IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, KOOME & MUSINGA, JJ.A)

CRIMINAL APPEAL NOS. 3, 4, 5, 6, 7, 9, & 10 OF 2016

BETWEEN

1. MTAWALI AMINI NGAWA

2. SAFARI FOLENI NGAWA

3. CHARO CHOME KITSAO

4. FOLENI KARIMA NGAWA

5. SAID AMINI NGAWA

6. BANAKA NGAWA CHOME

7. NGALA CHARO PONDA

8. ABEID AMIN NGAWA.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya

at Mombasa (Muya, J.) dated 22nd October, 2015

in

H.C.CR.C.NO. 40 of 2012)

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JUDGMENT OF THE COURT

[1] Mtawali Amini Ngawa, Safari Foleni Ngawa, Charo Chome Kitsao, Foleni Karima Ngawa, Said Amini Ngawa, Banaka Ngawa Chome, Ngala Charo Ponda and Abeid Amini Ngawa (1st – 8th appellants respectively), the deceased and some of the witnesses (PW1, PW2 and PW3) were all close relatives. Another of their relative, one Daniel Foleni had died and his body was being interred on 21st July, 2012 at Malamano Village. The appellants, PW1, PW2, PW3 and the deceased were some of the people who attended the burial that Saturday morning.

[2] Adan Kahindi Ngala (PW1), a son of the deceased told the court that he saw the appellants and others breaking into small groups holding discussions in low tones. The 3rd appellant is said to have gotten hold of the deceased drew him aside and posed as if he wanted to discuss something with him. The 2nd appellant however, produced a hammer and hit the deceased with it twice. Before PW1 could intervene, the other appellants and some other persons who were not before court joined the fray and started attacking the deceased using different weapons; and also kicked him all over his body. The 8th appellant is said to have hit the deceased with a huge stone while others used wood

planks. When PW1 tried to intervene in a bid to save his father, the 1st and 3rd appellants got hold of him and pushed him away. The deceased's lifeless body was left on the ground as his assailants left the scene. The matter was reported to the area Assistant Chief and later to the Police.

[3] Senior Sgt Raymond Karisa, who was then attached to DC's Office Ganze received the report and proceeded to the scene in company of another Police Officer. He found the body of the deceased still lying at the scene. He was given the names of the suspects. The appellants were apprehended later and taken to the police station but a few of them remain at large. The eight appellants were subsequently charged with the murder of the deceased contrary to **Section 203** as read with **Section 204** of the **Penal Code**. They all denied the charge and the matter proceeded to hearing with the state calling a total of six witnesses in support of its case. On their part, the appellants gave unsworn statements of defence and called no witnesses.

[4] The other eye witnesses Nathaniel Mumba (PW2), and Hamisi Kahindi (PW3) gave similar evidence to that of PW1 and described how the appellants and others while armed with different kinds of weapons attacked the deceased. When Mumba tried to find out why his uncle was being assaulted, he was beaten up by 3rd and 4th appellants and others who were not before court. He nonetheless told the court that the deceased was being accused of practicing witchcraft. All the appellants denied committing the offence they are charged with.

[5] The first appellant told the court that he was on his way to the funeral when he met members of public among them PW1 who informed him that there was a fracas and the deceased had been beaten unconscious. He proceeded to the scene where he confirmed that the deceased had been killed. He was later arrested and taken to the police station.

[6] 2nd appellant said that his brother was being buried on the date in question. He had gone home briefly when he heard screams and on going to the scene to find out what was happening, he found the deceased having been beaten.

[7] 3rd appellant said he was at home when he heard screams coming from the funeral site. He rushed there and found people fighting. He found the deceased lying unconscious. He was arrested for no reason and taken to police station.

[8] 4th appellant gave a similar defence and said that he was at home when he was informed that there was a fracas at the funeral. He went to the scene and found the deceased having been killed already.

[9] 5th appellant said he was not even at the scene when the incident happened. He was asleep in his house when he was waken up and told that there was a fight. He rushed to the scene and found the deceased already dead.

[10] 6th appellant gave the same story. He was asleep in his house when he was called and informed that there was a fight at the funeral. He went there to find out what was happening and was informed that the deceased had been beaten unconscious.

[11] Ngala Charo (7th appellant) said he was inside the house serving tea to visitors when he heard screams outside. When he went outside, he found the deceased who was his uncle had already been killed.

[12] Lastly, the 8th appellant stated that he had been sent to purchase foodstuffs to be cooked at the funeral and upon his return, he found police officers at the scene. He was just arrested and taken to the police station.

[13] Having considered this evidence and the submissions made by learned counsel on behalf of the appellants and the learned state counsel, the High Court (**Muya, J**.) was satisfied that the witnesses who were relatives of the appellants had given consistent evidence as to the role each appellant had played in the incident; that there was no likelihood of mistaken identity as they all knew each other; that the killing was a revenge killing by the deceased's relatives who believed their relative had been bewitched by the deceased; and that malice aforethought had been established. The learned Judge found there was no grudge between the appellants and the witnesses and ultimately convicted the appellants and sentenced them to death, which was then the only lawful sentence for the offence of murder.

[14] Being aggrieved with both conviction and sentence, the appellants filed separate memoranda of appeal which were subsequently consolidated and heard together. Their grounds of appeal were also replicated word for word and can be summarised as follows: - *That the evidence was fabricated; the cause of death was not established; their defence was not considered and that the conviction was therefore unsafe*.

[15] **Mr. Ole Kina**, learned counsel appearing for the appellants in the appeal, later with leave of Court filed one supplementary ground of appeal which faulted the learned Judge for failing to consider that there was a general belief by the appellants that the deceased was practising witchcraft and that he was responsible for the death of the appellants' relative. Learned counsel was therefore introducing the defence of provocation by way of witchcraft. Expounding the said grounds in his oral submissions before us, Mr. Ole Kina urged that although the witnesses alluded to the issue of witchcraft, the learned Judge failed to consider the same. According to learned counsel, had the learned Judge considered that issue, he could have found that there was provocation and the offence of murder could not therefore have been sustained. He further submitted that the evidence on record was fraught with contradictions as there was no agreement on the weapons the appellants had and which role each appellant played in the deceased's death. He urged us to allow the appeal.

[16] The appeal was opposed by **Mr. Monda**, Senior Assistant Director of Public Prosecutions who told the Court that the defence of provocation on account of witchcraft was not raised by the appellants before the High Court and it was not open to them in this appeal. According to Mr. Monda, even if witchcraft had been alluded to, there was no sufficient basis laid to show that the deceased was involved in witchcraft and whatever was said amounted to nothing more than mere allegations. Learned counsel was emphatic that the learned Judge who had the advantage of seeing the witnesses testify, was satisfied with the veracity and consistency of their evidence and he cannot be faulted for relying on the evidence adduced before court. He urged us to uphold the conviction, and if we are inclined to interfere with the sentence, then we should substitute the same for a life sentence in view of the brutal way in which the deceased's life was ended.

[17] This being a first appeal, we are enjoined by **Rule 29(1) (a)** of **the Rules of this Court** to re-evaluate and re-analyze the facts and evidence adduced before the High Court and make an independent decision one way or another. Applying this principle in the *locus classicus* case of **Okeno V. Republic, [1972] E.A. 32**, the predecessor of this Court pronounced itself as hereunder:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R. [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."***

[18] We shall therefore consider afresh the above evidence *vis-a-vis* the grounds of appeal raised and submissions of both counsel and come to our independent conclusion as to whether the conviction against the appellants was safe or not. It is not disputed that the deceased, appellants and the eye witnesses were all relatives who were at the material time attending the burial of a close relative. There was not even a hint of animosity among them which would make the witnesses fabricate the evidence against the witnesses. We are satisfied that PW1, PW2 and PW3 were at the scene and they told the court exactly what they saw. They witnessed from the start as the 3rd appellant approached the deceased and led him away from where he was seated and how all the appellants attacked him with a hammer, wood planks and with kicks.

[19] On the issue of inconsistency and contradictions in the evidence of these witnesses, we do not find any significant or material contradictions in the evidence that would lead to impeachment of the credibility of the said witnesses. As stated earlier, we must be circumspect of the fact that, unlike the trial Judge, we did not see the witnesses testify and have the advantage of assessing their demeanor. The trial Judge after hearing the witnesses first hand came to the conclusion that PW1, PW2 & PW3 gave consistent evidence as to the role each of the appellants played during the incident. We have reconsidered this evidence and are in concurrence with the trial court that the evidence was consistent. Each appellant was placed at the scene by the witnesses who even mentioned names of others who were not arrested. We find the evidence on record consistent in all material details and any contradictions in the evidence are trivial and do not go into the root of the evidence. The ground of appeal on inconsistency and contradictions therefore, fails.

[20] On the issue that the appellants' defence was not considered, we find that the learned Judge did consider the defence in question. The learned Judge found that although the appellants all claimed to have been away when the deceased was killed and went to the scene after the killing, the evidence of PW1, PW2 and PW3 had placed them squarely at the scene. The learned Judge was satisfied that the three witnesses were steadfast in their testimony and he had no cause to disbelieve them. The fact that the learned Judge did not believe the appellants' defence does not mean they were not considered. We are satisfied that the learned Judge did consider the defence raised by the appellants, but found the same unconvincing vis-à-vis the evidence of PW1, PW2 and PW3. That ground therefore fails.

[21] This brings us to the supplementary ground on the defence of provocation by way of witchcraft. Counsel was of the view that the learned Judge failed to consider the allegations of witchcraft made by the appellants against the deceased. The defence of provocation arising from belief in witchcraft is a recent one when compared to other well established defences which are engrained in written law and which traverse the entire criminal law jurisprudence. This is a defence which rears its head in areas such as this one where witchcraft is widely practised. This defence is nonetheless not allowed whimsically and this Court has set out clear parameters which must be satisfied before an accused person can be availed the said defence. We shall advert to this issue later.

[22] While it is true that the appellant did not raise the defence of provocation during his trial, that in itself did not preclude the trial court from considering such defence if it was disclosed by the evidence that was adduced. (See **KATANA KARISA & 4 OTHERS V. REPUBLIC, CR. APP. NO. 372 OF 2006)**. Whether or not there exists circumstances from which the trial court can conclude that the defence of provocation by reason of belief in witchcraft is available to an accused person must depend on the facts of each case. (See **PATRICK TUVA MWANENGU V. REPUBLIC**, (supra). Recently, in **THOYA KITSAO ALIAS KATIBA V. REPUBLIC, CR APP NO. 123 OF 2014,** we held that on the facts of that case the defence of provocation by witchcraft was not available to the appellant because, beyond the bare assertion that he came from a community which believed in witchcraft and that the deceased was rumoured to be a witch, there was no evidence of any circumstances, such as death of a relative or family member which the appellant attributed to witchcraft by the deceased so as to form the basis for the defence of provocation.

[23] In other words, although this defence will be dependent on the peculiar facts of each case, there must be evidence that the parties involved believed in witchcraft; there must be evidence also that the deceased was believed to practise witchcraft and further that he was responsible for the death of a person or had committed other identifiable acts of witchcraft. Mere allegations that a person is a witch will not suffice to accord an accused person the defence in question. There must be firm basis laid that the deceased had actually committed acts of witchcraft and strong belief that the said acts had resulted in the death of the deceased.

[24] Counsel cited the case of **Mwanatsongo Muhenda Chengo & others v. Republic Malindi Criminal Appeal No. 395 of 2012** in support of his contention that an allegation of witchcraft renders a defence of provocation feasible in circumstances such as in this matter. In his view, the belief by the appellant that the deceased were practicing witchcraft availed him the defence of provocation and the learned Judge erred in not considering as much. In our view, there was no evidence of any allegations made against the deceased before the date in question that he was involved in acts of witchcraft. The only evidence before the court was that there were *'murmurs'* that morning that the deceased was a witch. These murmurs were unsubstantiated and, in our view, fell way short of the threshold set for invocation of the said defence of provocation on account of belief in witchcraft. The supplementary ground also fails. From the foregoing, it is clear that the appeal against conviction has no merit. We dismiss the same and uphold the decision of the trial court.

[25] On the issue of sentence, we note that as at the time the sentence was passed, the law decreed death sentence in mandatory terms. That is no longer the case following the decision of the Supreme Court in **Francis Karioko Muruatetu & Others v. Republic, (Supreme Court**

Petition No. 15 of 2015) eKLR 2015 which loosened the bands on the sentencing courts' hands and broadened its latitude in sentencing in capital offences. We appreciate the fact that the appellants had been accorded opportunity to mitigate and had tendered detailed mitigation. In our view, the said mitigation suffices as basis for us to reconsider the sentence meted out by the trial court. We have considered the said mitigation as well as the state's sentiments and reasons for asking for a life sentence. We also note the prevalence of unwarranted deaths propelled by baseless beliefs in witchcraft. With all this in mind, we find it mete and just to interfere with the death sentence. We set it aside and substitute therefor with twenty (20) years imprisonment for each appellant to be calculated from the date of conviction and sentence by the High Court.

Dated and delivered at Mombasa this 20th day of September, 2018.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR