IN THE COURT OF APPEAL

AT MALINDI

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

CRIMINAL APPEAL NO. 123 OF 2014

BETWEEN

THOYA KITSAO alias KATIBA…….....…..APPELLANT

AND

REPUBLIC.……..…….....……RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Malindi, (Meoli, J.) dated 6th September 2014

in

H.C.CR. C. NO. 10 OF 2012)

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JUDGMENT OF THE COURT

In this first appeal, the appellant, ***Thoya Kitsao*** alias ***Katiba***, who was convicted for the offence of murder and sentenced to death by ***Meoli, J***. on 6th September 2014, challenges his conviction and sentence on three grounds; firstly that the trial court erred by convicting him on evidence that, due to its contradictions and inconsistencies, could not prove the offence beyond reasonable doubt; secondly by acting on his inadmissible confessions made to private citizens, contrary to sections 25 and 26 of the Evidence Act; and lastly by failing to consider his defence of provocation arising from his belief that the deceased was a witch.

According to the information upon which he was prosecuted and convicted, the appellant murdered ***Kambizi Mwaro Mbaya (deceased)*** on the night of 6th and 7th January 2012 at Majaoni Village, Tezo Location of Kilifi County. Both the deceased and the appellant were fellow villagers at Majaoni. At the material time, ***Maalim Omar Katana Salim (PW1),*** a madrassa teacher and an Ustadhi had employed the appellant as a herdsman. According to the postmortem report that was produced in evidence by ***Hashim Suleiman (PW8),*** a medical officer at Kilifi Hospital, the deceased woman was aged about 67 years. Other evidence indicated that she lived alone and there were rumours in the village that she was a witch, although no evidence was led to establish that she was indeed one.

On the morning of 7th January 2012 the neighbours woke up to find the badly mutilated body of the deceased outside her house. From the postmortem report the deceased must have met a rather brutal and gruesome end. The report indicated that she sustained a 25 cm cut wound on the back, so deep that intestines were protruding from the back. She also suffered an 8 cm cut wound on the occipital part of the head. There was complete transection of the spinal column and cord with fractured vertebrae. The pathologist formed the opinion that the cause of death was cardiopulmonary arrest secondary to severe head and spinal injury due to assault with a sharp weapon.

No one saw the appellant or anyone else for that matter murder the deceased. The only evidence that linked him to the murder were two alleged confessions that he was alleged to have had made, first in the presence of a group of fellow villagers partaking traditional brew at a funeral wake on 3rd February 2012, almost one month after the murder of the deceased. The second confession was allegedly made to his employer, PW1, on 9th February 2012 after reports had filtered back to him that his employee had bragged that he had killed the deceased. Although at the trial no objection was raised regarding the admissibility of the above confessions, in his defence it was clear that the appellant denied that he killed the deceased. Be that as it may, the trial court found the confessions credible enough to prove the offence of murder beyond reasonable doubt.

In his unsworn defence the appellant stated that he did not know who murdered the deceased and that he was arrested on 21st February 2012 and subsequently charged with robbery with violence. In June he was acquitted of the charge of robbery with violence but he was later on charged with the murder of the deceased.

After he was convicted of murder and sentenced to death, the appellant instituted the present appeal. We shall consider his three grounds of appeal sequentially.

As regards the inconsistencies in the evidence, ***Ms. Otieno,*** learned counsel for the appellant submitted that the prosecution case was riddled with contradictions and gaps and could not therefore prove the charge beyond reasonable doubt. On the day that the appellant was alleged to have confessed at the funeral wake to having murdered the deceased, counsel submitted, the prosecution evidence was inconsistent as some witnesses testified that the appellant had taken local brew and refused to pay, whilst others stated that he had attempted to take forcibly the drink of other mourners. Other contradictions, according to learned counsel, included the circumstances under which the appellant had left the funeral wake; the age of the deceased and the character and disposition of the appellant.

On the confessions, Ms. Otieno submitted that under sections 25 and 26 of the Evidence Act, confessions are generally inadmissible. Counsel also relied on Article 49 (1) (b) and (d) of the Constitution which respectively guarantee an accused person the right to remain silent and the right not to be compelled to make any confession or admission that could be used in evidence against him. Also invoked was Article 50 (2) (a) on the presumption of innocence and Article 50(4) which declares inadmissible evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights, if admission of the same would render the trial unfair, or would otherwise be detrimental to the administration of justice.

It was further submitted that the alleged confession to PW1 was not free and devoid of influence because PW1 was the appellant's employer, and therefore a person in authority within the meaning of section 26 of the Evidence Act. As regards the confession at the funeral wake, we were invited to find that the same was neither voluntary nor reliable as the appellant, according to the prosecution evidence, was drunk and agitated.

The appellant buttressed the above submissions with the decisions of this Court in ***KANINI MULI V. REPUBLIC, CR. APP. NO. 238 OF 2007***; ***MUSILI TULO V. REPUBLIC, CR. APP. NO. 30 OF 2013;*** and the ruling of the High Court in ***REPUBLIC V. SIMON NGAHU NJUGUNA, HCCRC NO. 81 OF 2008 (NAKURU)*** and concluded that if the confessions were excluded, there was no other evidence upon which the appellant could be convicted for the murder of the deceased.

On the last ground of appeal, Ms. Otieno submitted that the evidence adduced by the prosecution had

confirmed that there were rumours in the village to the effect that the deceased was a witch. In light of those rumours, it was submitted, the trial court erred by failing to inquire into the allegations that the deceased was a witch and to consider the appellant's defence of provocation arising from his belief that the deceased was indeed a witch. On the authority of the decisions of this Court in ***PATRICK TUVA MWANENGU V. REPUBLIC, CR. APP. NO. 272 OF 2006 (MOMBASA)*** and ***KATANA KARISA & 4 OTHERS V. REPUBLIC, CR. APP. NO. 372 OF 2006 (MOMBASA)***, we were urged to hold that the defence of provocation by witchcraft was available to the appellant or at the very least that he was entitled to the benefit of doubt in that regard.

Mr. Monda, learned Assistant Director of Public Prosecutions opposed the appeal and urged us to find the same bereft of merit and to dismiss it in its entirety. On the contradictions and inconsistencies that the appellant claimed riddled the prosecution case, we were urged to find the same not to be material or otherwise capable of vitiating the conviction.

Turning to the confessions, Mr. Monda, relying on the judgment of this Court in ***MARY WANJIKU GITONGA V. REPUBLIC, CR. APP. NO. 83 OF 2007***, submitted that the confessions in issue were admissible and were properly admitted; that the appellant had made them freely and voluntarily without coercion or intimidation; the confessions were confirmed by three different witnesses, namely PW1, PW4 and PW7; and that at the time of making the confessions the appellant was neither a suspect nor under arrest.

On the last ground of appeal relating to provocation due to witchcraft, learned counsel submitted that the appellant had not raised any such defence of provocation; that he did not have a general duty or obligation to kill any person he deemed to be a witch; and that there was no relationship established between the appellant and the deceased from which the alleged provocation could have arisen. We were urged to find that the decisions of this Court in ***PATRICK TUVA MWANENGU V. REPUBLIC, (supra)*** and ***KATANA KARISA & 4 OTHERS V. REPUBLIC, (supra)*** did not establish a general rule that an accused person is availed the defence of provocation in all and sundry cases where accused person is a member of a community that believes in witchcraft and the deceased is alleged to have been a witch.

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 self-evident fact that we do not have the advantage which the trial court had of seeing and hearing the witnesses testify**. *(OKENO V. REPUBLIC (1972) EA 32).***

We shall promptly dispose of the question of contradictions and inconsistencies in the prosecution evidence. It is true that as regards the confessions there are slight variations from the account of one witness to the other. But we must ask ourselves whether these are normal variations that would be expected when different human beings recollect an event or incident or whether they are of such a nature as to betray a cooked up or contrived case? This Court has stated severally that the mere fact that there are some variations in evidence does not *ipso facto* prove that the evidence is false or unreliable (See ***WILLIS OCHIENG ODERO V. REPUBLIC, CR. APP. NO. 80 OF 2004 (KISUMU))***. Indeed variations must be expected in evidence that is true. It is said that sometimes evidence without the slightest variation may be a good indicator of coached witnesses.

In ***DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR APP NO 92 OF 2007,*** the Court of Appeal of Tanzania stated as follows regarding discrepancies in evidence, which we respectfully endorse:

> ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

In this appeal, we are satisfied that the contradictions and inconsistencies cited by the appellant are not fundamental, of their own, to vitiate the judgment of the trial court. They were minor and never went to

the root of the prosecution case.

This brings us to the confessions by the appellant. We have recently held in ***SANGO MOHAMED SANGO & ANOTHER V. REPUBLIC, CR. APP. NO. 1 OF 2015 (MALINDI)*** that the decision of this Court in ***MARY WANJIKU GITONGA V. REPUBLIC (supra),*** is still good law and that there is nothing in the Evidence Act that bars admission of a confession by an accused person made ***voluntarily*** to a private citizen or a person not in authority. The changes that were brought to the provisions of the Law of Evidence Act touching on confessions by ***Act No. 5 of 2003*** and ***Act No. 7 of 2007*** were intended to address the then egregious abuse and irregularities arising from confessions taken ***by the police***. The overriding question is whether a confession to a fellow citizen or to a person not in authority was made voluntarily. Under both the Evidence Act and Article 50(4) of the Constitution, the trial court is obliged to exclude evidence, including a confession that is obtained in circumstances that would render the trial unfair or otherwise undermine the administration of justice.

In this case, the confessions in question were made on two occasions, first to a group of mourners in a funeral wake and subsequently to PW1, who was at the material time the appellant's employer. As regards the first confession, the evidence of PW4, PW5, PW6 and PW7 was that the appellant was among a group of mourners at the wake and was imbibing traditional brew. According to PW7, the appellant had downed two bottles, which he refused to pay for. When asked for the money, he, in a fit of bravado, threatened the seller by telling her ***"do you want me to do to you what I did to Kambizi Mwaro"***. While there was agreement between the four witnesses that those were the words that the appellant uttered, the only variation, which we have found is not material, was in the evidence of PW6 who testified that the appellant uttered the words when PW6 and his friends stopped him from partaking their drink.

It is not disputed that the appellant uttered the words that are alleged to constitute the confession, in circumstances of general drunkenness. Indeed but for the confession that the appellant later made to PW1, which we shall consider shortly, the trial court was prepared to dismiss this confession at the wake as ***"the empty bravado of an inebriated man."***

More importantly however, is the question whether the words uttered by the appellant of themselves or in conjunction with the other evidence adduced by the prosecution, could constitute a confession. In our opinion, those words were extremely vague. They cannot be interpreted to exclusively mean that whatever the appellant had done to the deceased was to murder her. They do not even point to when or where the appellant had done whatever he had done to the deceased, so as to lead exclusively to the conclusion that he had indeed murdered her.

As regards the second confession to PW1, the same is equally fraught with fundamental doubts as regards its voluntariness. It is common ground that the appellant was at the material time employed by PW1, a local Ustadhi. From the evidence on record it was not the appellant who voluntarily went and confessed to PW1. Rather, it was PW1 who summoned and engaged the appellant after he had learnt that the appellant had bragged that he had murdered the deceased. PW1 testified that he had questioned the appellant closely, though he denied that he was an investigator. At that precise time, the appellant was also seeking a favour from PW1, so that the latter could secure for him more permanent employment with a person that the witnesses called "an Arab neighbour."

More telling was the evidence of PW2 and PW3 who testified that PW1 had set a trap for the appellant so that he could confess to the offence. While it is clear to us that in the circumstances of this appeal the admissibility of the confession was not barred under section 26 of the Evidence Act, which prohibits admission of confessions in criminal proceedings which have been caused by inducement, threat or promise from a person in authority and capable of giving the accused person grounds for reasonably supposing that by confessing he would gain some advantage or avoid any evil of a temporal nature ***in reference to the proceedings*** against him, nevertheless the surrounding circumstances which we have adverted to raise serious doubt as to the voluntariness of the confession to PW1.

In ***NJUGUNA S/O KIMANI & OTHERS V. REGINA (1954) EA 316*** the former Court of Appeal for Eastern Africa held that the trial court has discretion to exclude a statement which has been obtained by

improper questioning or other improper means and that objection to admissibility of such statement was not confined to the circumstances enumerated in the present section 26 of the Evidence Act. We would add that Article 50(4) of the Constitution has reinforced that position.

Taking into account all the circumstances under which the two confessions were made or obtained, we are satisfied that they were not voluntary and ought not to have been admitted or relied upon. Although the appellant did not take any formal objection to the admissibility of the confessions, the trial court was still obliged to consider the circumstances under which they were made the moment that appellant, in his defence, denied ever making them. (See ***KINYORI S/O KARIDITU V. REGINA*** ***(1956) EA 480***, ***LAKHANI V. REPUBLIC (1962) 644*** and ***KANINI MULI V. REPUBLIC, (supra)).***

The last issue relates to the appellant's defence of provocation by reason of witchcraft. From the record, at no time did the appellant, either directly or obliquely raise the defence of provocation arising from the belief that the deceased was a witch. What we have in this appeal is a belated attempt to capitalize on the evidence of two witnesses, PW1 and PW2 that there were village rumours that the deceased was a witch, without any evidential basis for deducing that the appellant himself considered the deceased to be a witch or that there were any prevailing circumstances from which it could be concluded that the fact of the deceased being a witch had affected the appellant or someone close to him to such an extent as to provoke him to the point of losing control of himself.

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.

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 and 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 vigilantes or 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.

As was stated in ***MWANENGU***, whether or not belief in witchcraft constitutes legal provocation must depend on the circumstances of each case. We may also add that in ***KATANA KARISA & 4 OTHERS V. REPUBLIC, (supra)***, this Court reduced the charge of murder to manslaughter because although the 1st

appellant had not raised the defence of provocation by witchcraft, there was overwhelming evidence that he had lost his 10 years old son in circumstances where he strongly believed the death to have been caused by the deceased through witchcraft.

In this appeal, save for the village rumours that the deceased was a witch, there is absolutely no evidence of any existing circumstances, such as illness of the appellant or death or illness of close members of his family, which by reason of attribution to witchcraft by the deceased provoked him so as to lose self-control. We find that the trial judge cannot be faulted for declining to hold that the defence of legal provocation by witchcraft was available to the appellant.

Ultimately we have come to the conclusion that the discrepancies in the prosecution evidence were not fundamental so as to vitiate the decision of the trial court and that the trial court did not err in the circumstances of this appeal in finding that the defence of legal provocation by reason of belief in witchcraft was not available to the appellant. The trial court however erred by admitting and relying on confessions by the appellant that were not voluntary or which otherwise rendered the trial unfair or undermined the administration of justice. Without those confessions, there was no other evidence linking the appellant to the murder of the deceased at all, let alone beyond reasonable doubt. Accordingly, we allow this appeal, quash the conviction and set aside the sentence imposed on the appellant. We direct that the appellant be set at liberty forthwith unless he is otherwise lawfully detained. It is so ordered.

Dated and delivered at Mombasa this 4th day of December, 2015.

ASIKE-MAKHANDIA

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