

TANZANIA / JUDGMENT

19850801 TZHC Mbeya

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44 IN TI HIGH COURT OF TANZAPA AT MBEYA

- ORIGINA. JISDICON (Mbeya Reistry) CRIMINAL sórs •p.ASE NO. 51 . OF 1981 . •• THE REFJELIC versus
- 1. MOSES s/o LrVACANYArYLE 2ELIZE D/O icus
- 3 HIDA D/O, MDfIBILE •.. I. Charr Murder c/s 196 of the 2enal Code, Cap.16 Vol.1 of the Laws. MJ1OSO 9 J. The four accused persons LIOESMWAKANYAMALE, ELIZE KIUSA, HIRDA NDIMBILE. and. MODP. ..SELEMANI, who, hencefor€h will he refered to in this judgment as the first, scond, third and fifth accused persons respectively, are among give persons who are charged with murder contrary to section 196 Of the Penal noticed Code, Cap16' of the Laws. It will bethat the person who ought to have been the fourth accused - one VICTORIA MGENGÉ did not'è'tand ti'ial 0 As the tri,i was.about. to begin the court received unconfirmed reports that this particular accuSed person died.-hi1e she was out on bail. This case being over five years oid it was conidereJ more aprorite to proceed with the trial of the present four accused persons rather than adjourn the hearing in order to ascertain the death or otherwi of the fourth accused. Learned State Attorney for the Republic therefore enterd Nolle Fro..equi:in respect. of that accused. These four accused persons .iofpre the court are aileged to have jointly murdered one WiLI 2VERE on 25th Iarch, 1980 at i:ipungut.i village, Māsoko area in Rungwe Distric± The first ccised is a solfconfessod witchdoctor who claims lie is --)ossessea or /occLlt owers to identify wibco sand. wizards. He also
- 2 - claims that he had medicine for cleansing witches of their witchcraft. The rest of the accused persons are women. The second and fifth accused....aid.thy were,..ptients suffering from stomach pains and had een the first accused only two days before the date they ai'e,allegedtohave. acted in concert in killing the deceased. The tlird"abcused said she had met the first accused about a month prior to the fateful day and that he took her or a wifei Oia the23rd IVIarch,1980he took those three women togethbr with the one now alleged to be dead to Mpunguti village.wher e he. was to practice his magical. art. The women companiong were to singt&;him in order to arouse in him the OCQU powErs•..... . or t1kupandisha mashetani" . .: as he put it.. In Mpunguti village he talked of his abiWit.y. .to,:detect witches and witchcraft and. that he could i-id thèviliage Of all evil medicines which maJo woien fail to conceive.. The villagers apeared impressed and

therefore, in the morning of 25th March, 1980 there was a large gathering of villagers. The first accused and the other accused persons went to the gathering. The first accused picked up several people from the crowd and made them sit separately from the rest of the crowd. Those presumably have been identified by him to be witches and wizards. The deceased Raili Pwore and her daughter Ruth Kasambo (PW1) were coming from a burial and passed near the gathering on their way home. The first accused called them and ordered the deceased to sit among those suspected or supposed to be witches. After sitting there for some time the deceased decided to leave and proceed home... Some time later, the first accused realised that the deceased had left. He ordered... the women accused persons to go with... him to get the deceased back to the gathering. The first accused ran after her until they caught up with her and brought her back to the gathering. The evidence of the prosecution witnesses who were present at the gathering varies regarding how the deceased was treated when she was being brought back to the gathering. ... Ruth Kasambo (PW1) said she was first accused beat up

- 3 - S.) the deceased with fists on the head and chest while the women accused persons also beat her all over the body - they all pushed her along to the gathering.
- Aseri Piwamakula whom the first accused had identified as a wizard at the gathering said he saw the first and third accused persons assault the deceased on the face, chest and buttocks using bare hands as they brought her back. He did not see the second and fifth, accused persons assault the deceased when she was being brought back. Another witness who was present at the gathering and was also suspected to be a wizard - PW3 Isaac Jwakiiesile said he saw all the accused slapping the deceased when they were bringing her back. PW5 Ayubu Hwakitalena was also present at the gathering, said only the first accused - assaulted the deceased when she was being brought back, PW16 - Hamsore Lianiyitu, an uncle of the first accused - who was present at the gathering said. he saw only the first accused slap the deceased when he was bringing her back. After the deceased was brought back the first accused fell her to the ground, according to Ruth - PW1 but the rest of the prosecution witnesses said. the first accused merely forcibly made the deceased sit down. All the prosecution witnesses said the first accused attacked the deceased when she was down. The witnesses except the PW16 Hamsore said the first accused kicked and trampled ... on the chest, stomach ... and at the ribs and beat her with fists on the head. The uncle of the first accused (PW6 - Hamsore) said the first accused only kicked the deceased once at the waist. As regards the women accused - only Ruth (PW1) said she saw them beat up the deceased when she was down. All the prosecution witnesses who were present at the gathering said that eventually the first accused gave the deceased something to drink which she vomited several times and that thereafter she died. The deceased died before she could get home. The evidence of PW4 Kasambo, her husband, testimony of Ruth, her daughter and a postmortem examination report left in the hands of Raili Pwore in fact died. On 25/3/80, according to the post mortem examination report the death of Raili was due to shock and asphyxia. The doctor who performed the post mortem said. in his report which was produced in evidence under section 275 of the Criminal Procedure Code, Cap. 20 that he

observed haoma on the face and that the liver was ruptured and there was collection of blood in the peritoneal cavity. The prosecution therefore attribute those injuries on the deceased and the resultant death to the alleged physical attack by the accused. All the accused persons gave their defence on oath and did not call witnesses. The first denied that they assaulted the deceased in any way. The first has no clue why she died or who caused her death. The second witness when addressing the assessors said all the prosecution witnesses lied out of sheer spite because they had been notified before the gathering to be witches or wizards. The gentlemen assessors said they believed the accused persons assaulted the deceased as alleged by the prosecution witnesses. I have reservations myself whether the women accused persons assaulted the deceased, As can be seen from the... summary of the evidence of the witnesses their versions differ, substantially, some saying that the women accused did not at all assault the deceased, I cannot know with certainty which group of these witnesses recollects better than the other and, for that reason I shall give the three women accused persons present in court the benefit of doubt by holding that there is no reliable evidence that the second, third and fifth accused persons assaulted the deceased. Since the death of the deceased is attributed solely to physical attack there is nothing else to link those accused persons with the charge of murder. I would therefore respectfully differ with the gentlemen assessors, the first who said the first accused should be found guilty of assault and the second who said they should be convicted of murder. I acquit them and they are now free. I do not think all the witnesses who said the first accused assaulted the deceased... being her... with fists on, the head and face and kicking her and trampling on her on the chest, stomach and liver were merely revengeful on the first accused. The position as to the injuries found on the deceased and as to the cause of her death is quite consistent. With the kind of assault on the deceased attributed to the first accused. I therefore find, as a fact that the first accused attacked the deceased in the manner described by the first, second, third and fifth prosecution witnesses. The first - Hamsore said the first accused had kicked the deceased only once at the waist but later, claimed he may have misdeeds. The acts of assault by the first accused on the deceased. He is an uncle of the accused and I believe he was trying what he could not to implicate him too far. I proceed to find as a fact also that it was the first accused who caused the death of the deceased. The next question for me to consider is whether the first accused intended to kill, or cause the deceased grievous harm or if not, did he at least know that his acts could cause either death or grievous harm of the deceased. Both gentlemen assessors found him guilty of murder as charged. The manner in which the first accused is said to have kicked the deceased and trampled on her using guri boots while she was down suggests that he should have known that he would at least cause her grievous harm. But the accused may have been so anxious to show off to the crowd that he could not have attacked the deceased more severely than he realised. I consider this a borderline case and I am giving him the benefit of doubt. The result is I would acquit him of the charge of murder and since the acts causing the death of the deceased were obviously unlawful I find him guilty and convict him, of the lesser offence of manslaughter contrary to section 195 of the Penal Code, 'S J.A. MR) SO JUDGE

Previous records Nil. Inmition: Accused is aged. 39 years, He Has 'heen in custody ____
____0.,C - rP ?J '-' ----- r - - - AP -

- r - -
- 6 - for'five'yers and-'4months0 He has 3 wives -and. 6 children who'depônd on hIm. He -ha an-old mother.: who depends on him0 Accused suffx frb- stomach ulcers and h'undergoné n operatioi twice,. ' He is very :sorry for caung the death of deceased0 Allocutus Nil0 SU.N.TENCE . .. Tlere have always been problems wi-th. -pesons. who cl1 thnselves wit chdctors. ' Not infrequently they have been a cause fo'. the deah of innocent poop] -and-'the present case is typical.. I thiik bourts should play a useful role: of disQouraging this practice by irposing fairly detrent.- sent,&nces in apropri'ate &ases. The deceased pid lady :. ' met her death at the" hths of this-accised who; in showiflg off his magial powers attackod so. he.b taLLy She di:e.d a few minutss later 0 After considei'rg.the 'itiating factors pleaded by counsel for the accused.. - I sentence him to seven years
- ixprisonment. J0A0.OSO-- JUDGE - ' Right- of appeal .explaid.. J.A0 MROSO - At I.ibeya . - ' JUDGE 1/3/85 JA1Vi/ATi\lima.

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