



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: VISRAM, KARANJA & KOOME JJA)**

**CRIMINAL APPEAL NO. 93 OF 2014**

**BETWEEN**

**KATANA KAKA alias BENSON .....1<sup>ST</sup> APPELLANT**

**KITSAO KALUME SANGA.....2<sup>ND</sup> APPELLANT**

**CHANGAWA CHARO KARISA.....3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Malindi written by Omondi, J. on 15<sup>th</sup> November, 2011 and delivered by Meoli, J. on 7<sup>th</sup> March, 2012*

*In*

***H.C.CR.C. No. 5 of 2011.)***

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**JUDGMENT OF THE COURT**

[1] The three appellants were jointly charged alongside one other, with two counts of murder contrary to **section 203** of the Penal Code as read with **section 204** of the Penal Code. According to the Information, the particulars of the charge were as follows:

*'1. K C, 2. KATANA KAKA alias BENSON KAZUNGU 3. KITSAO KALUME SANGA 4. CHANGAWA CHARO KARISA: On the 31<sup>st</sup> day of January, 2010 at Shella village, Sabaki sub location in Malindi District within the Coast Province, jointly and severally murdered KAKA CHULA and KADZO CHULA'*

[2] The appellants denied the charges; hearing of the matter began in earnest, before Omondi J., with the 1<sup>st</sup> and 2<sup>nd</sup> appellants being represented by learned counsel Mr. Mwadilo, while the 3<sup>rd</sup> appellant was represented Mr. Lughanje. The prosecution's case was supported by the evidence of a total of 7 witnesses who testified in support of the charges. Upon considering the prosecution's evidence, the learned trial Judge found each of the appellants had a case to answer, on being placed on their defence, they each gave

unsworn statement denying the offence and did not call any witness. At the close of the trial, each of the appellants was found guilty as charged; the 1<sup>st</sup> accused person before the trial court was however a minor when the offence was committed, thus he was committed to Shimo La Tewa Borstal Institution for three years while the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> appellants were sentenced to suffer death.

[3] That is the conviction and sentence that has provoked the instant appeal. We wish to first highlight briefly some background facts so as to put the entire matter in perspective. This being a first appeal, we are required to re-analyse and re-evaluate the evidence adduced before the trial court and come up with our own conclusions while at the same time bearing in mind that we did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. See **OKENO V. R.**, [1972] EA 32 at p. 36, where the predecessor of this Court stated:

***“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] EA 336) and to the appellant court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (SHANTILEL M. RUWAL V. R., [1957] EA 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 take 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] EA 424”.***

[4] On the evening of 31<sup>st</sup> January, 2010, at Shella village, Sabaki sub-location in Malindi, Charo Gia Mwambalo (PW1) a casual worker, was at home with his wife and children preparing to go to bed immediately after supper. Suddenly a group of villagers whom he identified as the appellants as well as K C (1<sup>st</sup> accused person in the trial court) stormed into his compound in the company of the father of 1<sup>st</sup> appellant, one Kaka Chula (1<sup>st</sup> deceased). The group exchanged greetings with PW1 and thereafter demanded for PW1’s wife, Kadzo Katana (2<sup>nd</sup> deceased) while claiming to be acting at the behest and authority of the area sub chief. The reason behind their mission being that the 2<sup>nd</sup> deceased was a suspected witch and that they had been authorized to collect and deliver her to the sub chief. PW1 demanded to see the written authority in this regard, but none was forthcoming.

[5] PW1 refused to release his wife to the villagers, but they set upon him and beat him with sticks. Scared for his life, he cowered against a wall, watching helplessly as they dragged his wife out of the house and beat her alongside the 1<sup>st</sup> deceased to death with sticks. Any neighbour that tried to intervene was also beaten and warned of a similar fate awaiting them should they continue to interfere and most backed off. Thereafter, the 1<sup>st</sup> appellant doused the bodies of the two deceased with petrol and set them ablaze; the bodies were severely burnt. The appellants thereafter disappeared from the village. Apparently, the perpetrators were all related to the victims and PW1 who told the trial court there existed no grudge or quarrels among them but before this incident, the appellants claimed that they had gone to a sorcerer, who revealed to them that PW1’s wife was a witch. PW1 attempted to have the matter sorted before the chief and letters were sent summoning the appellants before the chief but this incident happened the day before the scheduled meeting with the chief.

[6] PW2 is a son of Kaka Chula (1<sup>st</sup> deceased); he testified that earlier on the material day, his own wife, had intimated to him that the 2<sup>nd</sup> deceased’s life was nearing to an end for she would die on that very day. On further enquiry, the said wife informed PW2 that there were plans by a group of villagers to kill the 2<sup>nd</sup> deceased owing to allegations that she was a witch. Armed with this information, PW2 warned his late mother and urged her to vacate the home but she would hear none of it, saying she could not abandon her children. Later that evening, and following a family dinner with his parents and the rest of the family, PW2 had retired to his house which is situated within the same homestead as his parent’s when he heard some commotion outside. He got out of his quarters to find his mother being dragged out of her house,

beaten and her body set ablaze. He identified the 3<sup>rd</sup> appellant as the person who was hitting her with a log of wood, and when he attempted to put out the fire, the 2<sup>nd</sup> appellant kicked him and asked him why he was protecting witches.

[7] A similar account was given by PW3 (another son of the 2<sup>nd</sup> deceased), who was informed by his wife of claims by their in-laws, that his parents were witches. He too informed his father (PW1) of these allegations. However, PW1 reiterated their innocence, saying they were ready to face their accusers before the area chief. At that point, PW3 went back to his house but hardly had he settled in than he heard screams and his brother calling him out saying that the 1<sup>st</sup> and 2<sup>nd</sup> deceased were burning. He was able to recognize and identify the appellants as among the perpetrators for not only was the area well lit by moonlight, but the appellants were his relatives by blood and by marriage, and he was able to recognize them.

[8] A post mortem examination was carried on the bodies of the two deceased persons by Dr. Mohamed Tayabali (PW6). He ascertained the 1<sup>st</sup> deceased's cause of death as head injury owing to a fatal blow to the back of the skull and with regard to the 2<sup>nd</sup> deceased, the cause of death was said to be severe burns. Consequently, PW5 (the investigating officer), investigated the matter, he recorded statements from eye witnesses, coupled with the post mortem reports and on eye witness accounts, he arrested the appellants, who were charged alongside one K C with the murder of the two deceased persons. Upon the close of the prosecution case, the learned trial Judge was satisfied the appellants had a case to answer and put them on their defences. Except for the 1<sup>st</sup> accused who gave a sworn statement of defence, the appellants opted to give unsworn statements and did not call any witnesses.

[9] According to the 1<sup>st</sup> appellant, he was in his house when he heard screams outside. On coming out, he was confronted by a grisly sight of two burning bodies, one of which was his father's (1<sup>st</sup> deceased). He proceeded to put out the fire and report the matter to the village elder. While at the scene of murder, the 1<sup>st</sup> appellant claimed that he expressed his wish to take the 1<sup>st</sup> deceased to hospital but the village elder advised him to take him home instead. It was only later, he said, that the police came and took the 1<sup>st</sup> deceased who was still alive albeit barely, to hospital but shortly thereafter, he died on account of the severity of the burns. To the 1<sup>st</sup> appellant, his subsequent arrest was baseless as he had nothing to do with the death of his own father. Similar evidence of denials was presented by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who stated that though they witnessed the burning of bodies of the deceased by fellow villagers, they did not take part in it.

[10] The learned trial Judge fastidiously went through the evidence by each of the witnesses and in her considered judgment, arrived at a conclusion that the prosecution discharged its duty by establishing beyond any reasonable doubt, that the two deceased persons met their deaths at the hands of the appellants as well as the 1<sup>st</sup> accused person. This was after weighing in the appellants' defence evidence which the Judge found untenable and incapable of denting the prosecution's case. Accordingly, the court convicted all the four accused persons as charged. However, as stated in the opening paragraphs of this judgment the appellants were sentenced to suffer death while K C, who was found to have been a minor at the time of the offence and was sentenced to serve a 3 year term in a Borstal Institution.

[11] Dissatisfied with their conviction and sentence, the appellants preferred the present appeal relying on the grounds stipulated in the appellants' respective memoranda of appeal as well as the supplementary grounds of appeal filed by their advocates. In a nutshell, they impugn the decision of the trial court on two grounds; that is the learned Judge erred; firstly, by denying the appellants a chance to be heard, which is contrary to the provisions of **Article 25(c)** as read with **Article 50(2) (f)** of the Constitution as well as **sections 213** and **310** of the Criminal Procedure Code (CPC); in this regard counsel submitted that there is no room for written submissions in a criminal trial; that the learned trial Judge erred by failing to find that on the evidence tendered, the cause of death was premised on the appellants' belief that they had been bewitched, given the general prevailing belief that the two deceased persons were practising witchcraft and thereby alluding to a defence of provocation, it should have been considered.

[12] In further arguments during the plenary hearing of this appeal, learned counsel for all the appellants Mr. Ole Kina submitted that the appellants were never given an opportunity to be heard. Upon the close of the defence hearing counsel for the appellants filed written submissions and the court merely directed a judgment would be given on notice. Yet, according to counsel although the appellants were represented at the trial it cannot be assumed that they understood the consequences of those written submissions. This effectively denied them a chance to participate in the trial. Citing *sections 230 and 310* of the CPC, as well as the decision in the cases of *Akhuya vs. Republic* [2003] eKLR, *Otieno K'Opiyo Gerald vs. Republic* [2010] eKLR and *Julius Kamau Mbugua vs. Republic* [2010] eKLR, counsel urged us to find the trial of the appellants fell below the threshold of a fair trial envisaged under *Article 25* of the Constitution.

[13] With regard to the guilt of the appellants, counsel submitted that as rightly appreciated by the trial court; there was a prevalent belief within the community that the two deceased persons were practising witchcraft. As such, upon finding the appellants' guilty, they ought to have been convicted of manslaughter and not murder in the circumstances of the case. Counsel urged us to consider or take judicial notice of the fact that due to morbid fear of the effects of witchcraft generally experienced within the area where the offence took place, the appellants should have been sentenced for a lesser charge of manslaughter and if we are so inclined, to consider the time served by the appellants when deciding the appropriate sentence.

[14] This appeal was opposed; Mr. Monda, learned Senior Assistant Director of Public Prosecutions (ADPP), submitted that the decision in the *Akhuya case*, (supra) is no longer good law on account of *Article 159* of the Constitution which allows courts to generally administer justice without undue regard to technicalities as the trial took place with the appellants who gave their defence and it was at the close of the defence that counsel for the appellants requested for time to file written submissions and thereafter they be given a date for judgment. Thus there was no prejudice suffered as the appellants were represented throughout the hearing. It was the appellants' counsel that requested to be allowed to file written submissions otherwise at the close of defence they should have made oral submissions. In conclusion; Mr. Monda urged us to ignore, the defence of provocation which was not pleaded before the trial court and which was not pointed out by the prevailing circumstances when the offence was committed.

[15] We have considered the whole record of appeal, the grounds, submissions and authorities cited; we discern two issues for determination; one, is whether the appellants were denied a fair hearing and secondly, whether the appellants should have been convicted if at all of a lesser offence of manslaughter. On the first issue, the record shows that indeed, at the close of the defence case, the appellants were directed to file written submissions and thereafter the matter was mentioned for purposes of scheduling a judgment date. The appellants have raised issue with the directive on submissions arguing that they were unrepresented and did not know the true import and consequences of the submissions. As such, that they were denied an opportunity to be heard. As mentioned earlier, at the commencement of trial, the appellants were represented by counsel just as it happens in all murder trials. According to the record, the 1<sup>st</sup> and 2<sup>nd</sup> appellants were represented by Mr. Mwadilo, while the 3<sup>rd</sup> and the 1<sup>st</sup> accused person who did not appeal were represented by Mr. Lughanje respectively throughout the trial.

[16] On 20<sup>th</sup> September, 2011 when the appellants were put on their respective defenses, Mr. Mwadilo was indicated as still being on record for K C and the 2<sup>nd</sup> appellant while Mr. Lughanje was still on record for the 3<sup>rd</sup> appellant. However, nothing was said of the 1<sup>st</sup> appellant's representation though the said appellant was in court. In the end, only Mr Lughanje filed submissions and even those, were expressed to be on behalf of the 3<sup>rd</sup> appellant. That left the court without any submissions for the 1<sup>st</sup> and 2<sup>nd</sup> appellants. Was this fatal? According to *Article 25(c)* of the Constitution, the right to fair trial is one of the fundamental rights and freedoms which cannot be limited. Also, under *Article 50(2) (c)* of the Constitution, every accused person has the right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence. The appellants contend that these rights were breached when the court moved on without their submissions and /or their input on the submissions filed.

**Under section 213 of the CPC;**

***“The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as the trial under this Code before the High Court.”***

**Section 213** above is to be read together with **section 311** which provides for the procedure applicable in the High Court in the following terms:

***“Where accused adduces no evidence:***

***If the accused person says that he does not intend to give or adduce evidence and the court considers that there is evidence that he committed the offence, the advocate for the prosecution shall then sum up the case against the accused person, and the court shall then call on the accused person personally or by his advocate to address the court on his own behalf.*** (Emphasis added)

[17] This address is what is colloquially referred to as final submissions. From a reading of the above provisions, that address is mandatory and inalienable where the accused person does not intend to give or adduce evidence. This means the accused person would have declined to testify (on oath or otherwise) or to call witness (es) to testify on his behalf. However, in the instant case, the appellants gave unsworn statements in their defence. So they cannot fault the learned trial Judge for not calling upon them to give an additional address to the court. In any case the prosecution did not have a final address either and it is counsel for the appellants who intimated to court, the appellants desire to file written submissions as a final address to the court. Are the appellants’ now approbating and reprobating at the same time? It is without doubt that by directing the appellants to file their submissions, the requirements of **section 311** were fulfilled. The appellants were in no way prejudiced by their failure to give oral submissions as their counsel opted for written submissions. What emerges is a failure by counsel on record to comply with that directive.

[18] Revisiting the **Akhuya case** (supra) which was cited to support the assertion that the appellants had to be granted an added opportunity to participate and orally address court over and above the filing of the submissions; it was held that filing of written submissions without the accused persons’ express consent and participation was found to be a denial of his right to a fair trial and thus a ground rendering a conviction unsafe. One distinguishing element however, is that in the present appeal, the appellants gave unsworn statements, unlike the **Akhuya case** where it remains unclear whether the accused was ever heard on defence as well as on closing statement at all.

[19] Of particular importance to note is that the **Akhuya case** (supra) was decided, before the current Constitution, according to **section 77 (2) (f)** of the repealed Constitution, it specifically provided that the right of the accused to be present at trial was only limited either by his consent or his conduct. In the current Constitution, **Article 50**, the consent of the accused is not a deciding factor in the determination whether the trial is fair. Indeed, **Article 50(2) (f)** of the Constitution dispenses with the question of consent and envisages the conduct of an accused to be the deciding factor. As a result, the consent of an accused is presumed unless otherwise proven. Interestingly also, the case of **Otieno Kopyo Gerald v. Republic** [2010] eKLR, echoes this position. In that it was held:-

***“It is not necessarily a fatal mistake for the court to accept written submissions. The mistake is only fatal if the express consent of the accused is not obtained by his advocate, who then files written submissions.”***

In the instant appeal, failure by counsel for the appellants who requested to be allowed to make written submissions and failed/neglected to abide by the court’s direction cannot be construed as failure by court to ask for the appellants’ consent in so far as written submissions were concerned. The said failure was occasioned by counsel, who neglected to put in submissions for their clients despite the undisputed directive by court that written submissions be filed. In this regard therefore we find the appellants were never prejudiced by the decision of the court to direct the filing of written submissions and by proceeding

to issue judgment as directed. On the same note, we wish to point out that *section 230* of the CPC, upon which learned counsel for the appellants also relied, was repealed by *section 82* of Act No. 5 of 2003. As such, the same is no longer applicable law.

[20] We have closely considered this line of argument and are of the view that the appellants were well represented by their respective counsel during the hearing, very vigorous cross examination of the prosecution's witnesses took place, the appellants gave their defence evidence and failure by their counsel to file written submissions as directed by court did not prejudice the appellants as they fail to point out any issue of law or fact that was missed in the said submissions. In any event there was no failure or lapse that can be ascribed to the learned trial Judge. We would also hasten to add that if there was any lapse, it is a kind that would be curable under the provisions of *section 382* of the **Criminal Procedure Code, Cap 75, Laws of Kenya** which provides:-

***“Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”***

Also see the case of; *Joseph Maina Mwangi -vs- Republic-* *Criminal Appeal No. 73 of 1993, Tunoi, Lakha and Bosire JJA*, held:-

***“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”***

[21] On the last issue, the appellants have contended that in view of the prevailing belief (within their village) that the deceased were engaging in witchcraft, then the court ought to have inferred the presence of provocation of the appellants and that any resulting conviction should have been for manslaughter and not murder. In order to reduce a charge of murder to one of manslaughter, the court must be first be satisfied that *mens rea*, guilty intent or malice aforethought, was absent and the offence was committed spontaneously on provocation. *Section 206* of the Penal Code provides as follows regarding malice aforethought:

***“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -***

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- (c) an intent to commit a felony;***
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.***

[22] In regard to allegations of witchcraft, the established legal principle is, and has remained for a long time, that the belief in witchcraft does not justify deviation from law by private infliction of punishment on a suspected witch, except in cases 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 (see. **Patrick Tuva Mwanengu vs. Republic** [2007] eKLR).

In this case, no such imminent danger was pleaded or shown; indeed provocation was only introduced in this appeal. It was not argued in the High Court and there is no opinion on it by the trial Judge nor did it emerge from the evidence. As a matter of fact, none of the appellants raised the defence of provocation. If anything, they all contended that at the time of the assault and murder of the two deceased persons, they themselves were not present and that they only came into the scene after the deceased were beaten and set ablaze. It is acknowledged that failure to *raise a defence of provocation at the trial does not preclude the trial court from considering such alternative defence if it emerged from the evidence. It is also acknowledged that the prosecution must not only dispose of the defence set up by the appellant that they did not kill the deceased, but must also prove that the evidence adduced is only consistent with murder* (see **Gunga Baya & another v Republic** [2015] eKLR and **Criminal Appeal 372 of 2006, Katana Karisa & Others v Republic**).

[23] In addressing her mind to the aspect of witchcraft, the learned Judge addressed the issues as thus;-

***“..Has malice aforethought been established as contemplated by the provisions of section 206 of the Criminal Procedure Code? PW2 and PW3 refer to a conversation they had with their female relatives who told them of a looming plan to eliminate their parents on account of them being witches...The motive behind the killing was the belief that the deceaseds (sic) were practicing witchcraft. The plan had been hatched and was executed on the day set.”***

The appellants are now of the view that in the mind of the learned Judge, this set of circumstances should have connoted a case of provocation. Nonetheless, even if it were to be so, that defence would still not succeed for the simple reason that from the evidence, there was no imminent danger apparent to trigger the killing of the deceased by the appellants. There was no evidence of a string of circumstances to demonstrate that the deceased persons were involved in witchcraft which could have impacted fear on the appellants for their lives or their loved ones. In other words who had the deceased bewitched? In conclusion, we find the learned Judge cannot be faulted for failing to find there was no provocation as indeed none was demonstrated.

[24] Consequently, the two grounds of appeal fail, the appeal lacks merit and we order it dismissed with the result that the conviction and sentence imposed by the trial court are upheld.

**Dated and delivered at Malindi this 5<sup>th</sup> day of October, 2017.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original

**DEPUTY REGISTRAR**