothers. They found the deceased there and accused him of having stolen the sewing machine of Nguta. They said they would take the deceased to the chief. Mwakima followed them and saw Luge and Masai beat up the deceased with a

rungu. They reached the home of Nguta but did not find him. Luge and Masai then beat up the deceased again until he said the machine was stolen by PW 3 Laban Kinoi (Laban).

They headed for the home where Laban was staying with his parents and found him. According to Laban (PW 3) the four of them arrived at 4 a.m. on 7.2.97 and asked him if he knew anything about Nguta's sewing machine. He said he did not. He was asked to accompany them to Nguta's home but on the way Luge and Masai started beating him up.

They found Nguta at home. Masai said he had brought these sewing machine thieves. Nguta then took a rungu and started beating up Laban and the deceased. Laban was hit on the back, hands and knees. The three; Nguta, Luge and Masai beat up the two young men. Mwakima was present.

They decided to take Laban to his parent's home. On the way they met Kondi, the headmaster heading for work. Kondi then took a rungu from Masai and hit the deceased on the back. He told the others he had started his work and the rest should finish it. Kondi went away.

At Laban's home the parents confirmed he was at home on the material day and he was released. Later he was taken to hospital for treatment of his injuries.

But the deceased was left with Nguta, Luge, Masai and Mwakima. He could not walk and lay on the grass. Mwakima and Masai left him there with Nguta and Luge. They went to the deceased's home to look for the sewing machine. They informed the people they found there that the deceased had been beaten up. When Mwakima returned, to the spot he did not find the deceased or Nguta and Luge.

Joyce Juma Mwasame PW 5 (Joyce) was going to Voi town at 7 a.m. on 7.2.97 when he found the deceased with four other persons: Nguta, Luge, Masai and Mwakima (PW 4). He knew them. They were beating the deceased and one of them Masai had a whip. The deceased asked for water and she gave him some. He denied that he had stolen anything. Joyce went her way and left them there. She saw injuries on the face and fingers of the deceased, on her way back from Voi she found the deceased who told her he had been beaten and hidden in between stones. He crawled to another woman's home and was taken to hospital on a wheelbarrow. Cross-examined however, Joyce stated that she did not see any of the two, Nguta and Luge beating the deceased.

Another woman Jedida Grace Mwagonde (Jedida) (PW 6) was also going to Voi town that morning at 7.30 a.m. She also found, the same 4 people, Nguta, Luge, Masai and Mwakima (PW 4) on the way. The deceased and Mwakima were seated. Nguta told her the deceased had stolen his sewing machine. The deceased denied it. She saw some injuries on the deceased's hands and she was told he was beaten as he tried to escape. As far as she could remember all the three persons Nguta, Luge and Masai had whips. She did not however witness any of the Appellants beating the deceased.

At about 3.30 p.m. on 7.2.97 Nguta went to the Chief's office and reported to A.P.C. Davis; Meloji (APC Meloji) (PW 8) that they had caught someone who had stolen a radio and he was unable to walk. APC Meloji called the police on telephone.

The mother of the deceased (PW 1) was at Voi Market where she carries on business. She heard about her son's beating up on 8.2.97 and she headed for Voi hospital where she found the deceased unconscious. Nguta and Luge were also there. She talked to Nguta and he told her the deceased was beaten by his (Nguta's) brothers. The deceased could not be admitted unless there was a police document and so the mother went to PW 9 PC Nabiswa at 5 p.m. and collected the letter for admission to hospital, whilst at the police station, PC Nabiswa saw the deceased was badly beaten

and could only talk with difficulty. He talked to him and the deceased said he was beaten by Nguta, Kondi Masai and Mwaeke (Luge).

PC Nasibwa arrested Nguta who was in the vehicle carrying the deceased and placed him<sup>1</sup> in custody. He was unable to arrest Kondi until 6.3.97 when Kondi produced a small stick with which he said he had beaten the deceased. The mother of the deceased also said the deceased told him who beat him up before he died. Luge was arrested on 29.7.97 by PW 10.

Medical evidence was tendered through PW 11 Dr. Harun Kimani who performed the Post Mortem on the deceased. He noticed multiple blunt injuries but no major wounds. There was only a crack on the left temporal region and moderate subdural haemorrhage. He formed the opinion that the cause of death was due to head injury due to a blunt weapon. The internal bleeding was slow and compressed the brain. It could take several hours or a week to cause death.

All the Appellants gave sworn testimony in their defence. Nguta stated how he received a report on the break-in to his house and stealing of his radio and sewing machine. He went and reported to the Chief. He later went to the police station where he heard the mother of the deceased say he was one of the persons who assaulted the deceased and he was immediately arrested.

Kondi said he was with Nguta at the school when the report about Nguta's house having been broken into was made. As the headmaster, he allowed Nguta to go and deal with the matter. He was arrested on 6.3.97 when he went to Voi police station after being told the police wanted him.

For his part Luge simply said he was working at Maungu Ranch on 27.7.97 when an Administration Policeman told him he was wanted at Voi Police Station. He went there and was arrested and charged.

The learned trial Magistrate analysed the entire evidence and believed the prosecution witnesses particularly, PW 3, Laban and PW 4 -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 deceased himself who was conscious for sometime named the Appellants as his assailants in the hearing of several witnesses, among them his mother, (PW 1) Joyce (PW 6), Jedida (PW 6), Peter Koini (PW 7) and PC Nasibwa (PW 9). 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.

Learned Counsel Mr. Wanyonyi submitted on behalf of Kondi, that the evidence of dying declaration was erroneously relied on by the trial Magistrate since the actual words were not stated by those who allegedly heard them. All the prosecution witnesses who purported to have heard the deceased before he died gave varying versions of what he stated. At any rate some of the witnesses merely gave hearsay evidence particularly PW 1, the mother and PW 2 the father both of whom were nowhere near the scene. The sources of their information were not called as witnesses.

As for the eye-witnesses Laban (PW 3) and Mwakima (PW 4), he submitted that they both stated that Kondi was only met on the way and was never in the company of the other appellants. Neither Joyce (PW 5) nor Jedida (PW 6) mentioned him. Simply put the Appellant Kondi was not in the group that was said to have been with the deceased. It was erroneous therefore for the trial Magistrate to say Kondi was identified to have been in that group. There could not therefore have been a joint or common intention involving Kondi. Even the Post Mortem Doctor gave his opinion that the cause of death was an injury on the head while the available evidence was that Kondi hit the deceased once on the neck or

back.

Death, Mr. Wanyonyi submitted, was due to the failure to administer immediate and adequate treatment on the deceased and not, due to any injuries caused by the Appellants.

As for the alleged confession made to PC Nasibwa by Kondi and the production of the object used in inflicting the injury on the deceased, Mr. Wanyonyi submitted that a confession cannot be made to a Police Constable. Therefore PC Nasibwa's evidence as regards Kondi should not have been admitted.

He cited various passages relating to "rungu", 'stick' or 'whip' and submitted that there were material contradictions in the prosecution case.

As for sentence, Mr. Wanyonyi submitted that it was excessive considering that the two other Appellants had taken the deceased to hospital. No dangerous weapons like knives, or pangas were used. It was an unfortunate death caused by lack of treatment.

Senior State Counsel Mr. Gumo however supported the findings of the learned trial Magistrate. He only conceded that there were serious misdirections as regards the dying declaration which was contradicting and uncertain. But the other evidence on record was consistent and credible and established that all three Appellants jointly assaulted the deceased, Mr. Gumo also supported the sentence, submitting that the Appellants took the law into their hands and caused the loss of a young life. The act was brutal and the sentence was commensurate.

I have carefully considered all the evidence on record and the submissions of Counsel.

Reliance was made by the Learned trial Magistrate on what were alleged to be dying declarations of the deceased. But as correctly observed by both defence and state counsel such declarations are contradicting and at best uncertain and ought not to have been relied on without reservation.

The learned trial Magistrate however believed on the testimony of the eye witnesses Laban PW 3 and Mwakima PW 4 and I have no reason to doubt it either, They squarely established that Nguta and Luge were at the epicentre of the assault and battering perpetrated on the deceased. They actively participated in the assault, and did not at any rate, take action to prevent such an assault which took place in their presence. They cannot escape liability for that cowardly and unlawful act. It may well be so that they did not use deadly weapons like knives and pangas and indeed the Doctor who performed the Post Mortem found no serious wounds on the body. But whatever object was used even if it be fists, it caused one fatal injury which could have been prevented by the two Appellants Nguta and Luge following the lawful process of reporting the theft of Nguta's property to the Police and letting the law take its course. The victim must be taken as he is found and it is no defence to a Manslaughter charge, that, the deceased had a thin skull or was weak generally or did not receive immediate treatment after the injury.

I find no merits in the Appeals by Nguta and Luge.

As for Kondi, the only evidence connecting him with the offence is the allegation that he was met on the way by the group holding the deceased and he administered one blow on the deceased's back, according to PW 3 or neck according to PW 1 with a rungu taken from one Masai who was never arrested or called as a witness. Other evidence by other witnesses was essentially hearsay or doubtful as in the deceased's dying declaration which I have so far discounted. The role played by Kondi, if any, remains doubtful and it was not safe to lump him together with the other appellants and to charge him with the serious offence of having killed the deceased. • In the circumstances I give the benefit of doubt to

the Appellant Granton Kondi and allow his Appeal. I quash the conviction and set aside the sentence. He shall be set at liberty forthwith unless he is otherwise lawfully held.

As for the sentences meted out on the other two appellants, it is clear that they were first offenders. They took the law into their own hands instead of following laid down procedures for reporting alleged crimes for investigation. A young life was lost in the process and cannot be recalled. Both the principles of restitution and deterrence are certainly applicable here. There is nevertheless the mitigating factors that the Post Mortem report did not reveal other injuries on the body save for the injury on the head which did not cause instant death. The Appellants appear to have been minded to take the deceased for treatment as one of them was still in the vehicle taking him there when he was arrested.

The mother of the deceased indeed testified that the Appellant Nguta offered to treat the child.

All these are circumstances which ought to have been considered on sentencing but were not. In the circumstances. I will interfere with the sentence imposed against the Appellants Ronald Mwasugina Nguta and Salim Mwaeke Luge by setting it aside and substituting therefore a term of imprisonment of 5 years commencing on the date of conviction by the lower court. To that extent only, the Appeals of those two Appellants succeed.

Dated at Mombasa this 26th day of November, 1999.

P.N WAKI

JUDGE



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