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RESEARCH ARTICLE

Provocation by Witchcraft: Exploring the Evolution of the Kenyan Courts' Interpretation of the Doctrine of Provocation in Relation to Witchcraft Beliefs

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Abstract

The belief in witchcraft and sorcery is a significant cause of intentional homicide in Kenya. Moreover, those who kill people suspected of being witches often employ as a defense for their actions the so-called provocation by witchcraft argument: the homicide was purportedly committed under the influence of belief in witchcraft and sorcery. One major legal difficulty that the Kenyan courts have frequently been invited to resolve is thus the question as to whether the belief in witchcraft and sorcery avails to an accused person the defense of grave provocation and, if so, under what circumstances. Drawing largely on pertinent case law, statutes, and academic literature, the author explores the controversy over provocation by witchcraft. The author first offers an exposition of the concept of witchcraft and sorcery in Africa and critically discusses the evolution of the Kenyan courts' interpretation of the country's law on provocation in relation to witchcraft beliefs since the 1930s. The author establishes that under the current Kenyan common law, defenses of heat of passion and sudden provocation may apply in instances where there is no real provocation and that the courts have exceeded the boundaries of the provocation defense without well-grounded reasons. The author cautions that giving the doctrine of provocation such a broad construction and application may increase the already rampant killings of suspected witches in Kenya.

Keywords: witchcraft; sorcery; provocation by witchcraft; witch-killing; self-defense; Kenya

Introduction

Intentional homicide is widespread in contemporary African societies. A 2019 study by the United Nations Office on Drugs and Crime suggests that approximately 464,000 people (6.1 per 100,000 population) across the globe were murdered in 2017; over the same period, an estimated total of 163,000 (approximately 35.1 percent—13 per 100,000 population) were murdered in Africa, making it the continent with the second-highest murder rate in the world.¹ Criminal homicide can take various forms and is influenced by a number of factors such as the personal characteristics of the victim and perpetrator, their cultural and

¹ United Nations Office on Drugs and Crime, *Global Study on Homicide. Homicide: Extent, Patterns, Trends and Criminal Justice Response* (Vienna: UNODC, 2019), 17.

physical environments, and their beliefs.² Disturbingly, a substantial proportion of intentional homicides in Africa results from certain superstitions, particularly beliefs related to witchcraft.³

Startling accounts of barbaric murders of people accused of witchcraft by mobs, religious leaders, community members, and even family have been reported and documented all over Africa.⁴ However, because numerous witchcraft-related killings are not reported in most African countries, exact figures are unknown. The number of people believed to have been murdered on the continent on charges of witchcraft during the last four decades is estimated to be in the tens of thousands.⁵ Several academics and researchers, including Silvia Federici, Hamisi Mathias Machangu, and Annie Singh and Norah Hashim Msuya, agree with Richard Petraitis that witch hunts claimed well over 23,000 lives in sub-Saharan Africa between 1991 and 2001, and that the pace of the murders of suspected witches has since accelerated.⁶ It is reported, for instance, that in Tanzania alone, 1,360 witchcraft-related killings were chronicled by law enforcement authorities between 2014 and 2016, and that at least 19 suspected witches were killed each month between January and June 2017.⁷ Elsewhere, I demonstrate that “[t]he most dominant motivations for such violations are the suspicion that the alleged witches are responsible for family or community members’ death or illness and the supposed victims’ economic or financial predicament.”⁸ I further note that Africans’ “perception and depiction of witchcraft and witches are so vicious and terrifying that every evil and calamity that cannot be rationally explained is attributed to witchcraft.”⁹

One African country known for rampant homicides of suspected witches is Kenya. Indeed, many of the intentional homicides that have been reported in the country or dealt with by the courts were triggered by the belief in witchcraft and sorcery.¹⁰ Because those who kill

² United Nations Office on Drugs and Crime, *Global Study on Homicide*, 27.

³ See, generally, Mensah Adinkrah, “Witchcraft Accusations and Female Homicide Victimization in Contemporary Ghana,” *Violence against Women* 10, no. 4 (2004): 325–56; Gerrie ter Haar, ed., *Imagining Evil: Witchcraft Beliefs and Accusations in Contemporary Africa* (Trenton: Africa World Press, 2007); Aleksandra Cimpric, *Children Accused of Witchcraft: An Anthropological Study of Contemporary Practices in Africa* (New York: UNICEF/WCARO, 2010); Annie Singh and Norah Hashim Msuya, “Witchcraft Accusation and the Challenges Related Thereto: Can South Africa Provide a Response to this Phenomenon Experienced in Tanzania?,” *Obiter* 40, no. 3 (2019): 105–16; Emmanuel Sarpong Owusu, “The Superstition that Maims the Vulnerable: Establishing the Magnitude of Witchcraft-Driven Mistreatment of Children and Older Women in Ghana,” *International Annals of Criminology* 58, no. 2 (2020): 253–90.

⁴ See, generally, Gerrie ter Haar, “Introduction: The Evil Called Witchcraft,” in *Imagining Evil: Witchcraft Beliefs and Accusations in Contemporary Africa*, ed. Gerrie ter Haar (Trenton: Africa World Press, 2007): 1–30; Ter Haar, *Imagining Evil*; Mensah Adinkrah, “Child Witch Hunts in Contemporary Ghana,” *Child Abuse and Neglect* 35, no. 9 (2011): 741–52; Cimpric, *Children Accused of Witchcraft*; Samantha Spence, *Witchcraft Accusations and Persecutions as a Mechanism for the Marginalisation of Women* (Cambridge: Cambridge Scholars, 2017); Owusu, “The Superstition that Maims the Vulnerable.”

⁵ See, generally, Ter Haar, *Imagining Evil*; see also Silvia Federici, “Witch-Hunting, Globalization, and Feminist Solidarity in Africa Today,” *Journal of International Women’s Studies* 10, no. 1 (2008): 21–35, at 22–23; Silvia Federici, “Women, Witch-Hunting and Enclosures in Africa Today,” *Sozial Geschichte Online*, no. 3 (2010): 10–27, at 13; Singh and Msuya, “Witchcraft Accusation and the Challenges Related Thereto,” 109–10.

⁶ Richard Petraitis, “The Witch Killers of Africa,” *Infidels*, 2003, <https://infidels.org/library/modern/richard-petraitis-witch-killers/>; Federici, “Witch-Hunting, Globalization, and Feminist Solidarity in Africa Today,” 22–23; Hamisi Mathias Machangu, “Vulnerability of Elderly Women to Witchcraft Accusations among the Fipa of Sumbawanga, 1961–2010,” *Journal of International Women’s Studies* 16, no. 2 (2015): 274–84, at 275; Singh and Msuya, “Witchcraft Accusation and the Challenges Related Thereto,” 110.

⁷ Legal and Human Rights Centre, *Bi-annual Tanzania Human Rights Report* (Dar es Salaam: Legal and Human Rights Centre, 2017).

⁸ Owusu, “The Superstition that Maims the Vulnerable,” 253.

⁹ Owusu, 259.

¹⁰ Katherine Angela Luongo, “Motive Rather than Means: Legal Genealogies of Witch-Killing Cases in Kenya,” *Cahiers d’Études Africaines* 48, nos. 189–90 (2008): 35–57; Jill Schnoebelen, “Witchcraft Allegations, Refugee Protection and Human Rights: A Review of the Evidence,” *News Issues in Refugee Research*, Research Paper no. 169 (2009).

suspected witches often employ the provocation defense, a major legal difficulty that the Kenyan courts have repeatedly been invited to address is the question of whether the accused's belief in witchcraft avails to the defense of grave provocation and if so, under what circumstances. In what follows, I explore the extent of the evolution of the Kenyan courts' interpretation of the country's law on provocation (specifically, sections 207 and 208 of the Penal Code) in relation to witchcraft and sorcery beliefs since the 1930s to ascertain its implication on the fight against witchcraft-driven homicides in the country. In doing so, I offer an exposition of the concept of witchcraft and sorcery in Africa in general and Kenya in particular; and critically analyze pertinent judicial decisions and legislation, and review relevant academic literature.

The Concept of Witchcraft and Sorcery in Africa

The belief in witchcraft is unarguably the most prevalent and harmful superstitious belief in Africa.¹¹ Kate Crehan and Jill Schnoebelen each assert that the “belief in the reality of witchcraft was an inescapable part of day-to-day life” on the continent.¹² This view is shared by Boris Gershman who notes that witchcraft beliefs are “a cultural phenomenon which is still a salient feature of daily life in many parts of the African continent.”¹³ Their assertion is corroborated by Peter K. Sarpong, who explains that beliefs in witchcraft and magic “are so entrenched in [African] people's ethos that they can hardly ever be wiped out.”¹⁴ All manner of people—the uneducated and educated, the poor and rich, the young and old, market women, pastors, teachers, and lawyers alike—hold beliefs in witchcraft.¹⁵ However, the meaning of the term *witchcraft* varies culturally and societally.¹⁶ For this reason, Jeffrey Burton Russell and Simeon Mesaki advise that cross-cultural assumptions about its meaning or significance should be avoided or applied with great caution.¹⁷ According to Mesaki, in English the term *witch* is derived from an old English noun *wicca*, meaning *sorcery*, and the verb *wiccian*, which means *to cast a spell*.¹⁸ The original European concept of witchcraft, according to Mesaki, thus “presupposed sorcery, an amalgam of beliefs and practices aimed at manipulating nature for the benefit of the practitioner or his/her client.”¹⁹ The same view is expressed by George W. B. Huntingford: writing about the Nandi, who inhabit the western part of the highlands of Kenya, he observes that “[a]n artificial distinction of terms, like

¹¹ For discussions of the prevalence and harm of belief in witchcraft across much of Africa, see Edward E. Evans-Pritchard, *Witchcraft, Oracles, and Magic among the Azande* (Oxford: Clarendon Press, 1937); John Middleton and Edward H. Winter, eds., *Witchcraft and Sorcery in East Africa* (London: Routledge, 2004); Ter Haar, *Imagining Evil*; Cimpric, *Children Accused of Witchcraft*; Mensah Adinkrah, *Witchcraft, Witches and Violence in Ghana* (New York: Berghahn Books, 2015).

¹² Kate Crehan, *The Fractured Community: Landscapes of Power and Gender in Rural Zambia* (Berkeley: University of California Press, 1997) <https://publishing.cdlib.org/ucpressebooks/view?docId=ft0779n6dt;chunk.id=0;doc.view=print>; Schnoebelen, “Witchcraft Allegations, Refugee Protection and Human Rights,” 14.

¹³ Boris Gershman, “Witchcraft Beliefs and the Erosion of Social Capital: Evidence from Sub-Saharan Africa and Beyond,” *Journal of Development Economics* 120 (2016): 182–208, at 182.

¹⁴ Peter K. Sarpong, *Odd Customs: Stereotypes and Prejudices* (Accra: Sub-Saharan Publishers, 2012), 17.

¹⁵ Javier Aguilar Molina, *The Invention of Child Witches in the Democratic Republic of Congo: Social Cleansing, Religious Commerce and the Difficulties of Being a Parent in an Urban Culture* (London: Save the Children, 2006); Schnoebelen, “Witchcraft Allegations, Refugee Protection and Human Rights”; Sarpong, *Odd Customs*.

¹⁶ Jeffrey Burton Russell, *Witchcraft in the Middle Ages* (New York: Cornell University Press, 1972); Simeon Mesaki, “The Evolution and Essence of Witchcraft in Pre-colonial African Societies,” *Transafrican Journal of History*, no. 24, (1995): 162–77; Cimpric, *Children Accused of Witchcraft*.

¹⁷ Russell, *Witchcraft in the Middle Ages*; Mesaki, “The Evolution and Essence of Witchcraft.”

¹⁸ Mesaki, “The Evolution and Essence of Witchcraft,” 163.

¹⁹ Mesaki, 163.

‘witch’ or ‘sorcerer,’ is not needed, because no difference exists.”²⁰ However, both Sarpong and Mesaki insist that there is a distinction between witches and sorcerers, at least, from the perspective of most Ghanaians and East Africans, respectively.²¹

Sarpong explains that witches act entirely psychically or use their supposed powers “without reference to any physical objects,” whereas sorcerers “use their powers in conjunction with physical objects.”²² Thus, in the view of Sarpong, among the Akan (the largest ethnic group in Ghana), the major difference between a witch and a sorcerer is a difference in technique—psychical and physical respectively. Edward E. Evans-Pritchard adds one more distinction from the viewpoint of the Azande of Sudan, which is that witchcraft is an inherent quality whereas sorcery is an acquired craft.²³ But this view is evidently inconsistent with that of several other experts and members of various ethnic groups who believe that witchcraft could also be acquired or learned.²⁴ Sarpong and Mesaki note that even though witches and sorcerers are believed to possess supernatural powers, the latter can be consulted for various favors whereas the former cannot be approached as they (witches) act secretly and entirely in the spiritual realm;²⁵ and this seems to be the view of most Africans. Nevertheless, the divergent arguments reinforce the view that the concept of witchcraft differs from culture to culture; therefore, it is inappropriate to assume that the terms *witchcraft* and *sorcery* are standard across societies. Notwithstanding this caution, all the evidence suggests that most communities in Africa make a distinction between witches and sorcerers.

Evans-Pritchard defines witchcraft simply as the use of innate, inherited supernatural powers to control people or events, or to cause disaster or death.²⁶ Closely related to this description is that of Nelson Tebbe, who defines witchcraft as “the practice of secretly using supernatural power for evil—in order to harm others or to help oneself at the expense of others.”²⁷ Belief in witchcraft, as Roma Louise Standefer opines, thus “constitute[s] a system for the personification of power and evil.”²⁸ A witch or wizard (male witch), therefore, “is a human being who secretly uses supernatural power for nefarious purposes.”²⁹ This definition is backed by Sarpong who describes witches and wizards as “people with very unusual psychic powers who are able to cause harm to others and who delight in using their evil potencies to the detriment of other people or, at best, for their own selfish ends.”³⁰ To Standefer, a witch is “a person who is thought capable of harming others supernaturally through the use of innate mystic power, medicines or familiars.”³¹ Drawing on these individual definitions and descriptions, I contend that witchcraft can conceivably be defined, “in most African countries, ‘as the ability to harm someone through the use of

²⁰ George W. B. Huntingford, “Nandi Witchcraft,” in *Witchcraft and Sorcery in East Africa*, ed. John Middleton and Edward H. Winter (London: Routledge, 2004), 175.

²¹ Sarpong, *Odd Customs*; Peter K. Sarpong, *Ghana in Retrospect: Some Aspects of Ghanaian Culture* (Accra: Ghana Publishing, 1974); Peter K. Sarpong, *Peoples Differ: An Approach to Inculturation in Evangelisation* (Accra: Sub-Saharan Publishers, 2002); Mesaki, “The Evolution and Essence of Witchcraft.”

²² Sarpong, *Odd Customs*, 17; see also Sarpong, *Ghana in Retrospect*, 47–48; Sarpong, *Peoples Differ*, 103–04.

²³ Evans-Pritchard, *Witchcraft, Oracles, and Magic among the Azande*.

²⁴ Robert A. LeVine, “Witchcraft and Sorcery in a Gusii Community,” in Middleton and Winter, *Witchcraft and Sorcery in East Africa*, 221–55; Sarpong, *Peoples Differ*, 102–03.

²⁵ Mesaki, “The Evolution and Essence of Witchcraft”; Sarpong, *Peoples Differ*; Sarpong, *Odd Customs*.

²⁶ Evans-Pritchard, *Witchcraft, Oracles, and Magic among the Azande*.

²⁷ Nelson Tebbe, “Witchcraft and Statecraft: Liberal Democracy in Africa,” *Georgetown Law Journal*, 96, no. 1 (2007): 183–236, at 190.

²⁸ Roma Louise Standefer, “The Symbolic Attributes of the Witch,” *Journal of the Anthropological Society of Oxford* 10, no. 1 (1979): 31–47, at 32.

²⁹ Tebbe, “Witchcraft and Statecraft,” 190.

³⁰ Sarpong, *Odd Customs*, 17.

³¹ Standefer, “The Symbolic Attributes of the Witch,” 32.

mystical power. Consequently, the witch embodies this wicked persona, driven to commit evil deeds under the influence of the ... force of witchcraft.”³² In other words, the fundamental element in all communities in Africa where belief in witchcraft is widespread is that witches and wizards are regarded as persons who possess extraordinary or supernatural powers to perform mostly devious activities.

On the other hand, sorcery, which is largely synonymous with juju, black magic, occultism, and voodoo, “is the African belief system and religious practice involving the use of objects or words to psychically manipulate events or alter people’s destiny positively or negatively.”³³ Thus, it is the belief “in the control over objects or events by verbal or non-verbal gestures (words or actions)”³⁴ so that there is a supposed connection between the gesture as cause and the desired outcome as effect. The overriding notion is that there is a causality between the performance of certain religious rites, the observance of a taboo, or the use of certain objects and an expected benefit or recompense or calamity as the case might be.³⁵ Such magical feats or rituals to protect or destroy people or change their destiny are usually performed by certain figures who are considered to be spiritually powerful and who may be called different names in different countries and communities in Africa: sorcerer, juju practitioner, witchdoctor, traditional spiritualist, fetish priest, occult capo, magician, *mganga*, and *laibon* among the people of Kenya and other East African countries; *mallam* and *odunsenii* among Ghanaians; and *sangoma* in communities in southern part of Africa.

Sorcerers or traditional spiritualists are, in brief, individuals who are believed to possess, innately, the knowledge and spiritual enlightenment, or have attained those qualities through training, to subdue or manipulate both natural and supernatural entities and forces.³⁶ Sorcerers or juju practitioners are therefore widely consulted in Africa for a variety of reasons, including material prosperity, good health, political or sporting success, fortification against physical and spiritual enemies, enhancement of fertility, and the destruction of adversaries.³⁷ However, even though juju practitioners are generally believed to have the supernatural power to protect and to destroy or harm people, many use that power for only a good cause—the protection of people in the community and the enhancement of human well-being.³⁸ Some of their major functions are summarized by Mesaki: to “divine, detect witches, make charms, prepare and administer herbal medicine, heal, eradicate witchcraft, ritualize in rain-making and offer ‘magical’ treatment in agriculture, fishing, hunting and trading.”³⁹ They are, therefore, “treated with a mixture of respect, caution and

³² Owusu, “The Superstition that Maims the Vulnerable,” 255–56.

³³ Emmanuel Sarpong Owusu, “The Superstition that Dismembers the African Child: An Exploration of the Scale and Features of Juju-Driven Paedicide in Ghana,” *International Annals of Criminology* 60, no. 1 (2022): 1–42, at 3.

³⁴ Edmund Leech, “Magic,” in *A Dictionary of the Social Sciences*, ed. Julius Gould and William L. Kolb (New York: Free Press, 1964): 388–99, at 397.

³⁵ James M. Henslin, “Craps and Magic,” *American Journal of Sociology* 73, no. 3 (1967): 316–30; Eric J. Hamerman and Carey K. Morewedge, “Reliance on Luck: Identifying Which Achievement Goals Elicit Superstitious Behavior,” *Personality and Social Psychology Bulletin* 41, no. 3 (2015): 323–35; Jane L. Risen, “Believing What We Do Not Believe: Acquiescence to Superstitious Beliefs and Other Powerful Intuitions,” *Psychological Review* 123, no. 2 (2016): 182–207.

³⁶ Ibo Changa, “Juju,” in *Encyclopedia of African Religion*, ed. Molefi Kete Asante and Ama Mazama (London: Sage, 2009): 355–56.

³⁷ Mesaki, “The Evolution and Essence of Witchcraft,” 173–74; Simon Fellows, *Trafficking Body Parts in Mozambique and South Africa* (New York: International League for Human Rights, 2008), 34–38; Comfort Max-Wirth, “Juju and Statecraft: Occult Rumors and Politics in Ghana” (PhD diss., Victoria University of Wellington, 2016), 24–28; Owusu, “The Superstition that Dismembers the African Child,” 8.

³⁸ Mesaki, “The Evolution and Essence of Witchcraft,” 173–74; Owusu, “The Superstition that Dismembers the African Child,” 8.

³⁹ Mesaki, “The Evolution and Essence of Witchcraft,” 174.

fear” in most African societies.⁴⁰ A study involving 500,000 respondents conducted in Kenya reveals that about 50 percent of Kenyan women have consulted a *mganga* (traditional spiritualist) at least once in the last seven years for various favors or assistance.⁴¹

Witchcraft Beliefs and Concomitant Homicides in Kenya

Across Africa, the terms for *witchcraft* and *witch* mean different things in different countries and to different ethnic groups, tribes, or communities. As Aleksandra Cimpric notes, “[t]he notion of witchcraft possesses a multifaceted semiology, referring to a wide variety of representations and practices, which further vary not only within a country but also according to different socio-cultural groups.”⁴² Consequently, understanding witchcraft-driven homicides in Kenya requires intimate familiarity with the Kenyan people’s beliefs in witchcraft. Accordingly, below I describe the most striking features of witchcraft-related beliefs and practices among three ethnic groups in Kenya: the Gusii, Kamba, and the Nandi. Most Kenyans’ understanding of witchcraft and witches is not significantly different from the general perception highlighted above. This notwithstanding, different groups in Kenya have different notions of witches. In other words, even though generally there is a widespread fear of and fixation on witchcraft in both rural and urban communities in Kenya, the degree of prevalence of belief in witchcraft and violence against suspected witches varies from ethnic group to ethnic group.

In an ethnographic study conducted among the Gusii (also known as Kisii) of southwestern Kenya, Robert A. LeVine found that for the Gusii people, a witch “is a person with an incorrigible, conscious tendency to kill or disable others by magical means.”⁴³ A similar notion of a witch is held by the Kamba, who are concentrated in the lowlands of southeastern Kenya.⁴⁴ Almost all the communities in the country believe that witches bewitch others for their own selfish interest or out of an inherent craving for causing harm and pain.⁴⁵ Among some groups, such as the Kamba and the Gusii, witches are believed to be cannibals who operate, usually in a group, at night. It is believed that they gather in organized groups at night on top of trees and other strange places for their nocturnal activities; and they supply human flesh and blood in turns.⁴⁶ Thus, both groups believe witches to have an inherent evil psychic force capable of destroying life by sucking blood from their victims. For instance, writing about the Gusii, LeVine notes that “[a] witch does not operate alone but in a group” and that “the witches of a particular area gather late at night to plot the deaths of their neighbors.”⁴⁷

⁴⁰ Mesaki, 174.

⁴¹ Joan Thatiah, “Half of Kenyan Women Have Visited a Mganga, Study Finds,” *Daily Nation*, March 31, 2017, <https://nation.africa/kenya/life-and-style/saturday-magazine/research-centre-half-of-kenyan-women-have-visited-a-mganga-study-finds-380104>.

⁴² Cimpric, *Children Accused of Witchcraft*, 11.

⁴³ LeVine, “Witchcraft and Sorcery in a Gusii Community,” 225.

⁴⁴ Katherine Angela Luongo, “Conflicting Codes and Contested Justice: Witchcraft and the State in Kenya” (PhD diss., University of Michigan, 2006), 23–26.

⁴⁵ For discussions of the notion or concept of witchcraft and witches across Kenya, see Huntingford, “Nandi Witchcraft”; LeVine, “Witchcraft and Sorcery in a Gusii Community”; Onesmus K. Mutungi, *The Legal Aspects of Witchcraft in East Africa with Particular Reference to Kenya* (Nairobi: East African Literature Bureau, 1977); Luongo, “Conflicting Codes and Contested Justice”; Tebbe, “Witchcraft and Statecraft”; Justus Ogembo, *Contemporary Witch-Hunting in Gusii, Southwestern Kenya* (Lewiston: Edwin Mellen Press, 2006).

⁴⁶ Huntingford, “Nandi Witchcraft”; LeVine, “Witchcraft and Sorcery in a Gusii Community”; Mutungi, *The Legal Aspects of Witchcraft in East Africa*; Luongo, “Conflicting Codes and Contested Justice”; Tebbe, “Witchcraft and Statecraft.”

⁴⁷ LeVine, “Witchcraft and Sorcery in a Gusii Community,” 226.

However, unlike the Kamba, who believe that witches eat living human beings, the Gusii believe that witches eat only human cadavers: they dig up recently buried corpses and dissect them; they then keep some of the parts (usually the skulls and arms) and eat the rest, particularly the internal organs.⁴⁸ The Kamba believe that witches, on the contrary, eat the flesh and blood of their victims in the spiritual realm while they (the victims) are still alive, and the effect of that spiritual act is manifested in the physical sphere. In other words, victims die physically as soon as the witches finish eating away their life essence or vital force in the spiritual world.⁴⁹ This is what Victor K. Ametewee and James B. Christensen refer to as “spiritual cannibalism.”⁵⁰ However, Onesimus Mutungi suggests that even though in the Nandi, Gisu, and Amba societies in East Africa witches are believed to have supernatural powers capable of causing all manner of harm or misfortunes, there is one major characteristic that differentiates the Gisu and Amba beliefs from those of the Nandi: the Gisu and Amba believe witches to have cannibalistic tendencies. The Gisu witches are believed to “feed on human flesh,” and Amba witches are believed to “open the body of a victim and remove his entrails in an invisible manner and ... have cannibalistic propensities.”⁵¹ Thus in his ethnographic study, Huntingford’s detailed description of the features of Nandi witchcraft and witches does not include cannibalism.⁵² The Nandi people do not, however, distinguish between witches and sorcerers.⁵³

For the Kamba, witchcraft is either bought (usually from witchdoctors or purveyors) or inherited.⁵⁴ Katherine A. Luongo explains that purchased witchcraft is described as a substance rather than a power, with a finite use value. Inherited witchcraft, on the other hand, “does not necessarily entail substances, but always requires the mobilization of a witch’s embodied powers of malfeasance ... [and] is a ‘permanent kind.’”⁵⁵ The Kamba people believe that purchased witchcraft is associated with men, whereas inherited witchcraft is only passed from mother to daughter and may thus be rightly referred to as women’s witchcraft.⁵⁶ However, the Gusii people seem to hold the idea that witchcraft can only be a learned or an acquired art, usually handed down from parent to child.⁵⁷ LeVine explains that “[i]f a woman is a witch, she will try to train her children in witchcraft ... The daughters of a witch are considered more likely to accept this training, because girls are more obedient than boys and also because they spend more time with their mothers.”⁵⁸ The people therefore feel that it is very “possible for the son of a witch to avoid becoming one himself by having as little contact as possible with his mother and refusing to do her bidding.”⁵⁹ This

⁴⁸ LeVine, 226.

⁴⁹ See, generally, Joseph Mutune Ndisya, “An Analysis and Response to the Fear of Evil Spiritual Forces among Kamba Christians in the Light of Biblical and Ellen G. White Teachings” (PhD diss., Andrews University, 2015).

⁵⁰ Victor K. Ametewee and James B. Christensen, “‘Homtodzoe’: Expiation by Cremation among Some Tongu-Ewe in Ghana,” *Journal of the International African Institute* 47, no. 4 (1977): 360–71, at 361.

⁵¹ Onesimus K. Mutungi, “Witchcraft and the Criminal Law in East Africa,” *Valparaiso University Law Review* 5, no. 3 (1971): 524–55, at 527.

⁵² Huntingford, “Nandi Witchcraft,” 186, concluding, moreover, that the Nandi “witch and his potential victims can survive side by side, for his livelihood does not depend on the exercise of witchcraft; he lives like other people, keeps cattle, and tills the ground.”

⁵³ Huntingford, 175.

⁵⁴ Luongo, “Conflicting Codes and Contested Justice,” 44–45.

⁵⁵ Luongo, 46.

⁵⁶ Luongo, 46.

⁵⁷ LeVine, “Witchcraft and Sorcery in a Gusii Community,” 228, noting that “[w]itchcraft for the Gusii is an acquired art, and though it is handed down from parent to child, others can learn it as well.”

⁵⁸ LeVine, 228.

⁵⁹ LeVine, 228.

explains the Gusii people's perception that although witches may be of any age and either sex, they are much more likely to be female.⁶⁰

In the view of the Gusii, people who learn witchcraft from someone other than their parents are typically adults, and most often are frustrated married women who have experienced a chain of misfortunes such as the strange deaths of an unusual number of their children and want power to protect themselves or to retaliate.⁶¹ For the Nandi, witchcraft can be obtained only by adults who go to live with a witch for a period of time to learn the craft. The essential element in the training of a witch is the ability of the learner "to believe in himself and to feel that he has a status which, even though it has to be concealed as much as possible, will be a source of pride and satisfaction to himself."⁶² The Gusii and Nandi believe that anyone may be the target of a witch's spell.⁶³ But among the Gusii, "[s]uspensions and accusations of witchcraft are more likely to arise between persons who are close in residence, blood relationship, and marital connections."⁶⁴ LeVine notes that when a Gusii person "believes himself bewitched, he is unlikely to blame someone he does not know quite well, even though he may have heard of several notorious witches beyond the range of his social contacts."⁶⁵ This notion espoused by the Gusii is shared by the Kamba.⁶⁶ Interestingly, the opposite seems to be the case with the Nandi people, who do not normally accuse close members of their paternal or maternal lineage.⁶⁷

As the prototype of all evil, purported witches are blamed for all kinds of calamities, from crop failure to barrenness or infertility, financial or economic hardship, business downturn, divorce, inexplicable illness, epidemic, motor vehicle accidents, mental health disorders, alcoholism, suicide, snake bite, miscarriage, sexual impotence, HIV/AIDS, and untimely deaths. And, consequently, suspected witches are persecuted.⁶⁸ Accusations of witchcraft are usually based on mere suspicion, leading to rumors or gossip that circulates within the community. Such rumors and accusations usually arise after a single grave misfortune, such as an unexpected death or a series of unexplained calamities in a family or the community.⁶⁹

⁶⁰ LeVine, 225.

⁶¹ LeVine, 229.

⁶² Huntingford, "Nandi Witchcraft," 184; see also Geoffrey Stuart Snell, *Nandi Customary Law* (London: Macmillan, 1954) at 76. He maintains that there is a form of witchcraft which is hereditary among the Nandi, but this type of witchcraft is practiced only by/within certain clans, "notably the Kapchepsaos, Kapsamechei, Kamwagei, Kapchemuri, Kametere and Kapketui." He further explains that "the form of witchcraft usually exercised by people in these clans ... [is] the imposition of a secret spell, the victim and sometimes the sorcerer himself being unaware of its imposition," and that this form of witchcraft "power is ... endowed upon only certain people within the clans concerned."

⁶³ See, generally, the following: LeVine, "Witchcraft and Sorcery in a Gusii Community"; Huntingford, "Nandi Witchcraft."

⁶⁴ LeVine, "Witchcraft and Sorcery in a Gusii Community," 241; see also Ogembo, *Contemporary Witch-Hunting in Gusii, Southwestern Kenya*, 34 ("[W]itches victimize their own kinsfolk and neighbors rather than strangers.").

⁶⁵ LeVine, 241.

⁶⁶ Joseph Mutune Ndisya, "An Analysis and Response to the Fear of Evil Spiritual Forces among Kamba Christians," 59, stressing that witchcraft is usually practiced only among family members or relatives, or people who know each other in the community.

⁶⁷ Huntingford, "Nandi Witchcraft," 176-77, clarifying that "a person does not normally accuse a member of his *kapkwani* (paternal kin) or of his *kapimamet* (maternal kin), though a man may accuse a member of his *kapyukoi* (wife's kin) and a woman a member of her *kapkatun* (husband's kin), since these affinal groups will contain people of whom they may well have no personal knowledge."

⁶⁸ See, generally, Ogembo, *Contemporary Witch-Hunting in Gusii, Southwestern Kenya*, offering a critical discussion of factors that triggered the burning of about fifty-seven suspected witches in Gusii communities between 1992 and 1994; Ter Haar, *Imagining Evil*, highlighting the findings of various studies conducted by various authors on witchcraft's impact on crimes in several communities in Africa; Owusu, "The Superstition that Maims the Vulnerable," 282.

⁶⁹ Owusu, "The Superstition that Maims the Vulnerable," 259.

In many Kenyan societies, those who kill witches are usually viewed as innocent and praiseworthy folks, “performing a necessary action on behalf of the community.”⁷⁰

Lethal violence against suspected witches in Kenya has been a part of life since pre-colonial time and through the colonial era. However, it appears that this type of homicidal violence has intensified across Kenya in the last three decades to degrees unprecedented in the colonial period. This is evidenced by the fact that the number of witchcraft-related murder cases that came before the courts yearly during the colonial era has been far outstripped by the numbers that the courts have had to deal with annually in the last couple of decades. Further, academics such as Adam Ashforth, Tebbe, and Jean Comaroff and John Comaroff maintain that not only have witch killings not faded with colonialism and apartheid in Africa, but they have intensified during the transition to democracy, and since the 1990s the witch killing phenomenon, particularly in South Africa, has become an epidemic affecting rural and urban communities.⁷¹ It is, however, probable that the numbers are higher in contemporary Kenya because of the considerable increase in the country’s population since the colonial period and with that, the number of believers in witchcraft.

Exact figures are difficult to come by since witchcraft-driven violence usually goes unrecorded. However, the figures that are available offer a reasonable clue as to the magnitude of the phenomenon—they demonstrate that the killing of people, particularly older folks, on allegations of witchcraft, is quite prevalent in contemporary Kenya. Many regions of the country, especially Kisii County, are known for witch hunts. According to Justus Ogembo, at least fifty-seven people—mostly women ages fifty to ninety—were burned alive during a witch-hunting crusade in Gusii communities between 1992 and 1994. Describing this disturbing event, he writes: “Villagers rounded up and ‘arrested’ suspects in their houses at night or chased and caught them like prey by day, bound their hands and feet with sisal ropes, torched them—after dousing them in gasoline purchased earlier or after placing them under grass-thatched roofs—and then drew back to watch the victims agonize and perish in the flames. Some of those murdered in this way left behind terrified and now orphaned offspring who, at the moment of their parents’ capture, fled in panic and confusion, wondering how they would fend for themselves in such a harsh world.”⁷² Similarly, in May 2008, between eleven and fifteen people, mostly elderly, suspected of being witches were burned alive in their houses in Kisii.⁷³ It has also been reported that, over the past six years, more than five hundred lynchings of suspected witches have occurred in Kilifi County, located north and northeast of Mombasa.⁷⁴ As recently as October 17, 2021, four older people in Kisii—three females between the ages of fifty-seven and sixty-two and an octogenarian male—were brutally burned alive by the mob on suspicion of being witches and bewitching a student.⁷⁵ According to the Kilifi County

⁷⁰ Richard D. Waller, “Witchcraft and Colonial Law in Kenya,” *Past & Present*, no. 180 (2003): 241–75, at 250.

⁷¹ Adam Ashforth, *Witchcraft, Violence, and Democracy in South Africa* (Chicago: University of Chicago Press, 2005), 255, noting that “[h]ardly a week passes in South Africa without press reports of witches being killed or of mutilated bodies being found with organs removed for purposes of sorcery”; Jean Comaroff and John Comaroff, “Alien-Nation: Zombies, Immigrants, and Millennial Capitalism,” *South Atlantic Quarterly* 101, no. 4 (2002): 779–805, at 779; Tebbe, “Witchcraft and Statecraft,” 194.

⁷² Ogembo, *Contemporary Witch-Hunting in Gusii, Southwestern Kenya*, 1.

⁷³ Wangui Kanina, “Mob Burns to Death 11 Kenyan ‘Witches,’” *Reuters*, May 21, 2008, <https://www.reuters.com/article/idUSL21301127>; David McKenzie, “Deadly Hunt for ‘Witches’ Haunts Kenya Villagers,” *CNN*, 2008, <https://edition.cnn.com/2008/WORLD/africa/06/12/kenya.witches/index.html>.

⁷⁴ Adrian Blomfield, “Witch Hunt: ‘Warlocks’ Cast out by Black Magic Claims,” *Telegraph*, <https://www.telegraph.co.uk/news/witch-hunt-in-kenya/>.

⁷⁵ Erick Abuga, “‘Witch Burning’ Is a Crime and Has Nothing to Do with Culture,” *The Standard*, October 31, 2021, <https://www.standardmedia.co.ke/national/article/2001427727/witch-burning-is-a-crime-and-has-nothing-to->

Police, between January 2019 and December 2021, an estimated one hundred and forty-five residents alleged to be witches were killed.⁷⁶

In Kenya, just as murder is the ultimate crime, so the sentence for those found guilty is death, a practice enshrined in Section 204 of the Penal Code.⁷⁷ But those who kill suspected witches often avoid the death sentence by employing the defense of provocation when charged and prosecuted. Indeed, since the 1930s, many of those charged with killing suspected witches have been convicted of the lesser crime of manslaughter, not murder, by using the defense of provocation. It appears that the very nature of the provocation defense has, as Reid Griffith Fontaine notes, remained unresolved as “judges, lawmakers, and academics alike have struggled to properly gauge the doctrine’s spirit, as well as the boundaries of its application.”⁷⁸ All the evidence shows that case law changes in Kenya have produced a much broader partial defense of provocation available to persons who kill alleged witches. But the big questions that need to be addressed are these: To what extent, if any, has the courts’ interpretation of the provocation by witchcraft defense evolved over time? Is the broad application of the provocation defense justified in contemporary Kenyan society where witch-killing is rampant?

A Brief Exposition of the Law of Provocation

There is no question that murder, which has been traditionally defined as “the killing of a human being by another with malice aforethought,”⁷⁹ is the crime of all crimes. Every homicide is a supreme tragedy, and people who commit such crimes deserve to be punished severely. Since murder is the ultimate crime, people who kill, mandatorily, receive the ultimate punishment of death in some societies, including Kenya. However, the laws of many of the countries or societies where capital punishment is in force have long taken the view that some murders are more senseless and require heavier punishment than others. They thus draw a distinction between murder, punishable by death, and manslaughter, which is not and should not be. “The law of provocation, therefore ... [exists] on an important dividing line between murder, which ... [results] in execution, and manslaughter, which ... [does] not.”⁸⁰ It is, indeed, “a defence which springs from an appreciation and understanding of the frailty of human nature,”⁸¹ and the “proneness [of humankind] to lose self-control under

do-with-culture; Magati Obebo, “Four Elderly Kisii Villagers Lynched for ‘Witchcraft,’” *The Star*, October 17, 2021, <https://www.the-star.co.ke/counties/nyanza/2021-10-17-four-elderly-kisii-villagers-lynched-for-witchcraft/>; HelpAge International, “Older People in Kenya Must Be Protected from Witchcraft Accusations,” *HelpAge*, October 22, 2021, <https://www.helpage.org/newsroom/latest-news/older-people-must-be-protected-from-witchcraft-accusations/>.

⁷⁶ Nehemiah Okwembah and Patrick Beja, “Concern over Rise in Killings of Elderly in Kilifi Over ‘Witchcraft’ Claims,” *The Standard*, November 13, 2022, <https://www.standardmedia.co.ke/health/coast/article/2001460557/concern-over-rise-in-killings-of-elderly-in-kilifi-over-witchcraft-claims>; Maureen Ongala, “Return of Kilifi Witch Killings Worries Authorities,” *Daily Nation*, April 12, 2022, <https://nation.africa/kenya/counties/kilifi/return-of-kilifi-witch-killings-worries-authorities-3779456>.

⁷⁷ Penal Code, Laws of Kenya, cap. 63, § 204 (“Any person convicted of murder shall be sentenced to death.”). The laws of Kenya are available at <http://www.kenyalaw.org/lex/index.xql#P>.

⁷⁸ Reid Griffith Fontaine, “Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification,” *University of Michigan Journal of Law Reform* 43, no. 1 (2009): 27–51, at 28.

⁷⁹ Adrian Williamson, “Gender and the Law of Provocation in the Long Twentieth Century,” *Women’s History Review* 29, no. 3 (2020): 495–519, at 497.

⁸⁰ Williamson, “Gender and the Law of Provocation in the Long Twentieth Century,” 497.

⁸¹ Law Reform Commissioner Victoria, “Provocation as a Defence to Murder,” Working Paper No. 6 (1979), 5, www.ojp.gov/pdffiles1/Digitization/62008NCJRS.pdf.

certain circumstances and thus to do things which ... [they] otherwise would not do.”⁸² As the Supreme Court of Canada notes, “all human beings are subject to uncontrollable outbursts of passion and anger which may lead them to do violent acts. In such instances, the law would lessen the severity of criminal liability.”⁸³

The most common meaning of *provocation* is incitement to irritation or anger. However, in criminal law or common law settings, the term is used to denote much more than ordinary or mere anger. “To extenuate the killing of a human being provocation has always needed to be of a special kind ... [I]t is seen to be *something* which incites immediate anger or ‘passion’ as an older terminology has it, and which overcomes a person’s self-control to such an extent as to overpower or swamp his reason.”⁸⁴ However, what that “something” can be or what the scope of that “something” is has been the subject of divided opinions through the centuries. In the Canadian case of *R v. Tripodi*, Rand J. defined a sudden provocative act as “the wrongful act or insult ... upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame.”⁸⁵ One expert has argued that to reduce the crime of murder to manslaughter, provocation must “in human frailty heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact; so that the party may rather be considered as having acted under a temporary suspension of reason than from any deliberate malicious motive.”⁸⁶ John Snowden also stresses that one fundamental principle in criminal law is the notion that malice is the distinguishing feature of any homicide to be punished as murder. Therefore, for an unlawful homicide to be punished as manslaughter rather than murder, a provocation defense must be powerful enough to negate or excuse the malice of the perpetrator.⁸⁷ In the United Kingdom case of *R v. Kiranjit Ahluwalia*, Lord Taylor held that the phrase “sudden and temporary loss of control” encapsulates an essential ingredient of the defense of provocation.⁸⁸

In Kenya, the provocation defense is available only in cases of murder, which is a capital offense. However, it is not deemed to be sufficiently fundamental to qualify as a complete defense, and consequently regarded as a matter that goes substantially in mitigation of sentence. In other words, provocation does not result in a complete acquittal on the charge, but only leads to a reduction from a conviction of murder to one of manslaughter. However, no executions have been carried out in Kenya since 1987. The death penalty, as Andrew Novak observes, is rapidly receding in sub-Saharan African countries, particularly those formerly colonized by Britain. Novak stresses that the “death penalty has fallen into disuse in most of common law Africa, and many of these countries are now considered de facto abolitionist.”⁸⁹ An estimated eight hundred criminals were sentenced to death per year in Kenya during the 2000s, but none has been executed.⁹⁰

Section 207 of the Kenyan Penal Code stipulates as follows: “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

⁸² Daniel D. N. Nsereko, “Witchcraft as a Criminal Defence, from Uganda to Canada and Back,” *Manitoba Law Journal* 24, no. 1 (1996): 38–59, at 50–51.

⁸³ *R v. Hill* [1986] 1 SCR 313, at 323.

⁸⁴ Law Reform Commissioner, “Provocation as a Defence to Murder,” at 5 (my emphasis).

⁸⁵ *R v. Tripodi* [1955] SCR 438, at 443.

⁸⁶ Law Reform Commissioner, “Provocation as a Defence to Murder,” 6.

⁸⁷ John R. Snowden, “The Case for a Doctrine of Provocation in Nebraska,” *Nebraska Law Review* 61, no. 4 (1982): 565–85, at 565.

⁸⁸ *R v. Kiranjit Ahluwalia* [1993] 96 Criminal Appeal, R 133, at 139–41.

⁸⁹ Andrew Novak, “Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya,” *Suffolk University Law Review* 45, no. 2 (2012): 285–344, at 285–86.

⁹⁰ Novak, “Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya,” 344.

sudden provocation as hereinafter defined, and *before there is time for his passion to cool*, is guilty of manslaughter only.”⁹¹

Section 208 defines the term *provocation* thus:

- 1) 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 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 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.⁹²

The stipulations of sections 207 and 208 of the Kenyan Penal Code, as do other acts related to provocation, clearly suggest that for the provocation defense to succeed, the defendants must (1) demonstrate that there was a “wrongful act or insult” by or from the victim, and that the “wrongful act or insult” was sufficient to significantly undermine the rationality of a reasonable person; (2) convincingly show that as a direct result of the said provocation, they became emotionally charged such that they lost self-control; (3) prove that they acted under “sudden provocation”—meaning that not enough time to cool off passed between provocation and killing; in other words, the unlawful killing must have occurred immediately after the provocation or just when it began; and (4) demonstrate that they did not cool off prior to killing their victim(s).⁹³

The doctrine of provocation is not an unreasonable principle. As Aristotle justifies, “[a]cts proceeding from anger are rightly judged not to be done of malice aforethought; for it is not the man who acts in anger but he who enraged him that starts the mischief. Again, the matter in dispute is not whether the thing happened or not, but its justice; for it is apparent injustice that occasions rage.”⁹⁴ But unfortunately, the Kenyan courts, as I show below, very frequently allow the provocation defense even where the killers of alleged witches take considerable time to brood and nurse suspicions about their victims; and where the victims, in fact, have said no word or committed no direct or explicit act that the law would classify or recognize as “sudden provocation.”⁹⁵ The big question, therefore, is

⁹¹ Penal Code § 207 (my emphasis).

⁹² Penal Code § 208 (my emphases).

⁹³ Penal Code § 208, § 207; Fontaine, “Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification,” 29–30; James R. Averill, *Anger and Aggression: An Essay on Emotion* (New York: Springer, 2012), 113; Marcia Baron, “Killing in the Heat of Passion,” in *Setting the Moral Compass: Essays by Women Philosophers*, ed. Cheshire Calhoun (Oxford: Oxford University Press, 2004): 353–78, at 354; Nsereko, “Witchcraft as a Criminal Defence,” 51.

⁹⁴ As quoted in Andrew John Ashworth, “The Doctrine of Provocation,” *Cambridge Law Journal* 35, no. 2 (1976): 292–320, at 292; see also Aristotle, *Nicomachean Ethics*, trans. Roger Crisp (Cambridge: Cambridge University Press, 2000), book 5, 8.

⁹⁵ Nsereko, “Witchcraft as a Criminal Defence,” 51; Luongo, “Motive Rather than Means,” 44.

whether the so-called provocation by witchcraft defense can ever be justified, and if so, under what circumstances.

Provocation by Witchcraft: The Evolution of the Kenyan Courts' Interpretation

The phrase *provocation by witchcraft* refers to a defense of a homicidal act supposedly committed under the influence of beliefs in witchcraft. Thus, this defense arises in instances where people kill suspected witches for fear of being bewitched or because they believe themselves or someone else to be the victims of bewitching. During the early 1900s, such homicides were so rampant in most sub-Saharan African countries, including Kenya, that legislation against witchcraft was deemed necessary and unavoidable by the colonial government. In 1909, the Kenya Witchcraft Ordinance, which defined the legal attitude toward witchcraft was enacted; it was redrafted in 1918. The redrafted wording of the 1918 amendment was, as Richard Waller notes, “carried over into the 1925 revision and formed the legal framework within which witchcraft cases were prosecuted throughout the colonial period.”⁹⁶ However, using the law—which deals with issues pertaining to the physical world or issues that can be empirically verified—to address the problem of witchcraft, which can only be understood in the spiritual realm, and concomitant homicide, was and still is undoubtedly an extremely difficult endeavor. It is therefore not surprising that writing in the 1930s, Lord Hailey described witchcraft as “the outstanding problem of the lawgiver in Africa.”⁹⁷

Witchcraft-related legislation, indeed, poses special difficulties, in that for it to be accepted and embraced in African societies such as those in Kenya, where belief in witchcraft is prevalent, it must strike in two directions—against both those who practice witchcraft and those who kill suspected witches.⁹⁸ Thus, in the view of the people, if the government has decided to treat the killing of suspected witches—which the people view as a form of locally legitimate self-defense—as outright murder, then it should also take on the task of protecting the community against witches who are viewed as the personification of evil—entities who work against everything good in society. However, as Waller has pointed out, “while it was not difficult to prosecute and convict witch killers under the Penal Code, it was far more so to secure convictions for witchcraft under the Ordinance.”⁹⁹ Therefore, in the eyes of those who believe in witchcraft, the government was protecting witches rather than the community beleaguered by the witches. As Waller notes, “if the law failed to deter witches, it all too effectively punished those who killed them. Here the form and rationality of the law worked against the accused. While witchcraft was unfamiliar to the court, murder was not.”¹⁰⁰

It must be emphasized that prior to the 1930s, the defense that was often employed by killers of alleged witches in Kenya was self-defense. But because murder is a capital crime, and as none of the possible arguments for a mitigation of sentence or a reduction to manslaughter could succeed, defendants were usually, if not always, sentenced to death. Apparently, the self-defense argument, rather than the provocation defense, was employed because the latter had never been seriously contemplated and used in any witchcraft-related case in Kenya and neighboring countries at the time. However, since the 1930s, the provocation defense has been offered more frequently, at times in conjunction with self-

⁹⁶ Waller, “Witchcraft and Colonial Law in Kenya,” 246.

⁹⁷ William Malcolm Hailey, *An African Survey: A Study of Problems Arising in Africa South of the Sahara* (London: Oxford University Press, 1938): 295–96; also cited in Waller, “Witchcraft and Colonial Law in Kenya,” 241.

⁹⁸ Waller, “Witchcraft and Colonial Law in Kenya,” 244.

⁹⁹ Waller, 244.

¹⁰⁰ Waller, 248.

defense, in murders of suspected witches. The employment of the provocation by witchcraft defense may thus be viewed as a subtle means to get rid of the evil entities (the witches) without facing the ultimate penalty—capital punishment. The question as to why the courts considered it necessary to allow such a defense in these murder cases is the subject of divergent views. It has been suggested by some academics and experts that the provocation by witchcraft defense “in common law was rooted in a desire to mitigate the harshness of the mandatory death penalty.”¹⁰¹

During and shortly after the colonial period, one important regional court served as the appellate court for all British colonies in eastern Africa, including Kenya. All national courts were bound by the rulings or decisions of this regional court, the East African Court of Appeal, which was established in 1902. Below, I discuss some relevant East African Court of Appeal cases that were first tried not in Kenyan courts but in the courts of other East African countries such as Uganda and Tanzania (formerly Tanganyika). The East African Court of Appeal ceased to exist following independence and the collapse of the previous East African Community in 1977. I note that in Kenya almost all, if not all, judgments do not have numbered paragraphs; consequently, pinpointing a particular paragraph, even where a direct quotation is used, has not been possible. Many of the cases and judgments I discuss were retrieved from the laws of Kenya and decisions of courts database, Kenya Law, which is the main electronic repository of the Kenya Law Reports.

The Colonial Era

The defense of provocation by witchcraft was first hinted at by the Kenya Supreme Court in *R v. Kumwaka wa Mulumbi and Others*, a very high-profile case decided in 1932. In this case (also known as the Wakamba/Kamba Witch Trials), seventy defendants were convicted by the Supreme Court of Kenya for beating to death a Kamba woman suspected of being a malevolent witch and bewitching the wife of one of the accused persons, Mr. Kumwaka. Sixty of the convicted persons were sentenced to death and the remaining perpetrators received custodial sentences because they were juveniles. The defendants had argued that their act was provoked by their genuine belief that the victim was bewitching the wife of one of them and other members of the community—a form of self-defense.¹⁰²

In its concluding statement, the court acknowledged that “[t]he belief in witchcraft is, of course, widespread and is deeply ingrained in the native character.”¹⁰³ It stressed, however, that the belief in witchcraft and the fear of witches do not justify deviation from law by private infliction of punishment on the suspected and feared witch “except in cases where the accused has *been put in such fear of immediate danger to his own life* that the defense of grave and sudden provocation has been held proved.”¹⁰⁴ It further cautioned that “[f]or 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.”¹⁰⁵ Even though the death

¹⁰¹ Solomon Rukundo, “Witch-Killings and the Law in Uganda,” *Journal of Law and Religion* 35, no. 2 (2020): 270–96, at 290; see also Joshua Dressler, “Rethinking Heat of Passion: A Defense in Search of a Rationale,” *Journal of Criminal Law and Criminology* 73, no. 2 (1982): 421–70, at 422.

¹⁰² *R v. Kumwaka wa Mulumbi and Others* [1932] 14 KLR 137; See also Luongo, “Conflicting Codes and Contested Justice,” 120; Katherine Angela Luongo, *Witchcraft and Colonial Rule in Kenya, 1900–1955* (Cambridge: Cambridge University Press, 2011), 99.

¹⁰³ *Kumwaka*, at 139

¹⁰⁴ *Kumwaka*, at 139.

¹⁰⁵ *Kumwaka*, at 139 (my emphases); also cited in Patrick Tuva Mwanengu v. R [2007] Criminal Appeal No. 272 of 2006, Kenya Law Reports (hereafter eKLR). The reference to eKLR is to the online database of Kenya Law Reports, which includes otherwise unpublished cases, <http://kenyalaw.org/caselaw/index.php>.

sentences were upheld by the East African Court of Appeal, the prerogative of mercy was exercised by the then governor of Kenya who commuted the sentences to varying jail terms with hard labor.

Another important case decided in the 1930s in which the provocation by witchcraft defense was indirectly raised by the accused was *R v. Lokoigut Churale*.¹⁰⁶ In this case, three brothers made their way to the hut of a suspected witch in a remote part of Baringo District (now Baringo County) one night. The three men knocked on the door, and when the alleged witch emerged, two of them smashed his head with a blunt object, killing him almost instantly. They then left the scene. Later, one of the assailants, Lokoigut Churale, was arrested, questioned, and charged with murder by law enforcement authorities. His argument at trial was that the victim was a witch who had used his witchcraft powers to kill two other brothers and a nephew. They, the survivors, therefore killed the suspected witch to save themselves before he killed them. In other words, they killed in self-defense out of grave fear after being provoked by the killings in their family believed to have been orchestrated by the deceased. This defense was rejected by the court, arguing that the feared danger or threat was not immediate, and the fact that they walked all the way from their house to the victim's house to kill him exemplified premeditation.

The Supreme Court's concluding statement in *Kumwaka* and remarks in other cases such as *Churale* suggest that the emotion of fear, which obviously does not have any place in the English doctrine of provocation was confused with the emotion of anger, which is the natural and, perhaps, only result or product of provocation one is confronted with. It was therefore not surprising that along the way, uneasiness began to emerge about the general applicability of what had, at the time, become an established principle. Wilson J., the trial judge in *R v. Sitakimatata s/o Kimwage*, for instance, stated, obiter, that the phraseology used in the *Kumwaka* case was not entirely free from obscurity. He mentioned that "[i]t 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," insisting that only anger not fear is "the natural and only product or result of provocation received."¹⁰⁷ The judge ultimately concluded that while the element of fear was ambiguous, the defendant's action was premeditated and exhibited none of the signs of sudden fear and loss of self-control that might facilitate a defense of provocation.

Onesimus Mutungi has argued that whereas the distinction between fear and anger may be very clear in theory, practically, it may be "impossible to draw such a fine line between fear and anger" in some circumstances such as certain murder cases involving suspected witches.¹⁰⁸ When the decision in *Sitakimatata* was appealed before the East African Court of Appeal, the regional court stated that the particular passage criticized by Judge Wilson "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 [207] and [208] of the Penal Code."¹⁰⁹ The East African Court of Appeal seems to imply that the Kenya Supreme Court's statement was tenable; however,

¹⁰⁶ *R v. Lokoigut Churale*, Kenya Supreme Court, Criminal Case No. 138/35, papers encl. in Byrne to Thomas, March 2, 1936: National Archives, London, Public Record Office, CO 533/462; also cited in Waller, "Witchcraft and Colonial Law in Kenya," 242–43.

¹⁰⁷ *R v. Sitakimatata s/o Kimwage*, [1941] 8 EACA 57, 58 (Court of Appeal for Eastern Africa) (reprinting the trial court judgment of Wilson J.). In the *Sitakimatata* case, the deceased told the appellant that he had killed the appellant's wife by witchcraft and that he would also kill the appellant by the same means. The appellant, out of fear, decided to kill the deceased and carried out his intention some hours later in circumstances that indicated premeditated revenge.

¹⁰⁸ Mutungi, "Witchcraft and the Criminal Law in East Africa," 545.

¹⁰⁹ *Sitakimatata*, 8 EACA at 59; also cited in *Mwanengu*.

unless the fear induced by the “fancied bewitchment” reaches such a degree as to deprive the accused of his self-control, it would not meet the provocation threshold.¹¹⁰

The decision in *Kumwaka* became the dominant precedent for close to a decade; and during this time, most of the cases in which the provocation by witchcraft defense was invoked, did not succeed. Among the prominent and well-publicized ones were the following: *R v. Kumutai arap Mursoi*,¹¹¹ *R v. Mawala bin Nyangweza*,¹¹² *R v. Maganyo s/o Ochiel*,¹¹³ *R v. Weyulo binti Kakonzi*,¹¹⁴ and *R v. Charo Hinzano*.¹¹⁵ In all five cases, the defense of provocation by witchcraft failed on the grounds that the accused persons or appellants had not been put in fear of immediate danger to their own lives. In other words, there was no evidence of immediate danger; consequently, their fear that supposedly triggered the killing of the suspected witches, wizards, or witchdoctors was unreasonable and did not meet the threshold set in *Kumwaka*.

It must be emphasized that during this era, cases resulting in death sentences were necessarily appealed to the East African Court of Appeal; and where an appeal failed, the law as written and precedent necessitated that the appeal court justices maintain the automatic death sentence. However, in cases where they deemed that the defendants’ real and genuine (albeit mistaken) belief in witchcraft had been established, the judges recommended such defendants to the governor’s clemency. In other words, a plea for clemency from the governor was made by the court on behalf of the accused. In many cases, their death sentences were commuted to various jail terms with hard labor. This, in fact, was the case in *Nyangweza*, *Maganyo*, and *Kakonzi*, among others. The practice of seeking executive clemency for defendants apparently ceased after independence.

In *R v. Fabiano Kinene and Others* and *Eria Galikuwa v. R*,¹¹⁶ the East African Court of Appeal somehow raised the threshold for the provocation by witchcraft defense to succeed. The Court pronounced that the defense of provocation arising from belief in witchcraft could be

¹¹⁰ *Sitakimatata*, 8 EACA at 58.

¹¹¹ *R v. Kumutai arap Mursoi* [1939] 6 EACA 117. The appellant killed the deceased because he believed that he was a wizard who had laid a spell on his child, resulting in the child’s death.

¹¹² *R v. Mawala bin Nyangweza* [1940] 7 EACA 62. The accused’s elder brother, uncle (the deceased’s husband), nephew, and mother had all died under what the accused claimed were mysterious circumstances, and the symptoms of the illness resulting in their deaths (mainly swellings) were similar. The accused then consulted witchdoctors, who told him that the deceased had caused the deaths by witchcraft. His other brother also became sick with swellings and died two weeks later. Within an hour after his brother’s death, the accused killed the deceased for having bewitched all his family.

¹¹³ *R v. Maganyo s/o Ochiel* [1940], Ministry of Legal Affairs case files, Kenya National Archives, Nairobi. In this case the accused claimed that the deceased practiced witchcraft, and had used his medicine to cause the death of his son. He killed the deceased with a spear after he (the deceased) went to his house at night and threatened to kill him with the same juju spell he had used to kill his child. See also Luongo, “Conflicting Codes and Contested Justice,” 171–242.

¹¹⁴ *R v. Weyulo binti Kakonzi* [1941] (Ministry of Legal Affairs case files, Kenya National Archives). This case concerned a young woman who killed her father-in-law, a well-known witchdoctor, on suspicion of bewitching her two children. She claimed that the father-in-law had threatened to cast juju spells on her children, so when one of her children died and the other fell ill shortly after the threat, she had no doubt that the deceased was the cause. Believing that she would be the next person to fall victim to the deceased’s deadly juju spells, she killed him in order to save her life and the life of her child. See also Luongo, “Conflicting Codes and Contested Justice,” 171–242.

¹¹⁵ *R v. Charo Hinzano* [1941] (Ministry of Legal Affairs case files, Kenya National Archives). The accused killed an alleged wizard whose wife he had been having an affair with. He claimed that when the deceased discovered that he was committing adultery with his wife, he threatened to kill him by witchcraft. He further claimed that prior to the threat to bewitch him, the deceased had killed his (the accused’s) mother, wife, and two relatives by witchcraft. He therefore killed him to save his own life. See also Luongo, “Conflicting Codes and Contested Justice,” 171–242.

¹¹⁶ *R v. Fabiano Kinene s/o Mukye and Others* [1941] 8 EACA 96; *Eria Galikuwa v. R* [1951] 18 EACA 175.

available to an accused person only where it could be demonstrated that the deceased was threatening to harm and performing in the presence of the accused some act or activity that the accused genuinely believed was an act of witchcraft against him or members of his family and he was thus angered to such an extent as to be deprived of the power of self-control and induced to assault the deceased.

In the *Kinene* case (also known as *Fabiano*), a group of village folks had long suspected a headman of using witchcraft to kill their relatives. One night, they found the suspect crawling naked in their compound, and, fearing he was attempting to bewitch them, they killed him by forcibly inserting unripe or green bananas into his anus, an act believed to be the prescribed way of killing a wizard in the accused persons' community. The East African Court of Appeal ruled that the deceased's act of crawling naked in the defendants' compound at night and their genuine belief that he was trying to bewitch them amounted to "grave and sudden provocation." The court made the following important statement:

We think that if the facts proved establish that the victim was performing in the actual presence of the accused some act which the accused did genuinely believe, and which an ordinary person of the community to which the accused belongs would genuinely believe, to be an act of witchcraft against him or another person under his immediate care (which act would be a criminal offence under the Criminal Law(Witchcraft) Ordinance ...) he might be angered to such an extent as to be deprived of the power of self-control and induced to assault the person doing the act of witchcraft. And if this be the case a defence of grave and sudden provocation is open to him.¹¹⁷

Kinene is believed to be the first case in which provocation by witchcraft was explicitly endorsed as, and held to be, a legal defense.

In the *Galikuwa* case, the appellant consulted the deceased, who was known to be a sorcerer or witchdoctor, to help him recover money stolen from him. The question as to whether or not the witchdoctor succeeded in helping the appellant recover his money is not clear from the report. What is evident is that the deceased demanded from the appellant exorbitant fees or payment for his services, threatening to use his juju spells to exterminate him if he failed to pay. The witchdoctor was described as an unscrupulous individual who saw in the defendant's credulity an opportunity for unjust enrichment. Unable to raise the money and fearing that the witchdoctor would use his juju spells to kill him as threatened, the appellant got hold of a stick and struck the witchdoctor five times on the head, killing him instantly. He invoked the provocation defense, but it was rejected on the grounds that there was no explicit physical provocative act on the part of the deceased, except a mere threat to cause injury or harm in the future. In upholding the conviction, the East African Court of Appeal made the following pronouncement:

It seems therefore that a mere threat to cause injury to health or even death in the near future cannot be considered as a physical, provocative act. In any case, the appellant's own evidence shows clearly (a) that he was motivated not by anger but by fear alone. He struck, not in the heat of passion, but in despair arising from the recognition of his inability to raise the money demanded and his hopeless fear of the consequences; and (b) that he was not suddenly deprived of his self-control but acted as he did deliberately and intentionally because he could see no other way out of the impasse.¹¹⁸

¹¹⁷ *Kinene*, 8 EACA at 101; also cited in Mutungi, "Witchcraft and the Criminal Law in East Africa," 542.

¹¹⁸ *Galikuwa*, 18 EACA at 178; also cited in Nsereko, "Witchcraft as a Criminal Defence," 52.

The Court stressed in both *Kinene* and *Galikuwa* that a belief in witchcraft by itself does not constitute a circumstance of excuse or mitigation for killing an alleged witch or wizard when there is no immediate provocative act.

Kinene and *Galikuwa*, in a way, deviated from *Kumwaka*, insisting that for the defense of provocation to succeed, it is not enough to have acted out of fear of danger (whether immediate or not). In brief, the following elements were required for a successful defense of provocation by witchcraft: the provocative act should be physical and done in the actual presence of the accused; an ordinary and reasonable person in the accused's community would share the same belief that the act was an act of witchcraft; the provocation must not only be grave but also sudden; the killing must have occurred immediately after the provocative act or in the course of it; the killing should have occurred in the heat of passion; and the provocative act must amount to a criminal offense under criminal law.¹¹⁹ This stance seems to be more consistent with the prima facie interpretation of the stipulations of sections 207 and 208 of the Kenya Penal Code. The reasoning in these two cases became the established legal principle for a couple of decades until it was altered in *Yovan v. Uganda*, *Julius Lopeyok Wero v. R*, and *Chivatsi and another v. R* in 1970, 1983, and 1990 respectively.¹²⁰

The Postcolonial Era

In *Yovan*, the court stated that *Kinene* (also known as *Fabiano*) and *Galikuwa* did not lay down a general rule for the legal provocation defense, and that the decisions in those cases ought to be interpreted with reference to the facts of each case. As noted above, one of the court's main positions in *Kinene* and *Galikuwa* had been that threats of future harm are unacceptable as a foundation for the defense of provocation. But this position was revised in *Yovan*, where the court pronounced that a threat to kill (whether immediately or in the remote future) taken together with various existing circumstances may amount to legal provocation, as such threats could easily anger people in communities where witchcraft belief is widespread to such an extent that they would be deprived of their power of self-control, and be induced to fatally assault the one threatening to bewitch them. This stance might have been informed by the argument advanced by certain academics and experts that, in some instances, if suspicions and fears are entertained by a person against another, passage of time may facilitate the heating up, rather than the cooling down, of his passions.¹²¹ As Robert B. Seidman notes, "the peculiar nature of witchcraft is that it presents an overhanging, omnipresent threat. Time in such a case does not cool the passion; it inflames it."¹²²

In the *Yovan* case, the accused had long suspected the deceased, his stepmother, of being a witch and having a hand in the death of his two children. He then confronted the stepmother, accusing her of bewitching his immediate family. In response to the allegation, the stepmother supposedly said something to the effect that the appellant would not live to bury his children. Out of fear and anger (so the defendant claimed), he killed the stepmother by slashing her head with a sharp tool, causing her to fall into and burn in a fire that she had set in her fireplace. Indeed, spoken words may, in certain circumstances, be the basis of

¹¹⁹ See *Galikuwa*, 18 EACA at 176–78; *Kinene*, 8 EACA at 101–02. See also Mohammed A. Diwan, "Conflict between State Legal Norms and Norms Underlying Popular Beliefs: Witchcraft in Africa as a Case Study," *Duke Journal of Comparative & International Law* 14, no. 2 (2004): 351–87, at 375; Mutungi, "Witchcraft and the Criminal Law in East Africa," 543.

¹²⁰ *Yovan v. Uganda* [1970] EA 405; *Julius Lopeyok Wero v. R* [1983] Criminal Appeal No. 50 of 1983, eKLR; *Chivatsi Dzombo Chivatsi and Another v. R* [1990] Criminal Appeal No. 77 of 1989, eKLR.

¹²¹ Peter Brett, "The Physiology of Provocation," *Criminal Law Review* (1970): 634–40; Robert B. Seidman, "Witch Murder and Mens Rea: A Problem of Society under Change," *Modern Law Review* 28, no. 1 (1965): 46–61.

¹²² Seidman, "Witch Murder and Mens Rea," 52.

provocation. For instance, in *R v. Mohamudu Kibwana*, it was explained that as a general rule, mere spoken words alone cannot be the basis of provocation; however, where words are accepted in customary perspective as constituting provocation, the words must be of so devastating a nature, or must have such overbearing force, as to shatter the self-control of a normal person in the community to which the accused belongs.¹²³

The court clarified in *Yovan* that what might be a grave or deadly insult to members of one community might be a triviality to folks in another community. In this respect, the opinion of the assessors who tend to have reasonable knowledge of the customs of the people of the community could be useful to the trial judge. But the question as to whether or not the words of the deceased were powerful enough to deprive any ordinary person in the accused's community of self-control, was the subject of divergent opinions. Even though the appellate court seemed to have admitted that the words of the defendant's stepmother did not, by themselves, amount to sufficient provocation, it reasoned that a threat to cause the death of the accused (irrespective of whether or not it had an overbearing force) together with the existing circumstances (that is, the death of the accused's two children, believed to have been caused by the victim, using witchcraft), amounted to provocation. The accused was accordingly found guilty of manslaughter only and not murder.

The principles enunciated in *Yovan* seems to have been followed in *Wero*, even if indirectly. In this case, two Pokot tribesmen ages twenty-five to twenty-eight who genuinely believed that the deceased, an elderly man in their community, had juju or occult powers and used them to harm their children, dragged him from his house, beat him up, and threw him into Lake Baringo, where he drowned. In Pokot custom, killing a person believed to be a witch or wizard was deemed an acceptable practice. The provocation by witchcraft defense was then raised. The two men were convicted of manslaughter, and Julius Wero, one of the defendants, was sentenced to eight years' imprisonment. In making this determination, the trial judge seemed to have considered factors such as the belief system of the Pokot people, the fact that the defendants were first offenders, and, more importantly, the existing circumstances: the troubles that the defendants and their children were supposedly experiencing, which made them believe that a juju spell had been cast on them by the deceased; and the persistent quarrels between one of the defendants and the deceased.

Julius Wero appealed against this conviction and sentence, arguing that because the killing of an evil person (witch) was a permissible act among the Pokot ethnic group, the deceased's death should be classified as justifiable homicide and, therefore, the sentence was excessive. His appeal was dismissed. In rejecting the appellant's pleas, the court stated that Wero was fortunate that the trial judge had not applied the tests enunciated in *Kinene* and *Galikuwa*, stressing that had that been the case, his provocation by witchcraft defense would have been rejected and he would have been convicted of murder as the victim never performed in his presence an act of witchcraft against him or another person under his immediate care. The court insisted that the sentence for the "appellant in the circumstances was legal, appropriate and not manifestly excessive."¹²⁴ It is apparent from the appeal court's language in this case that it was, one way or another, satisfied with the trial judge's decision, which was somehow consistent with the principles in *Yovan*. In fact, there is no clear indication that the trial judge and appeal court judges in the *Wero* case had the benefit of the decision in the *Yovan* case as the latter was decided in Uganda and therefore many Kenyan jurists might not have known anything about it or the details at the time.

In 1990, *Yovan* was reaffirmed in *Chivatsi*. The facts of the *Chivatsi* case are that in August 1987, one of the sons of the victim died after taking poison. The circumstances surrounding

¹²³ *R v. Mohamudu Kibwana* [1968] HCD No. 186.

¹²⁴ *Julius Lopeyok Wero v. R* [1983] Criminal Appeal No. 50 of 1983, eKLR.

this event raised suspicion that his death was caused by witchcraft. The first accused (also a son of the deceased), who believed that his brother's death was suspicious, consulted a witchdoctor for answers. The witchdoctor confirmed that the first accused's brother was driven to ingest the poisonous substance by their father (the deceased), using witchcraft or some magical power. This revelation infuriated both the first accused and second accused (the deceased's nephew and the first accused's cousin) who, armed with a kitchen knife, made their way to the deceased's place of residence to confront him for an explanation as to why he had caused the death of his own son (the first accused's brother). They entered the deceased's room, shut the door behind them, and bolted it. A struggle ensued during which the victim was cruelly stabbed to death. According to the accused persons, the deceased confirmed he had caused the death of his son and other relatives through witchcraft, and he went further to threaten that he would not spare the remaining relatives, whom they (the accused persons) believed included themselves. This threat thus provoked them to kill him. Prior to the killing of the deceased, the second accused's mother had died, and he believed that her death had been caused by the deceased using witchcraft; hence his decision to participate in the lethal attack. The trial judge made the following determination: "The upshot of the foregoing and in deference to the assessors the conclusion I come to is that the accuseds' acts were not prompted by sudden provocation. They killed the deceased in cold blood and I find and hold that their actions amounted to murder. I accordingly find them guilty of murder contrary to section 204 of the Penal Code and convict them of the charge."¹²⁵

The accused persons appealed; and reiterating the pronouncement in *Yovan*, the appellate court stated:

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.*¹²⁶

Their murder conviction was consequently substituted with manslaughter and the death sentence was commuted to eight years' imprisonment.

The key reasoning in *Yovan* and *Chivatsi* is that a reasonable provocative act may not only be physical but verbal, and the spoken words may not only be insulting but threatening or seemingly threatening. A critical look at sections 207 and 208 of the Kenyan Criminal Code and relevant literature shows that the drafters of the law on provocation never anticipated or contemplated the provocation by witchcraft defense and therefore did not intend the meaning of the phrase, "wrongful act or insult," to encompass a threat to kill or harm by witchcraft. Therefore, by incorporating the threat to kill element into the provocation by witchcraft defense, the courts have extended the scope of the said defense beyond the

¹²⁵ R v. Chivatsi Dzombo Chivatsi and Another [1989] Case No. 21 of 1988, eKLR.

¹²⁶ *Chivatsi*, appeal (emphases added).

envisioned threshold, and they have thus made the defense easily accessible to many killers of suspected witches.

The Impact of *Yovan* and *Chivatsi* on Killings of Suspected Witches in Kenya

It must be stressed that in Kenya, accusing someone of being a witch is itself a criminal offense. Section 6 of the Witchcraft Act states that “[a]ny person who accuses or threatens to accuse any person with being a witch or with practicing witchcraft shall be guilty of an offence and liable ... to imprisonment for a term not exceeding five years.”¹²⁷ This explains why people who not only accuse others of being witches but proceed to kill them should receive severe punishments. However, all the evidence suggests that the decisions in *Yovan*, *Wero*, and *Chivatsi* have the potential of letting killers go free or get a lesser sentence—thus, letting them escape meaningful punishment. In fact, the evidence seems to show that the rulings in *Yovan* and *Chivatsi* have already opened the floodgates for killers of alleged witches to employ the so-called provocation by witchcraft defense and escape murder convictions. For instance, killers of suspected witches in cases such as *Katana Karisa and Others v. R*¹²⁸ were convicted of manslaughter or had their murder convictions commuted to manslaughter on appeal only after invoking the defense in question and claiming that they killed because threats to kill them or close members of their families had been made by the victims.

In the *Karisa* case, an eighty-year-old blind man was killed by his cousin (the first defendant and appellant) and the cousin’s wife and three sons, on suspicion of being a witch and using witchcraft to kill one of the first defendant’s sons. The facts of the case are that the first defendant’s three sons went to the house of the deceased to tell him and his wife that their father wanted to see them. They then held the deceased by both legs and dragged him to their home together with the deceased’s wife. Upon arrival there, they tortured the deceased by burning him on the private parts and buttocks and chopping off his tongue. They tied a rope around the deceased’s neck and dragged him about one and half kilometers from the first defendant’s home before disposing of his lifeless body. At no point during the trial did any of the defendants claim that the deceased had caused the death of the first defendant’s son through witchcraft. Moreover, the issue of the killing of the first defendant’s son by the deceased through witchcraft did not clearly emerge from the prosecution’s case. Yet, when they were convicted for their various roles in the murder of the blind octogenarian, they appealed, this time, raising the provocation by witchcraft defense and alleging that the deceased had previously threatened to kill them by witchcraft. Their appeal succeeded because of the supposed “threat to kill by witchcraft taken together with the existing circumstances” of the death of the appellants close relative.¹²⁹

The indisputable truth is that Kenyan and, indeed, African witches (not sorcerers or juju practitioners), even if they are truly malevolent entities with supernatural powers, generally do not threaten to kill people openly, as they are aware that letting others know that they are witches would result in them being persecuted or lynched by members of their own family and the community. Indeed, over 90 percent of people accused of being witches categorically deny it. The frequent argument by killers of suspected witches that they killed because the victim threatened to kill them by witchcraft is thus supposed to be viewed with great suspicion. It appears that the courts have not been stringent and meticulous enough when it comes to establishing the veracity or falsity of a threat to kill claim in cases in which the provocation by witchcraft defense is raised. Thus, all that accused persons have to do is to mention that the alleged witches or deceased threatened to kill them and that prior to the

¹²⁷ Witchcraft Act, Laws of Kenya, cap. 67, § 6.

¹²⁸ *Katana Karisa and Others v. R* [2008] Criminal Appeal No. 372 of 2006 eKLR.

¹²⁹ *Katana Karisa*, Criminal Appeal No. 372 of 2006.

threat some people in their family had died after being bewitched by the deceased. Many of these claims appeared to be pure fabrications, manufactured by the defendants themselves and imputed to the victims. These claims could have been easily detected if the courts had been more rigorous and diligent in their approach.

To make matters worse, there have been numerous murder cases in which, although no actual threat or direct provocation by the victims occurred, the courts have considered it reasonable to make the provocation defense available to the accused persons. Four of such cases are *Mohammed Tawa Kea and Others v. R*, *Charo Kalu Thinga v. R*, *R v. Stephen Wambua Mutisya and Others*, and *Patrick Tuva Mwanengu v. R*.¹³⁰

Kea and Others concerned a traditional herbalist (traditional healer or medicine-man) who was brutally murdered by a group of three young men on suspicion of being a witch and bewitching members of the community. They had tortured and killed the victim using machetes, stones, and other weapons, and they were accordingly indicted for murder. In their unsworn defenses, they denied having committed the crime. The first two defendants claimed that on the material day, while in their respective houses, they were attracted by the noise or shouts from a crowd of people, and upon going where the crowd had assembled, they found the deceased already killed on suspicion of being a witch. The third defendant asserted that on the material day, he had gone to church and returned home at around 8:00 p.m. only to be confronted with the news of the murder. All three were found guilty of murder. They then appealed, but this time admitting that they had participated in the killing of the deceased and invoking the provocation by witchcraft defense. Surprisingly, their appeals succeeded.

In the *Thinga* case, a man who believed that his father and stepmother were witches, killed the former and battered the latter. He was convicted and sentenced to death even though he denied any involvement in the murder. He appealed, but this time confessed that he was the perpetrator, claiming that he killed the deceased due to provocation arising from his belief that the deceased was a witch and was responsible for some mysterious deaths in the family, including the death of his brother, which apparently triggered the fatal assault. The court determined that the appellant genuinely believed the deceased and the stepmother were witches and responsible for the deaths in his family and therefore the defense of provocation was readily available to him. It reasoned that the fact that the appellant did not raise the defense of provocation during his trial did not prevent the court from considering such defense if it was disclosed by the evidence that was adduced. His murder conviction was reduced to manslaughter; and the sentence of death was commuted to twenty years' imprisonment.

In *Mutisya and Others*, the deceased, who was a teacher, had long been suspected by members of the community of being a witch responsible for the supposed predicaments of members of his family and the entire community. On March 12, 2011, he was abducted and killed by the accused for supposedly bewitching members of his family and the community. The defendants raised the provocation by witchcraft defense at trial and succeeded.

The courts' decisions in all the three cases described above were significantly informed by the principles set in an earlier case, *Mwanengu*, which seems to have become the established principle over the last decade and a half. In the *Mwanengu* case, the appellant had been seen in the middle of the night, hacking, with what appeared to be a machete, his uncle, who was sleeping in front of his house with some other family members. His only defense made in sworn testimony was that at the time of the murder he was with his family in a town about 100 kilometers away from the scene of the crime. In fact, at no time during the trial did he explicitly allude to witchcraft or state that the deceased had bewitched him or any member

¹³⁰ *Mohammed Tawa Kea and Others v. R* [2016] Criminal Appeal No. 45 of 2015, eKLR; *Charo Kalu Thinga v. R* [2015] Criminal Appeal No. 125 of 2011, eKLR; *R v. Stephen Wambua Mutisya and Others* [2012] Case No. 19 of 2011, eKLR; *Patrick Tuva Mwanengu v. R* [2007] Criminal Appeal No. 272 of 2006, eKLR.

of his family. It was, rather, the evidence from the prosecution witnesses that suggested that he had, on a few occasions, expressed some suspicion that his uncle was a wizard and was perhaps bewitching him and his son. He was convicted and sentenced to death. He then appealed, first admitting that the alibi defense put forward before the trial court was incorrect and misadvised and then arguing that “[t]he 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 ... [deceased]; a fact which, had the learned Judge appreciated, was sufficient to reduce the offence charged to a lesser offence of manslaughter.”¹³¹

The court determined that the trial judge had erroneously applied the principles articulated in *Kinene* and *Galikuwa* and that had been reexamined by the appeal court in *Yovan* and *Chivatsi*. It was also satisfied that the circumstances of the case met the legal provocation defense threshold set in the latter pair of cases; therefore, the appellant was entitled to the benefit of doubt and to have his conviction reduced to manslaughter. What makes this decision even more controversial is that there was no mention or evidence of the victim threatening to kill or harm by witchcraft. Thus, the only evidence that was considered by the court was the circumstances that prompted the killing—which was the mere belief that the accused and his son were being bewitched by the deceased.

The superior courts have persistently indicated that a belief in witchcraft per se does not constitute a circumstance of excuse or mitigation for killing a person believed to be a witch in absence of an immediate provocative act. But some of its own decisions, including the ones highlighted above, have been inconsistent with this vital principle. For example, the circumstances or facts of *Mwanengu*, *Mutisya*, *Thinga*, and *Kea* did not even meet the controversial threshold set in *Yovan* and *Chivatsi* to merit the legal provocation defense. Yet, the defendants’ provocation by witchcraft pleas succeeded even though there were no threats by the deceased to kill or destroy or harm the accused or any member of their families in any way; the victims never spontaneously confessed to being witches; the victims never insulted the accused and never claimed to have the power to harm others; and they did not do or say anything that created any suspicion that they were up to no good. The only reason the accused killed the victims was that there were supposedly unexplained deaths or problems in the accused’s families or communities, and they believed the victims were witches causing those calamities by using witchcraft. Arguably, the Kenyan courts, particularly in *Mwanengu*, have unreasonably extended the scope of the provocation defense beyond the realms contemplated by the drafters of sections 207 and 208 of the Penal Code.

Unfortunately, such decisions “sanction the opening of a window for believers in witchcraft [and other superstitions] to unleash death and mayhem on innocent citizens.”¹³² The decisions, to use the appeal court’s own vocabulary, “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.”¹³³ In brief, judicial decisions in many of the recent cases in which the provocation by witchcraft defense was invoked seem to facilitate the creation of an environment where aggrieved or disgruntled elements may hide behind a façade of unfounded beliefs to inflict severe pain and suffering on others and consequently jeopardize public peace and tranquility.

Some local people have lamented that the Kenyan laws such as the Witchcraft Ordinance and the Penal Code unfairly protect the so-called evil witches and punish the supposedly

¹³¹ Patrick Tuva Mwanengu v. R [2007] Criminal Appeal No. 272 of 2006, eKLR.

¹³² Mwanengu, Criminal Appeal No. 272 of 2006, summarizing the submission of the Kenyan principal state counsel, Mr. Ogoti.

¹³³ Thoya Kitsao Katiba v. R [2015] Criminal Appeal No. 123 of 2014, eKLR.

innocent witch killers, making it possible for the former to operate with impunity.¹³⁴ One commentator has even argued that the courts too readily allow the defense of provocation by witchcraft and avoid convictions of first degree murder for fear of the sentence that necessarily follows such a conviction—the death penalty.¹³⁵ Such a theory may contain some iota of credibility. However, the debate about whether capital punishment is relevant in the contemporary Kenyan society or relevant in the fight against the killing of suspected witches is beyond the scope of this article. My focus here is on the inconsistencies in some pertinent judicial decisions and how such verdicts may hinder efforts to curtail violence against vulnerable people. In any case, it is reasonable to take the utilitarian view that society is perhaps better protected by executing so-called honest witch killers than by allowing supposed witches to be lynched by the mob with impunity. However, it must be stressed that even though murder is a capital offense in Kenya, in 2010 the Court of Appeal repealed the mandatory death sentence for murder in *Godfrey Ngotho Mutiso v. R.*¹³⁶ The mandatory death penalty meant that any person convicted of murder automatically received the death sentence. But *Mutiso* recommends judicial discretion to substitute a lesser sentence in certain circumstances.

Conclusion

In homicide cases, the provocation defense ought to succeed only where it is convincingly proved that the accused persons killed during a sudden loss of self-control caused by provocation that was enough to make a reasonable person do as they did.¹³⁷ However, in many recent cases of murder of suspected witches in Kenya, the provocation by witchcraft defense has been successful even when there was no provocation or a significant time had elapsed between the alleged provocation to which the accused was subjected and the actual deed of homicidal violence. Thus, in many homicide cases, the applicability of the heat of passion principle has been supported by the courts even though evidence of provocation by the victims has been nonexistent.

Disturbingly, belief in witchcraft has been the cause of some of the most vicious crimes against vulnerable people in Kenya. Moreover, some of those accused of these crimes are proud to admit that they killed the victims, claiming that they were ensuring their own survival or that of members of their family or the community. Such perpetrators take significant time brooding and nursing suspicions against their victims, who in most cases said no word to the accused or did not perform any direct, explicit act in the presence of the accused that the law would recognize as sudden provocation.¹³⁸ It should thus be appreciated that the law's insistence on "sudden provocation," as Daniel D. N. Nsereko rightly notes, is meant to "guard against self-help by deliberate and premeditated killings of other

¹³⁴ See, generally, Charles Clifton Roberts, *Tangled Justice: Some Reasons for a Policy of Change in Africa* (London: Macmillan, 1937); Waller, "Witchcraft and Colonial Law in Kenya"; Diwan, "Conflict between State Legal Norms and Norms Underlying Popular Beliefs."

¹³⁵ Muna Ndulo, "Infidelity as Provocation: A Comment," *Zambia Law Journal*, no. 6 (1974): 129–30.

¹³⁶ *Godfrey Ngotho Mutiso v. R.* [2010] Criminal Appeal No. 17 of 2008, eKLR; see also Novak, "Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya" (Novak critically analyzes the Court of Appeal's decision in *Mutiso*, which struck down the mandatory capital punishment for murder as unconstitutional and incompatible with human rights norms); Andrew Novak, "The Abolition of the Mandatory Death Penalty in Africa: A Comparative Constitutional Analysis," *Indiana International & Comparative Law Review* 22, no. 2 (2012): 267–95, at 287–93.

¹³⁷ Ashworth, "The Doctrine of Provocation," 292, 317. See Ashworth generally for a critical analysis of various provocation interpretations and scenarios.

¹³⁸ Nsereko, "Witchcraft as a Criminal Defence," 52.

people.”¹³⁹ It is therefore reasonable for any concerned person to genuinely fear that by accepting a mere threat to cause harm or death and trivial circumstances as an important provocative act or event, the courts are not only intentionally or unintentionally making it easier for those who kill suspected witches to meet the threshold for the defense of provocation by witchcraft, but also they are making witch killing even more attractive.

It is a fact that belief in witchcraft and the destructive powers of witches and sorcerers is widespread in various communities in Kenya. But such beliefs, however genuine, cannot excuse an assault on another person. Indeed, the pervasive belief in witchcraft may provide some explanation for fundamental human rights violations, but it does not excuse it. In democratic societies, people are free to believe what they wish to believe, but that freedom does not extend to acting on one’s beliefs in ways that the law deems punishable. However, in Kenya, the doctrine of provocation is already a concession. The pronouncements in *Yovan*, *Chivatsi*, *Mwanengu*, and other recent cases compel one to conclude that the Kenyan courts, particularly the appellate court, are making further concessions on the provocation defense; and this trend has the potential to perpetuate—even encourage—the nursing of baseless suspicions and to provide a legal cover for those who wish ill on community and family members. Because belief in witchcraft and fear of witches are so deeply entrenched in Kenyan culture, any attempt to curb murders of suspected witches cannot be achieved through legislative actions and the criminal justice system alone but would involve a multipronged approach that would include ensuring economic improvement and wider access to formal education and health care, along with extensive public education campaigns and programs.

¹³⁹ Nsereko, 52.

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