



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO 21 OF 1988

BETWEEN

REPUBLIC..... APPELLANT

AND

CHIVATSI DZOMBO CHIVATSI.....1ST ACCUSED

MTENGO CHAI.....2ND ACCUSED

JUDGMENT

May 25, 1989, **Bosire J** delivered the following judgment.

The charge is murder contrary to section 204 of the Penal Code. The accused persons are Chivatsi Dzombo Chivatsi (1st accused) and Mtengo Chai (2nd accused). The deceased in the case is Dzombo Doi Dzombo. He was the father of the 1st accused and an uncle to the second. The offence was allegedly committed on the evening of 9th September, 1987, at Majengo King'orani, Mombasa. The both accused denied the charged. Consequently the case proceeded to trial.

This sad story started this way. In August, 1987, a son of the deceased died in circumstances which raised suspicion that his death was caused by witchcraft. The 1st accused, his brother, got concerned. He went to consult a witchdoctor to tell him the circumstances which led to his brother's death. The brother had taken poison which was the immediate cause of his death. The witchdoctor told the 1st accused that the deceased in this case had bewitched his son with the result that the magical power drove him to take the poison. That infuriated the 1st accused, and later the second. They both resolved to confront the deceased and seek an explanation from him as to why he had caused the death of his own son. The both accused stated in court and had before that told the police that the deceased had killed the deceased by witchcraft together with several other relatives.

On 9th September, 1987, the 1st accused, apparently with the knowledge of the second accused, armed himself with a kitchen knife. In the company of the second accused he proceeded to the house of the deceased at Majengo King'orani, Mombasa. It was a single roomed rented accommodation. It was part of a block of rooms. The owner of the premises was Mrs Hadija Kombo (PW 1). They reached there at about 7 p.m. The deceased was present. He welcomed them. They entered the room and shut the main door behind them. Without any prompting from the deceased they bolted the door.

Almost immediately upon arrival at the deceased's house, the both accused demanded to know from the

deceased why he had killed his son and several other close relatives by witchcraft. The both accused did not say what they intended to do with whatever explanation the deceased would give. Nor did they state what they intended to do if the deceased did not cooperate with them. The question they put to the deceased was clearly pregnant with menaces. According to the both accused the deceased confirmed he had killed the several relatives who the witchdoctor had told them had been killed by him, and went further to add that he would not spare the remaining relatives.

The prosecution case was that the both accused there and then sprang at the deceased, with the second accused holding him by the neck. They knocked him down. The 1st accused took out his knife. While the 2nd accused held him firmly to the ground the 1st accused cut his neck with the knife. The deceased writhed, kicked and groaned in pain. In the process he kicked off the 1st accused's hand the knife he was using to cut him. The knife fell to the ground. The 2nd accused must have been watching keenly what was happening because he picked the knife and used it to stab the deceased in the mouth and the neck. The struggle attracted the attention of the people in neighbouring rooms who gathered outside the house to find out what was afoot. They could not enter the room because the door was fastened from inside. PW1 testified that the window was open, and that although there was no light inside the room she was able to see the deceased on the ground bleeding profusely.

The prosecution's contention was that the both accused planned to kill the deceased and therefore possessed the necessary malice aforethought to constitute murder.

The both accused's contention is different. It was their case that they did not plan to kill the deceased, that they went to his residence merely to ask for an explanation as to why he had killed several close relatives, that the answer he gave to their inquiry extremely provoked them to attack him and to inflict fatal injuries on him. It was also their case that the deceased is the one who had the murder weapon which he brandished at them before they wrenched it away from his grip and used it to cut and stab him several times.

The 1st accused was arrested on the same night the deceased was killed. The second accused was arrested on the next day having been named and pointed out to the police by the 1st accused as having been with him, and, together having killed the deceased. While in police custody they both made charge and caution statements in which they made a clean breast of the killing. The statements were admitted in evidence without any objection from the defence. Learned defence counsel, Mrs M Metho, told court that the statements had been voluntarily given by her clients.

The both accused's respective statements in court substantially adopted their charge and cautionary statements. There was only a slight departure. Contrary to what they stated in their respective confession statements, each of them stated in court that the killer weapon belonged to the deceased, and that he had it just before a struggle between them and him ensued.

As is clear from what I have outlined above, the facts are not so much in dispute. The accused persons admitted they killed the deceased by cutting and stabbing him with a kitchen knife several times. Medical evidence is also clear that the deceased died as result of shock due to multiple cut and stab wounds, some of them deep, over his neck, face and mouth. The defence the both accused put forward is provocation. It was their case that the deceased by his statement that, he had before the material date killed several close relatives, and would thereafter kill the remaining ones by witchcraft, evoked consternation in them with the result that they lost their self control. They set on him due to anger and killed him.

Provocation is not an absolute defence. It is only available to an accused to reduce an otherwise clear case of murder to manslaughter. The prosecution adduced evidence, which I accept, and in any case the both accused admitted as much, that the both accused went to the deceased's house, and due to what the both accused called a provocative remark by him, they set on him and stabbed him several times until he died. The question to grapple with is whether there is evidence on record to support the defence of provocation. The law is clear that an accused does not assume the responsibility of proving the defence he puts forward to a charge. It is upon the prosecution to call evidence to disprove the defence. They must also adduce evidence to prove beyond any reasonable doubt that the offence charged was committed before a

conviction of an accused of it can lie.

The assessors returned a unanimous finding that the both accused were provoked by the deceased and that the provocation was sufficient to cause any reasonable man of the status and similar personal circumstances as the accused persons to lose his self-control. They advised that I find the both accused guilty of the lesser charge of manslaughter. I remind myself that I am not bound by that finding. I am free to make my own findings on the basis of the evidence and the law.

Provocation was explained by one eminent English Judge, Lord Goddard L CJ, in the case of *R v Whitfield* (1976) 63 Cr App R 39 as meaning:

“...some act or series of acts done or words spoken which would cause in any reasonable person and actually caused in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for a moment not master of his mind.”

The alleged provocation in the instant case was that the deceased told the both accused that he would in the near future cause death to the remaining close relatives, whom they believed included themselves. The Court of Appeal for East Africa held in the case of *Galikuwa v R* 18 EACA 175, that mere belief in witchcraft does not constitute a circumstance or excuse or mitigation for killing a person believed to be a witch or wizard when there is no immediate provocation.

In the case just cited a witchdoctor threatened the appellant with death unless he paid him a specified amount of money. The appellant being unable to raise the sum, killed the witchdoctor in the honest belief that he was saving his own life from witchcraft, as was the case in the instant case. The court expressed the view that there was no immediate provocative act. The threat to injury to health or even death was in then near future not immediate.

In the case of *R v Fabiano Kinene s/o Mukye* 8 EACA 96, the trial court found provocation established. In the case a witchdoctor whom the appellants believed had caused the death of a number of relatives of theirs by witchcraft was one night found by them crawling naked inside their compound. They attacked and killed him in a gruesome manner. It was the practice in the olden days to kill people believed to be witchdoctors in like manner. The court held that the deceased's act was provocative enough. The appellants were convicted of manslaughter.

The authorities appear to show that witchcraft as a provocative act can only avail an accused as a defence where the victim is shown to have done an act in the presence of the accused which he believed, was an act of witchcraft against him, and he was thereby angered as to be deprived of his self-control. It is not available as a defence where the threat to injury or death is in the near or far future, as was in the instant case. There was no sudden provocative act. The both accused knew before they went to the deceased's house that he was a wizard, that he had previously killed some close relatives, and that he was likely to kill many more.

There was no sudden provocation. The deceased did not perform any act which would have made the both accused believe he was bewitching them.

Moreover on the evidence before me it is clear the both accused persons had gone to the deceased's house with the sole purpose of killing him. I come to that conclusion advisedly. Firstly, the 1st accused carried a knife from his house at Msanifu Kombo Road, Mombasa. It was not a pocket knife. I looked at and examined the knife. It was about ten or so inches long. He did not, in my view, carry it for an innocent purpose. The 2nd accused knew the 1st accused had carried the knife. He must have approved that act. He used the knife later on the same evening to stab the deceased several times. Secondly upon their arrival at the deceased's house and as soon as they had been allowed into the house they closed the door behind them and bolted it from inside. The purpose of doing that must have been to exclude any people who would have wanted to enter in the event the deceased raised any alarm. The deceased had not prompted them to fasten the door. Thirdly, the both accused dealt with the deceased gruesomely and did not relent

until they satisfied themselves that he was dead. That was conduct which manifested their intention. They aimed the stabbings on the parts of the deceased's body which would produce the desired results soonest, the neck and the mouth. They dealt with him worse than a butcher would an animal for slaughter. Coupled with that is the conduct of the second accused. When the deceased knocked the murder weapon off the 1st accused's grip, he picked it up. He personally used it to stab the deceased in the mouth and the face and neck areas. He had control over his mind. That is why he was able to consciously aim at the mouth and neck.

There was also the fact that the both accused went to the deceased's house not merely to visit him but to demand an explanation as to why he had allegedly killed close relatives by witchcraft. The mission was full of menaces. The both accused did not declare what they would do upon receiving whatever explanation the deceased would give. Bearing in mind the fact that they armed themselves it is quite clear they had planned to butcher the deceased. This was not a case in which the accused person driven by passion picked the nearest object to them and hit the deceased with it. Their actions were calculated.

The up-shot of the foregoing and in deference to the assessors the conclusion I come to is that the accuseds' acts were not prompted by sudden provocation. They killed the deceased in cold blood and I find and hold that their actions amounted to murder. I accordingly find them guilty of murder contrary to section 204 of the Penal Code and convict them of the charge.

Dated and delivered at Nairobi this 25th day of May , 1989

S.E.O BOSIRE

JUDGE