IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 395 OF 2012

BETWEEN

MWANATSONGO MUHENDA CHENGO.....1ST APPELLANT

TSUMA GEREZA …….…….2ND APPELLANT

MAJIMBO NGALANI.....3RD APPELLANT

MWENZANGU MASUDI MRIBE.....4TH APPELLANT

AND

REPUBLIC……...……..RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Mombasa (Odero, J.), dated 24th October, 2012

in

H.C.CR.C. No.27 of 2009)

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JUDGMENT OF THE COURT

All the four appellants who were initially charged with a fifth person were convicted of the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code and sentenced to 50 years imprisonment by the High Court (Odero, J).

In accordance with the practice developed by the Court over the years, our first duty, seeing that the appellants, though convicted of murder were sentenced to a term of imprisonment, was to warn them as to the consequences of continuing with their appeals when they risked the imprisonment sentence being substituted with death sentence should the appeal be disallowed. This is how Shah, JA explained the rationale of this practice in his *dictum* in the case of **Joseph Boit Kemei and Samuel Ruto Kiptoo v R, Criminal Appeal No.7 of 1995**,

> **"If I were to find that the appellants were properly convicted contrary to section 296(2) of the Penal Code... the appellants would be sentenced to death for the first time (emphasis**

added) by this Court from where they have absolutely no chance of a further appeal and when they were not warned of such consequences, it would in my view be abhorrent to my sense of justice to suddenly, out of the blue so to speak, sentence them to death when they have had no chance at all either to withdraw their appeal or consider the devastating effect of such a decision."

Although today the final court is the Supreme Court, the principle enunciated above still holds true, not the least because the appellants do not have an automatic right of appeal to the Supreme Court.

Having, accordingly warned the appellants of this risk and given sufficient time of nearly four months to reflect and reconsider their options, at the resumed hearing of the appeal they insisted to go on with it.

This is a first appeal in which by dint of section 379 of the Criminal Procedure Code and in accordance with the decisions such as **Okeno v. R** [1972] EA 32, we are expected to subject the entire evidence to a fresh examination. To do this effectively we must summarise the events leading to the trial of the appellants.

On the night of 30th June, 2009 the deceased and his second wife, **Kadhi Khadija (Khadija)** and their three children aged between 7 years and 1 month went to their farm for night vigil against wild animals that were destroying the crops. On the farm which was away from the homestead they had a temporary shed. After having dinner **Khadija** remained behind with the children in the temporary shed while the deceased went out to chase the animals. At about 8 pm three men came to the temporary shed demanding to see the deceased. **Khadija** gave them three seats as she went to fetch the deceased. Upon Khadija returning with the deceased the three men, who were shortly joined by two others, without any provocation attacked the deceased with clubs and *panga*, inflicting very severe injuries leading to his immediate death. **Khadija** was able to escape and returned home safely with the children. After informing her co-wife of the attack, they both made a report to the village chairman, who in turn reported it to the police. They went to the scene in the company of the police and found the deceased dead. Because **Khadija** had recognized one of those involved, as the 1st appellant, he was arrested immediately and through him the rest of the appellants were also apprehended and subsequently charged jointly as explained.

At their trial the main question was whether their identification, as the persons who attacked the deceased, was accurate since the cause of death of the deceased had been determined as severe hemorrhage due to severe vascular injury in the neck and head. The question of identification was central at the trial for the reasons that while **Khadija** insisted that she was able to recognize the 1st appellant and identify three others, all the five suspects who were eventually charged denied involvement in the murder and raised *alibi* defences. The question was also critical because the attack took place at night and all the accused persons maintained that they did not know both the deceased and **Khadija**.

Odero, J heard and saw the witnesses and was struck by the honesty and truthfulness of **Khadija**. The learned Judge also appreciated that the attack was at night but was persuaded by the testimony of **Khadija** which was corroborated by other witnesses who went to the scene that night, that there was light both from a full moon and a lantern lamp. From that background she concluded that;

"The fact that PW1 had a clear view of the events of that night is further buttressed by the fact that she was able to give a very clear narration of the events of that night lending credence to her testimony that there was sufficient light at the scene. She stated that out of the three men who initially came to their shed she was able to recognise the 1st accused whom she identifies as 'Mwanatsongo Muhenda".

Apart from that, the learned Judge also noted that **Khadija** knew the 1st appellant both by name and appearance as they were neighbours; that she also identified the 2nd and 3rd appellants with the aid of the moonlight and light from the lantern lamp as the men who came with the 1st appellant to the farm on the fateful night; that she had ample time and opportunity with the attackers, held a brief conversation and

even offered them seats and that she would therefore had no difficulty identifying them; that the encounter was not mere fleeting or casual glimpse; and that the existence of light at the scene on that night was corroborated by PW10 C.I.P Leonard Baraza, who visited the scene the same night and confirmed the presence of a lantern lamp and a full moon.

In the end, as we have stated, the learned Judge found the charges proved beyond any reasonable doubt and convicted four of the five accused persons. The four are the appellants in this appeal who, being aggrieved by both the conviction and sentence lodged identical memoranda of appeal in which they complained that the learned Judge erred in relying on a single witness evidence of identification which was weak and unsafe in the circumstances; and that their respective unsworn statements of defence were not considered.

Mr Fedha, learned counsel for the respondent, in opposing the appeal submitted that there was overwhelming evidence of identification and urged us to dismiss it for lack of merit.

Given the ages of the deceased person's three children who had accompanied him and **Khadija** to the farm, the only eye witness account presented by the prosecution was that of **Khadija**. We reiterate that the learned Judge enjoyed an advantage that we do not have in a second appeal. She heard and saw the witness. In the course of recording the evidence of **Khadija** the learned Judge remarked regarding her mien that "demeanour, honest". The Judge described **Khadija** as a clear, forthright and consistent witness and that she was unshaken under intense cross-examination by defence counsel. The learned Judge was alive of the duty to examine with considerable circumspection **Khadija's** evidence, being evidence of a single witness on an occasion where the conditions for accurate identification may have been difficult. See **John Muriithi Nyaga v. R**, Cr. Appeal No. 201 of 2007.

The appellants gave *alibi* defence. That alone did not relieve the prosecution of the burden to prove that the appellants were indeed the people who went to the farm on the night in question and inflicted the fatal injuries on the deceased.

Khadija was categorical that she knew the 1st appellant, a son of a neighbour. She knew him very well even by name. Though it was night time she said a lantern lamp was burning in addition to the charcoal fire in their temporary structure. Above all there was a full moon, which she described as being very bright. When the assailants came, they exchanged greetings with her. They asked for the deceased person and before she left to fetch him, she offered seats to them. When she returned with the deceased and the men attacked him **Khadija** watched in shock.

We think that with a lantern lamp burning, the flames of fire from charcoal and a bright moonlight coupled with the fact that the 1st appellant was known to her, and in view of the time the assailants took, Khadija had a good opportunity to positively identify the attackers. That is why she was able to tell the village chairman, her co-wife and the police officers at the first encounter that she had recognized the 1st appellant and could identify three others. That is also why she was able to pick the other appellants in the identification parade. We agree with the observation of the learned Judge that the witness was credible for she readily admitted that she could not recall the fifth suspect, who on that score was acquitted. But for the rest, she described in great detail and precision of an eye witness the role played by each during the attacked on the deceased. She identified who among the attackers were armed and with what, how they were dressed, including the colour of the clothes and where they sat that night.

With respect, the learned Judge correctly applied the law, appropriately warned herself of what to do before convicting on the evidence of a single witness when conditions for identification may not be conducive. We cannot find any justification to interfere with her conclusion that the appellants were identified; that they caused the death of the deceased by viciously attacking him.

On malice aforethought the learned Judge noted that, evidence was presented before her that there was a land dispute between the deceased and the father of the 1st appellant and also that there were allegations that the deceased practiced witchcraft; that he had bewitched 1st appellant's father who died as a result.

Without making any pronouncement on the two issues the learned Judge concluded on the malice aforethought that;

> ***"The fact that the accused persons being a group of five able bodied men chose to brutally attack and chop up an unarmed man, having caught him unawares with his family in his shamba is proof enough that their intention was to kill the deceased. The ferocity of the attack leaves no doubt whatsoever of their intention to completely finish the deceased. In terms of Section 206(a) of the Penal Code there can be no doubt whatsoever of a clear common intention on the part of the accused persons to cause the death of or do grievous harm to the deceased. I am satisfied that the mensrea being malice aforethought has been proved to have existed. As such I find that this charge of murder has been proved beyond any reasonable doubt and I accordingly convict the 1st, 2nd, 3rd and 4th accused as charged".***

Mr. Ngumbau Mutua, learned counsel for the appellants faulted the manner in which the learned Judge treated the evidence relating to allegation of witchcraft; that PW1, PW3, PW10 and PW 12 testified to the allegations of existence of a land dispute and witchcraft; that the evidence of land dispute was directly linked to witchcraft which was allegedly used, in turn to cause the death of the 1st appellant's father; that the learned Judge ought to have appreciated that the 1st appellant was provoked as he genuinely believed the deceased, using the power of black magic caused the death of his father due to the land dispute. For these reasons counsel submitted that the 1st appellant was entitled to a conviction for manslaughter. On this question **Mr. Fedha** submitted that there was no evidence to support the submission that the 1st appellant's father was bewitched by the deceased.

Although none of the appellants raised the defence of provocation based on belief in witchcraft, that alone did not take away the defence of provocation if from the circumstances, it was apparent to the court that the defence was disclosed by the totality of the evidence of other witnesses. See **Katana Karisa & 4 Others v. R,** Cr. App. No.372 of 2006. It was agreed that there was a general belief that the deceased bewitched the father of the 1st appellant. We reiterate what we recently said in **Thoya Kitsao *alias* Katiba V. R,** Cr. App. No. 123 OF 2014, that the defence of provocation by witchcraft was not available to an appellant merely because he comes from a community that believes in witchcraft; that there must be evidence of circumstances directly affecting the appellant from which it could be readily concluded that on account of his belief in witchcraft, he was provoked to murder the alleged witch; that there ought to be some proof that prior to the commission of the offence there were either illnesses or deaths of immediate members of the family that made the appellant believe that those illnesses and deaths were caused through witchcraft and that the deceased was responsible for them; that what is clearly murder cannot be excused merely on the ground of general repute in which the deceased was regarded as a witch; that there is no room in law and the courts will not countenance the use of violence by those who consider themselves village *vigilantes* or witch busters to unleash terror on anybody they suspect to be a witch even when he or she has not harmed them in any way. Those involved and who do not meet the foregoing criteria commit criminal acts and deserve to be punished and not praised. The danger into which the society would be plunged if those who believe that witches in the society must be eliminated, were to be given the green light to accomplish their desires is obvious as was admirably summed up as long ago as 1932 in **Rex v. Kumwaka wa Mulumbi** (1932] 14 K.L.R. 137 where the Court warned that;

> **"Threat of witchcraft has been consistently rejected by the court except where the accused has been put in such fear of immediate danger to his own life that the defence of grave and sudden provocation has been held proved. For courts to adopt any other attitude to such cases, would be to encourage the belief that an aggrieved party may take the law into his own hands and no belief could be more mischievous or fraught with greater danger to the public peace and tranquility".**

This case was followed by a long line of decisions which developed the defence of provocation in cases of witchcraft. **Regina v. Fabiano Kinene** [1941] 8 E.A.C.A. 96 which has been described as the unchallenged touch-stone, is important in this development because it epitomized the requisite elements of provocation, as defined in the Penal Code and applied them to witchcraft stressing that the act causing

the death was done in the heat of passion caused by sudden provocation; that the wrongful act or insult was done to the victim himself or herself or to a person under his or her immediate care or to a person to whom he or she stands in a conjugal, parental, filial or fraternal relation; that the act causing provocation must have been performed in the presence of the accused. See sections 207 and 208 of the Penal Code. Of course in witchcraft cases the acts alleged to cause death may not be committed in the presence of the accused person but comprise continuous acts over a period of time that would amount to what this Court in **Stephen Kipkeror Cheboi v. R** Criminal Appeal No. 50 of 1991, relying on the decisions of the Court of Appeal in England **R. v. Humphreys** [1995] 4 All E.R. 1008, described as "**cumulative provocation**". That;

> **"…… in a case where the provocative circumstances comprised a complex history with several distinct and cumulative strands of potentially provocative conduct which had built up over time until the final encounter, the Judge ought to give guidance to the jury in the form of careful analysis of those strands so as to enable them to understand their potential significance".**

See also **Eria Galikuwa v. Rex (**1951) 18 E.A.C.A. 175. With respect we agree with **Mr. Ngumbau** that of the four appellants, the 1st appellant genuinely believed that, due to land dispute between his family and that of the deceased his father was bewitched. The rest of the appellants were not affected in any way but were merely blind recruits of the 1st appellant.

For the foregoing reasons the appeal in respect of the 2nd to the 4th appellants fails and is dismissed. We allow the appeal by the 1st appellant, set aside his conviction and death sentence for the offence of murder and substitute it with a conviction for manslaughter and a prison term of ten years from the date of the conviction by the High Court.

Dated and delivered at Mombasa this 11th day of May, 2017.

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……..…….....

JUDGE OF APPEAL

K. M'INOTI

……..…….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR