IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 45 OF 2015

BETWEEN

1. MOHAMMED TAWA KEA

2. WILLIAM JUMA SHAURI

3. SALIM SHAURI MWABORA..........................APPELLANTS

AND

REPUBLIC...RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya

at Mombasa (Odero, J.) dated 9th July, 2014

in

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

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JUDGMENT OF THE COURT

Mwadziwe Dosho (PW 1) is an elderly resident of Huruma Sub location in Rabai Location of Kilifi County. He is a paternal uncle to **Mwabari Mwadzure** "*the deceased*" and the appellants. The appellants and the deceased were brothers though they had never known peace. The appellants constantly accused the deceased of being selfish, having taken the lion's share of the family land as well as being a witch. When PW 1 attempted to intervene in a bid to patch up the family discord, he was also branded a witch and together with the deceased were threatened with death. Indeed the deceased was suspected to have had a hand in the death of several members of the family and in particular their younger brother **Saha**, who passed away on 7th January, 2011. Fearing for their lives, the deceased and PW 1 reported the threats to **Liston Chibogo Ukonda** (PW 5), the Assistant Chief, Rabai Location as well as **Stephen Mukamba Mutaa** (PW 7), the Chief of Rabai Location and thereafter to Kaloleni Police Station. But this was not enough as they were forced to relocate and seek refuge in safer grounds away from home.

On 6th February, 2011, the deceased and PW 1 met PW 5 at the chief's office and informed him that they wanted to go to their homesteads to collect cassava. However, according to PW 1, the deceased had

asked him to accompany him to his house to collect his traditional medicine. The deceased was a traditional medicine man, but not a witch according to PW 1. PW 1 practiced similar trade as well. Yet according to **IP Peter Nyamayi** (PW 14), the investigating officer, the deceased had gone home to collect his charms. PW 5 warned them against going to their homes until those who had threatened them had been rounded up and arrested. They did not heed the advise by PW 5 and proceeded to the home of the deceased.

As the deceased was collecting what he had gone for under watchful eye of PW 1, a crowd armed with pangas, rungus and stones descended on them and cut them senselessly. Though PW 1 was cut on the hand, he managed to escape to an adjacent farm owned by an Asian family where he sought refuge and protection. **Samuel Marita Onserio**, PW 2, a security guard provided the necessary cover. He had seen PW 1 run towards him with a crowd in hot pursuit. After securing PW 1, PW 2 called the village headman, **Patrick Ngaka** (PW 4) as well as a neighbour **Ndegwa Mwalunya** (PW 3). They in turn called PW 5 and PW 7. The latter informed the OCS, Kaloleni Police Station. Police officers led by PW 14 and in the company of **Cpl Samuel Ngeno** (PW 8), arrived at the scene and found the deceased had been killed. The body of the deceased had several cuts on the head. The attackers had however all escaped. PW 1 knew the attackers as they were members of his family and had been among those who attacked them. That night, PW 5 and PW 14 with the assistance of PW 1 were able to arrest the appellants, PW 1 having pointed out their houses. Also arrested was another brother of the appellants; **Nzaro Chai Karisa,** who was a co-accused but passed on whilst the case was pending trial.

The body of the deceased was later removed to Coast General Hospital Mortuary. Dr. **Francis Otieno** (PW 9), conducted the post mortem and noted deep cut wounds over the right eye, across the back of the head with open fracture internally and multiple skull fractures at the back of the head and bleeding on the brain. In his opinion, the cause of death was head injury due to repeated assault by a sharp object.

Armed with this evidence, PW 14 then preferred an information in the High Court at Mombasa charging the appellants and Nzaro Chai Karisa, deceased, with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code, brief particulars being that the appellants with their co-accused on 6th February, 2011 at Shauri Moyo Village, Rabai Location of Kilifi County, jointly with others not before court murdered Ali Mwabari Mwadzure.

The appellants entered a plea of not guilty and were soon tried. In their defences which were unsworn, they denied having committed the crime. Save for the 3rd appellant, the other appellants all claimed that on the material day while in their respective houses they were attracted by the noise and or shouts from a crowd of people. On going where the crowd had assembled, they found the deceased already killed on suspicion of being a witch. As for the 3rd appellant, his defence was an *alibi* that on the material day, he had gone to church and returned home at about 8 p.m. only to be confronted with the news that the deceased had been killed.

Following a full hearing, the trial court was convinced that the deceased was murdered due to a family land dispute and on suspicion of being a witch. The appellants were accordingly convicted for the offence of murder. Upon conviction, the 1st appellant was sentenced to be detained at the President's pleasure as he was a minor aged 17 years at the time of the commission of the offence. The other appellants were however erroneously sentenced to life imprisonment, though they had been convicted for the offence of murder. We shall say something later in this judgment over this irregular or illegal sentence.

The conviction and sentence aforesaid provoked this appeal on three grounds; that the offence of murder had not been proved beyond reasonable doubt, that the trial court failed to consider that, belief in witchcraft was a perfect defence for the offence of murder, and lastly, that the sentence meted out was inappropriate, extremely punitive, harsh and excessive, considering the circumstances of the case.

Before the commencement of the hearing of the appeal, we drew the attention of the appellants and their learned counsel, **Miss Otieno,** of the illegal sentence. We warned the appellants as required that having

been convicted for the offence of murder and in particular with regard to 2nd and 3rd appellants, the only lawful sentence that the trial court should have imposed was death. That the custodial sentence imposed on them was therefore illegal and we would be minded, should the appeal fail, to correct the illegal sentence by imposing the appropriate sentence; death. The appellants having appreciated the purport and intent of the warning and in consultation with their counsel nonetheless elected to prosecute the appeal.

In support of the appeal, Miss Otieno submitted on ground one that the offence of murder was not proved. That there was no evidence of common intention by the appellants to prosecute and commit the offence though the appellants were charged jointly with murdering the deceased. On common intention, counsel relied on the case of **Obed Kariuki Muthike v Republic [2007] eKLR.** Counsel further submitted that the prosecution relied on the evidence of a single identifying witness (PW 1) in convicting the appellants yet no cogent evidence was led to place them at the scene of crime. That conditions for proper recognition of the appellants were also difficult as the deceased and PW 1 were under siege and PW1's judgment could therefore have been impaired in the circumstances.

Arguing grounds two and three as an alternative to ground one aforesaid, counsel submitted that at best the evidence led by the prosecution disclosed the offence of manslaughter as opposed to murder. That there was evidence that the appellants and the deceased had disagreed earlier. There had been a tiff even with PW 1 that led him and the deceased to file a complaint with the police. Both had been accused of being witches and on the fateful day, the deceased had been found in possession of charms. Counsel went on to submit that belief in witchcraft by the appellants was a proper defence. That there was evidence that the appellants had visited another witch who had pointed out the deceased as the person who had caused the death of their kin. On the defence of provocation by way of witchcraft, counsel relied on the case of **Katana Karisa v Republic [2008] eKLR**.

Concluding her submissions, counsel maintained that if witchcraft is accepted by this Court to be a defence, then the sentence imposed was harsh and excessive considering that the appellants were young people aged 17, 21 and 27 years respectively at the time of the commission of the offence and further considering that they had been in lawful custody since 2010.

Opposing the appeal, **Mr. Yamina**, learned Principal Prosecution Counsel, submitted that the findings of the High Court once re-examined independently by this Court can be supported on the evidence on record. That motive for the commission of murder by the appellants was self-evident. That the genesis of the problem was a land dispute followed by claims of witchcraft. On the basis of the foregoing, the deceased and PW 1 were banished from their homes by the appellants and their relatives. Counsel further submitted that there was evidence of common intention and witchcraft provided the motive. It was also submitted that if witchcraft was to form a defence, it could only be on the basis of provocation. In the circumstances of this case, there was no provocation as the appellants did not act on the spur of the moment. They had had ample time to cool off. For these reasons, counsel discounted the defence of provocation on account of belief in witchcraft. In any event counsel maintained, the appellants were not personally affected by the deaths of their kin. Counsel further submitted that in the absence of the defence of provocation coming out clearly to justify the actions of the appellants, then the appellants were guilty of murder. It did not matter who delivered the fatal blow. The attack on the deceased was savage and involved the use of pangas, rungus and stones. The intention was to kill the deceased which was achieved, hence common intention. On sentence, counsel maintained it was proper and was in consonance with **Section 25(2)** of the Penal Code.

This being a first appeal, we are obliged to re-evaluate the evidence on record and come to our own independent conclusion. We are also required to pay due regard to the fact that we do not have the distinct advantage which the trial court enjoyed of seeing and hearing the witnesses and therefore attest to their demeanour. See generally **Okeno v Republic [1972] EA 32**.

It is common ground that the deceased was killed by a village crowd on account of being suspected to be a witch in the neighbourhood, and a land dispute pitting him against his siblings. However, we are persuaded that the deceased was murdered not so much because of the land dispute but because of the belief by the appellants that he was a witch. In their defences, the appellants maintained that they were

never part of the village crowd. However, to the prosecution they were part and parcel of the crowd and infact they were the prime movers of the events of that day. PW 1 was an eye witness and also a victim of the vicious attack. He is a paternal uncle to the appellants as well as the deceased. Indeed, he was with the deceased when the attack was launched. The attack was in broad daylight, at about 10.30 a.m. when PW 1 had escorted the deceased to his home from which he had been banished for a while to collect either cassava, medicine or charms. The irresistible conclusion that can be drawn from this set of facts is that the deceased met his death at the hands of the very people who had attacked him and PW 1. Indeed according to the testimony of PW 1 as he fled the scene, the deceased had already been cut, seriously injured and was infact lying on the ground as some of the assailants continued in their orgy while the others pursued him.

In his evidence, PW 1 was emphatic that in that crowd he clearly and vividly saw the appellants. He could not have mistaken them for other people. There is no evidence that during the attack, the appellants were disguised to make their recognition difficult. They were in fact the ones cutting them. It was a case of recognition as opposed to visual identification of a stranger. As stated in the case of **Anjononi v Republic [1980] KLR 59**, recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other. The trial court appreciated further that the case turned on the evidence of a single identifying witness and duly warned herself of the dangers of relying on such evidence and was impressed by the demeanour of PW 1. It found him to be clear, persuasive and consistent in his testimony. As a first appellate court we cannot, unless persuaded otherwise, interfere with observation by the trial court of the demeanour of a witness. There is no basis to hold that despite the trial court's impression of PW 1, he was nonetheless unreliable as argued by the appellants.

It is also not lost on us that this witness recognized the appellants by their names. As correctly observed by the trial court, the fact that he was able to recognize the appellants by their names during the attack bolstered his evidence of recognition. The appellants made heavy weather of the names attributed to them and claimed that there was no evidence showing that they went by the names attributed to them by the witness. However, we must not lose sight of the fact that this witness was a member of the same family as the appellants. At some point, he was involved in dispute resolution between them and the deceased. The names he gave to PW 5 and PW 4 are the very names that led to the arrest of the appellants. When arraigned in court and during the plea and subsequent proceedings, they all answered to those respective names. Finally, the appellants were throughout the trial represented by counsel who never challenged the names attributed to each appellant in cross examination of the witness or when it came to their defences. All said and done, the names used to identify the appellants leave no doubt at all that they belong to the appellants.

The appellants too have submitted that the prevailing conditions during the attack were so harrowing to PW 1 as to make recognition of the appellants in the crowd nearly impossible. There is no basis for such an assertion. The appellants did not just fall from the sky. PW 1 watched as they approached and cut them. Being members of the family, how could he have failed to recognize them in the group in broad daylight, more so when they came into close proximity as they cut him? They even pursued him to where he sought refuge and were only repulsed by PW 2. All this time, they were not disguised at all. He was seeing them clearly.

We are on the whole satisfied, just like the trial court, that notwithstanding the fact that the recognition of the appellants was by a single witness, the evidence on record in that respect does pass muster. PW 1 had a clear and unhindered view of the appellants as they approached him and the deceased; it was in broad day-light and in addition the appellants were persons known to him, thus he was able to both recognize and name them. PW 1 also later pointed out the appellants to the local administration and police officers who effected their arrest. The evidence no doubt places the appellants at the scene of crime.

In acting as they did, common intention in terms of **Section 21** of the Penal Code can be inferred. It matters not who or who did not deliver the fatal blow. There is no doubt at all that the appellants had formed a common intention to kill the deceased or cause him grievous harm. It is clear that the appellants with others were mercilessly involved in assaulting the deceased and PW 1. They are equally to blame

for the aftermath of their actions. The authority cited by the appellants does not advance their case at all. The facts in that case are clearly different and distinguishable from this case.

What was the justification for the killing of the deceased? According to the appellants the deceased and PW 1 were witches who had been responsible for the pain, misery and untold suffering in their family. They were fingered for unexplained deaths in the family, the latest victim being Saha, a young brother of the appellants, who according to PW 5 fell sick and within seven days died on 7th January, 2011. By then the deceased and PW 1 had been banished from their homes and could not attend the burial. According to PW 14, following the death of Saha, the appellants had consulted another witch or medium who categorically told them that the death of Saha had been caused by the deceased. The evidence of PW1, PW 2, PW 3, PW 5 and PW 14 respectively attest to the appellants' suspicion of PW 1 and the deceased in particular, of being a witch.

It would appear that within days of such banishment and burial of Saha, PW 1 and the deceased made their way back to the home of the deceased despite being warned not to undertake such a mission before the appellants and others who had threatened them with death were arrested. They ignored the warning by PW 5 and PW 7. They gave various reasons why they needed to go home ranging from collecting cassava, traditional medicine and or charms. Infact according to PW 7, when they were attacked, the deceased had spread the medicine and or charms within his compound.

Considering that charms or traditional medicine were found in the deceased's possession; another witch had fingered him as the cause of the death of Saha, a brother to the appellants; he had also been accused of previous deaths in the family, and for that reason had been banished from the village and soon thereafter returned to the village hardly days after Saha's death, we think that the appellants were sufficiently provoked as to undertake the mission to obliterate the deceased from the face of this earth. We doubt as urged by counsel for the respondent that passions had by then cooled and that in attacking both the deceased and PW 1 as they did, the appellants did not act on spur of the moment.

Dealing with the issue of the deceased being a witch, this how the trial court delivered itself:-

> **"….PW 1 told the court that following a land dispute between the family members, allegations were made by some that the deceased was a witch. This evidence is confirmed by PW 5 the assistant chief …… After allegations of witchcraft were made against the deceased, PW 5 advised him to report to the police. PW 8 APC Corporal Samuel Ngeno from Shika Adabu Police Post confirms that the report had indeed been made at Kaloleni Police Station of threats to the deceased's life. Thus it is clear that the deceased was murdered due to a family land dispute and due to suspicions that he was a witch. The motive is quite evident…."**

The trial court thus treated the suspicion of the deceased being a witch as motive for his eventual demise of the deceased and not as a possible defence for the appellants' actions. In our view this was a wrong approach. Motive is not generally relevant in criminal proceedings. See **Section 9** of the Penal Code. The proper approach should have been to treat it as a possible defence of provocation and try and fit it within the perimeters set by this Court in a host of decisions. See **Katana Karisa & 4 others** (supra), **Charo Kalu Thinga v Republic [2015] eKLR, Thoya Kitsao Katiba v Republic [2015 eKLR** and **Patrick Tuva Mwanengu v Republic [2007] eKLR** but to mention a just a few. In the case of **Thoya Kitsao** (supra), this Court delivered itself thus:-

> **"…..The appellant has relied heavily on the decision of this Court in** PATRICK TUVA MWANENGU V. REPUBLIC, **(supra) and suggested that the moment there is some scintilla of evidence suggesting that the deceased may have been a witch, he is automatically entitled to have the charge reduced from murder to manslaughter because he is a member of a community that believes in witchcraft. We find absolutely no basis for giving the judgment in** MWANENGU **such a broad construction and application**.
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> **In that case as in this appeal, the appellant had not raised the defence of provocation by witchcraft, but there was evidence that the deceased was accused to be a witch and that at**

some point when the appellant was very ill, it had been suspected that the deceased had bewitched him. The trial court convicted him of murder and on appeal this Court, after a review of past decisions on the defence of provocation by witchcraft, held that although the issue of witchcraft was raised through prosecution witnesses, it mattered not that the appellant had not expressly raised it. Having been raised, it was necessary to give it due consideration. The Court observed as follows:

'So the members of the family and the provincial administration were aware about the allegations about the deceased's involvement in some of the deaths of the members of the family. The appellant himself was also sick at the time.'

Ultimately the Court gave the appellant the benefit of doubt and reduced the charge from murder to manslaughter.

In each case that were reviewed by this Court in MWANENGU, **there was clear 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. There were either illnesses or deaths of immediate members of the family that made each accused person believe that the deceased was, through witchcraft, responsible for the same. In none of the cases was belief in witchcraft alone, without evidence of circumstances negatively affecting the appellant directly and which he attributed to witchcraft, deemed sufficient to excuse a murder merely because by repute the deceased was regarded as a witch. To uphold the appellant's proposition in that regard would be to extend the defence of provocation by witchcraft far and beyond the realms contemplated in** MWANENGU **and grant those who consider themselves witch busters a** *carte blanche* **to unleash terror on anybody they suspect to be a witch even when he or she has not harmed them in any way**….."

In this case, the defence of provocation on account of witchcraft was raised by the appellants very early through cross-examination of various prosecution witnesses. There was also evidence of close members of the family dying on account of the deceased's alleged underworld activities, the last straw being the death of Saha, a brother of the appellants. These led to the deceased and PW 1 being banished from the homestead. There was thus evidence of circumstances directly affecting the appellants from which it could be deduced that on account of their belief in witchcraft, they were provoked to murder the alleged witches. Matters were not helped when it turned out that at the time of the attack, the deceased was actually found in possession of traditional medicine, herbs, charms, name it.

The facts in this case bears distinct similarities with the case of **Charo Kalu Thinga** (supra). Just like in that case, in this case, the evidence on record proved that the appellants believed the deceased and PW 1 were witches who were responsible for the deaths in their family. Immediately before the assault causing the death of the deceased, the appellants' brother had died.

On the whole, we are satisfied that there was sufficient evidence upon which the learned Judge should have availed to the appellants the defence of legal provocation and returned a verdict of guilty for the offence of manslaughter as opposed to murder. Accordingly, we allow the appeal, quash the conviction and set aside the sentences imposed. In lieu thereof, we substitute a conviction for the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code.

As regards sentence, we would reiterate what the learned Judge stated in her sentencing notes; that the attack on the deceased was vicious and unnecessary. That the abhorrent practice of killing elderly persons on suspicion of being witches which is rampant in this part of the world should be condemned in no uncertain terms and should invite deterrent sentence. In this case, we note though that the appellants are young people now aged 23, 27 and 33 years respectively. That they have been in legal custody since 2010. They are remorseful and were first offenders. Taking into account all the circumstances into account, we are satisfied that a sentence of twelve (12) years imprisonment effective from the date of conviction and sentence by the High Court will meet the ends of justice. That sentence will apply to 2nd and 3rd appellants. As for the 1st appellant who was held in detention at the pleasure of the President on

account of his age, we think that he has been sufficiently punished. We accordingly order for his immediate release unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 27th day of May, 2016

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR