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The Provocation by Witchcraft Defence in Anglophone Africa: Origins and Historical Development

Emmanuel Sarpong Owusu *

ABSTRACT

Provocation by witchcraft, a defence to a homicidal act supposedly perpetrated under the influence of belief in witchcraft and juju, has become a plea frequently invoked by witch-killers in many African countries, particularly those formerly colonized by Britain. Over the last century, the courts in Anglophone Africa have repeatedly been invited to address the question as to whether the belief in witchcraft and juju avails to an accused person the defence of grave provocation and, if so, under what conditions. Yet, very little is known about the origins and nature of this controversial legal defence, and the boundaries of its application remain murky. Drawing on a wide range of relevant academic literature, statutes and, more importantly, case law, the present study investigates the origins of the provocation by witchcraft plea and explores the historical development of this contentious defence, highlighting the extent to which the courts' perspective on the scope of its application has evolved since the 1930s.

1. INTRODUCTION

Several studies and reports show that homicide is widespread in contemporary African communities.[1] According to a study released by the United Nations Office on Drugs and Crime (UNODC) in 2019, approximately 163,000 people (13 per 100,000 population) were murdered in Africa in 2017. This figure represents about 35.1 per cent of all the murders that were chronicled globally that year.[2] Indeed, intentional homicide is prompted

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[1] Etienne G Krug and others (eds), *World Report on Violence and Health* (World Health Organization 2002); United Nations International Children's Emergency Fund (UNICEF), *Hidden in Plain Sight: A Statistical Analysis of Violence Against Children* (UNICEF 2014); United Nations Office on Drugs and Crime (UNODC), *Global Study on Homicide 2019* (UNODC 2019).

[2] United Nations Office on Drugs and Crime (n 1).

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by a variety of factors such as the personal characteristics of the victim and perpetrator, their socio-cultural and physical environments, and their religious beliefs.[3] In Africa, a sizable proportion of intentional homicides results from the belief in witchcraft and juju.[4]

Remarkably, witch-killers in Africa many a time raise the witchcraft provocation defence when charged and prosecuted. The phrase 'provocation by witchcraft' refers to a defence to a murderous act supposedly committed under the influence of belief in witchcraft and juju. Thus, this defence is raised in instances where people prosecuted for killing suspected witches claim that they committed the crime because they genuinely believed that the deceased was bewitching them and/or close relatives, or that the deceased had threatened to bewitch or kill them and/or close relatives, causing them to become extremely angry and lose the power of self-control. One major legal difficulty that the courts in Africa have thus frequently been called to resolve, is the question of whether the belief in witchcraft and juju avails to a defendant the plea of grave provocation and, if so, under what circumstances.

The provocation defence has been raised since the 1930s with varying degrees of success. But surprisingly, the origins, nature, and historical development of this controversial defence have received virtually no attention in the academic literature. The relevant extant literature mainly addresses the general subject of witchcraft's impact on homicides, and only briefly delves into possible defences for witchcraft-related murders.[5] The present study fills the significant gap in the literature. Drawing on a wide range of relevant academic works, statutes and, more importantly, case law, this article investigates the origins of the provocation by witchcraft argument/plea and explores the historical development of this controversial legal defence, highlighting the extent to which the courts' perspective on the boundaries of its application has evolved since the 1930s.

Section 2 offers an introduction to key witchcraft and juju concepts in Africa and how such beliefs affect homicides. This is necessary since an understanding of the concept of witchcraft in African communities will facilitate a better appreciation of the discussion on the provocation by witchcraft controversy. Section 3 presents a brief general description and scope of the doctrine of provocation. Section 4 investigates the origins of the provocation by witchcraft defence, identifying the key relevant legislation and case law that served as the precursor to/of the witchcraft provocation plea. Section 5 delves into the historical development of the provocation by witchcraft defence, underscoring the extent to which the Anglophone African courts' interpretation of the doctrine of provocation in relation to witchcraft beliefs has evolved since the 1930s. This is followed by a conclusion that recaps the key points. It must be clarified at the outset that the phrase 'Anglophone Africa' is used in this study to refer specifically to the English-speaking African countries that were formerly colonized by Britain and whose laws are significantly modelled on the British legislation and English common law.

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[3] ibid.

[4] Gerrie ter Haar (ed), *Imagining Evil: Witchcraft Beliefs and Accusations in Contemporary Africa* (Religion in Contemporary Africa Series, Africa World Press 2007); Silvia Federici, 'Witch-Hunting, Globalization, and Feminist Solidarity in Africa Today' (2008) 10(3) Journal of International Women's Studies 21; Mensah Adinkrah, *Witchcraft, Witches and Violence in Ghana* (Berghahn Books 2015); 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?' (2019) 40(3) Obiter 105.

[5] See, for instance, Onesmus K Mutungi, 'Witchcraft and the Criminal Law in East Africa' (1971) 5(3) Valparaiso University Law Review 524; Daniel DN Nsereko, 'Witchcraft as a Criminal Defence, from Uganda to Canada and Back' (1996) 24(1) Manitoba Law Journal 38; Hallie Ludsin, 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law' (2003) 21 Berkeley Journal of International Law 62; Nelson Tebbe, 'Witchcraft and Statecraft: Liberal Democracy in Africa' (2007) 96 Georgetown Law Journal 183; John Alan Cohan, 'The Problem of Witchcraft Violence in Africa' (2011) 44(4) Suffolk University Law Review 803; Solomon Rukundo, 'Witch-Killings and the Law in Uganda' (2020) 35(2) Journal of Law and Religion 270.

2. THE AFRICAN CONCEPT OF WITCHCRAFT AND JUJU

A. The meaning of witchcraft

The term 'witchcraft' denotes different things in different countries, and to different ethnic groups and tribes or communities; hence, cross-cultural assumptions about its meaning should be avoided or applied with considerable caution.[6] Thus, the concept of witchcraft differs from culture to culture and, therefore, it is inadvisable to standardize the terminological usage of witchcraft as it applies to a particular culture or society. Edward Evans-Pritchard defines witchcraft, from the perspective of the Azande of Sudan, as the use of innate or inherited mystical powers to control people and manipulate events, or to cause calamity or death.[7] According to Adam Ashforth, '[w]itchcraft in the South African context typically means the manipulation by malicious individuals of powers inherent in persons, spiritual entities and substances to cause harm to others'.[8] In a study conducted by the Ghana National Commission for Civic Education (NCCE) on witchcraft and the rights of women in Ghana, about 89 per cent of the respondents defined witchcraft essentially as the use of spiritual or mystical powers by certain human entities to harm or kill others.[9] Even though Nelson Tebbe admits that beliefs and practices surrounding witchcraft vary from place to place, he proposes a definition that he claims 'many Africans would accept', namely: 'the practice of secretly using supernatural power for evil—in order to harm others or to help oneself at the expense of others'.[10] Witchcraft beliefs, thus 'constitute a system for the personification of power and evil'.[11]

In an ethnographic study conducted among the Gusii of Kenya, Robert LeVine found that a witch or wizard (male witch) in Gusii belief, 'is a person with an incorrigible, conscious tendency to kill or disable others by magical means'.[12] A similar notion of a witch is held by the Kamba of Kenya and the Akan of Ghana.[13] Closely related to LeVine's description is that of Tebbe who defines a witch as 'a human being who secretly uses supernatural power for nefarious purposes'.[14] To Roma Standefer, a witch is 'a person who is thought capable of harming others supernaturally through the use of innate mystic power, medicines or familiars'.[15] It could be deduced from the aforementioned individual definitions and descriptions that most African communities perceive witchcraft 'as the ability to harm someone through the use of mystical power. Consequently, the witch embodies this wicked persona, driven to commit evil deeds under the influence of the . . . force of witchcraft'.[16] Thus, the fundamental notion of people in most witch-believing communities in Africa is that witches are persons who possess supernatural powers to perform mostly malicious and calamitous activities.

[6] Jeffrey Burton Russell, *Witchcraft in the Middle Ages* (Cornell University Press 1972); Simeon Mesaki, 'The Evolution and Essence of Witchcraft in Pre-Colonial African Societies' (1995) 24 Transafrican Journal of History 162; Aleksandra Cimpric, *Children Accused of Witchcraft: An Anthropological Study of Contemporary Practices in Africa* (UNICEF/WCARO 2010).

[7] Edward E Evans-Pritchard, *Witchcraft, Oracles, and Magic Among the Azande* (Clarendon Press 1937).

[8] Adam Ashforth, 'An Epidemic of Witchcraft? The Implications of AIDS for the Post-Apartheid State' (2002) 61(1) African Studies 121, 126.

[9] National Commission for Civic Education (NCCE), *Witchcraft and Human Rights of Women in Ghana: Case Study of Witches Villages in Northern Ghana* (NCCE 2010).

[10] Tebbe (n 5) 190.

[11] Roma Louise Standefer, 'The Symbolic Attributes of the Witch' (1979) 10(1) Journal of the Anthropological Society of Oxford 31, 32.

[12] Robert Alan LeVine, 'Witchcraft and Sorcery in a Gusii Community' in John Middleton and Edward H Winter (eds) *Witchcraft and Sorcery in East Africa* (Routledge [1963] 2004) 221–55, 225.

[13] Mensah Adinkrah, 'Witchcraft Accusations and Female Homicide Victimization in Contemporary Ghana' (2004) 10(4) Violence Against Women 325; Katherine Angela Luongo, 'Conflicting Codes and Contested Justice: Witchcraft and the State in Kenya' (PhD thesis, University of Michigan 2006). Adinkrah (n 4).

[14] Tebbe (n 5) 190.

[15] Standefer (n 11) 32.

[16] Cimpric (n 6) 1–2.

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B. The meaning of juju

Juju, which is often used as a synonym for black magic, occultism, sorcery, and voodoo, 'is the African belief system and religious practice involving the use of objects and/or words to psychically manipulate events or alter people's destiny positively or negatively'.[17] Such magical feats or rituals are normally performed by certain specialists who 'claim to possess supernatural powers to diagnose people's problems and to find their causes; they claim to be able to counteract spells, find witches that are allegedly responsible for their clients' ills, and to find remedies to their supplicants' problems'.[18] Figures such as fetish priests, witchdoctors, traditional spiritualists, traditional healers, and magicians may all be classified as juju practitioners/specialists.[19] They may also be called different names in different countries and communities in Africa—*mganga* and *laibon* among the people of Kenya and other East African countries, *mallam* and *juju-man* or *juju-woman* among communities in Ghana, Nigeria and other parts of West Africa, *sangoma* and *inyanga* in communities in the southern part of Africa, etc.

Juju practitioners are widely consulted in Africa for a variety of reasons, including wealth accumulation, good health, success in business or political career, and enhancement of fertility. Many supposed victims of witchcraft also consult them for fortification and the destruction of adversaries in both the physical and spiritual worlds.[20] Some of their major functions are summarized by Simeon Mesaki in the following words: 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'.[21] They are, therefore, 'treated with a mixture of respect, caution and fear' in most African societies.[22] It is evident from the above descriptions that the essential difference between witches and juju practitioners is that the former act entirely psychically or use their supposed powers without reference to any physical objects, whereas the latter use their powers in conjunction with physical articles. It must, however, be stressed here that among some groups such as the Nandi of Kenya, no difference exists between a witch and a sorcerer.[23]

C. Distinctive features of African witchcraft and witches

In some African countries, the mystical activities of witches are, according to their perceived effects, divided into good or protective and bad or destructive witchcraft. However, the general view among Africans is that witches are the embodiment of evil, and that witchcraft is used chiefly for malevolent and malicious purposes.[24] Witches are generally believed to be cannibals who operate, usually in a group, in strange places at night and supply human flesh in turns.[25] They may also plot the death of their relatives and neighbours during such

[17] Emmanuel Sarpong Owusu, 'The Superstition that Dismembers the African Child: An Exploration of the Scale and Features of Juju-Driven Paedicide in Ghana' (2022) 60(1) International Annals of Criminology 1, 3.

[18] Nsereko (n 5) 45–46; Tebbe (n 5) 186–87.

[19] Owusu (n 17)

[20] Mesaki (n 6); Simon Fellows, Trafficking Body Parts in Mozambique and South Africa. A Report for Human Right League in Mozambique (*Scribd*, 2010) <https://www.scribd.com/document/363331553/Trafficking-Body-Parts-in-Mozambique-and-South-Africa-Research-Report-2010> accessed 17 March 2022; Owusu (n 17).

[21] Mesaki (n 6) 174.

[22] ibid.

[23] GWB Huntingford, 'Nandi Witchcraft' in John Middleton and EH Winter (eds), *Witchcraft and Sorcery in East Africa* (Routledge [1963] 2004) 175.

[24] John Middleton and Edward H Winter (eds), *Witchcraft and Sorcery in East Africa* (Routledge [1963] 2004); HW Debrunner, Witchcraft in Ghana: A Study on the Belief in Destructive Witches and its Effect on the Akan Tribes (Waterville 1978); Ter Haar (n 4).

[25] John Middleton and Edward H Winter (eds), *Witchcraft and Sorcery in East Africa* (Routledge [1963] 2004); Victor K Ametewee and James B Christensen, '"Homtodzoe": Expiation by Cremation among Some Tongu-Ewe in Ghana' (1977) 47(4) Journal of the International African Institute 360; Susan Drucker-Brown, 'Mamprusi Witchcraft, Subversion and Changing Gender Relations' (1993) 63(4) Journal of the International African Institute 531; Adinkrah (n 13); Ter Haar (n 4).

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gatherings in the spiritual world.[26] Even though for some societies such as the Gusii, witches eat only human cadavers,[27] the general belief among most communities in Africa is that they eat living human beings. In other words, witches eat the flesh and blood of their victims in the spiritual realm whilst they (the victims) are still alive, and the effect of that spiritual act is then manifested in the physical sphere.[28] Thus, victims die physically as soon as the witches finish eating away their life essence or vital force spiritually.[29] This is what Victor Ametewee and James Christensen refer to as 'spiritual cannibalism'.[30] One common notion among the Akan and Ewe of Ghana is that witches can transform themselves into a ball of fire blinking as they fly, or various deadly animals such as snakes to harm people.[31]

Different groups in Africa have different notions as to how one becomes a witch or how the witchcraft power is obtained. For some, witchcraft is inherited/innate; for others, it may be bought or learnt. Many also believe that witchcraft is an acquired art usually handed down from parent to child or grandparent to grandchild.[32] Among some groups such as the Akan of Ghana, acquired witchcraft is at times transferred from one person to another in the form of gifts or food. Thus, a witch (usually an elderly person) may offer witchcraft-infested gift or food to others, usually children they love, who then become witches after accepting the gift infused with witchcraft powers or ingesting the 'contaminated' food/drink. Among some groups, the common belief is that witches largely bewitch close relatives and friends or acquaintances. But in other African communities, a witch can attack anyone—a relative, friend, neighbour, or stranger.[33] As the prototype of all evil, purported witches are blamed in Africa for all kinds of calamities or misfortunes.[34] Studies show that anybody can be a victim of witchcraft accusations and witchcraft-driven crime; however, the most common victims of witchcraft accusations in Africa are elderly people—particularly women.[35]

D. The extent of witchcraft and juju beliefs in Africa

The belief in witchcraft is inarguably the most widespread harmful superstitious belief in Africa.[36] Some academics refer to it as an inescapable part of day-to-day life on the continent—it is so ingrained in African people's ethos that it can hardly ever be eradicated.[37] Witchcraft and juju beliefs are held by all manner of people—the uneducated and educated, the poor and rich, the young and old, males and females, simple petty traders and sophisticated business moguls, as well as church leaders, teachers, and legal practitioners among

[26] LeVine (n 12) 226.
[27] ibid.
[28] Ametewee and Christensen (n 25); Debrunner (n 24); Drucker-Brown (n 25); Ter Haar (n 4).
[29] Ter Haar (n 4); Emmanuel Sarpong Owusu, 'The Superstition that Maims the Vulnerable: Establishing the Magnitude of Witchcraft-Driven Mistreatment of Children and Older Women in Ghana' (2020) 58(2) International Annals of Criminology 253.
[30] Ametewee and Christensen (n 25) 361.
[31] Ametewee and Christensen (n 25); Debrunner (n 24); Adinkrah (n 13).
[32] LeVine (n 12); Huntingford (n 23); Adinkrah (n 13); Luongo (n 13); Adinkrah (n 4).
[33] See LeVine (n 12); Huntingford (n 23); Drucker-Brown (n 25); Maakor Quarmyne, 'Witchcraft: A Human Rights Conflict Between Customary/Traditional Laws and the Legal Protection of Women in Contemporary Sub-Saharan Africa' (2011) 17(2) William & Mary Journal of Women and Law 475.
[34] Evans-Pritchard (n 7); Justus Mozart Ogembo, *Contemporary Witch-Hunting in Gusii, Southwestern Kenya* (Edwin Mellen Press Ltd 2006); Quarmyne (n 33); Adinkrah (n 4); Owusu (n 29).
[35] Samantha Spence, *Witchcraft Accusations and Persecutions as a Mechanism for the Marginalisation of Women* (Cambridge Scholars Publishing 2017); Owusu (n 29).
[36] Evans-Pritchard (n 7); Cimpric (n 6).
[37] Kate Crehan, *The Fractured Community: Landscapes of Power and Gender in Rural Zambia* (University of California Press 1997); Jill Schnoebelen, 'Witchcraft Allegations, Refugee Protection and Human Rights: A Review of the Evidence' (2009) Paper No 169 New Issues in Refugee Research <https://www.unhcr.org/uk/research/working/4981ca712/witchcraft-allegations-refugee-protection-humanrights-review-evidence.html> accessed 7 January 2021.

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others.[38] A survey conducted by one academic on his students over several years shows that about 80 per cent of African students in universities believe in the existence of witches and ancestral spirits.[39] A more expansive study carried out by Gallup in 2010 also confirms the high prevalence of witchcraft belief in Africa. The study which surveyed 18,000 people in 18 African countries reveals that the rate of belief in witchcraft varies (from 15 to 95 per cent), but on average, 55 per cent of residents on the continent personally believe in witchcraft and the existence of witches.[40] The belief in juju is also rife in most sub-Saharan African countries.[41] A study conducted by Pew Research Center shows that approximately 30 per cent of Africans, including Christians and Muslims, believe in the protective and destructive power of juju.[42] However, this may be a gross underestimation, as several reports and research in various African countries suggest a far higher rate for belief in juju and its protective and destructive power.[43]

E. Witchcraft detection and punishment in indigenous African communities

Witchcraft accusations are usually based on mere suspicion, which then leads to rumours or gossip that circulate within the community.[44] Such suspicions are often triggered by the occurrence of unpleasant events or a series of misfortunes such as serious or incurable illness, financial hardship, unexpected death strikes, and a mere bad dream.[45] In a typical indigenous African community, when people suspect others of bewitching them, they consult a witch doctor for confirmation and to seek a remedy (today, more and more people are turning to pastors for such consultations).[46] Others report suspected witches to the traditional leaders who then summon the suspects to appear before the traditional court/tribunal and be tried.[47] There are communal and private procedures for determining causes of misfortune, and for trying and punishing witches.[48] The communal methods are used primarily when there is a high degree of community consensus concerning the guilt of an alleged witch and the necessity for instant countermeasures.[49] The private measures are exploited when individuals believe that they, their children or other close family members are being plagued, and witchcraft is suspected.[50] The afflicted person or a concerned relative of the plagued 'then decides who to blame for the misfortune and what counter-measures should be taken'.[51]

The commonest traditional procedures or methods for determining causes of calamities and detecting witches are divination and trial by ordeal.[52] In some communities, curses and

[38] 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* (Save the Children 2006); Schnoebelen (n 37); Owusu (n 29).

[39] See John Hund, 'Witchcraft and Accusations of Witchcraft in South Africa: Ontological Denial and the Suppression of African Justice' (2000) 33 Comparative & International Law Journal of South Africa 366.

[40] Bob Tortora, 'Witchcraft Believers in Sub-Saharan Africa Rate Lives Worse: Belief Widespread in Many Countries' (*Gallup*, 25 August 2010) <https://news.gallup.com/poll/142640/Witchcraft-Believers-Sub-Saharan-Africa-Rate-Lives-Worse.aspx> accessed 20 July 2020.

[41] James H Neal, *Juju in My Life* (George G Harrap 1966); Mensah Adinkrah, 'Ritual Homicides in Contemporary Ghana' (2005) 5 International Journal of Comparative Criminology 29; Fellows (n 20); Owusu (n 17).

[42] Pew Research Center, *Tolerance and Tension: Islam and Christianity in Sub-Saharan Africa* (Pew Research Center 2010)

[43] Neal (n 41); Claire Keeton, Sangomas to Join Formal Medical Fraternity, *Sunday Times* (South Africa, May 2004) 4; Joan Thatiah, 'Half of Kenyan Women have Visited a Mganga, Study Finds' *Daily Nation* (Nairobi, 31 March 2017) <https://mobile.nation.co.ke/lifestyle/Half-of-Kenyan-women-have-visited-a-mganga/1950774-3872504-5r34nu/index.html> accessed 20 June 2020.

[44] Mutungi (n 5); Quarmyne (n 33); Owusu (n 29).

[45] LeVine (n 12); Adinkrah (n 13); Drucker-Brown (n 25).

[46] Owusu (n 29).

[47] Natasha Gray, 'Witches, Oracles, and Colonial Law: Evolving Anti-Witchcraft Practices in Ghana, 1927-1932' (2001) 34(2) The International Journal of African Historical Studies 339.

[48] LeVine (n 12); Ogembo (n 34).

[49] ibid.

[50] ibid.

[51] LeVine (n 12) 245.

[52] Ametewee and Christensen (n 25); Mesaki (n 6); Cohan (n 5).

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oaths may also be used to determine the veracity or falsity of suspicions and accusations.[53] Different techniques and skills for divining and conducting ordeals are used by different communities or ethnic groups. However, divination techniques usually include incantations and/or long periods of fasting by a diviner,[54] special rituals such as the casting of objects (eg, stones or pebbles and beads) and reading/examining their postures and relying on intuition.[55] Among the common forms of ordeals are immersing hands in boiled water to pull out a specific object, drinking specially prepared traditional medicine or 'poisonous' concoction, jumping over fire, etc.[56] The belief is that if the accused persons are guilty but do not confess, they would die or be badly injured whilst undertaking various dangerous activities or ordeals.[57] In most communities, people accused of being witches and brought before the traditional tribunals or witchdoctors are generally not killed when found guilty. In most cases, they are 'given a medicine to eliminate the power of witchcraft from their person'.[58] Some 'culprits' may be banished from the community either for good or for a specified period of time; others may be subjected to public humiliation or be compelled to undergo certain humiliating rites such as having their head completely shaved in public and being hooted at as they walk from one end of the village to the other. Corporal punishment may also be inflicted on culprits in some communities and under certain circumstances.

The indigenous traditional system generally discourages the so-called instant justice and encourages the use of existing indigenous tribunals and systems to address witchcraft-related issues. However, for centuries, some perceived victims of witchcraft have taken the law into their own hands to kill 'witches' believed to be the cause of their predicaments.[59] Several researchers agree that over 23,000 people were murdered on witchcraft allegations in sub-Saharan Africa between 1991 and 2001, and that the pace of the witchcraft-driven murders has since accelerated.[60] Interestingly, the defences that have repeatedly been employed by witch-killers since the colonial period are insanity/mental incapacity, mistaken belief/mistake of fact, self-defence and, more intriguingly, provocation. The present study, as already indicated, focuses on the defence of provocation in relation to witchcraft beliefs.

3. A BRIEF EXPOSITION OF THE DOCTRINE OF PROVOCATION

Since homicide, traditionally defined as 'the killing of a human being by another with malice aforethought',[61] is the ultimate crime, people who kill almost mandatorily receive the heaviest or severest punishment the relevant laws allow. In almost all Anglophone African countries, the mandatory punishment for committing intentional homicide is the death penalty. However, the laws of many countries or societies, including those in Africa, have long taken the view that some killings are less senseless and should attract a lesser punishment than others. They thus draw a distinction between murder (punishable by the heaviest penalty available) and manslaughter or culpable homicide (which deserves a less severe penalty).

[53] Mutungi (n 5); Luongo (n 13).

[54] A diviner is a juju specialist who uses oracles to communicate with the ancestral spirits, diagnose misfortunes, and prescribes appropriate remedies.

[55] LeVine (n 12), Mesaki (n 6), Huntingford (n 23).

[56] LeVine (n 12); Mesaki (n 6).

[57] LeVine (n 12) 231.

[58] Ametewee and Christensen (n 25) 361; Gray (n 47).

[59] Nsereko (n 5); James S Read, 'Crime and Punishment in East Africa: The Twilight of Customary Law' (1964) 10 Howard Law Journal 164.

[60] Richard Petraitis, 'The Witch Killers of Africa' (*Infidels*, 2003) <https://infidels.org/library/modern/richard-petraitis-witch-killers/> accessed 12 May 2019; Federici 2008 (n 4); Hamisi Mathias Machangu, 'Vulnerability of Elderly Women to Witchcraft Accusations among the Fipa of Sumbawanga, 1961-2010' (2015) 16(2) Journal of International Women's Studies 274; Singh and Msuya (n 4).

[61] Adrian Williamson, 'Gender and the Law of Provocation in the Long Twentieth Century' (2020) 29(3) Women's History Review 495, 497.

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Killings triggered by provocation fall within the latter category. Provocation is thus an important dividing line between murder and manslaughter or culpable homicide.[62]

The commonest and simplest meaning of the term 'provocation' could be said to be incitement, unconsciously or consciously, to anger. However, in criminal law, the term denotes much more than ordinary anger. To mitigate or extenuate the killing of a person, provocation must be of a special kind—it must produce immediate anger or 'passion' and overcome a person's self-control to such an extent as to subdue or overpower his reason.[63] In the Canadian case, *R v Tripodi*, Rand J defined a 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'.[64] Edward Hyde East argues 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'.[65] In the UK case, *R v Kiranjit Ahluwalia*, Lord Taylor held that the phrase 'sudden and temporary loss of control' encapsulates an essential ingredient of the defence of provocation.[66]

It is evident that the provocation defence springs from an appreciation or understanding of the fragility/frailty of human nature and humankind's proneness to loss of self-control under certain circumstances.[67] As the Supreme Court of Canada notes, 'all human beings are subject to uncontrollable outbursts of passion and anger which may lead them to violent acts. In such circumstances the law would lessen the severity of criminal liability'.[68] It is worth clarifying that in Anglophone African countries, as in most States the world over, the provocation defence is available only in murder cases. Besides, even though provocation serves as an excuse for a murderous act and changes the nature of the crime committed, it is regarded not as a complete defence, but as a matter which goes substantially in mitigation of sentence. Thus, provocation does not result in an acquittal but only leads to a reduction from a conviction of murder to one of manslaughter and, consequently, a lesser sentence.

4. ORIGINS OF THE PROVOCATION BY WITCHCRAFT DEFENCE

The term 'provocation by witchcraft' is a defence utilized by witch-killers to persuade judges to convict them of manslaughter or culpable homicide instead of murder so that their sentence or punishment may be significantly reduced. Under this defence, the arguments usually put forward by witch-killers in criminal proceedings are that they committed the homicidal act because they genuinely believed that the deceased was the cause of some calamities in their lives or families, and/or that the deceased had threatened to bewitch or kill them and/or close relatives, causing them to become irrepressibly angry or lose the power of self-control. The provocation by witchcraft defence has been frequently raised by killers of alleged witches and juju practitioners in different parts of Anglophone Africa over the last century with varying rates of success. However, as earlier indicated, not much is found in the academic literature about its historical background and scope. This part of the discussion thus delves into the origins and intricacies of the provocation by witchcraft plea.

[62] ibid.
[63] Law Reform Commissioner Victoria, 'Provocation as a Defence to Murder' (Working Paper No 6 Melbourne, Victoria, 1 October 1979) 5.
[64] *R v Tripodi* [1955] SCR 438, 443.
[65] Edward Hyde East, *A Treatise of the Pleas of the Crown* (Vol 1, Butterworth 1803) 238.
[66] *R v Kiranjit Ahluwalia* [1993] 96 Criminal Appeal, R 133, 139–141.
[67] Law Reform Commissioner Victoria (n 63); Nsereko (n 5) 50–51.
[68] *R v Hill* [1986] 1 SCR 313, 323.

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It is worth mentioning at this point that three major regional appellate courts existed in Anglophone Africa during the colonial period, namely: (i) the West African Court of Appeal (WACA) first established in 1864, abolished 7 years later and reintroduced in 1928, which served as the appellate court for all British colonies in the western part of Africa (the Gold Coast now Ghana, Nigeria, Sierra Leone, and the Gambia); (ii) the East African Court of Appeal (EACA) established in 1902 and dealt with cases tried in British colonies in eastern Africa (Kenya, Uganda, and Tanganyika and Zanzibar now Tanzania; over time, the jurisdiction of the court expanded to include other territories such as Somaliland, Mauritius, Seychelles, etc); and (iii) the Rhodesia and Nyasaland Court of Appeal (RNCA) which served some southern African territories (specifically Northern Rhodesia now Zambia, Southern Rhodesia now Zimbabwe and later Nyasaland now Malawi).[69] All national courts were bound by the rulings or decisions of the respective regional courts.

In the case of South Africa, the Supreme Court of South Africa (SCSA) formed in 1910 was the superior court that handled appeals within the Union of South Africa (now the Republic of South Africa) and related territories. Appeals from the three regional courts and the SCSA went to the Judicial Committee of the Privy Council (JCPC) which acted as the highest and final court of appeal for the entire British Empire (except the UK itself). It is not certain whether the decisions of the one regional appeal court were binding on the other. According to TO Elias, it was not stated anywhere that the regional appellate courts had any kind of connection except via the Privy Council decisions, adding that the judgments of each were 'only of persuasive authority with the other'.[70] The regional appellate courts ceased to exist following independence.

It must be mentioned that in many African countries, judgments do not have numbered paragraphs; therefore, pinpointing a particular paragraph, even where a direct quote is used, has largely not been possible. Some of the cases and judgments discussed in this study were retrieved from the online law portals or databases of various credible legal information bodies such as the African Legal Information Institute which convenes a network of 16 legal information institutes in English-speaking Africa, and other legal information organizations and law reports. These online databases usually include otherwise unpublished cases.

A. Witchcraft and colonial legislation

Witchcraft-driven crimes were quite rampant in most sub-Saharan African countries during the colonial period. To the superstitious mind, particularly the indigenous folks, witchcraft was real and a social evil that must be tackled and uprooted.[71] However, the colonial government or administrators viewed witchcraft as imaginary and utter nonsense, and the English criminal law could not ignore crimes triggered by belief in witchcraft. Thus, anti-witchcraft legislation was deemed necessary and unavoidable by the colonial administrators.[72] Like the current anti-witchcraft statutes in Anglophone Africa, the earlier colonial models outlawed a wide variety of practices, including witchcraft accusations and concomitant violence.

Interestingly and quite ironically, anti-witchcraft statutes also criminalized the practice of witchcraft; however, that provision was generally not enforced due to the difficulty in prosecuting a crime for which there was no hard evidence.[73] As John Hund emphasizes: 'Anyone brought before the courts for practising witchcraft ... [was] set free for lack of concrete evidence'.[74] In instances where witchcraft accusations resulted in homicide, perpetrators were

[69] TO Elias, 'Colonial Courts and the Doctrine of Judicial Precedent' (1955) 18(4) The Modern Law Review 356.
[70] ibid 363.
[71] Nsereko (n 5), Richard D Waller, 'Witchcraft and Colonial Law in Kenya' (2003) 180 Past & Present 241
[72] Waller (n 71).
[73] Tebbe (n 5); Hund (n 39); Waller (n 71).
[74] Hund (n 39) 368.

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tried under the penal code. Since murder required a mandatory death sentence under the penal codes of almost all Anglophone African countries, witch-killers were necessarily handed the death penalty when convicted. To escape the death sentence, many accused witch-killers employed the provocation plea.

B. The provocation provision in Anglophone Africa

The provocation doctrine/law is entrenched in various sections of the criminal/penal codes of Anglophone African countries. It has been established that one of the first criminal codes to emerge in Anglophone Africa was a code drafted and promulgated for Northern Nigeria in 1904; and this code was modelled on the Queensland Criminal Code of 1899.[75] The code originally introduced in East Africa was the Indian Penal Code of 1860, but this was replaced in the early 1930s by codes drafted for the Colonial Office. According to James S Read, the draftsman of the codes drafted for the Colonial Office, which could be termed model penal codes, took the Northern Nigeria Criminal Code of 1904 as his principal source.[76] This means that the Nigeria Penal Code became a model for many other British colonies in the western and eastern parts of Africa and beyond. The Ghanaian Criminal Code, which was extensively revised in 1960, is unique in Africa, in that 'it finds its origin in the St Lucia Code of 1889, itself derived from the code drafted for Jamaica but never brought into force there'.[77]

It is evident, therefore, that all the criminal codes found in Anglophone African countries owe their origins to the English criminal law which thus became the point of reference for the criminal laws of former British colonies in Africa.[78] In fact, many of the penal codes had sections which mandated all courts to interpret the code according to English legal principles.[79] Thus, in instances where the code was unclear, the courts were required to rely on the decisions of the English superior courts for guidance. Writing in the early 1960s, Read makes the following important observation: 'The influence of English criminal law throughout the English-speaking areas has been universal: even in southern Africa where the legal systems are founded upon Roman-Dutch law, criminal law is to a great extent English in character.'[80]

Evidently, the various penal statutes drafted during the colonial period have been amended or revised several times to bring them in line with changing political, socio-economic, and religious conditions in the respective countries. However, a critical look at the current versions shows that the wording and substance of the sections relating to the provocation doctrine remain largely the same. This study adopts the current version of the Ugandan law on provocation (which is indistinguishable from the Kenyan version) as a model. This is for two reasons: (i) the current wording of the Ugandan version is strikingly similar to that of the earliest drafts and (ii) the provocation by witchcraft defence originated from or is rooted in the Ugandan and Kenyan common law as shall be demonstrated later in this discussion.

Section 192 of the Ugandan Penal Code stipulates that:

> When a person who unlawfully kills another under circumstances which, but for [the provision of] this section, would constitute murder, does the act which causes death in the heat

[75] James S Read, 'Criminal Law in the Africa of Today and Tomorrow' (1963) 7(1) Journal of African Law 5; HF Morris, 'How Nigeria Got its Criminal Code' (1970) 14(3) Journal of African Law 137; Nsereko (n 5).
[76] Read ibid 5–6; see also Morris ibid.
[77] Read (n 75) 5.
[78] ibid; Elias (n 69).
[79] Read (n 75).
[80] ibid 5.

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of passion caused by sudden provocation as defined in section 193, and before there is time for his or her passion to cool, he or she commits manslaughter only.

Section 193 defines the term 'provocation' as:

1) . . . any wrongful act or insult of such a nature as to be likely—
   a) when done or offered to an ordinary person or
   b) when done or offered in the presence of an ordinary person to another person—
      i) who is under his or her immediate care or
      ii) to whom he or she stands in a conjugal, parental, filial or fraternal relation, or in the relation of master and servant,

to deprive him or her of the power of self-control and to induce him or her 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 –
   a) to another or
   b) in the presence of another to a person –
      i) who is under the immediate care of that other or
      ii) to whom that other stands in any such relation as aforesaid,

the former is said to give to that other provocation for an assault.[81]

It appears that before the 1930s, the provocation defence had not been seriously contemplated and used in witchcraft-related criminal trials in Africa. Instead, the dominant plea employed was self-defence.[82] It is therefore reasonable and relevant to now briefly delve into the self-defence plea, which appears to be the direct precursor of the provocation by witchcraft defence. This will facilitate a better comprehension of the discussion on the evolution of the provocation by witchcraft defence that follows.

C. The self-defence plea in witchcraft-related murder cases

As already mentioned, accused witches usually do not perform any tangible act, and supposed victims who try to press charges usually base their accusations on mere suspicion and intuition. Consequently, even though practising or pretending to practise witchcraft was a crime under various anti-witchcraft legislation, witches could not easily be brought within the purview of the criminal statutes for prosecution during the colonial period.[83] Unable to invoke the aid of the law, accusers usually resorted to self-help—they took the law into their own hands and punished, at times killed, alleged witches.[84] Witchcraft-related murder cases were thus frequently dealt with by the courts during the colonial period. However, prior to the 1930s, the defence that was most often invoked by witch-killers in Anglophone Africa was self-defence and not provocation.

The provocation defence was not employed for two main interdependent factors: (i) the circumstances in which witch-killings occur are not apt to satisfy 'the legal tenets as formulated by both the penal codes and case law' and (ii) the criminal law principles relating to provocation 'are not appropriate in witchcraft cases'.[85] For instance, the requirement that the killing must have been sudden, in the heat of passion, and before there is time for the killer's

[81] The Uganda Penal Code Act (ch 120) 1950 (Amended in 2002, 2007, 2009, 2010, and 2014).
[82] Nsereko (n 5); Mutungi (n 5); Kharisu Sufiyan Chukkol, 'Supernatural Beliefs and Criminal Law in Nigeria' (1983) 25(4) Journal of the Indian Law Institute 444.
[83] Nsereko (n 5); Waller (n 71).
[84] Nsereko (n 5); Mutungi (n 5).
[85] Mutungi (n 5) 546.

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passion to cool, could not be satisfied because, as Robert Seidman observes, '[t]he nature of the threat of witchcraft is that the passage of time serves only to inflame the passions, not to cool them'.[86] Again, the requirement that the alleged provocative act or insult must have been done in the presence of and seen by the accused, could hardly be satisfied since witches generally do not perform any tangible or visible or audible act. Additionally, provocation could not be invoked because 'most of witch-killings arise very often out of fear and rarely out of sudden anger'.[87] Since witchcraft is a metaphysical phenomenon, and alleged bewitchments or attacks could not and still cannot be empirically verified, none of the possible self-defence arguments for an acquittal or mitigation of sentence could succeed. Defendants were therefore 'routinely sentenced to death, sometimes in embarrassingly large numbers'[88] as was the case in *R v Kumwaka wa Mulumbi and others* (Kenya).[89]

One high-profile witchcraft-related murder case in which the self-defence plea was raised is *Maawole Konkomba v R* (Ghana), the accused who genuinely believed that the deceased had caused the death of one of his brothers by witchcraft and was about to kill another (who was seriously ill) by the same supernatural means, decided to take drastic measures to repel the metaphysical attacks. He invited the deceased to provide medicine to reverse the condition of his sick brother after a juju-man he had consulted confirmed that the deceased was responsible for his brother's illness. When the deceased insisted that he was not responsible for the illness of the accused's brother and had no such curative medicine to reverse his condition, the accused inflicted lethal blows on his head with an axe. It was apparent that the accused killed the deceased to prevent him from exterminating his sick brother and the rest of his surviving family by witchcraft. Dismissing his appeal against a conviction of murder, the WACA expressed 'no doubt . . . that the appellant honestly believed when he struck the fatal blows that he was striking a man who had already killed one of his brothers by witchcraft and was in the process of killing another'.[90] However, it stressed that killing someone to repel metaphysical attacks was no defence in law as such beliefs are unreasonable.[91] The 'reasonableness' test becomes an important element not only in self-defence pleas but also provocation by witchcraft defences as shall be shown in this discussion.

In *Attorney General of Nyasaland v Jackson* (Malawi), the deceased had a squabble with the accused during which she (the deceased) told him (the accused) that he would not see the sun that day. The accused, interpreting this statement to be a threat to kill him by witchcraft, decided to kill the deceased before sunset to save himself from dying by her witchcraft. He shot her with an arrow in the stomach and then struck her on the head several times with a hoe. When charged with murder, he argued that he genuinely believed that the deceased would kill him by witchcraft before sunset and that he acted in self-defence. The trial court allowed the defence after finding that his witchcraft belief, though a mistaken belief, was honest and reasonable. However, the Rhodesia and Nyasaland Federal Supreme Court reversed the verdict, stating that the appellant's belief that the deceased would kill him by witchcraft before sunset, even if genuine, was not reasonable.[92]

Interestingly, the regional and other superior courts in Anglophone Africa have had significantly divergent views on how 'reasonableness' should be determined or assessed and

[86] Robert B Seidman, 'The Inarticulate Premiss' (1965) 3(4) Journal of Modern African Studies 567, 586.

[87] Lutapimwa L Kato, 'Functional Psychosis and Witchcraft Fears: Excuses to Criminal Responsibility in East Africa' (1970) 4(3) Law & Society Review 385, 397.

[88] Waller (n 71) 248.

[89] *R v Kumwaka wa Mulumbi and others* (1932)14 KLR 137. This case will be looked at more closely in the subsequent section. It must be noted that the country placed in brackets after the case title, is the place or colony in which the case originated and tried. This has been done, where necessary, throughout the discussion.

[90] *Maawole Konkomba v R* (1952) 14 WACA 236, 237

[91] ibid.

[92] *The Attorney General of Nyasaland v Jackson* [1957] RNLR 443.

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whether a belief in witchcraft or killing a person as a result of witchcraft beliefs can ever be reasonable. In the *Jackson* case, the Rhodesia and Nyasaland Federal Supreme Court reasoned that a belief was reasonable if it 'would appear reasonable to the ordinary man in the street in England', insisting that the law applied in England was 'still the law of England even when it extended to Nyasaland'.[93] The Court held the view that the appellant's belief that the deceased would kill him by witchcraft before sunset was not one that an ordinary Englishman in the streets of England would entertain; therefore, it was not reasonable, and the self-defence plea must be rejected.[94] This standard was rightly heavily criticized by several experts who viewed it as an unfair and unreasonable test to be applied in a less enlightened society.

In the view of the EACA, a belief was reasonable if 'an ordinary person of the community to which the accused belongs would genuinely' have the same belief under similar circumstances.[95] The Court of Appeal of Botswana used a similar test in *Innocent Manjesa v the State*, stating that a belief is reasonable if 'an ordinary person of the class of the community to which the accused belongs' would have the same belief.[96] This, as Daniel Nsereko explains, means that if the accused persons are from a rural community, their 'conduct would be judged by the standard of conduct expected of an . . . average person from that community', and if they are urbane and educated, their conduct would 'be judged by the standard of an average urbane and educated individual'.[97] Evidently, the test applied by the EACA and the Botswanan Court seems to be more reasonable than that of the Rhodesia and Nyasaland Federal Supreme Court.

The WACA in *Muhammedu Gadam v R* (Nigeria) took a more radical or revolutionary position, stressing that the fact that the majority, even an overwhelming majority, of the members of a community to which the accused person belongs believe in witchcraft does not render the accused's belief reasonable.[98] In the *Gadam* case, the appellant's wife died as a result of an infection caused by a miscarriage. The accused who genuinely believed that his wife's miscarriage and eventual death were caused by an 80-year-old woman using witchcraft, killed the woman by striking her with a hoe-handle. Dismissing an appeal against the perpetrator's conviction for the murder, the WACA held that the belief in witchcraft, though prevalent in the appellant's community, was not reasonable. The Court cited the following passage from an earlier unreported case to buttress its position:

> I have no doubt that a belief in witchcraft such as the accused obviously has is shared by the ordinary members of his community. It would, however, in my opinion be a dangerous precedent to recognize that because a superstition, which may lead to such a terrible result as is disclosed by the facts of this case, is generally prevalent among a community, it is therefore reasonable. The Courts must, I think, regard the holding of such beliefs as unreasonable.[99]

What the court apparently means by this language is that the belief in witchcraft and an ensuing criminal act could not be reasonable and excusable under any circumstances—not even if the entire village or community were engrossed in witchcraft beliefs. This position

93 ibid 448–49.
94 ibid 449.
95 *R v Fabiano Kinene s/o Mukye and others* [1941] 8 EACA 96, 101. This case will be examined in more detail later in this discussion.
96 *Innocent Manjesa v State* [1991] CA, Criminal Appeal No 30 of 1991.
97 Nsereko (n 5) 48.
98 *Muhammedu Gadam v R* [1954] 14 WACA 442.
99 *Gadam* 443, the WACA citing *lsekwe Ifereonwe v R*.

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was reinforced by the Nigerian Supreme Court in *Nse Obong Jonah v The State* where the appellant (a petty trader) killed the deceased (a relative) on suspicion of spiritually tormenting him and using witchcraft to prevent people from buying his mats when he took them to the market.[100] Nsereko opines that the WACA's reasoning or position 'has some merit, in that it underscores the criminal law's educative value, setting societal standards of behaviour and requiring members to conform to those standards'.[101] However, he questions whether '[w]hen the majority of the people in a community are uneducated and unenlightened', it would be 'reasonable or fair to expect them to behave as if they were educated and enlightened'.[102] The stance of the courts in the Union of South Africa and associated territories was not significantly different from that of the WACA. In *R v Magabeni and others* (Natal, South Africa), the Native High Court suggested that a reasonable person does not believe in superstitions such as witchcraft and juju; therefore, the belief in witchcraft cannot be reasonable under any circumstances.[103] This position was reiterated in *S v Mokonto* where the court pronounced that 'the beknighted belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the Dark Ages'.[104]

Evidently, the witchcraft legislation that criminalized witch accusations and associated violence, and the penal codes that prescribed the mandatory death penalty for murder convictions, posed special difficulties during the colonial era as they still do today, in that for them to be recognized and accepted in 'witch-ridden' African communities, they must strike in two directions—against not only those who kill alleged witches but also the 'witches' themselves.[105] However, while 'innocent' witch-killers were frequently prosecuted, convicted and sentenced to death, the real 'guilty' persons and evil-doers (the alleged witches) were left off the hook.[106] Therefore, to many indigenous Africans who believed in witchcraft, the colonial government was protecting witches rather than the community tormented by the witches.[107]

Interestingly, where an appeal failed, the courts had no option but to recommend certain appellants to the clemency of the relevant colonial governor. In other words, in cases where the judges deemed that the defendants' real and genuine (though mistaken) belief in witchcraft had been established, a plea for clemency from the relevant governor was made on behalf of the accused. By this, the superior courts handed 'over the impossible task of deciding between the claims of legal guilt and moral innocence to the executive arm, the Governor-in-Council, who could make a decision based on policy, not law'.[108] In most cases, the relevant governor commuted the death sentence to a term of imprisonment with hard labour. The fact that judges often sought executive clemency for accused persons, and governors frequently commuted capital punishments to varying jail terms, raised doubts about the justifiability and relevance of imposing the death penalty on witch-killers. As Onesmus Mutungi opines, '[s]uch recommendations and reliance on the executive clemency defeat any deterrent effect of the death sentence in witchcraft cases'.[109] In the view of Richard Waller, '[t]hat the law had to be rescued from a dilemma of its own making by invoking the claims of policy suggested that its overriding and universal authority might itself be overridden'.[110]

100 *Nse Obong Jonah v The State* [1977] SC, Case No SC 145/1976.
101 Nsereko (n 5) 49–50.
102 ibid 50.
103 *Rex v Magabeni and others* [1911] Native High Court 107. In this case, a group of people were convicted for stabbing and burning a man suspected of using witchcraft to cause sickness and death in their kraal (village).
104 *S v Mokonto* [1971] 2 SA 319, 324. This case will be revisited in the latter part of the discussion.
105 Waller (n 71) 244.
106 Waller (n 71).
107 ibid 248; see also C Clifton Roberts, *Tangled Justice* (Macmillan 1937).
108 Waller ibid.
109 Mutungi (n 5) 546.
110 Waller (n 71) 248.

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It has been argued that the fact that courts often made recommendations to the governor or Head of State to exercise the prerogative of mercy, suggests that the courts were themselves sceptical about the fairness of the written law in imposing mandatory capital punishment on 'unenlightened' witch-killers.[111] Several academics and experts thus argue that the provocation by witchcraft defence 'in common law was rooted in a desire to mitigate the harshness of the mandatory death penalty'.[112] Since the early 1930s, the provocation by witchcraft defence has been offered frequently, at times in conjunction with self-defence, in witchcraft-related murder cases in every part of Anglophone Africa. Today, the courts, as one commentator observes, too readily allow the defence of provocation by witchcraft and avoid convicting witch-killers of first-degree murder for fear of the sentence that necessarily follows such a conviction.[113]

It is apparent, therefore, that the employment of the so-called provocation by witchcraft defence, and the court's decision to recognize/allow such a defence in certain circumstances was a subtle way of preventing people who killed out of genuine belief that the deceased was bewitching them, from facing the ultimate punishment. The problem, however, is that for over a century, the courts throughout English-speaking Africa have had to grapple not only with the justifiability of the provocation by witchcraft defence but also the boundaries of its application. The next section thus explores the evolution of the Anglophone African courts' interpretation of the doctrine of provocation in relation to witchcraft and juju beliefs.

5. EVOLUTION OF THE SCOPE OF PROVOCATION BY WITCHCRAFT

A. The colonial era

One of the first reported cases in which the defence of provocation by witchcraft was hinted at is *Kumwaka*, a high-profile case decided in 1932. In this case, 70 defendants were convicted, and 60 of the convicts were handed the death penalty by the Supreme Court of Kenya for beating to death a woman suspected of bewitching the wife of one of the accused persons (Mr Kumwaka) by rendering her mute. They argued that their action was provoked by their genuine belief that the victim was bewitching their colleague's wife and other members of the community.[114] In its concluding statement, the court accepted that '[t]he belief in witchcraft is, of course, widespread and is deeply ingrained in the native character'.[115] However, it stressed that the belief in witchcraft and the fear of witches do not justify deviation from law by private infliction of punishment on the alleged witch except in exceptional circumstances. The court stated as follows:

> The plea has frequently been put forward in murder cases that the deceased had bewitched or threatened to bewitch the accused, and that plea has been consistently rejected except in cases where the accused has been put in such fear of immediate danger to his own life that the defence of grave and sudden provocation has been held proved. For Courts to adopt any other attitude to such cases, would be to encourage the belief that an aggrieved party may take the law into his own hands, and no belief could well be more mischievous or fraught with greater danger to public peace and tranquillity.[116]

[111] Waller (n 71); Mutungi (n 5); Nsereko (n 5).
[112] Rukundo (n 5) 290; see also Joshua Dressler, 'Rethinking Heat of Passion: A Defense in Search of a Rationale' (1982) 73 Journal of Criminal Law and Criminology 421.
[113] Muna Ndulo, 'Infidelity as Provocation: A Comment' (1974) 6 Zambia Law Journal 129.
[114] *Kumwaka* (n 89); see also Katherine Angela Luongo, *Witchcraft and Colonial Rule in Kenya, 1900–1955* (Cambridge University Press 2011).
[115] *Kumwaka* (n 89) 139.
[116] ibid.

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The Supreme Court's language seems to suggest that the provocation by witchcraft defence had been raised several times prior to *Kumwaka*; but unhelpfully, not a single relevant case or previous decision was cited to buttress this assertion, and none seems to exist. Even though the EACA dismissed the appeal lodged by the defendant's advocates, the prerogative of mercy was exercised by the then governor of Kenya who commuted the death sentences to varying jail terms with hard labour.

It is evident that self-defence and mistaken belief, the main pleas in the *Kumwaka* case, were raised in conjunction with the provocation defence.[117]

The Supreme Court's concluding statement in *Kumwaka* suggests that the emotion of fear was confused with the emotion of anger which is the only result or product of provocation received. It was therefore not surprising that in the course of time, judges and other legal experts began to share reservations about the accuracy of the Kenyan Supreme Court's perspective on the provocation defence. Many became uncomfortable with the general applicability of what had, at the time, become an established principle in Anglophone East Africa and beyond. For instance, Wilson J, the trial judge in *R v Sitakimatata s/o Kimwage* (Tanzanian), stated, obiter, that the phraseology used in the *Kumwaka* case was shrouded in ambiguity or not entirely free from obscurity. He complained 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 the emotion of fear has no place in the English doctrine of provocation and that only anger, not fear, is the natural product of provocation received.[118]

Some academics have, however, contended that the distinction between fear and anger may be quite clear in theory. Practically, however, it may be impossible to draw such a fine line between fear and anger in certain witchcraft-related murder scenarios.[119] When the decision in *Sitakimatata* was appealed before the EACA, the regional court did not explicitely dispute or discredit Justice Wilson's stance that anger, not fear, is 'the natural and only product or result of provocation received'.[120] It stated that the concluding passage in *Kumwaka* '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 ... the Penal Code'.[121] However, the regional court seemed unwilling to exclude fear as one of the relevant elements of provocation. The EACA's ruling suggested that the provocation defence may still succeed if the 'threat of bewitchment induces in the victim [(the accused)] such a degree of fear as to deprive him of self-control and induce him to assault his provoker'.[122]

There is evidence that *Kumwaka* had some influence on rulings in witchcraft-related murder cases in other regions, including Anglophone West Africa. For instance, in the *Konkomba* case mentioned above, the trial court in Ghana considered the defence of provocation. But drawing on the principles articulated in *Kumwaka* it rejected the plea, reiterating that in murder cases, a defence of provocation 'founded on witchcraft has always been rejected except in cases where the accused himself had been put in such fear of immediate danger to his own life that the defence of grave provocation has been proved'.[123] In the view of the courts, there was no immediate danger to the accused's own life.

[117] Luongo (n 13).

[118] *R v Sitakimatata s/o Kimwage* [1941] 8 EACA 57, 58 (reprinting the trial court judgment of Wilson J); also cited in *Patrick Tuva Mwanengu v R* [2007] Criminal Appeal No 272 of 2006, eKLR; Kato (n 87) 396. In the *Sitakimatata* case, the deceased told the appellant that he had killed the appellant's wife by witchcraft and that he would kill the appellant too by the same means. The appellant, out of fear, decided to kill the deceased and did carry out his intention some hours later in circumstances which indicated premeditated revenge.

[119] Mutungi (n 5) 545; Kato (n 87); Chukkol (n 82).

[120] *Sitakimatata* (n 119) 58.

[121] ibid 59.

[122] ibid, 58.

[123] *Konkomba* (n 90) 237.

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The decision in *Kumwaka* became the dominant precedent in Anglophone East Africa and beyond for close to a decade; and during this time, the provocation by witchcraft defence almost always failed.[124] They failed primarily on the grounds that the accused persons or appellants had not been put in fear of immediate danger to their own lives; and their fear which supposedly triggered the killing of the suspected witches and witchdoctors was unreasonable. There might, indeed, be some degree of credibility in the argument advanced by some experts that fear and anger may be two sides of the same coin in certain witchcraft-related murder situations. However, the English common law and the English doctrine of provocation, which guided all decisions by courts in Anglophone Africa, have never confused the two emotions and never intended the two to be employed interchangeably—fear raises the plea of self-defence, and grave anger raises the defence of provocation. It is therefore surprising that the Kenyan Supreme Court and the EACA accepted/recognized fear as a legitimate element of the provocation defence in certain witchcraft-related murder cases.

In 1941, the EACA, in *R v Fabiano Kinene and others* (Uganda),[125] tightened the requirements that must be satisfied for the provocation by witchcraft defence to succeed. It pronounced that the defence of provocation arising from belief in witchcraft could be available to an accused person only where it could be shown that the deceased was performing in the actual presence of the accused some act or activity which the accused genuinely believed was an act of witchcraft against him and/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 to be induced to assault the deceased. In the *Kinene* (also known as *Fabiano*) case, a group of people in a Ugandan village found a reputed witch they had long suspected of being responsible for the deaths in their family crawling naked in their compound at night. Believing that he was attempting to bewitch them, they killed him by forcibly inserting unripe bananas into his bowel through the anus, an act believed to be the prescribed way of killing a wizard in the accused persons' community. The EACA ruled that the deceased's act of crawling naked in the defendants' compound at night, and the accused persons' genuine belief that he was trying to bewitch them, amounted to 'grave and sudden provocation'. The court made the following important pronouncement:

> 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.[126]

Kinene is believed to be the first reported case in which 'provocation by witchcraft' was explicitly endorsed and allowed as a legal defence. Two years after *Kinene*, the EACA was invited, once again, to resolve a similar case, *R v Kelementi Maganga and another* (Uganda) where the accused persons beat and strangled a suspected witch whom they found walking

[124] Some of the cases that failed include, *R v Kumutai arap Mursoi* [1939] 6 EACA, 117; *R v Mawala bin Nyangweza* [1940] 7 EACA, 62; *R v Maganyo s/o Ochiel* [1940], Ministry of Legal Affairs (MLA) case files, Kenya National Archives (KNA); *R v Weyulo binti Kakonzi* [1941] MLA case files, KNA.

[125] *Kinene* (n 95).

[126] ibid 101.

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naked at night in their compound. It was held that the act of walking naked at night in the accused's compound satisfied the requirement for legal provocation.[127]

Applying the principles in *Kinene*, the appellate court in 1946 rejected the provocation by witchcraft plea raised by the accused in *R v Emilio Lumu* (Uganda). The facts of the *Lumu* case are that a 2-year-old son of the appellant's sister died after a short illness in the appellant's own arms. His sister then divulged to him that prior to the child's illness and eventual death, the deceased (the accused's father-in-law), a reputed witch, had fed the child some black powder which she believed was witchcraft medicine and the cause of the child's death. On hearing this allegation, the accused (who was a soldier) made his way to the deceased's house and stabbed him to death.[128] The EACA stated that the alleged administration of the black powder could pass for an act of witchcraft and a provocative act. However, the legal provocation defence was rejected for two main reasons, namely, (i) that the alleged provocative act was not done in the appellant's actual presence and (ii) that even if it was done in his actual presence, the fatal stabbing was carried out a couple of days after the provocative act had been performed—meaning that there was enough time for the accused's passion to cool. Thus, the accused did not satisfy the Penal Code's requirement that the provocative act be performed '*in the presence* of an ordinary person to another . . . to whom he or she stands in a conjugal, parental, filial or fraternal relation.' The court stressed that except for provocation by adultery, the person alleged to have been provoked 'must see the act done'.[129]

In *R v Petero Wabwire s/o Malemo* (Uganda), the provocation defence failed not only because the act was not done in the accused's actual presence but also because the accused's witchcraft belief was deemed unreasonable. In this case, the accused left his hut to go for a walk. When he returned, he found his wife in possession of what he believed to be a poisonous witchcraft medicine. He demanded an explanation as to where and for what purpose she had obtained the medicine, but the wife refused to offer an explanation. Out of anger and genuine belief that his wife was going to poison him with the supposed witchcraft medicine, he killed her. His provocation defence was rejected largely on the grounds that his belief was unreasonable.[130] The trial judge made the following statement in relation to the unreasonableness of the defendant's belief: 'The accused's assumption that his wife was going to poison or bewitch him with the stuff simply because she failed to answer questions and because her medicine was something which he did not understand was not, I think, an assumption that an ordinary villager would have made without much further inquiry and evidence'.[131] The EACA agreed with the trial court's decision, stressing that 'the learned trial Judge and the assessors were clearly justified in finding that the accused's belief that his wife intended to bewitch him or poison him was in the circumstances disclosed quite unreasonable. In the circumstances the plea of provocation must clearly fail'.[132]

In 1951, the boundaries of the provocation by witchcraft defence's application, as defined in *Kinene*,[133] were further clarified and reinforced in *Eria Galikuwa v R* (Uganda).[134] In this case, the accused consulted the deceased, a well-known witchdoctor, to help him recover some stolen money. The question as to whether the witchdoctor managed to recover the appellant's money is not clear from the report. What is evident is that the deceased demanded from the appellant outrageous fees/payment for his services, threatening to harm

[127] *R v Kelementi Maganga* [1943] 10 EACA 49.
[128] *R v Emilio Lumu* [1946] 13 EACA 144.
[129] ibid 146, emphasis added.
[130] *R v Petero Wabwire s/o Malemo* [1949] 16 EACA 131.
[131] ibid 132.
[132] ibid 134.
[133] *Kinene* (n 95).
[134] *Eria Galikuwa v R* [1951] 18 EACA 175.

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or kill him through juju spells if he failed to pay. Unable to raise the money and fearing that the witchdoctor would carry through his threats to kill him by juju spells if he failed to pay the fees demanded, the accused struck him with a stick several times on the head, killing him instantly. His provocation plea was refused 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 EACA made the following statement:

> It seems 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.[135]

The Court stressed in *Galikuwa* as in *Kinene* and other relevant cases 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.

Evidently, *Kinene* and *Galikuwa* deviated from *Kumwaka*, insisting that for the defence 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 provocation by witchcraft defence to succeed: that the provocative act should be physical and done in the actual presence of the accused; that an ordinary person in the accused's community would have the same belief that the act was an act of witchcraft; that the provocation must be grave and sudden; that the killing must have occurred during or immediately after the provocative act; that the killing should have occurred in the heat of passion; and that the provocative act must amount to a criminal offence under the relevant criminal statutes.[136] It has been observed that after *Kinene* and *Maganga* (which succeeded), the defence of provocation was 'rejected by the courts in practically every case because one or more of the requisite elements was lacking'.[137] The reasoning in *Kinene* and *Galikuwa* became the established legal principle and *locus classicus* on witchcraft provocation for almost three decades and was only altered after the independence of most Anglophone African countries.

B. The post-colonial era (part 1): From 1970 to 2006

Shortly after the independence of most Anglophone African countries, the boundaries of the provocation by witchcraft defence's application were, once again, significantly altered by the superior courts of the various independent States. The first of the high-profile post-independence cases in which the scope of the provocation by witchcraft defence was revised is *Yovan v Uganda* decided in 1970.[138] The court stated that *Kinene* and *Galikuwa* did not lay down a general rule for the legal provocation defence and that the decisions in those cases and similar others ought to be interpreted with reference to the facts of each case. As already indicated above, one of the courts' main positions in *Kinene* and *Galikuwa* had been that threats of future harm are unacceptable as a foundation for the defence of provocation. But this position was revised in *Yovan*, where the court pronounced that a threat to kill or cause

[135] ibid 178.
[136] ibid 175; see also Mohammed A Diwan, 'Conflict Between State Legal Norms and Norms Underlying Popular Beliefs: Witchcraft in Africa as a Case Study' (2004) 14 Duke Journal of Comparative & International Law 14 351; Mutungi (n 5) 543.
[137] Mutungi (n 5) 544.
[138] *Yovan v Uganda* [1970] EA 405.

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grave harm (whether immediately or in the remote future) taken together with existing circumstances may amount to legal provocation, as such threats could easily anger people in communities where witchcraft belief is widespread and induce them to fatally assault the one threatening to bewitch them. This stance might have been informed by the argument advanced by some academics and experts that, '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'.[139]

In the *Yovan* case, the accused who suspected the deceased (his stepmother) of being a witch and causing the death of his two children, confronted her. In response to his accusation, the stepmother allegedly said something to the effect that the accused would not live to bury his children. Out of fear and anger, he killed the stepmother by slashing her head with a sharp tool. Indeed, spoken words in customary law may, in certain circumstances, be the basis of provocation. However, to constitute provocation, such words must be of so devastating a nature, or must have such overbearing force, as to shatter the self-control of a normal person.[140] The appellate court apparently admitted that the words of the appellant's stepmother did not, by themselves, amount to sufficient provocation. However, it reasoned that the threat to kill the accused, taken together with the existing circumstances (eg, the death of the accused's two children believed to have been orchestrated by the deceased, using witchcraft), amounted to provocation. The accused was accordingly found guilty of manslaughter and not murder. A similar decision was reached in *Uganda v Nambwagere s/o Rovumba* and *Uganda v Bonefasi Muvaga*.[141]

In 1990, *Yovan* was reaffirmed in *R v Chivatsi and another* (Kenya). The facts of the *Chivatsi* case are that in August 1987, one of the sons of the deceased died after taking poison. The first accused (also a son of the deceased) who believed that his brother's death was suspicious, consulted a witchdoctor who confirmed that his brother was driven to ingest the poisonous substance by their father (the deceased) using some magical power. This revelation infuriated both the first accused and his cousin (the second accused) who went to the deceased's place of residence and fatally stabbed him with a kitchen knife. They claimed that when they went to the deceased's house, he confirmed that he had caused the death of his son and other family members through witchcraft and further threaten to kill every member of the community, including the accused persons, by witchcraft and live in the village alone. This threat thus provoked them to kill him. The trial judge ruled that the defendant's act was premeditated and accordingly found them guilty of murder.[142] The defendants 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

[139] Robert B Seidman, 'Witch Murder and Mens Rea A Problem of Society under Change' (1965) 28(1) The Modern Law Review 46, 52; see also Peter Brett, 'The Physiology of Provocation' (1970) Criminal Law Review 634.

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

[141] *Uganda v Nambwagere s/o Rovumba* [1972] ULR 14. In this case, the deceased, whom the accused believed had killed his wife through witchcraft, threatened to kill the accused's children by witchcraft, prompting the accused to kill her; *Uganda v Bonefasi Muvaga* [1973] ULR 30. In this case, the accused stabbed his stepmother to death on suspicion that she had killed his son by witchcraft, after finding her squatting in the doorway of his house (something considered a taboo for women in the accused's community to do) and making threats that if the accused was not careful, she would kill him by witchcraft.

[142] *R v Chivatsi Dzombo Chivatsi and another* [1989] Case No 21 of 1988, eKLR.

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> 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.[143]

Their murder conviction was consequently substituted with manslaughter, and the death sentence was commuted to 8 years' imprisonment. A similar conclusion was reached in the Tanzanian case, *John Rudowiki v R*[144] where the accused killed the deceased (his grandfather) with an axe after the latter had stated in the accused's house that many of the deaths and predicaments in their family were caused by him using witchcraft, and threatened to kill the accused too by the same means. The appellate court reduced the defendant's conviction to manslaughter and his death sentence to a prison term of 12 years.

The key reasoning in the post-colonial cases discussed so far is that provocation can result from either physical or verbal acts; and the spoken words may not only be insulting but threatening or seemingly threatening. As a matter of fact, African 'witches' (not juju practitioners or witchdoctors) 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. Studies show that most of the people accused of being witches categorically and bitterly deny that they are witches.[145] For instance, in a study involving about 310 participants who had been accused of being witches in Ghana, 287 (approximately 93 per cent) of the accused witches vehemently denied the witchcraft allegations. Only 22 (approximately 7 per cent) openly admitted that they were witches.[146] Describing Botswanan people's perception of witches in *Gobudilwe and another v Shaobuye and another*, Mokama CJ stated that 'a "moloi" or a witch is regarded as a despicable and a dangerous person who never admits to being one'.[147] Adinkrah suggests that in most cases, 'those who "confess" or agree with their accusers often do so simply to avert physical assaults and retributions that may follow denials'.[148] The frequent claim by witch-killers that they killed because the victim threatened to kill them by witchcraft is thus supposed to be viewed with great suspicion. Besides, a critical look at the relevant sections of the various criminal codes in Anglophone Africa and relevant literature shows that the drafters of the law on provocation never intended the meaning of the phrase 'wrongful act or insult' to involve 'a threat to kill' or harm by witchcraft. Therefore, by incorporating the 'threat to kill' element into the provocation by witchcraft plea, the courts extended the scope of the provocation defence beyond the threshold envisioned by the drafters.

C. The post-colonial era (part 2): From 2007 to present

In 2007, the scope of the provocation by witchcraft defence was surprisingly further expanded in *Patrick Tuva Mwanengu v R* (Kenya).[149] The appellant, in this case, had been seen butchering his uncle, who was sleeping in front of his house with some other family members, in the middle of the night. At trial, he asserted that at the time of the murder, he was with his nuclear family in a town about 100 km away from his uncle's house. In fact, at no point during the trial did he explicitly state that the deceased had bewitched him or any member of his family. It was rather the evidence from the prosecution witnesses that

143 *R v Chivatsi Dzombo Chivatsi and another* [1990] Criminal Appeal No 77 of 1989, eKLR.
144 *John Ndunguru Rudowiki v R* (1991) Criminal Appeal, TLR 102.
145 Drucker-Brown (n 25) 535; Adinkrah (n 13) 337.
146 National Commission for Civic Education (n 9) 32.
147 *Motanalo Gobudilwe and Another v Kesebonye Shaobuye and Another* [1993] BLR 56, 61.
148 Adinkrah (n 13) 337.
149 *Mwanengu* Criminal Appeal (n 118).

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suggested that he had on some occasions expressed suspicion that his uncle was a wizard and bewitching him and his son. He was convicted and sentenced to death. He then appealed, but this time admitting to the crime and confessing that the alibi defence put forward before the trial court was misadvised. His defence team then raised the provocation defence arguing that:

> The learned trial Judge erred in law and fact by failing to find on the evidence that the cause of the incident leading to death of the deceased was that he was practicing witchcraft and that the Appellant believed that he and his son had been bewitched by the ... [deceased]; a fact which, had the learned Judge appreciated, was sufficient to reduce the offence charged to a lesser offence of manslaughter.[150]

The court determined that the trial judge had erroneously applied the principles enunciated in *Kinene* and *Galikuwa* both of which had been revised by the appellate courts in *Yovan* and *Chivatsi*. It was also satisfied that the circumstances of the case met the legal provocation defence threshold set in the latter pair of cases. The appellant's conviction was consequently reduced from murder to manslaughter. What makes this decision hugely controversial is that there was no mention or evidence of the victim threatening to kill or harm the accused or other members of his family by witchcraft. Thus, the only evidence that was considered by the court was the supposed genuine belief that the accused and his son were being bewitched by the deceased.

The ruling in *Mwanengu* seems to have opened the floodgates for killers of alleged witches to employ the provocation by witchcraft defence in order to escape murder convictions and the death penalty. Thus, since this ruling, the witchcraft provocation defence has been raised consistently by witch-killers with incredibly high degrees of success. For instance, in *Katana Karisa and others v R* (Kenya), the appellate court had the appellants' murder convictions commuted to manslaughter even though the deceased never threatened them. In the *Karisa* case, an 80-year-old blind man was killed by his cousin (the first appellant) and the cousin's wife and three sons, on suspicion of being a witch and using witchcraft to kill one of the first appellant's sons. 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. Yet, when they were convicted for their various roles in the murder of the blind octogenarian, they appealed, but this time, raising the provocation by witchcraft defence and alleging that the deceased had previously threatened to kill them by witchcraft.[151]

Another notable case is *Charo Kalu Thinga v R* (Kenya).[152] In this case, a man who believed that his stepmother and father were witches, battered the former and killed the latter. He was convicted and sentenced to death even though he denied any involvement in the murder. In his appeal, he confessed to killing his father but claimed that he killed him due to provocation arising from his belief that the father was a witch responsible for some mysterious deaths in the family, including the death of the accused's brother, which apparently triggered the fatal assault. The court determined that the appellant genuinely believed that the deceased and the stepmother were witches and responsible for the deaths in his family. It reasoned that the fact that the appellant did not raise the defence of provocation during his trial did not prevent the appeal court from considering such a defence if it was disclosed by the evidence that was adduced. His murder conviction was reduced to manslaughter, and the death sentence was substituted with 20 years imprisonment.

[150] ibid, summarizing the submission of the Kenyan principal state counsel, Mr Ogoti.
[151] *Katana Karisa and Others v R* [2008] Criminal Appeal No 372 of 2006, eKLR.
[152] *Charo Kalu Thinga v R* [2015] Criminal Appeal No 125 of 2011, eKLR.

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Mention must also be made of *Mohammed Tawa Kea and others v R* (Kenya),[153] which concerned a group of three young men who tortured and murdered a traditional herbalist on suspicion of being a witch and bewitching members of the community. Even though they denied having participated in the commission of the crime, all three were found guilty of murder. They then appealed, admitting that they killed the deceased and invoking the provocation by witchcraft defence. Surprisingly, their appeal succeeded. In fact, the circumstances or facts of many of the recent cases, including the ones described above, did not even meet the controversial threshold set in *Yovan* and *Chivatsi* to merit the legal provocation defence. Yet, the defendants' pleas succeeded. Thus, there were no threats by the deceased to kill or destroy or harm the accused or any member of their family in any way. The only reason why the defendants/accused killed the deceased/victims was that there were supposedly unexplained deaths and/or problems in their family or community, and they believed the victims were witches causing those calamities using witchcraft.

Presently, *Yovan*, *Chivatsi*, and *Mwanengu* are the standard tests for dealing with provocation by witchcraft defences in Anglophone East Africa. In other parts of Africa such as South Africa, Lesotho, and Zambia, there have been several cases where the courts' decisions seem to have been informed by these three recent cases. For instance, in cases such as *R v Lehlohonolo*, *R v Tlaitlai*, and *R v Tsita*, and others, the Lesotho courts either convicted the defendants of murder but handed down significantly reduced jail terms or convicted the defendants of the lesser offence of manslaughter or culpable homicide, after considering the threat to kill element together with other existing or extenuating circumstances.[154] Also in *Chanda and Chisanga v the People* (Zambia), the appellants who were convicted of beating a man to death after accusing him of using witchcraft to cause the death of their relative, had their death sentence commuted to 20 years imprisonment on appeal, due to the supposed existence of extenuating circumstances (ie the death of the defendant's relative).[155]

However, non-East African countries do not necessarily apply the principles spelt out in those three current leading cases. For instance, in 1971, the South African courts briefly touched on the issue of provocation by witchcraft in *S v Mokonto* but the principles applied were consistent with those articulated in *Kinene* and *Galikuwa* and not *Yovan*. In the *Mokonto* case, the deceased told the defendant and his two brothers that they would all die. Coincidentally, the two brothers died shortly after the threat. Armed with a cane knife, the defendant, who believed that the deceased had killed his brothers with witchcraft, went to confront her. During the confrontation, the deceased allegedly reiterated that the defendant too would soon die. This threat prompted him to kill her. The court's decision indicated that to qualify for the provocation defence, the accused must, among others, act in the heat of the moment, without time to think through his or her behaviour. The fact that the accused armed himself with a cane knife when confronting the deceased suggested premeditation.[156]

Again, in the *State v Shingirai Hamunakwadi*, a case decided in Zimbabwe in 2015, the trial court applied the principles enunciated in *Kinene* and *Galikuwa*. This case concerned a man who went to his mother's house to strangle her on suspicion of being the cause of an erectile dysfunction that he supposedly suffered shortly after getting married. His provocation by

[153] *Mohammed Tawa Kea and others v R* [2016] Criminal Appeal No 45 of 2015, eKLR.

[154] *R v Lehlohonolo* [1980] CRI/T/7/80 LSCA 74; *R v Tlaitlai* [1995] CRI/T/68/91 LSCA 161; *R v Tsita* [2001] CRI/T/31/99 LSCA 84.

[155] *Chanda and Chisanga v The People* [2012] Criminal Appeal No 104,105/2011 ZMSC 49.

[156] *Mokonto* (n 104).

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witchcraft and insanity defences were rejected. Drawing on the decision in *Galikuwa*, the judge made the following statement:

> Even if it were to be assumed in his favour that his belief in witchcraft played a part in prompting him to kill his mother, the act causing death was not done in the heat of . . . passion. His victim was not performing an act which the accused genuinely believed and which an ordinary person of the community to which he belongs would generally believe to be an act of witchcraft against him or another person under his immediate care.[157]

The fact that the standards spelt out in *Kinene* and *Galikuwa* were applied in the two cases above shows that not all the courts in Anglophone Africa are comfortable with the principles enunciated in the recent leading cases (ie, *Yovan*, *Chivatsi* and *Mwanengu*). However, a closer look at recent decisions in cases where the witchcraft provocation defence was raised confirms John Alan Cohan's observation that courts in Africa (particularly those in southern and eastern African countries) generally 'agree to reduce the charges or the sentence if there is evidence that the defendant [genuinely] believed that the victim was responsible for an act of witchcraft or was threatening to commit an act of witchcraft against the defendant or close relatives'.[158] A recent example is *S v Denford Nyamande* (a case decided in 2022) where the Zimbabwe High Court rejected the accused's provocation by witchcraft defence but imposed a lesser sentence because of the accused's sincere witchcraft beliefs and existing circumstances.[159] In this case, a man who believed that the supposed misfortunes in his life, including persistent illness, excruciating bodily pains, and a dramatic 'shrinking' of his genital organs, were caused by his octogenarian father and auntie (his father's sister) using witchcraft, killed them with an axe and a hoe, respectively. The court was convinced that the crimes were committed by a person with a 'criminal mind rather than an emotionally and psychologically pressured mind', as the homicidal acts 'were not done in the heat of the moment'.[160] However, the accused received a lesser sentence—35 years imprisonment, instead of the death penalty. Justifying its decision to impose a lesser sentence, the court made the following pronouncement:

> If it had not been for the significant witchcraft mitigating factor, the accused would have been a suitable candidate for the capital punishment. However, the aggravating circumstances considered with the mitigating factors leave us to arrive at a finding that the . . . sentence is appropriate in the circumstances.[161]

Evidently, by accepting mere threats to cause harm or death in the spiritual realm and other insignificant circumstances and events as provocative acts, and by accepting a sincere belief in witchcraft as a mitigating factor, the courts in Anglophone Africa are consciously or unconsciously making it easier for killers of alleged witches to meet the provocation defence threshold, and making witch-killings more appealing in the region.

6. CONCLUSION

Witchcraft and juju beliefs have, indeed, been the cause of some of the most violent and vicious homicides recorded in Africa; and accused persons are at times proud to admit that

157 *The State v Shingirai Hamunakwadi* [2015] Criminal Trial, ZWHH 323-15, CRB No 58/15.
158 Cohan (n 5) 852.
159 *S v S v Denford Nyamande* [2022] 871 of 2022 ZWHHC 871.
160 ibid.
161 ibid.

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they killed the victims to ensure their own survival and/or the survival of members of their family or the community. Such perpetrators, who usually take significant time brooding and nursing suspicions against their victims, surprisingly tend to invoke the provocation defence when charged and prosecuted. It has been demonstrated that the provocation by witchcraft defence (a contention that beliefs in witchcraft constitute mitigating circumstances in homicidal acts) has been raised with varying degrees of success since the 1930s. However, the conditions under which such a defence would be deemed sufficient to commute a capital sentence to a jail term or reduce a murder conviction to one of manslaughter are not clear-cut. In homicide cases, the provocation defence traditionally ought to succeed only where there is considerable evidence that the accused killed during a sudden loss of self-control caused by provocation which was enough to make a reasonable person do as they (the accused) did. However, in many recent witchcraft-related murder cases in Anglophone Africa, the provocation by witchcraft defence has been successful even where either there were no provocations at all or significant time passed between the alleged provocative acts and the lethal attacks.

It has been shown that the provocation by witchcraft defence in common law was rooted in a desire to extenuate the harshness of the mandatory death penalty introduced by the British colonial government. But today, the death penalty is rapidly receding in sub-Saharan African countries, particularly those formerly colonized by Britain.[162] As Andrew Novak notes, the 'death penalty has fallen into disuse in most of common-law Africa, and many of these countries are now considered de facto abolitionist'.[163] In Kenya for instance, an estimated 800 criminals were reportedly sentenced to death per year during the 2000s, but none has been executed.[164] In Ghana, no execution has been carried out since 1993. So, since the death penalty is clearly falling into disuse in Africa, one wonders if the provocation by witchcraft defence will not soon lose its relevance in contemporary Anglophone Africa. It is unclear if or when the current principles or tests relating to the provocation by witchcraft defence in Anglophone Africa will undergo further judicial transformation. Only time will tell.

Evidently, the purpose of the anti-witchcraft legislation is to eradicate witchcraft beliefs and practices and to dispel fears in witchcraft. However, it must be admitted that since witchcraft beliefs and the fear of witches and juju are deeply entrenched in the culture and ethos of the African people, attempt to curb witchcraft-driven murders cannot be achieved through legislative actions and the criminal justice system alone. Instead, it would involve a multi-pronged approach that would also entail the provision of effective healthcare services, economic improvement, promotion of formal education, and extensive public education campaigns/programmes. As one writer mentions, witchcraft beliefs and witch-killing may only be eradicated by 'the removal of ignorance through education of the masses . . . [and] providing them with a scientific view of the world'.[165] There is no question that some people will still hold witchcraft and juju beliefs irrespective of their level of education. However, formal education remains a vital weapon in the fight against witchcraft-related killings in Africa as educated persons (even if they believe in witchcraft) are highly unlikely to partake in the killing of alleged witches. This is because they tend to have a better appreciation of the relevant statutes and the rights and duties of individuals in society.

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[162] See Andrew Novak, 'Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya' (2012) 45(2) Suffolk University Law Review 285, 285.
[163] ibid.
[164] ibid.
[165] Kato (n 87) 387.