



IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 125 OF 2011

BETWEEN

CHARO KALU THINGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Malindi, (Omondi, J.) dated 30<sup>th</sup> May 2011

in

H.C.CR. C. NO. 3 OF 2008)

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JUDGMENT OF THE COURT

This is yet another appeal raising the issue of availability of the defence of provocation by reason of belief in witchcraft. The appellant, **Charo Kalu Thinga** contends that the High Court (**Omondi, J.**) erred in convicting and sentencing him to death for the murder of his father, **Mwadodo Thinga (deceased)**, and by failing to consider his defence of legal provocation founded on his belief that the deceased was a witch.

The tragic events behind this appeal are fairly straightforward. The deceased and his family lived at Makwala sub-location in Kilifi County. The deceased had three wives, **Jumwa Dondo (PW1)** being the first wife. The appellant's mother is the second wife of the deceased. The third wife does not feature in this appeal. There is evidence on record from PW1 and **Corporal Titus Mutunga (PW6)** that there were allegations in the village that the deceased and PW1 were witches. The appellant had previously alleged that his father and stepmother were witches and were responsible for the deaths in the family, and vowed to kill them.

Before the murder of the deceased, one of the appellant's brothers, **Alex Kalu** was taken ill and admitted in a Hospital in Mombasa. On 18<sup>th</sup> September 2007, the appellant went to visit his said brother and returned home in the company of one of his brothers called **Randu**. They were shouting and wailing because their brother Alex Kalu had just died. Armed with sticks, they viciously assaulted PW1 who became unconscious, but survived the ordeal after admission for a number of days at Kilifi Hospital. They

also set upon the deceased and inflicted upon him severe injuries from which he died instantly.

According to the evidence of **Dr. Barbara Mambo (PW7)**, the medical officer at Kilifi Hospital who produced a postmortem report prepared by **Dr. Mutinda**, the deceased sustained a deep cut on the frontal aspect of the head; fracture of the skull with rugged edges; depressed fragments leading to facial deformities; exposed brain matter and bruise on the posterior aspect of the head. The pathologist formed the opinion that a heavy blunt object had inflicted the injuries and that the cause of death was severe head injury, depression fracture and subdural hemorrhage.

PW1 testified on how she was assaulted by the appellant and his brother. As regards the deceased, no one saw the appellant murder him. **Katite Mgenja (PW2)** and **Kanze Charo (PW2)**, the witnesses who came to the scene immediately after the death of the deceased, testified that the appellant and his brother were at the scene, armed with sticks and very aggressive and hostile to every person who tried to get to the deceased's home. They chased everyone away and berated those who crying on account of the death of the deceased. The appellant soon after disappeared and was not arrested until two months later on 27<sup>th</sup> September 2007, at a place called Bamba. His brother Randu was never arrested and is presumably still at large.

When put on his defence, the appellant denied having killed the deceased. He stated that on the material day, he was working at Bamba when he received news of the death of his brother Alex Kalu in Mombasa. He proceeded home where he got information that his father had been beaten to death. Thereafter he was arrested by the police at Bamba and charged with the murder of the deceased.

After considering the evidence, Omondi, J. found that the appellant had killed the deceased of malice aforethought and accordingly convicted and sentenced him to death, leading to the present appeal.

Although the appellant's original grounds of appeal and the supplementary grounds of appeal dated 19<sup>th</sup> March 2014 raised a total of 14 overlapping grounds of appeal, it is common ground between counsel for the appellant and counsel for the respondent that this appeal turns on the one ground of appeal in the supplementary grounds of appeal dated 29<sup>th</sup> September 2015, namely whether in the circumstances of this appeal, the defence of legal provocation by reason of belief in witchcraft was available to the appellant.

**Mr. Ole Kina**, learned counsel for the appellant conceded that there was sufficient circumstantial evidence from which it could be properly concluded that the appellant had killed the deceased. However, he submitted that there was sufficient evidence too on record from which the trial court was obliged to find that the appellant had killed the deceased due to provocation arising from his belief that the deceased was a witch. Learned counsel argued that prosecution witnesses, including PW1, had confirmed that the appellant believed that his father and stepmother were witches who were responsible for deaths in their family and had previously threatened to kill them both. Further it was submitted that the appellant attacked the deceased and PW1 immediately upon learning of the death of his brother Alex Kalu. In the circumstances of this appeal, it was submitted the learned judge was obliged to consider whether the defence of provocation was available to the appellant, even though he had not specifically raised it.

Relying on the decision of this Court in **PATRICK TUVA MWANENGU V. REPUBLIC, CR. APP. NO. 272 OF 2006** and the decision of the Supreme Court of Uganda in **BYABAGAMBI V. UGANDA, CR. APP. NO. 16 OF 2002** learned counsel invited us to find that the appellant was provoked by his belief that the deceased was a witch; that the deceased was responsible for the death of his brother; and that the appellant had acted in the heat of the moment. We were accordingly urged to substitute the conviction of murder with that of manslaughter and to set aside the sentence of death and impose one of imprisonment for the period that the appellant has already served.

**Mr. Monda**, learned Assistant Director of Public Prosecutions conceded the appeal and agreed with the appellant that the evidence on record proved the offence of manslaughter rather than murder. The evidence adduced by the prosecution, it was urged, left no doubt that the appellant believed that his father and step mother were witches and were responsible for the death of his brother. In addition, it was

submitted, the offence was committed immediately upon the appellant learning of the death of the brother; in the heat of the moment; and before the appellant's passions had cooled. Learned counsel concluded by submitting that had the trial court closely inquired into these circumstances, it would have concluded that the defence of provocation was readily available to the appellant.

As regards sentence, Mr. Monda urged us to impose one that was commensurate with the offence so as to show disapproval of the practice of killing persons merely because of suspicion that they were witches

We have duly considered the evidence, the submissions by learned counsel, the authorities cited and the law. In our view, from the circumstances of this appeal, the respondent's concession to the appeal is well founded.

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.

In this appeal the situation is quite different. Indeed, the trial court made several specific findings in its judgment, which on the face of it, leave no doubt that the defence of provocation was indeed available to the appellant and that the offence of murder was clearly not proved beyond reasonable doubt. At page 10 of the judgment, the learned judge expressed her self thus:

***“The circumstances on which the prosecution based its case are:***

- a. ***Accused had previously alleged that his father and his senior wife (PW1) practiced witchcraft and were responsible for deaths within the family;***
- b. ***Accused had vowed that due to that practice, he would kill both of them;***
- c. ***A brother of the deceased died that very day and as soon as news about his death reached the family, (the) deceased and his wife were attacked;***
- d. ***Several witnesses saw the accused armed with stick, which he wielded menacingly as he displayed an aggressive and hostile mood, ordering everyone to go to their own homes;***
- e. ***Deceased was found dead with injuries shortly within the same period when accused was displaying his combative attitude.”***

Under **section 207** of the Penal Code a person who could otherwise be guilty of murder because of an unlawful killing of another is only guilty of manslaughter if the death is caused in the heat of passion arising from sudden provocation and before there is time for his passion to cool. The relevant part of **section 208** of the Penal Code defines provocation as follows:

***208 (1) The term “provocation” means and includes...any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relationship of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged***

*committed upon the person by whom the act or insult is done or offered.*

*(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in such relation as aforesaid, the former is said to give to the latter provocation for an assault.”*

The evidence on record does prove that the appellant believed the deceased and PW1 were witches who were responsible for the deaths in their family. Immediately before the assault causing the death of the deceased, the appellant’s brother Alex Kalu had just died. The relationship between the deceased and his dead brother is one of those recognized in section 208(1). The assault on the deceased happened immediately the deceased learnt of the death of his brother. The appellant was wailing and the fact that he had lost his power of self-control is clear enough from the evidence adduced by the prosecution, which describes him as hostile and aggressive to everyone who attempted to get to the deceased’s homestead.

We are satisfied that there was sufficient evidence upon which the learned judge should have concluded that the defence of legal provocation was available to the appellant. We accordingly allow this appeal, quash the conviction for murder and set aside the sentence of death. In lieu thereof, we substitute a conviction for the offence of manslaughter contrary to section 209 as read with section 205 of the Penal Code.

As regards the sentence, the assault on the deceased, who was the appellant’s father, was so vicious that he died on the spot. The punishment prescribed by **section 205** of the Penal Code for the offence of manslaughter is life imprisonment. Taking into account all the circumstances in this appeal, the sentence that commends itself to us is a term of imprisonment of 20 years with effect from the date of conviction and sentence by the High Court for the offence of murder. It is so ordered.

**Dated and delivered at Malindi this 11<sup>th</sup> day of December, 2015.**

**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**