REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 272 of 2006

PATRICK TUVA MWANENGU ……..……..……APPELLANT

AND

REPUBLIC ……....……..RESPONDENT

***(An appeal from the conviction and sentence of the High Court of Kenya Malindi (Ouko, J.) dated 7th November, 2003* in H.C.CR.C. NO. 3 OF 2003)**

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JUDGMENT OF THE COURT

The appeal before us brings into focus a vexing, yet an important issue to a significantly large part of the population of this country. It is this: Does the belief in witchcraft avail to an accused person the defence of provocation, and if so, under what circumstances?

There is a long line of authorities, which we do not propose to review at any length, to illustrate the vexing nature of the issue both pre- and post the colonial era. These include, amongst others: R. v. Kumwaka Wa Mulumbi & others, 14 KLR 137; R v. Kimutai arap Mursoi, 6 EACA 117; R v. Mawala bin Nyangweza, 7 EACA 62; R. v. Sitakimatata s/o Kimwage, 8 EACA 57; R. V. Fabiano Kinene s/o Mukye & others, (1941) EACA 96; Wero v. R [1983] KLR 549; and Chivatsi & Another v. R. [1990] KLR 529.

The position taken by the courts in the earlier decisions was typically exemplified in the ***Kumwaka case*** (supra) which was decided on 26th March, 1932. There, a group of 70 Kamba "natives" genuinely believed that the deceased woman was a witch and that she had bewitched the wife of one of them and made her ill and unable to speak. The group seized the deceased and brought her to the sick woman's hut and ordered her to remove the spell. Apparently half the spell was removed overnight, but early the following morning the deceased was seen running away from the home. The group ran after her and pounded her to death. A plea was then put forward in their defence on a murder charge that the group honestly believed that this was excusable homicide. The predecessor of this Court stated as follows: -

"**The belief in witchcraft is, of course, widespread and is deeply ingrained in the native character. It is also widely known, and as appears from the evidence in this case the fact was present to the mind of the first accused, that Government does not tolerate the killing of witches. The plea has been frequently put forward in murder cases that the deceased had bewitched or threatened to**

bewitch the accused, and that plea has been consistently rejected 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. 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 well be more mischievous or fraught with greater danger to public peace and tranquility."

The established legal principle therefore was, and remained for a long time, that the belief in witchcraft does not justify deviation from law by private infliction of punishment on the 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. That is why the appellant in ***Mawala Bin Nyangweza*** (supra) could not escape the gallows despite the following evidence to explain the deliberate killing of the deceased:

"**He gave evidence at the trial to the effect that in recent years his elder brother, his uncle (husband of deceased), his nephew and his mother had all died mysteriously; that the symptoms (swellings, etc.) were similar in each case; that he consulted witch doctors and was told that the deceased had caused the deaths by witchcraft. Then, some two weeks before the killing of the deceased, his brother Bunyika became sick with swellings and in spite of treatment by medicine men became worse. Witch doctors told appellant that deceased had bewitched his brother. When his brother died appellant decided to kill deceased for having bewitched all his family and about an hour later he killed her at a place not far away."**

All the court could do, after confirming his conviction for murder, was to see if the prerogative of mercy could be exercised in his favour by the Governor. It stated: -

"……**we draw the attention of the Governor in Council to the extenuating features in the case in that it would appear that the appellant genuinely, from the point of view of an African of his class, had reason to believe that the members of his family had died as the result of being bewitched by the deceased and took action immediately after the latest death."**

Along the way however, uneasiness began to emerge about the general applicability of the established principle. Wilson J, for example, the trial Judge in the ***Sitakimatata s/o Kimwage*** case stated *obiter*: -

"**The phraselogy used in this passage** *(the Kumwaka case)* **seems to me, with respect, not to be entirely free from obscurity. It is rather difficult to discover from the concluding phrase what standard of fear is required to establish a defence of provocation based on a belief in witchcraft, and the emotion of fear (which does not seem to me to have any place in the English doctrine of provocation) is confused with the emotion of anger, which is, I think, the natural and only product or result of provocation received."**

He was however quickly shot down on appeal in the same case when the court stated:

"**With regard to the references in the judgment to the case of Kumwaka wa Mulumbi the particular passage criticised which was obiter may not be happily expressed, but it should not be taken to mean that there can be any other provocation which will have the effect of reducing a charge of murder to one of manslaughter than that defined in sections 191 and 192 of the Penal Code."**

Sections 191 and ***192*** of the Penal Code referred to in that judgment are now ***sections 207*** and ***208*** and have remained the same since the enactment of the Code. They provide as follows: -

"**207. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.**

208. (1) The term "provocation" means and includes except as hereinafter stated, 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 relation, or in the relation of master or servant, to deprive him of the power to 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 any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality."

The decisions referred to above were pre-colonial. In 1983, the Court of Appeal was faced with the scenario where two Pokot tribesmen, genuinely believed that the deceased had occult powers and used them to harm their children. They got hold of him, beat him up and threw him into the Lake Baringo where he drowned. They pleaded guilty to manslaughter and were sentenced to long terms of imprisonment because it was on the borderline between murder and manslaughter. One of them appealed. The Court (Madan/Kneller JJA and Chesoni Ag. JA) in rejecting the pleas for justifiable homicide stated: -

"**It is a question of facts whether an accused in all the circumstances of the particular case was acting in the heat of the passion caused by grave and sudden provocation when he killed someone and the plea is that the victim performed an act of witchcraft against him or another person under his immediate care in his presence so that he was angered to such an extent as to be deprived of his power of self-control and induced to assault the person doing the act of witchcraft. R. v Fabiano Kinene s/o Mukye and Others (1941) 8 EACA 96. Here, the appellant had no such act performed in his presence so he was fortunate that his plea was not rejected."**

Seven years later, the Court of Appeal (Nyarangi/Masime/Gicheru JJA) decided **Chivatsi & Another v. R.** (supra) where the facts relating to witchcraft were that: -

"……**the deceased threatened to kill by witchcraft as many people as he deemed necessary and remain alone in the village. At the time the deceased made the threat to kill everybody (including the appellants), a brother of Dzombo had died after taking poison. It was said that the deceased had bewitched him. The other appellant believed that his mother had died as a result of being bewitched by the deceased."**

The Court posed the issue for decision as follows: -

"**The crux of this appeal turns on the issue as to whether the trial judge erred in holding that witchcraft as a provocative act can only avail an accused person where the victim was performing in the actual presence of the accused some act which the accused genuinely believed was an act of witchcraft against him and he was thereby angered to such an extent as to be deprived of the power of self-control. For that proposition of law, the trial judge relied on the decisions in *Eria Galikuwa v Rex* (1951) 18 EACA 175 and *Rex v Fabiano Kinene & Others*, (1941) 8 EACA 96."**

The cases of ***Galikuwa*** and ***Fabian Kinene*** mentioned therein had earlier been re-examined by the Court of Appeal in **Yovan v Uganda [1970] EA 405** where it was held that those cases did not lay down a general rule and that they ought to be interpreted with reference to the facts of each case. A threat to

kill taken together with other existing circumstances could amount to legal provocation. The Court then made this profound statement which has since guided the courts on the issue posed at the beginning of this judgment: -

"**There are communities in Kenya where the sort of threat which the deceased administered at the appellants would be treated as twiddle-twaddle, as arrant nonsense. Not so, however, in the community to which the appellants belong. It is not the business of this or any other court to moralize. It is yet a fact that belief in witchcraft is widespread in the community of the appellants. We take that community as we find them, having regard to the law.**

In our judgment, there is no room for doubt that the threat to kill, which was made by the deceased in the presence of the appellants, angered the appellants to such an extent that each was deprived of his power of self-control and induced both to jointly and fatally injure the deceased.

In our view this is a case where a threat to kill taken together with the existing circumstances of the deaths of close relatives of the appellants amounts to legal provocation.

Upon this other circumstance, turning on witchcraft, the appellants could be found guilty of manslaughter only." Emphasis added.

In summary, the application of the principle will be governed by the facts and circumstances of each case.

What has all this learning got to do with the case before us?

Patrick Tuva Mwanengu ("the appellant") was convicted by the superior court (Ouko J) for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. According to the Information filed by the Attorney General on 30th October, 2002, he was alleged to have murdered one ***Gona Mwanengo Gona*** ("the deceased") on the night of 26th and 27th January, 2002 at Sesoni Village in Jilore Location, Malindi District. Seven prosecution witnesses were called to prove the charge. One was ***Kenga Mwanengo***, (PW1) the younger brother of the deceased. On the night in issue he was sleeping on the same bed with the deceased outside the deceased's house. On a separate bed in the same place was another bed where the deceased's wife, ***Sidi Kiti Kalu*** (PW4) slept, and on a third bed were the three children of the deceased with Sidi. The appellant was their nephew and lived in the same homestead.

At about 11 p.m., ***Kenga*** (PW1) was suddenly awakened by the screams of Sidi (PW4). Sidi herself was awakened by a "choking and groaning" noise from the deceased. When Kenga woke up he noticed a man next to them slaughtering the deceased. There was moonlight and he saw and recognized their nephew, the appellant. He raised an alarm and the appellant took off. When he was first seen by Sidi holding the deceased by the neck before she screamed, the appellant had warned Sidi to shut up or he would kill her. Sidi saw and recognized the appellant too in the moonlight and through his voice, before she ran off screaming to inform the appellant's mother. They went back to the scene and found the deceased dead. Another brother of the deceased and uncle of the appellant, Pastor ***Mbogo Mwanengo Tona*** (PW2) was informed and went to the scene. He found his brother was "slaughtered like a goat" and he reported the murder to the Assistant Chief of the area ***Robert Safari Fondo*** (PW3) the same night. They both proceeded to the Chief, ***Gilbert Safari*** (PW7) who sent them to Malindi Police Station. ***Pc Joseph Ringera*** (PW5) the investigating officer, visited the scene and found the deceased's body lying on a Giriama bed outside the house with two deep injuries on the neck. He drew sketchmaps, took the body to the mortuary and organized a postmortem by ***Dr. Philip Masaulo*** (PW6) the District Medical Officer of Health in Kilifi. Dr. Masaulo's findings were: -

"- *Deep cut wound on the left side of the neck*

- *7.5 cm long cutting*

- *Through major vessels supplying the brain.*

- *Internal organs were normal but pale for losing blood.*

- *Cause of death was excessive hemorrhage from these cuts."*

On 28th January, 2002, the appellant was taken to Pc Ringera by an Administration Policeman and was rearrested. He had been taken to the Administration Police by Chief Safari (PW7) who was stopped by the appellant that morning as he went to his office. The appellant had a knife with him which he surrendered to the chief. They had a meal together in some kiosk before the appellant and the knife were handed over to the Administration Policeman.

The appellant's only defence made in sworn testimony was that he and his family were residing in Chakana area which is 100 Kms away from the scene of crime. He was nowhere near that scene on the night of 26th and 27th January, 2002. But on the evening of 28th January, 2002, he saw his uncle Kenga (PW1) with some two other people who introduced themselves as policemen. Kenga pointed at him and he was arrested and taken to Malindi Police cells. There, he was tortured and charged with the murder of his deceased uncle which he knew nothing about. He blamed this on his uncle PW1, who had previously approached him for money to pay dowry but he did not give him. The same uncle wanted to sell the family land to raise the dowry and wanted the appellant out of the land. He also testified that Sidi (PW4) had been married to Kenga (PW1) before she married the deceased. She was also not happy when the appellant refused to lend money to PW1 for dowry.

At no time did the appellant expressly allude to witchcraft or state that the deceased had bewitched him or any member of his family. That evidence came from the prosecution witnesses through cross-examination by defence counsel. It was also the subject matter of submissions by counsel on both sides and the assessors were directed by the trial Judge, in summing up, to express themselves on the issue. Before us on this first and last appeal, learned counsel appearing for the appellant, Mr. Oguk, a retired Judge of the High Court, raised only one issue contained in the supplementary memorandum of appeal filed by him. All other grounds listed by the appellant in person in his memorandum of appeal were abandoned. Indeed it was conceded before us that the appellant had caused the death of the deceased and for our part, we do not see how that conclusion would have been escapable in view of the cogent and forthright eye-witness account from PW1 and PW4. The appellant, through Mr. Oguk, informed us that the alibi defence put forward before the trial court was misadvised. We need only therefore consider the sole ground of appeal, which is this: -

"1. *The learned trial Judge erred in law and fact by failing to find on the evidence that the cause of the incident leading to death of the deceased was that he was practicing witchcraft and that the Appellant believed that he and his son had been bewitched by the Appellant (sic) a fact which had the learned Judge appreciated was sufficient to reduce the offence charged to a lesser offence of manslaughter."*

As stated earlier, the issue of witchcraft was raised through prosecution witnesses and it matters not, therefore, that the appellant did no expressly do so. It was for consideration and was indeed considered by the superior court. The witnesses who referred to the issue stated as follows in cross-examination: -

PW1 - Kenga Mwanengo: -

"*The deceased had never been accused of practicing witchcraft. The accused did not report to me that the deceased was a wizard. He was not a wizard. There was never any misunderstanding between the accused and the deceased. The deceased has never lost any of his children through death."*

PW2 - Pastor Mbogo Mwanengo Tona: -

"*The accused is very well known to me. I have a separate home from that of the deceased. The family has always had very warm relationship. The deceased and the accused were very close. Only once I heard allegations that the deceased practiced witchcraft. This was very many years ago. The accused never at anytime told me that the deceased was bewitching his family. P.W.1 at one time was extremely ill. I took him to hospital. He had a growth in the nose. It was suspected that he had been bewitched by*

the deceased. The accused has 3 children. His wife is alive and well. His family are at his in laws. They left before the death of the deceased. It is the father of the accused person's wife who collected her due to a balance of dowry."

PW3 - Assistant Chief Robert Safari: -

"*I know the deceased and his family. I have never seen the accused before this incident. The home of the accused to my home is about 1 Km. As an Assistant Chief of the area I was informed that the deceased was killed because he was suspected to be a wizard."*

PW4 - Sidi Kiti Kalu*: -*

"*There were murmurs that the deceased was a wizard. It was only one person who accused him of being a wizard. It was the accused. The deceased's father died before the deceased. The accused's brother called Shida died also before the deceased. The accused has 2 children. I only know of the two. The wife gave birth to the two in my presence on various occasions. The deceased was not linked to the death of Shida. The accused shared the same homestead with us. He appeared normal to me. The accused was sick just before the incident in question. He did not ask for any assistance. He did not ask the deceased for money."*

PW7 - Chief Gilbert Safari: -

"*I knew the residents in my location. I did not know the accused initially. But I knew his family including the deceased. I had not heard that the deceased was practicing witchcraft. I was only told that the deceased had bewitched the son of the accused. I did not investigate this."*

So that, the members of the family and the provincial administration were aware about the allegations about the deceased's involvement in witchcraft and in some of the deaths of the members of the family. The appellant himself was also sick at the time. The learned Judge directed the assessors on the issue as follows: -

"**You will also consider the submissions by the learned counsel for the accused that the accused was provoked. That the accused genuinely believed that the deceased was practicing witchcraft and that he feared that he and his family may be harmed by the deceased. The defence of provocation would be available where it is shown that an act was done to the accused person or to a person under his immediate care in his presence which caused him great anger to such an extent as to deprive him of his power to self-control and to induce him to act in the heat of passion in committing the assault in causing death. Belief in witchcraft is widespread among many communities in Africa. The belief can be deeply entrenched that the believer, who is convinced that the woes in his family are caused by the wizard or the witch will strike the latter without reflection. Witchcraft is believed to cause death gradually and the witch or the wizard will generally not unleash his or her charms in close proximity with the victim and those close to the victim. So that in considering the defence of provocation you must see the wide picture surrounding the claim. The cumulative effect of events culminating with the final blow. There was evidence that there were allegations in the village that the deceased was a wizard."**

That direction may well have been confounding to the assessors. In one breath, it espoused the legal definition of "provocation", while in the other, it invited the assessors to return an opinion of justifiable homicide if they believed that the appellant was labouring under a belief, held over a period of time, that the deceased was a wizard and had harmed some members of his family or was capable of doing so. It is no wonder therefore that the three assessors had different opinions in the matter. ***Nathaniel Shida Kazungu***, a 30 year - old from the same community as the appellant found him guilty of murder. ***Dickson Ngana Katana***, also a 30 year - old working as a cook and from the same community, was of the opinion that it was manslaughter because he (the assessor) believed that witchcraft is dangerous as it causes harm, fear and death. He believed the deceased was practicing witchcraft since the appellant was sick when he testified and his son had been bewitched and died. The third assessor ***Stephen Thuku***

Macharia was from a different community but was resident in Malindi. He found the appellant not guilty but the reason had nothing to do with witchcraft. He thought the evidence relating to the state of lighting at the scene of crime and the manner of arrest of the appellant was contradictory. The learned Judge in the end added to the complexity in the matter when, in his judgment, he took a totally different view of the prosecution evidence on witchcraft and the effect of it on the appellant, from the directions he gave in summing up. He stated as follows: -

"**For the defence of provocation to be available to the accused under Sections 207 and 208 of the Penal Code, it must be established that the accused caused death in the heat of passion before there was time to cool off, that the provocation was sudden, that the provocation was caused by a wrongful act or insult, that the wrongful act or insult was of a nature as to deprive an ordinary person of the accused person's class of the power of self control and the provocation must be such as to induce the person offering the provocation.**

In the circumstances of the instant case, there ought to have been evidence that the deceased performed an act of witchcraft against the accused or another person under his immediate care and in his presence so that he was angered to such an extent that he was deprived of his power of self-control and induced to assault the deceased. See R V Fabian Kinene s/o Mukye and others (1941) 8 EACA 96. Here, clearly the accused had no such acts of witchcraft performed in his presence. The attack by the accused on the deceased happened in the middle of the night as the deceased was sleeping. Not a single (sic) was adduced of any members of the accused person's family who died in circumstances that was attributable to the deceased person's charms.

The accused was ill prior to the commission of this offence. Again, it was not suggested that he genuinely believed that his sickness was as a result of witchcraft practiced on him by the deceased. Although there was rumours in the village that the deceased was a wizard, no evidence of people he had bewitched, was given. He was merely suspected."

In forming that opinion the learned Judge evidently relied on the **Galikuwa case** (supra) and the ***Fabiano Kinene*** case (supra). He differed with the assessors for the reason: -

"**that the accused persons act of wounding the deceased was not prompted by sudden provocation. The deceased did nothing to the accused or any person under his care to have provoked him."**

The homicide, he held, was therefore premeditated murder as defined in the Penal Code.

Mr. Oguk urged us to hold the view that the circumstances surrounding the causing of death of the deceased amounted to what he termed "slow punctured provocation", but no authority was cited in support of such profound submission. He pleaded that we reduce the charge to manslaughter and punish the appellant to the extent of that offence. On the other hand learned Principal State Counsel Mr. Ogoti passionately pleaded with us not to sanction the opening of a window for believers in witchcraft to unleash death and mayhem on innocent citizens. In his submission, it is only when the appellant's actions fall under the legal definition of provocation that liability for the capital offence may be reduced, and that was not the case in the matter before us.

We have anxiously considered the facts in this matter, the submissions of both counsel, and the conclusions of law made by the superior court. We are conscious about the dangers alluded to by Mr. Ogoti which were the same fears expressed more than 70 years ago in the ***Kumwaka case*** (supra). We are also alive to the principle that a court on appeal will not normally interfere with findings of fact by the trial court unless they are based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did - See **Chemagong v Republic [1984] KLR 611**.

As we have observed above, the learned trial Judge relied on the authorities of the ***Galikuwa*** and the ***Fabiano Kinene*** cases (supra). We have seen already that those cases were re-examined by this Court in subsequent decisions, notably the ***Yovan*** case and the ***Chivatsi*** case. Attention of the superior court was

not drawn to the two latter cases. We can only speculate on how the Judge would have directed the assessors in summing up or how he would have decided if the decisions in both cases had been made available to him. What is certain is that in failing to apply the principles enunciated in those cases the learned trial Judge fell in error and we are therefore entitled to interfere with the judgment.

We think in all the circumstances of this case the appellant was entitled to the benefit of doubt and to have the charge facing him reduced to one of manslaughter. We give him that benefit with the result that the appeal is allowed and the conviction for murder is set aside. We substitute therefor a conviction for the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. The killing of the deceased was savage and bordered between murder and manslaughter. The appellant must bear the consequences of his actions through appropriate sentence.

We order that the appellant shall serve a term of imprisonment of 18 years, the sentence to run from the date of conviction, that is 7th November, 2005.

Those shall be our orders in this appeal.

Dated and delivered at Mombasa this 27th day of July, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OFAPPEAL

P.N. WAKI

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR