IN THE COURT OF APPEAL

AT MOMBASA JULY 18, 1990

NYARANGI, MASIME & GICHERU JJ A

CRIMINAL APPEAL NO 77 OF 1989

CHIVATSI DZOMBO CHIVATSI & ANOTHER ……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal from a Judgment of the High Court at Mombasa, Bosire J, dated 25 May 1989 in High Court Criminal Case No 29 of 1988)

JUDGMENT

This is a very strange case indeed.

The appellants were convicted of murder contrary to section 203 as read with section 204 of the Penal Code, in that on the 9th September, 1987 at Majengo King'orani in the Mombasa District they jointly murdered Dzombo Dol Dzombo.

It is not in dispute that the first appellant killed his deceased father by stabbing him. The first appellant, Chivatsi Dzombo Chivatsi, a son of the deceased, told the trial court that he had a heated argument with his late father who took out a knife, brandished it against him and cut the appellant on the head. This appellant then grabbed the knife and fatally stabbed the deceased.

The version of Mtengo Chai, the other appellant, is that he and the other appellant went to see the deceased at Mombasa. The deceased told them he had killed the appellant's mother and uncle through witchcraft and would kill other people in the village in the same way. A struggle ensued and the deceased used a knife to injure Mtengo Chai's palm. This appellant claimed that his deceased uncle died during the struggle. Thus, he denied killing the deceased.

The case for the prosecution as presented at the trial depends very much on the evidence of Mrs Hadija Kombo (PW 1) who was the landlady of the deceased.

This witness told the court that on the material day at about 8.00 pm she heard shouts, rushed out, noticed members of the public peeping through a window, also observed, saw people struggling with the deceased and attempted to open the door of the deceased's room but found it was bolted from inside. Later, police officers forced the door open to find the deceased's body lying on the ground.

The witness added that at the time when she looked through the window, she noticed people fighting in the room. She did not identity anyone. However, upon looking carefully, she recognised both appellants whom she already knew as the children of the deceased.

We pause here to observe that the unchallenged testimony of PW 1 and the statutory statements of the appellants place the appellants at the scene of the crime and disclose also that there was a fight involving the deceased and the appellants inside the deceased room. We reach the position that the deceased was assailed by the appellants in his own room and that he received the multiple cut wounds which was the cause of death.

The consultant psychiatrist (PW 10) who examined both appellants on 16th September, 1987 certified both as fit to plead. Significantly, this medical expert did not observe any injuries on the person of either appellant.

It is clear to us that the appellants jointly unlawfully killed the deceased. The evidence as a whole discloses two significant circumstances. First, the fight inside the deceased's room. Secondly, the claimed witchcraft. The learned trial judge has, with respect, made the cardinal mistake of omitting to consider the evidence that there was a fight which was unbearably intense during when the deceased received the fatal injuries. On that evidence, each appellant is entitled to benefit from killing on provocation-see section 207 and 208 of the Penal Code – and could therefore be found guilty of manslaughter only.

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 decision in the case of *Eria Galikuwa* wherein the case of *Rex v Fabiano* was applied was considered by the Court of Appeal in *Yovan v Uganda,* [1970] EA 405. The court proceeded *inter alia*, to make the following statement, on page 406, letters B and C

"In considering this case the trial judge to a large extent relied on the principles relating to provocation as explained by this court in the case of *Eria Galikuwa v Rex* (1951), 18 EACA 175 and having held that the substantive act of provocation here was a threat to cause the appellant's death, said, following that decision, that a threat to cause death cannot be considered a physical provocative act. With respect we are of the view that the decision in the *Galikuwa* case should not be regarded as laying down a general rule but must be interpreted with reference to the facts of the case. There may be cases where a threat to kill taken with the other existing circumstances could amount to legal provocation."

The trial judge did not have the benefit of the decision in the *Yovan* case. The evidence is overwhelming in this case 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.

Those were the other existing circumstances.

There are communities in Kenya where the sort of threat which the deceased administered at the appellants would be treated as twiddletwaddle, 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.

The prosecution did not prove that the appellants kicked the deceased with malice aforethought.

We have covered the two grounds of appeal.

We hope that we will be acquitted of discourtesy if we deal in a summary manner with the other minor points made by counsel and say that we have considered them but found them to be irrelevant to the real issue.

In the result, we allow this appeal, quash the conviction, set aside the sentence, and substitute therefor in each case a conviction for manslaughter and sentence each appellant to a sentence of 8 years' imprisonment from the 25th day of May, 1989.

Orders accordingly.

Dated and Delivered at Mombasa this 18th Day of July 1990

J.O. NYARANGI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL