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WITCHCRAFT AND THE CRIMINAL LAW IN EAST AFRICA

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INTRODUCTION

As recently as 1967 in the case of *Athuman v. Republic*,¹ the High Court of Kenya still found itself in doubt as to whether or not witchdoctors exist. Such doubts led the court to seemingly contradictory statements in the course of its decision. The dilemma which faced the Kenya court in *Athuman* was whether to acknowledge that witches exist or deny their existence which would lead to dismissal because a charge of "obtaining money by falsely pretending that one is a witchdoctor"² presupposes the existence of a genuine witchdoctor.

Similar contradictions are found in the three witchcraft statutes in East Africa³ where the legislatures seem on the one hand to doubt, in fact deny, the existence of witchcraft but on the other hand to acknowledge that witchcraft can kill.⁴ Yet, the very existence of witches and witchcraft is but one of the many problems which have confronted the courts and which may be faced by future judges and any lawyer dealing with witchcraft in the context of the criminal law in East Africa. These problems arise most often in the recognition of the pleas of 1) self defence, 2) provocation and 3) insanity. These are defences (either partial or absolute) which have repeatedly been raised with varying degrees of success by the accused persons. These three headings, examined in the light of *Athuman*, may provide some insight into the future of witchcraft litigation and the potential for a change in attitude by courts and legislatures.

At the outset, however, it should be noted that the root of the problem in this field is the question of whether or not the English law, which is reproduced in the penal codes, is appropriate in witchcraft cases. Though not dealt with under a separate heading as such, this question should be kept in mind throughout because whether or not the courts' approach and attitude toward witchcraft can be defended may well depend on the law they administer.⁵

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1. [1967] E.A. 401 (Kenya).

2. *Id.* at 401-02.

3. See notes 18-23 *infra* and accompanying text.

4. See notes 20-23 *infra* and accompanying text.

5. For an excellent discussion of the problems presented by the introduction of the legal system of a colonising power and its conflict and competition with indigenous

The future of witchcraft and its beliefs are briefly outlined in an attempt to discover whether a changed approach or different principles of law are desirable. It should also be pointed out that very few legal topics are as closely linked with sociology-anthropology as witchcraft. While every effort has been made to refer only to those aspects which are legally relevant to East Africa, references to other disciplines are unavoidable. A law which does not take into account the social ethos of the community which it is supposed to regulate is doomed to be ignored, and its effect diminished.

RECOGNITION OF THE EXISTENCE OF WITCHDOCTORS AND WITCHCRAFT

Witchdoctors

Whether witchdoctors exist is a question which (though dictum) was basic to the statements by the High Court of Kenya in *Athuman*. In that case the appellant had been charged and convicted of obtaining money by false pretences by pretending that he, Athuman, was a witchdoctor with power to remove devils (Majini) from the wife of one Aloisi. The wife suffered from pains in her head, stomach and eye, and the appellant was contacted for help. After stating that he would cure the wife, the appellant asked for and received 418 shillings as payment for the treatment in addition to a goat and two yams. Shortly thereafter, the appellant announced that he would not undertake the treatment and returned the goat but not the money. The complainant, Aloisi, regarding the matter as a swindle, complained to the police.

In its decision the court began by questioning the particulars of the charge.

The statement in those particulars that the appellant pretended that he was a witchdoctor could perhaps be criticized since the phrase may imply that there are such things as genuine witchdoctors.⁶

Shortly thereafter, but in the same paragraph, the phrase, "so-called witchdoctors," is used by the court in reference to witchdoctors. The court continued:

Is it not possible, it may be asked, that honest though strangely deluded witchdoctors exist, and that the appellant may be one of them? We may be forgiven for saying that there probably

legal systems, see Bentsi-Enchill, *The Colonial Heritage of Legal Pluralism*, 1 ZAMBIA L.J. 1 (1969).

6. [1967] E.A. at 402.

are witchdoctors. There may well be men who undertake the cure of ailments for reward and have an honest belief in the efficacy of rituals, incantations and the like. Common sense leads us to suppose that those who practice medicine with the aid of such arts are likely to have lost much, if not all, of their faith in those arts by reason of hard experience.⁷

The court's attitude appears to indicate a denial of the existence of witches. To the court, witches are not human beings. They are "things." This approach could not, however, be maintained in view of the charge against the accused. At the root of "falsely pretending to be a witchdoctor" lies the assumption that genuine witchdoctors exist, and in the absence of that assumption it is difficult, if not impossible, to imagine the rationale for the crime which the appellant committed. The court, perhaps realising the absurdity of the approach it had thus far taken, shifted its argument and appeared to acknowledge that witchdoctors *can* exist: "But we do not deny the possibility of the existence of an honest witchdoctor."⁸ If "an honest witchdoctor" can exist,⁹ then the court had to determine whether the appellant was one of the genuine witchdoctors.

The Kenya court's reluctance to acknowledge the existence of witchdoctors seems unnecessary in light of the innumerable instances where the existence of witchdoctors has been granted judicial acknowledgement. For instance, Lord Hale, charging a jury in 1665 said "[t]hat there are such creatures as witches I have no doubt at all."¹⁰

The recent witchcraft trials in India¹¹ and the many current practices in England¹² and the United States of America¹³ illustrate that the

7. *Id.* The court's supposition that witchcraft practitioners have lost faith in their art is not supported by, and in fact is contrary to, the evidence that belief in witchcraft has not decreased. See notes 108-13 *infra* and accompanying text.

8. [1967] E.A. at 402.

9. It must be emphasized that whether or not witchdoctors exist was not the gravamen of the court's decision. However, the issue of the existence of witchdoctors so dominates the larger part of the court's deliberations that it in fact tends to obscure the central issue in the case, *i.e.*, whether the accused *falsely* pretended that he was a witchdoctor.

10. Trial of the Suffolk Witches, 6 St. Tr. 687, 700-01 (1665). See also 4 W. BLACKSTONE, COMMENTARIES *60-61. For other earlier references acknowledging the existence of witches, see *Exodus* 2:18; *Leviticus* 20:7; 1 *Samuel* 15:23; 2 *Kings* 9:22. The works of Shakespeare and, in particular, *Macbeth* are replete with reference to the existence of witches.

11. In Raipur, India, local police battled with villagers to save two women from being buried alive for alleged acts of witchcraft in the village. In the commotion, police opened fire into the furious crowd, and a villager was wounded. Daily Nation, Mar. 4, 1969, at 2, col. 1.

12. See, *e.g.*, G. PARRINDER, WITCHCRAFT: EUROPEAN AND AFRICAN (1963) (especially ch. 7, Witchcraft Trials in Britain and America).

13. See, *e.g.*, C. HANSEN, WITCHCRAFT AT SALEM (1970).

notion of the existence of witches is prevalent in "developed" as well as "under-developed" countries.

Assuming then that witches and genuine witchdoctors exist, the next question is how to identify them. There are no universally agreed upon criteria, even in East African communities, on what constitutes a witchdoctor. The characteristics which make a witchdoctor in one tribe are not necessarily what another tribe would consider sufficient to "qualify" a person to be called a witch or witchdoctor. Thus, among the Nandi, witches have the power to kill or injure people by means of spells or cause illness, deformity, madness or bodily swelling.¹⁴ Witches are also believed to have the power to cause small black snakes or bits of stone or wood to enter a victim's body.¹⁵ Among the Gisu, witches walk about naked late at night, cause crops to wither and animals to die, commit incest, feed on human flesh and use human arms to stir the beer which is said to give the witches extra strength.¹⁶ In the Amba tribe, witches are believed to quench their thirst with salt, to have supernatural powers to open the body of a victim and remove his entrails in an invisible manner and to have cannibalistic propensities.¹⁷

These illustrations are not exhaustive, but they are sufficient to show the diversity of the concept of the nature of witches among the tribes. It is submitted that the characteristics which make a witch, different as they are from one tribe to another, should be considered by the court when dealing with witchcraft cases. How, for example, can a court deal with an allegation that one party falsely obtained money by holding himself out as a witch without considering whether the alleged offender was or was not a witch within the meaning of that word in the community concerned? The author has come across no definition of a "witch" in the witchcraft statutes in East Africa. In the absence of such a definition, it is submitted that the courts have no choice but to determine whether the accused is a witch on the basis of the facts and evidence before the court. This means a determination as to whether the accused is a witch according to the traditions of the specific tribe. And this, it is further submitted, is what the court in *Athuman* should have done.

14. Huntingford, *Nandi Witchcraft*, in WITCHCRAFT AND SORCERY IN EAST AFRICA 175, 177 (J. Middleton & E. Winter ed. 1963).

15. *Id.* at 179.

16. LaFontaine, *Witchcraft in Bugisu*, in WITCHCRAFT AND SORCERY IN EAST AFRICA 197 (J. Middleton & E. Winter ed. 1963).

17. Winter, *Amba Witchcraft and Sociological Theory—The Enemy Within*, in WITCHCRAFT AND SORCERY IN EAST AFRICA 277, 280 (J. Middleton & E. Winter ed. 1963).

Witchcraft

Recognition of the existence of witchdoctors is not synonymous with the recognition of the existence of witchcraft. It is therefore necessary to examine whether or not witchcraft exists and if so whether its existence is recognized. The importance of this consideration cannot be over-emphasized because, if witchcraft does not exist in the eyes of the courts, then the relevant witchcraft statutes may be superfluous.

Whether witchcraft exists is a matter of definition, and, in search for a definition of witchcraft, the initial source of inquiry would appear to be the witchcraft statutes. One would expect, however, precise definitions of "witchcraft," especially in light of the heavy penalties stipulated in the East African witchcraft statutes. Unfortunately, that is not the case.

In Uganda the interpretation section of the Witchcraft Act reads: "For the purposes of this Act, Witchcraft does not include bona fide spirit worship or the bona fide manufacture, supply or sale of native medicines."¹⁸ The Act, however, does not say what witchcraft *is* and the "exclusions" do not furnish us with the "inclusions." The only glimpse comes from section 3 (1) which reads: "It is an offence for any person to directly or indirectly threaten another with death by witchcraft or by any other supernatural means."¹⁹ From this it may be deduced that witchcraft is a "supernatural power."

In Kenya the Witchcraft Act appears to contribute more confusion than assistance. Like the Kenya High Court in *Athuman*, the Act seems to deny the existence of witchcraft while at the same time recognising that witchcraft can kill. Section 3 reads: "Any person professing a knowledge of so-called witchcraft shall be guilty of an offence;"²⁰ section 11 provides: "Nothing in this Act shall affect the liability to the death penalty of any person who by use of witchcraft commits wilful murder."²¹ The two sections are incompatible. The use of the phrase "so-called witchcraft" constitutes a denial of the existence of witchcraft and is the same phrase as used in *Athuman*; however, the proposition that witchcraft does not exist but yet can kill is untenable. Either witchcraft is or is not, and, if it is not, then the penalty under section 11 is superfluous since murder by witchcraft could never be committed in the first place. Furthermore, it should be noted that unlike the Uganda Act, which

18. Witchcraft Act § 2 (Cap. 108, Laws of Uganda (1964)).

19. *Id.* § 3 (1).

20. Witchcraft Act § 3 (Cap. 67, Laws of Kenya (1962)).

21. *Id.* § 11.

hints that witchcraft involves supernatural power, the Kenya Act clearly takes the position that witchcraft and supernatural power are two different phenomena. The relevant portion of section 2 provides that "[a]ny person who pretends to exercise any kind of supernatural power, witchcraft, sorcery or enchantment, shall be guilty of an offence."²² The Tanganyika statute is on better footing. Section 2 reads:

Witchcraft includes sorcery, enchantment, bewitching, the use of instruments of witchcraft, the purported exercise of any occult power and the purported possession of any occult knowledge.²³

While definition by listing a term's coverage is not uncommon, where the "inclusions" are themselves subjects deserving of definition, it is doubtful whether the definition serves much purpose. To say that witchcraft "includes bewitching" is not particularly helpful. Indeed, such definition hangs on the verge of absurdity. The reader who does not know what witchcraft *is* is made no wiser by knowing that it includes "bewitching." Furthermore, how one is to identify "instruments of witchcraft" in the absence of any knowledge of what witchcraft *is* is a legal curiosity. Section 2, however, does demonstrate that in Tanganyika witchcraft is considered to be a supernatural power even though the term "purported" is used in connection with occult power and occult knowledge.

In the absence of a satisfactory statutory definition of witchcraft, the alternative is to look to the case law for assistance. Even here, however, the one authority dealing with the definition of witchcraft recites only the Webster's dictionary definition and concludes that "the meaning of witchcraft is narrowed to the practices or art of witches or intercourse with evil spirits."²⁴

To recapitulate, the East African witchcraft statutes do not seem to offer sufficient guidance in the very area of the law that they purport to regulate. Not only are the definitions of witchcraft inadequate but (and this applies particularly to Kenya) the statutes seem to deny the existence of the very subject matter of the crimes they aim to prevent. In light of these contradictions in the operative law, the statutory witchcraft offences render themselves vulnerable to criticism.

Witches and witchcraft are viewed with abhorrence by the tribal communities. This is evidenced not only by the practice of putting witches

22. *Id.* § 2.

23. Witchcraft Ordinance § 2 (Cap. 18, Laws of Tanganyika (1954)).

24. Hamadi Bin Juma v. Rex, [1948] 8 Z.L.R. 116, 119. *A fortiori*, one may define law or medicine as "the practices or art of lawyers and doctors" respectively.
<http://scholar.valpo.edu/vulr/vol5/iss3/3>

to death but also by the likelihood of defamation when an accusation of practising witchcraft is laid against a member of the community.²⁵ This abhorrence is also reflected in the statutes where heavy punishments are meted out to those practising witchcraft. For example, under the Uganda Act²⁶ the court is empowered to make an exclusion order²⁷ in lieu of or in addition to punishment which may be imposed. Such exclusion may be for as long as ten years on the first conviction or for life on a second or subsequent conviction.²⁸ The powers given to the trial judge or magistrate by section 10 of the Kenya Act, in addition to awarding punishment under the relevant section which may have been violated, allow him to recommend to the Minister²⁹ that the convicted person be deported or restricted.³⁰ It is submitted that these punishments should not be meted out where there is any doubt as to the existence of the subject matter of the crime itself. The problem still remains, however, that there is punishment for acts of "so-called" witchcraft in Kenya.

Despite the contradictions and confusion in the Kenya Witchcraft Act, the provisions of the Uganda statute and the Tanganyika ordinance seem clearly to point out that witchcraft is "supernatural power." This definition of witchcraft is supported by sociological-anthropological writers like E. E. Evans Pritchard who describes an act of witchcraft as "a psychic act,"³¹ and LaFontaine in his essay on the Bugisu who defines witchcraft as "all supernatural attacks."³² These two writers illustrate that the sociological-anthropological approach considers the phenomenon of witchcraft as supernatural, or at least that a belief in witchcraft is a belief in the supernatural powers of witches. Throughout

25. See, e.g., Witchcraft Ordinance § 5 (Cap. 31, Laws of Nyasaland (1957 rev.)) which provides that it is not only an offence to accuse or threaten to accuse any person with being a witch or with practising witchcraft (unless such an accusation is made to a person in authority), but the imputor is also liable for any harm which may befall the other person as a consequence of such imputation. Similar provisions can be found in the Witchcraft Acts of Kenya and Uganda. Witchcraft Act § 6 (Cap. 67, Laws of Kenya (1962)); Witchcraft Act § 4 (Cap. 108, Laws of Uganda (1964)).

26. Witchcraft Act § 7 (Cap. 108, Laws of Uganda (1964)).

27. An exclusion order prohibits, for such periods as may be stated therein, a person from entering and remaining in a specified area. This usually includes the place in which the offence was committed. Witchcraft Act § 7 (2) (Cap. 108, Laws of Uganda (1964)).

28. *Id.*

29. The Minister for Home Affairs under whose portfolio fall all the powers of detention and deportation.

30. Witchcraft Act § 10 (Cap. 67, Laws of Kenya (1962)).

31. Pritchard, *Foreward to WITCHCRAFT AND SORCERY IN EAST AFRICA* vii (J. Middleton & E. Winter ed. 1963).

32. LaFontaine, *supra* note 16, at 192.

the rest of this article, the term "witchcraft" is used in the above sense, *i.e.*, that witchcraft is "supernatural power."

IRRECONCILABILITY OF BELIEF IN WITCHCRAFT AND THE COMMON LAW

The believer in witchcraft seldom, if ever, questions the existence of witchcraft and believes that witches have the ability to destroy not only his physical existence but his earthly success as well. Baidelman has emphasised the awe with which a witch is viewed: "Some Karugu prefer to defacate and urinate in their huts rather than venture outside at night. These practices are all chiefly due to the prevailing fear of witches."³³ Prior to the advent of penal statutes, native customs approved of capital punishment for witches.³⁴ As recently as 1938³⁵ a suspect was taken to a tree before a large baraza³⁶ and hanged by two of the "complainants" while a considerable part of the gathering sat around the tree and offered no protest. The killing of a witch was the only practical way of ridding the society of such undesirables. The power of evil possessed by the witches was, and still is, considered stronger than the witch's own will-power. They could bewitch other people irrespective of their good intentions.³⁷ The believers in witchcraft found themselves in a position where no outside power could save them from witches. They had no alternative but to strike in terror and self-defence. This reaction constituted not only the right of self-preservation, but was also considered a commendable service and execution of a duty to the society, *i.e.*, the cleansing of the society from witches.

Statutory laws and the English Common Law, however, took an entirely different attitude from that adopted and sanctioned by native traditions. A belief in witchcraft has never received legal blessing except in those limited instances where the accused has been put in such fear of immediate danger to his own life that the defense of "grave and

33. Baidelman, *Witchcraft in Ukaguru*, in *WITCHCRAFT AND SORCERY IN EAST AFRICA* 61 (J. Middleton & E. Winter ed. 1963).

34. In *Rex v. Fabiano Kinene*, [1941] 8 E.A.C.A. 96, the defendants killed the deceased immediately after they caught him performing an act which they genuinely believed to be an act of witchcraft. The manner of retribution was severe; death was caused by the forcible insertion of unripe bananas into the deceased's bowel through the anus. In their confession to the killing, the appellants said "that they had . . . killed him in the way which, in the olden time, was considered proper for the killing of a wizard." *Id.* See also *Rex v. Kumwaka wa Mulumbi*, [1932] 14 K.L.R. 137.

35. *Rex v. Komen Arap Chelal*, [1938] 5 E.A.C.A. 150.

36. The baraza is Swahili for "council."

37. See LeVine, *Witchcraft and Sorcery in a Gusii Community*, in *WITCHCRAFT AND SORCERY IN EAST AFRICA* 226 (J. Middleton & E. Winter ed. 1963).

sudden provocation" could be proved.³⁸ As one court stated:

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.³⁹

It is worth observing that the question of taking the law into one's hands never arose under native traditions. If tribal custom authorised the act of an individual upon a known witch, the same native community would not turn back and condemn the actor for carrying out a praiseworthy act and public duty. Accordingly, for the courts to term such belief as "mischievous and fraught with great danger to public peace and tranquillity" is a contradiction of known words. What "public peace and tranquillity?" It was surely not that of the native society. Furthermore, for practical purposes, the successful invocation of "grave and sudden provocation" and "self-defence" is further limited by the technical requirements laid down by the criminal law before an accused can succeed on such a plea.⁴⁰

In short, then, the witchcraft believer finds himself in a predicament. On the one hand he is convinced that life affords no protection for him against the powers of witches and witchcraft, his only protection being his own actions. On the other hand, the state condemns any such self-help measures except in those severely limited cases in which the action is sanctioned. Such cases, however, are enshrined in what the believer would describe as "not only foreign, but unrealistic rules in his witchcraft-oriented world."⁴¹ Such protection as the statutory law affords against witches might as well be non-existent.⁴² The law does not protect the believer; therefore, if witches are born, but not made,⁴³ it is

38. In *Rex v. Fabiano Kinene*, [1941] 8 E.A.C.A. 96, and *Rex v. Kelement Maganga*, [1943] 10 E.A.C.A. 49, a belief in witchcraft was held to constitute legal provocation.

39. *Rex v. Kumwaka wa Mulumbi*, [1932] 14 K.L.R. 137, 139. This principle was also approved in *Rex v. Kumutai Arap Mursoi*, [1939] 6 E.A.C.A. 117, and *Rex v. Mawalwa bin Nyagwesa*, [1949] 16 E.A.C.A. 62.

40. See notes 44-95 *infra* and accompanying text.

41. This is the precise sentiment expressed by more than 65 percent of those persons interviewed by the author at the coastal region of Kenya where witchcraft fears are greatly menacing the local population. See notes 110-11, 114 *infra* and accompanying text.

42. The author has come across no reported case where a witch was sentenced to death, and it is submitted that nothing short of that can convince witchcraft believers that the law can replace their customary protection.

43. LaFontaine, *supra* note 16, at 196.

both futile and working against the laws of nature to attempt a reformation of such creatures by imprisoning them.

JUDICIAL ATTITUDE TOWARD WITCHCRAFT-HOMICIDE DEFENCES

The general background provided in the immediately preceding paragraphs is considered essential for the following reasons: 1) in the absence of such background it is difficult to understand why the believer in witchcraft has reacted as he has toward witches; 2) it is only with the full appreciation of the environment in which the believer operates that the courts' attitude toward witchcraft, and the propriety of the application of the criminal law principles (as they stand) to witchcraft, can be appraised. The courts' attitude toward witchcraft cases and the related question of whether the criminal law principles are appropriate in witchcraft cases are best examined under the following three headings: self defence, provocation and insanity.

Applicability of Self-Defence and Defence of Another

Grappling with problems of witchcraft and self-defence runs some of the hazards of navigating among icebergs; many of the critical points for determination are not immediately clear. An examination of how the courts have applied the tenets of self-defence law to witchcraft cases makes manifest the possible dangers.

In East Africa, self-defence law is governed by the English Common Law. Under the Common Law, one who kills his attacker in self-defence is justified so long as the means of resistance which he employs are reasonable under the circumstances. The person who seeks to rely on self-defence must also establish that he retreated and can only be excused for death caused during the process of defending himself if it was no longer possible for him to withdraw with safety.⁴⁴ In practical terms, this means that the accused cannot successfully rely on self-defence unless it was absolutely necessary to act as he did under the circumstances, and what is "necessary under the circumstances" has not in the least received a uniform interpretation from the courts. For example, in *Rex v. Kumwaka wa Mulumbi*⁴⁵ the appellants admitted inflicting corporal punishment on the deceased woman as a result of which death occurred. The

44. The requirement, of course, will only apply to a situation where retreat is deemed necessary to make any resulting homicide excusable. Therefore, if a person, in order to defend himself or his property even against an assault or trespass not involving felonious violence, uses force which is reasonable in the circumstances and unintentionally kills his assailant, the killing is excusable. In defending himself in such a case, a person must retreat as far as he can before resorting to force. 10 HALSBURG'S LAWS OF ENGLAND § 1384, at 722 (3d ed. 1955).

45. [1932] 14 K.L.R. 137.
<http://scholar.valpo.edu/vulfr/vol5/iss3/3>

deceased was believed to be a witch, and the appellants genuinely believed that she had bewitched the wife of one of the appellants, making her ill and unable to speak. She, the deceased, was brought to the hut where the sick woman lay and was ordered to remove the spell. At night the deceased removed half the spell, but in the morning was seen running away, whereupon she was chased and beaten with sticks until dead.

On the issue of self-defence, counsel for the appellants cited *Rex v. Rose*,⁴⁶ in which a son had shot his father when he, the son, genuinely believed that his father was cutting his mother's throat. The rationale under which the son was acquitted was that "[i]f the accused had reasonable grounds for believing and honestly believed that his aid was necessary for the defence of his mother, the homicide was excusable."⁴⁷ The Kenya court dismissed the relevance of *Rose* on the sole ground that, unlike the case before it, the act of the accused was necessary in the English case. In a society that adheres to the belief that the only defence to witchcraft is the death of the witch, it is questionable whether what the appellants did was not necessary.

The holding of the Kenya court is also found in other former English colonies. Thus, killing a witch to save the life of another was rejected as a defence in Ghana (then Gold Coast)⁴⁸ in a case where, after the defendant's brother died, a "juju" was consulted and pointed out the deceased as the guilty party. When the defendant's second brother fell sick, a charge of witchcraft was laid against the deceased by the defendant who then killed him. The defendant was convicted of murder. The case is not dissimilar from the English case of *King v. Bourne*,⁴⁹ where the defendant, a socially prominent physician, was charged with committing abortion upon a 15 year old girl who had been the victim of a brutal rape. Relying on the advice of a psychiatrist that if the pregnancy was not discontinued severe psychiatric damage to the child might ensue, the defendant performed the abortion, and it was held justifiable. Yet the results were totally different. As observed by R. B. Seidman:

In [both cases] the defendant honestly believed that what he did was necessary to save another. . . . Yet one man was found guilty, and the other exonerated. The only apparent difference is that the tribunal believed in psychiatry, and not in witchcraft.⁵⁰

46. 15 Cox Crim. Cas. 540 (1884).

47. *Id.*

48. *Rex v. Konkomba*, [1952] 14 W.A.C.A. 236.

49. [1939] 1 K.B. 687.

50. Seidman, *Witch Murder and Means Rea: A Problem of Society Under Radical*

The Unreasonable Reasonable Man

The crucial issue involved in both the *Rose* and the *Bourne* case seems to be the effect of mistake of fact. Under mistake of fact,⁵¹ if *A* points at *B* with an unloaded pistol, and *B*, honestly and reasonably but mistakenly believing the pistol to be loaded, fires and kills *A*, *B* would not be guilty of murder since he can plead that he was defending himself against what he thought posed a threat of imminent death to himself. Furthermore, the defence of self-defence is not restricted to the particular person actually attacked. It extends to defence of one's property as well as defence for persons who are under the immediate care of the accused.⁵² But the important factor in mistake of fact is that the person relying on it would have been justified if the true state of affairs had been as imagined. Thus, in *Rose*, the accused was acquitted because, had his father been cutting the throat of the accused's mother, the accused would have been justified in killing his father.

The question, then, is whether a belief that a person is a witch and is bewitching either the accused or those under his immediate care can ever fulfill the above requirement. For such belief to afford a defence under mistake of fact, it must be shown that if the belief were actually true, then there would be justification to act in self-defence (subject to other essentials of self-defence law). And it is on such issues as this that the social ethos and traditional customs fundamentally differ from English Common Law and statutory law. Under native customs the accused would be absolutely exonerated of any liability; however, under the English Common Law no such defence seems available. This position has been endorsed by the East African courts over the years in their application of criminal law principles. The technique adopted by the courts hinges on the interpretation of "reasonableness" in the belief that the accused's life was threatened by an act of witchcraft. It should be noted that in the majority of cases, the honesty in such belief has been accepted by the courts. But on the question of "reasonableness" in such belief, the accused have, almost without exception, failed to establish their cases. This is primarily because of the application of the "English reasonable man" as the standard in judging the African's behavior.⁵³ Therefore, one court stated that "[i]t is difficult to see how an act of

51. Penal Code § 10 (1) (Cap. 63, Laws of Kenya (1962)).

52. *Rex v. Konkomba*, [1952] 14 W.A.C.A. 236; *Regina v. Rose*, 15 Cox Crim. Cas. 540 (1884).

53. *E.g.*, *Attorney General for Nyasaland v. Jackson*, [1957] Rhodesia & Nyasaland

witchcraft unaccompanied by some physical attack could be brought within the principles of the English common law."⁵⁴

This proposition was cited with approval in *Jackson*⁵⁵ where the High Court had acquitted the accused on the ground of justifiable homicide. Both the High Court and the Federal Supreme Court, on appeal, concurred in the view that it was sufficient if the accused genuinely believed that his own life was threatened even if that were not, in fact, the case. The Federal Supreme Court, however, parted company with the High Court on the "reasonableness" of the accused's belief. The lower court had relied upon the opinion of the African assessors in determining what would be regarded as "reasonable" in a person with the background and upbringing of the defendant. The Federal Supreme Court, however, had a different view: "Whereas genuineness is a subjective test, reasonableness in one's belief is objective and the applicable standard is that of *the ordinary man in the street in England*."⁵⁶ This conclusion was reached notwithstanding the Nyasaland Penal Code provision that "an ordinary person shall mean an ordinary person in the community to which the accused belongs."⁵⁷ The court justified its non-compliance with the clear dictates of the Nyasaland provision by rationalizing that "[t]he law of England was still the law of England even when it extended to Nyasaland."⁵⁸

On the basis of the court's attitude and approach to witchcraft, as demonstrated in the cases of *Galikuwa* and *Jackson*, it is probably safe to state that a belief in witchcraft can never constitute self-defence. If the standard of "reasonable man" is that of the "gentleman" in London streets and not the ordinary man within the accused's community, then the case appears to be prejudged, and nothing can rescue the accused. Conviction is almost guaranteed in every case. It may be argued that legislation can alter the position. But what clearer statutory provision is called for if that in the Nyasaland Penal Code is not sufficient? In *Jackson* the court was clearly directed as to the applicable standard of reasonableness. Yet the court, by "an interpretation that shocks the conscience," succeeded in sabotaging the clear, legislative intentions.

54. *Eria Galikuwa v. Rex*, [1951] 18 E.A.C.A. 175.

55. *Attorney General for Nyasaland v. Jackson*, [1957] Rhodesia & Nyasaland L.R. 443. The court in *Jackson* also cited with approval *Rex v. Fabiano Kinene*, [1941] 8 E.A.C.A. 96.

56. *Attorney General for Nyasaland v. Jackson*, [1957] Rhodesia & Nyasaland L.R. 433 (emphasis added).

57. Penal Code § 214 (Cap. 23, Laws of Nyasaland (1957 rev.)).

58. *Attorney General for Nyasaland v. Jackson*, [1957] Rhodesia & Nyasaland L.R.

There is no assurance that what happened in *Jackson* cannot be repeated but on different arguments. For instance, since most courts in East Africa are situated in urban environments, the judge can take the behavior of the urban population with which he is mainly familiar as representative of the community.

There is a lesson to be learned from *Jackson*—it is not enough to have “good laws” (whatever that may mean) without corresponding judicial officials who are committed to applying them to the practical problems of a given society. Judicial officials who are worth their salt should not apply immutable legal rules to practical day-to-day social problems and even less so when the local conditions call for a different approach, if not a modification, of the written law. It is hoped that the situation will improve with the increase of Africans on the bench; however, such hopes may not be heavily relied upon for it is not enough to have an African judge. The training of the judge (and at present the training in East Africa is entirely English-oriented) must also be taken into account.

Fear of the Witch and His Arsenal

There are additional reasons for skepticism as to the success of a self-defence plea. The court in *Jackson* attempted to differentiate between “killing in self-defence” and “killing because of fear for one’s life.” This distinction appears too fine to appreciate. Once a person is assailed and strikes back, it is purely academic to embark upon an exercise of separating fear from self-defence. As a matter of fact, one precedes the other in such an interlocking manner that the two must as of necessity go hand-in-hand. Without fear for one’s safety (be that safety for one’s life or those immediately under his care) it is difficult to comprehend the whole idea behind self-defence. It is humbly submitted that the distinction is unworkable in practice.

Yet another objection to the approach of the courts in East Africa and Nyasaland in respect to witchcraft is that in both jurisdictions the courts seem to have a weird concept of a weapon. According to these courts, a weapon has to be physical before self-defence can succeed.⁵⁹ This requirement runs contrary to witchcraft which by definition is supernatural power. If one must be attacked with a physical weapon, which is taken to mean a “tangible” instrument like a pistol, then witchcraft can never under any circumstances constitute a basis of self-defence.

59. See *Eria Galikuwa v. Rex*, [1951] 18 E.A.C.A. 175, 177.

The preceding paragraphs should not be interpreted to mean that the law itself (be it Common Law or statutory law) is appropriate in witchcraft cases, and therefore the problems are all judge-made. On the contrary, it is submitted that the legal rules themselves may pose unsurmountable problems when applied to witchcraft cases. Accordingly, it is a requirement in self-defence law that the assailed person must show that the force he used in resisting the attack was neither excessive nor unreasonable under the circumstances.⁶⁰ The question then is what force is reasonable or what means are appropriate to counteract supernatural power. What is the measure of "reasonable force and means" in witchcraft? In ordinary self-defence cases, any force or means are proper so long as they are proportionate to the force and means used by the assailant.⁶¹ Sticks, bows and arrows, pistols and guns may be mentioned as a few of the weapons to which the assailed may revert. But are such tangible weapons necessarily the appropriate means of self-defence in witchcraft cases? Are they appropriate to rebut a supernatural attack? Should one not be legally permitted to resort to supernatural power in one's self-defence against witchcraft?

According to the East African witchcraft statutes, the weapons to which a victim of witchcraft attacks may revert are restricted to the point of being non-existent. In view of the court's attitude and/or approach, weapons like pistols are, for practical purposes, ruled out since such tangible weapons are appropriate only where the attack is by another tangible weapon; however, witchcraft is not a tangible weapon. The only alternative is the traditional methods of rebutting witchcraft attacks. These include the use of witchcraft itself against the alleged witch and the use of witchcraft instruments which vary from one community to another. If one was bewitched or believed he was being bewitched, he could consult another witchdoctor who could either supply a preventative or curative counter-measure or supply the bewitched with the proper witchcraft to counteract the activities of the assailant. Such measures or weapons, however, are by virtue of the witchcraft statutes illegal.⁶² For instance, section 5 of the Kenya Witchcraft Act declares it an offence to be in possession of a charm or other articles usually used in the exercise of witchcraft, sorcery or enchantment for the purpose of causing fear, annoyance or injury to another in mind, person or property and without showing reasonable cause why he should retain

60. See 10 HALSBURY'S LAWS OF ENGLAND § 1382, at 721 (3d ed. 1955).

61. *Id.*

62. See, e.g., Witchcraft Act § 3.4 (Cap. 67, Laws of Kenya (1962)).

any such charm or other article in his possession.⁶³ At first glance, it is arguable that if a person in possession of such articles shows that the articles are for his "self-defence," that would be reasonable cause for his possessing them. But this is not the case. One cannot defend himself before he is attacked. Thus the person in possession of the articles or charms would have to go further and show who his assailant is—the witch against whom he is protecting himself. This, unfortunately, amounts to accusing the alleged attacker of being a witch which constitutes an offence under section 6 of the same act.⁶⁴

In short, the believer's position is an awkward one. On the one hand, the Common Law authorizes him to use any reasonable means and force in his self-defence. What is reasonable varies with the particular facts and circumstances of each case. And within this, witchcraft and instruments used in the *practice* of the same could well be covered. On the other hand, the common law right of self-defence is taken away from the witchcraft believer by what outwardly appears to be unreasonable rules of interpretation conceived and upheld by the courts and by the express prohibition of the witchcraft statutes.

On the requirement of "retreat" in self-defence, the problem still awaits decision as to whether such requirement is appropriate in witchcraft cases. The rationale behind "retreating" is that one should try to keep away from the attack until such a stage that he can no longer retreat with safety.⁶⁵ A common example where such tenet is practical is where the attacker has a panga or bow and arrow. With such weapons, the victim may easily remove himself from the "danger-region." But this requirement does not sound reasonable in witchcraft cases. How can one retreat from supernatural power? Among the Gusii, the "obasaro," allegedly used in witchcraft killings, is traditionally believed to be capable of acting at infinitely great distances.⁶⁶ To fulfill the requirement of retreat in such case, the assailed may be forced to leave his own village, location or even the country. The common law requirement does not seem to have envisaged, nor intended, such consequences.

Applicability of the Defence of Provocation

While there are cases where witchcraft has been used to perpetrate a fraud⁶⁷ or as a means of self-defence, the chief vehicle by which

63. *Id.* § 5.

64. *Id.* § 6.

65. See note 44 *supra*.

66. LeVine, *supra* note 37, at 227. The "obasaro" is black, poisonous powder allegedly used in witch killings.

67. Athuman v. Republic, [1967] E.A. 401 (Kenya).

witchcraft has presented itself for scrutiny by the courts is the ground of provocation. It is from this most important angle of witchcraft that the court's attitude toward witchcraft must be examined.

Many are the instances where the accused has, with little success, tried to justify his killing on the ground that either: 1) the victim, by an act of witchcraft, provoked the accused; or 2) the accused, believing the deceased to be a witch, killed him. On the latter ground, belief that the victim is a witch is not, per se, a defence on a murder charge. The danger into which the society would be plunged if those who believed others to be witches or to have bewitched them were given the green light to accomplish their desires is obvious. The position was admirably summed up in *Rex v. Kumwaka wa Mulumbi*:

Threat of witchcraft has been consistently rejected by the court except 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 be more mischievous or fraught with greater danger to the public peace and tranquillity.⁶⁸

Most cases in the area of provocation involve a situation where the victim has provoked the defendant by an act of witchcraft. *Rex v. Kumwaka wa Mulumbi* is the earliest reported case in East Africa.⁶⁹ On a charge of murder the accused pleaded, among other defences, provocation. The court held that such a defence was unavailing since the accused had not been "put in such fear of immediate danger to their own lives that the defence of grave and sudden provocation could be held proved."⁷⁰

The Test of Provocation

To the extent that the standard of fear required to establish a defence of provocation based on a belief in witchcraft is not discernible from the court's statement of facts, it may be said that the above statement is too general. However, in 1941, the East African Court of Appeal seized the opportunity to clarify what the statement meant:

68. [1932] 14 K.L.R. 137.

69. *Id.* For a summary of the facts of this case, see note 45 *supra* and accompanying text.

70. *Id.* at 139. On the same reasoning and authority, provocation as a defense was rejected in *Rex v. Muwaka bin Nyangwesa*, [1940] 7 E.A.C.A. 62.

The phrase confuses the emotion of fear (which has no place in the doctrine of provocation) and the emotion of anger, which is the natural and only product or result of provocation received. A defence of provocation arising from a belief in the potency of witchcraft is established if a fancied bewitchment, or threat of bewitchment, induces in the victim such a degree of fear as to deprive him of self-control and induce him to assault his provoker.⁷¹

On the basis of the court's language, it appears that unless the fear engendered reaches such a degree as to deprive the accused of his self-control, it will not constitute provocation.

The case of *Regina v. Fabiano Kinene*⁷² is the unchallenged touchstone by which belief in witchcraft, as a possible element of provocation, must be valued. The decision is important because it epitomized the requisite elements (as per the Penal Code) which must be fulfilled before a murder conviction can be reduced to manslaughter on the ground that an act of witchcraft provoked the accused. Additionally, this was the first instance where a belief in witchcraft fulfilled the legal tenets of provocation. The following were the facts in that case:

The appellants had been convicted of murder for killing the deceased whom they found crawling naked in the compound on the night of the killing. The appellants believed the deceased had bewitched their relatives, and that they had caught him in the act of bewitching them. They then forcibly inserted unripe bananas into his bowel through the anus. The method they used to kill him was traditionally considered proper for killing a wizard. The appellants admitted that they used the bananas knowing that the deceased would die. The court found that the appellants saw the deceased acting in such a way as to cause them to believe that he was then and there practising witchcraft against them.⁷³

As their defence, the appellants asserted that the deceased, by his act,

71. *Rex v. Sitakimatata s/o Kimwage*, [1941] 8 E.A.C.A. 57. In this case the deceased told the appellant that he had compassed the death of the appellant's wife by witchcraft and that he would kill the appellant by the same means. Appellant thereupon decided to kill the deceased and carried out his intention some hours later in circumstances which indicated premeditated revenge: appellant went back to his home to fix up his affairs, put the cattle in the Kraal and fowls on the roost, saw that the children got their evening meal and then armed himself with a spear with which he killed the deceased. *Id.*

72. [1941] 8 E.A.C.A. 96.

73. *Id.* at 98-99.

provoked them. The court was thus faced with the issue as to whether there was a case of legal provocation under the circumstances.

It is of significance to spell out in detail the court's arguments in *Fabiano* because subsequent cases on the topic are only intelligible in the light of those arguments. The reasoning employed therein also demonstrates why previous cases had been decided the way they were. The court found that the accused "genuinely and reasonably" believed that the deceased was actually, and there and then, engaged in practicing witchcraft against them when they found him crawling naked in the compound.⁷⁴ The court made an invaluable observation by taking notice of the "large part played by witchcraft in the life of the average African native."⁷⁵ The court also explained the meaning of the phrase "in the heat of passion" as used in the Penal Code.⁷⁶ The phrase is "more properly referable" to the emotion of anger than to that of fear.⁷⁷ The court continued:

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 and similar legislation in the other East African territories] 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 witchcraft. And if this be the case, a defence of grave and sudden provocation is open to him.⁷⁸

The court concluded that the defence of provocation had been established, and accordingly, the sentence was reduced to manslaughter.

To summarize, the following are the requisite elements, as restated

74. This finding was based on the evidence of the Muruka Chief that "if in the night I saw a naked man crawling in my compound, I would think he was a witch doctor actually practising witchcraft." *Id.* at 100-01. *Cf.* Attorney General for Nyasaland v. Jackson, [1957] Rhodesia & Nyasaland L.R. 443, where the opinion of the African assessors was rejected by the court.

75. 8 E.A.C.A. at 101.

76. This principle, that the act of killing must be done in the heat of passion, governs two other cases decided prior to *Fabiano*: *Rex v. Mawalwa bin Nyangwesa*, [1940] 7 E.A.C.A. 62, and *Rex v. Kimutai Arap Mursoi*, [1939] 6 E.A.C.A. 117, in both of which it was held that the time lapse between the alleged provocation and the killing was too long for there to be provocation.

77. 8 E.A.C.A. at 101.

78. *Id.*

in *Eria Galikuwa v. Rex*,⁷⁹ before a plea of provocation can succeed:

(a) The act causing the death must have been done in the heat of passion, i.e., in anger. Fear alone, even fear of immediate death, is not enough.

(b) The victim must have been performing in the actual presence of the accused an act which the accused genuinely believed, 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.

(c) A belief in witchcraft per se does not constitute a circumstance of excuse or mitigation for killing a person believed to be a witch in absence of an immediate provocative act.

(d) The provocative act must amount to a criminal offence under criminal law.⁸⁰

Before examining how these elements have been applied in subsequent cases, it should be pointed out that element (d) has its own peculiarity. If the provocative act must amount to a criminal offence under criminal law, then it is submitted that the court was giving witchcraft a unique approach not found in other criminal cases. For instance, if a man sees his wife in the act of adultery, he may be provoked, but the passion engendered is not necessarily because adultery is a violation of a penal statute.⁸¹ In fact, adultery is not a criminal offence in Kenya and Tanzania. It is only in Uganda that adultery is a crime.⁸² Yet, provocation has never been denied in Kenya and Tanzania if one caught his wife red-handed practising adultery. Accordingly, the passion engendered by a witch performing his profession might well arouse passion to such an extent that one loses self-control whether or not a statute prohibits witchcraft. It is therefore suggested that element (d) should be excluded when determining what would constitute legal provocation. Indeed, in no other case, prior or subsequent to *Fabiano*, has the court addressed itself to the issue of whether the provocative act was or was not a criminal offence in deciding whether provocation had been established. Accordingly, to make out a case of provocation, only elements (a), (b) and (c) should have to be proved. The three elements must coincide if the

79. [1951] 18 E.A.C.A. 175.

80. *Id.*

81. See Seidman, *supra* note 32, at 52, where the author illustrates the point at some length.

82. Penal Code § 150A (Cap. 106, Laws of Uganda (1964)).

accused is to succeed, and failure to establish any one of the three elements means failure to prove provocation.

Thus in *Rex v. Kelement Maganga*,⁸³ where the accused beat and strangled the deceased whom they caught walking naked at night in the accused's compound, it was held that the facts established legal provocation. But it should be noted that subsequent to *Kelement Maganga*, the plea of provocation has been rejected by the courts in practically every case because one or more of the requisite elements was lacking. In *Rex v. Kafuma s/o Mbake*,⁸⁴ the accused was convicted of murder and not manslaughter because he could not prove that he received immediate provocation or establish that the deceased was performing the alleged witchcraft act in the actual presence of the accused. A year later, in *Rex v. Emilio Lumu*,⁸⁵ the plea of provocation failed because "although the accused was present when his allegedly bewitched child died, he was not present when the bewitching was performed. He was merely informed."⁸⁶

In *Rex v. Petero Wabwire*,⁸⁷ the accused was convicted and sentenced to the death penalty because:

Although he genuinely believed that his wife was practicing witchcraft against him with intention of killing him, such belief was unreasonable since an ordinary person of the community to which the accused belonged would not genuinely believe that the deceased's act was one of witchcraft.⁸⁸

Honest as he might have been in his belief, the accused fell below the standard of "reasonableness," vis-a-vis, his fellow villagers.

In *Eria Galikuwa v. Rex*,⁸⁹ the plea of provocation failed because

83. [1943] 10 E.A.C.A. 49.

84. [1945] 12 E.A.C.A. 104.

85. [1946] 13 E.A.C.A. 144.

86. *Id.* at 145. On the same ground, the plea of provocation was rejected in *Rex v. Akope*, [1947] 14 E.A.C.A. 105.

87. [1949] 16 E.A.C.A. 131.

88. *Id.*

89. [1951] 18 E.A.C.A. 175. The facts were as follows: The appellant had some money stolen from him, and he hired the deceased, who had a great reputation as a witch doctor, in hopes that the deceased might recover the stolen money. The deceased, an unscrupulous rogue, seized the opportunity for unjust enrichment. On his first visit he exacted Shs. 70/- (70 shillings) as his fees and a chicken. On the second visit he demanded Shs. 320/-, a goat and threatened appellant that his "medicine would eat him up" unless he paid. On his third visit the deceased demanded Shs. 1,000/-, a sum which appellant did not have but which he promised to raise in a few days. That evening the appellant heard the deceased's "medicine" demanding the money saying it would "eat him up if you don't pay us." Appellant promised to pay. The demand was repeated the following night by the "voice" adding that appellant would be killed at noon the next day if he failed to pay. The "voice" added also that "if you go to borrow the money we

the requirement that the act causing death must be done in the heat of passion, *i.e.*, anger, was not complied with. The court concluded that the appellant was motivated by fear alone and not anger: "He struck, not in the heat of passion but in despair arising from his inability to raise the money and his hopeless fear of the consequences. He was not suddenly deprived of his self-control."⁹⁰

As applied, the above principle would seem to have wrought injustice to the appellant in *Galikuwa*. The distinction between fear and anger may be very clear in theory. Practically, however, as in the circumstances and facts of *Galikuwa*, it is next to impossible to draw such a fine line between fear and anger. One is even led to question whether the above principle was not more appropriate in *Galikuwa* than in *Fabiano* for it will be recalled that in the latter case, the appellants, after seeing the deceased crawling naked at night, thought he was simultaneously practicing witchcraft against them. An important factor which must have weighed heavily in the minds of the appellants in deciding to kill the deceased was that they believed the deceased had bewitched their relatives and was then bewitching them. The proper question was whether the appellants were afraid that the deceased would kill them in the same manner as he had killed their relatives. Yet, how is that any different from the fear which the appellant in *Galikuwa* had, taking into account the mysterious manner by which the chicken and the goat had been killed by the deceased? The only possible distinction which one can draw between the two cases is that in one the victims of the deceased's practices were human beings (the relatives of the appellants) whereas in the other case no human being had been killed by the deceased.

This factual distinction does not seem sound in view of the facts in both cases. In fact, it is humbly submitted that to reconcile the decisions on that distinction is unrealistic because it would appear that the crucial issue is not "the thing killed" but "the killing power" of the alleged witch. So long as the alleged witch has power to kill by use of witchcraft, it should be immaterial whether it is an animal or a human being that has been killed. Such distinctions hardly ever cross the minds of witchcraft-believers.

will go with you and if you don't get money we will eat you by sucking your blood." Appellant testified that he had witnessed the hen and the goat which he had given to deceased on previous visits die instantly, without the deceased giving them anything. As a result of that threat to his life, appellant decided to kill, and did kill, the deceased to save his own life. *Id.*

90. *Id.* at 178.

Superiority of Judicial Construction

To summarize, provocation, as a defence, has not been easily available in witchcraft cases. Two interdependent reasons may account for this. The first is that the circumstances in which killings in witchcraft arise are not apt to fulfill the legal tenets as formulated by both the penal codes and case law. The second reason may be that the criminal law principles in respect to provocation are not appropriate in witchcraft cases, and especially the requirement that the killing must have been sudden, in the heat of passion and before there is time for the killer's passion to cool. Professor R. B. Seidman suggests that the statutory requirements on provocation are inapt in witchcraft cases: "The nature of the threat of witchcraft is that the passage of time serves only to inflame the passions, not to cool them . . ." ⁹¹ This thesis is supported by the facts in several cases ⁹² and is a suggestion worthy of serious thought and consideration. If the applicable law is defective, it is probably asking for too much to expect the courts to adopt an elastic attitude in bending the legal rules to suit local conditions—the legal rules are themselves incompatible with witchcraft practices and reactions thereto. Were the theory acceptable, the accused in the relevant cases would have been guilty of manslaughter only. The theory also may have considerable merit in view of the popular notion that law should take into account the social ethos of the community in which it operates and that the function of a judge "is not to apply immutable principles, but rather to solve practical problems." ⁹³

The courts seem to have sensed the necessity for giving such convicts a somewhat different treatment. While they have sentenced the convicts to death (for the "legal bible" leaves no vagueness on the punishment to meted out to anyone convicted of murder), they have simultaneously and regularly recommended that the executive exercise its clemency, and, in effect, reverse the sentence. ⁹⁴ Such recommendations and reliance on the executive clemency defeat any deterrent effect of the death sentence in witchcraft cases. Whether such an approach is an

91. Seidman, *The Inarticulate Premiss*, 3 J.M.A.S. 567, 586 (1965).

92. *See, e.g.*, *Rex v. Sitakimatata s/o Kimwage*, [1941] 8 E.A.C.A. 57. The facts are summarized at note 64 *supra*.

93. Seidman, *The Inarticulate Premiss*, 3 J.M.A.S. 567, 582 (1965).

94. *See, e.g.*, *Rex v. Sitakimatata s/o Kimwage*, [1941] 8 E.A.C.A. 57 (Tanganyika); *Rex v. Akope*, [1947] 14 E.A.C.A. 105 (Kenya). In *Kajuna s/o Mbake*, [1945] 12 E.A.C.A. 104, the judge commented that "in dismissing the appeal, we conclude by observing that in *all* cases such as this we are aware that the element of witchcraft is *always* taken into account by the Governor In Council." *Id.* at 106 (emphasis added).

appreciation of the inadequacy of judicial solutions to the problems raised by witchcraft or an acknowledgement of the fact that the problems posed by witchcraft are probably never found in any other criminal law area is not quite clear from the decisions. But those are inferences which may be drawn from the conduct of the courts.

The wisdom in amending the penal codes to provide for a different standard in witchcraft, in contradistinction with other criminal cases, however, seems questionable. It is true that the problems posed by witchcraft are unique and probably are never found in any other criminal law area. But whereas such problems may be a necessary condition in adopting the approach the courts seem to have taken, it is doubtful whether they are sufficient grounds for an amendment of the penal codes. In the writer's opinion, such an amendment is uncalled for. The penal code provisions concerning provocation can well cover the situation if properly construed by the courts. How the courts interpret the words, "killing in the heat of passion; sudden provocation and before there is time for the passion to cool,"⁹⁵ seems to be the gravamen of the matter. No legal drafting, however thorough, however comprehensive, can cater for all eventualities in which the statute may be invoked, and the penal codes are no exception. It is for the courts to fill in the gaps which the legislature could not foresee—gaps which may vary with the facts of each case. There is no mathematically fixed time for the "cooling of passion," nor would such suggestion be tenable. What amounts to "sudden provocation" may also vary with the facts of each case. And in that light, if it is discovered that in witchcraft more time is required to arouse the anger of the victims of witchcraft or that more time elapses before the passion cools down, the statutory provisions on provocation should be interpreted in view of such evidence. It must be pointed out, however, that the approach advocated herein—interpretation of the already existing penal code provisions rather than an amendment of the same—can only be based on, and in fact presupposes, an existence of a bench with the full appreciation and background knowledge of the environment in which witchcraft believers live. It is not questioned that on several occasions the courts have shown such an appreciation;⁹⁶ however, the prevalence of such understanding is not as widespread as the special witchcraft situation necessitates.

95. Penal Code § 207 (Cap. 16, Laws of Kenya (1962)).

96. See, e.g., *Regina v. Magata*, [1957] E.A. 330 (Uganda); *Rex v. Fabiano Kinene*, [1941] 8 E.A.C.A. 96.

*Applicability of the Defence of Insanity*⁹⁷

Section 12 of the Kenya Penal Code (and identical sections in the other two states)⁹⁸ reads :

A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind, incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission.⁹⁹

The problem with such provision is in extracting what constitutes a "disease affecting the mind." Is a person who genuinely believes that another member of his community feeds upon human flesh and uses salt to quench his thirst sane? Or is insanity confined to only those who have been so certified by the physicians?

The two East African cases on this topic do not render sufficient guidance as to the courts' position on witchcraft and insanity. In the first case, *Muswi s/o Musula*,¹⁰⁰ the court rejected the assertion that a belief in witchcraft could constitute insanity. In that case the defendant killed his wife by shooting her with an arrow as she sat in her kitchen. There had been continued quarrels between them for some time, and the defendant believed she was practicing witchcraft against him. A psychiatrist testified that there was a history of madness and epilepsy in the family and that the defendant was probably suffering from mild depression at the material time. Rejecting the defence of insanity, the court said :

[E]ven if the defendant believed that he was justified in killing his wife because she was practicing witchcraft, there is again no evidence that such belief arose from any mental defect; it is a belief sometimes held by entirely sane Africans.¹⁰¹

The problem with insanity law, as per the penal code and the M'Naghten Rule, is the simplicity with which it requires the human mind to be compartmentalized. To convince the court that the accused was insane at the time the crime was committed, it is imperative to show that the

97. For a detailed analysis of the element of mens rea, see Seidman, *supra* note 50. See also the brief discussion of insanity in Seidman, *Mens Rea and the Reasonable African: The Pre-Scientific World View and Mistake of Fact*, 1966 INT'L & COMP. L.Q. 1135, 1152.

98. § 12 (Cap. 106, Laws of Uganda (1964)); § 13 (Cap. 16, Laws of Tanganyika (1964 rev.)).

99. Penal Code § 12 (Cap. 16, Laws of Kenya (1962)).

100. [1956] 23 E.A.C.A. 622.

101. *Id.* at 625.

defendant was incapable of understanding what he was doing or of knowing that he ought not to have done what he did. The position is made doubly difficult by the requirement that the incapacity to understand what he was doing or the wrongfulness of the act must be as a result of a disease affecting his mind. This distinction is important in differentiating between erroneous conclusions arrived at as a result of training or lack of it, and a mental disease which may impair such understanding whether or not one has the necessary training. It is only in light of this distinction that the court's conclusion in *Muswi* should be construed. The belief entertained by the defendant was traceable to the traditional native life and had nothing to do with insanity. Were the defendant's contentions acceptable, the term "insanity" would cover a large percentage of the African society which holds similar beliefs. The defendant's actions indicated an erroneous conclusion of a sane mind and that is why belief in witchcraft, per se, is not insanity within the M'Naghten Rule¹⁰² or the penal codes. In 1957, a year after *Muswi* was decided, the High Court of Uganda held that an accused who had killed his father under the honest belief that he was a witch was insane as a result of such belief.¹⁰³ The facts in that case were as follows:

Both the accused and his father had been to a burial of a boy. As they walked home from the burial, they were on friendly terms. The accused suddenly killed his father by cutting his neck (head) with a panga. The accused said that he had killed his father because he (the father) was Satan, i.e., he believed his father was bewitching him. He also said that his father had bewitched his two sons and killed them; bewitched his wife and killed her; bewitched the accused and made his feet swollen; bewitched his goats and killed them all; his cow was still sick; bewitched his second wife—she was always sick; "after I was bewitched, I was hated in the village and even my relatives hated me. My second wife also hated me and said she was going to marry someone else. *Because I was bewitched my head was not right*; even my ears were affected; when I have sexual connections with my wife, my penis burns."¹⁰⁴

Holding the accused guilty of murder but insane at the time, the court found that he was mad. He had held those thoughts that his father was bewitching him for a long time. That affected his mind, and when

102. See *Hotema v. United States*, 186 U.S. 413 (1901).

103. *Regina v. Magata*, [1957] E.A. 330 (Uganda).

104. *Id.* at 331 (emphasis added).

he killed his father "he did not know he was doing wrong."¹⁰⁵ The court observed that "[a]n African living far away in the bush may become so obsessed with the idea that he is being bewitched that the balance of his mind may be disturbed to such an extent that it may be described as a disease of the mind."¹⁰⁶ In a council of two there cannot be a majority. It is difficult to be dogmatic where there are only two cases indicative of the court's position in respect to witchcraft and insanity. Moreover, the two cases are not by the same court. One is by the East African Court of Appeal while the other is by the Uganda High Court. It seems clear, however, that in appropriate cases, even the Court of Appeal for East Africa would come to the same conclusions as that arrived at by the Uganda Court; "there is again no evidence that such belief arose from any mental defect . . ."¹⁰⁷ suggests that had relevant evidence been adduced, insanity could have been established in *Muswi*. What is not quite clear is what more was expected from the defendant in *Muswi*. It is inarguable that insanity cannot be established except by analysis of the facts of each particular case. But looking at the facts of the two cases, the only major distinction between the two cases seems to be the number of "irrational beliefs" held by one defendant but not by the other. Otherwise, each of the accused in the two cases killed because he believed that the deceased was bewitching him. It is submitted that the courts have not, as yet, arrived at any definitive posture as to the applicability of self-defence in the witchcraft situation.

THE IMPROPRIETY OF TRADITIONAL WITCHCRAFT ATTITUDES

The propriety of the penal code and the Common Law to witchcraft should be questioned. The survey seems to indicate that some of the principal requirements, especially in self-defence, may justifiably be compared to a dwarf in a giant's robe when applied to witchcraft. The cases and the statutory sanctions tend to regard the defendants (believers in witchcraft) as especially dangerous persons who are in acute need of treatment. If the community of which the defendant is a member holds the same beliefs, then the identification as "dangerous" is a misnomer—"dangerous" in whose judgment, and to whom? It is beyond the scope of this paper to examine the aims of punishment in criminal law. It should suffice, however, to point out that if one of the goals of punishment is to express the society's disapproval of the defendant's conduct with the intention of rehabilitating him (capital punishment does not fit into

105. *Id.*

106. *Id.*

107. [1956] 23 E.A.C.A. 622, 625.

this), such punishment serves little purpose in witchcraft cases where the defendant's act is not only approved but is also a praiseworthy service to the society. If any achievement results from such punishment, it is to lead the indigenous society to believe that the law is in "collusion" with the witches.

It may also be a fair comment to say that the cases suffer from a common vice of treating what was/is right and proper in punishing witches under the native custom as criminal. Both the criminal law and the native traditions are in agreement that witchcraft is bad and socially disruptive, that witches should be punished and that where they cause death by their wicked practices, they shall be served with the death penalty. If, therefore, the basic point is agreed upon, the rest is a matter of methodology—what type and degree of severity of the sentence shall be meted out and by what organ of the society. The African customs authorised the whole community or a group thereof, as well as an individual, to punish those believed to be witches. The danger with this is in establishing that the person punished is actually a witch. To allow one who believes, however genuinely, that he has been or is being bewitched to be both the witness, the judge and the executor of the appropriate sentence is unquestionably absurd. Personal malice cannot be kept out in such a system. It is a fallacy, however, to assume that this was the common practice among the native communities prior to statutory punishment. On the contrary, the alleged witchdoctor was given an opportunity to exculpate herself/himself in a properly constituted gathering in accordance with the customs. Witnesses would come forward and adduce evidence to establish the charge. In short, the punishment of witches was not, under the African traditions, a mere whimsical exercise whereby one could lose his life purely through the emotions of his enemies. The Kamba tribe, for instance, would never invoke operation "KINGOLE"¹⁰⁸ in the absence of corroborated evidence. The whole village or even the entire clan was permitted to be present in the public hearing of such cases, and all evidence was relevant.

THE FUTURE OF WITCHCRAFT BELIEFS

It is important to discuss the future of witchcraft beliefs—important

108. The accusation of witchcraft could not be brought before the 'King'ole' by one or two men acting alone. They must be able to produce the supporting evidence of the 'mundu mue' and would first propagate their belief throughout the area so that the accusation to the 'King'ole' elders should have general support.

D. PENWILL, *KAMBA CUSTOMARY LAW* 96 (1951). 'King'ole' is the meeting of the mass of the adult male population for the purpose of condemning and executing an evil doer.

because there would be no real necessity of advocating any change in the court's attitude and/or approach to witchcraft cases, much less any amendments to the penal statutes, if it can be proved that witchcraft beliefs and all that go with them are dying a natural death. Were such the case, some of the seemingly absurd decisions arrived at by the courts could probably be overlooked as "blank judicial history" with little future relevance. Unfortunately, however, and contrary to what most people would expect, witchcraft beliefs are not dying the natural death that they should. A detailed analysis of the future of witchcraft beliefs, however, is outside the scope of a paper of this nature in view of the sociological content that it would entail. Perhaps it will suffice to point at one or two factors to illustrate any trends and reasons for why people believe in witchcraft. This may probably dispel some of the conceptions held not only by the courts but also by a large proportion of the non-believers in witchcraft. That done, it is possible that believers in witchcraft will get a more sympathetic hearing, if not treatment.

The sole issue worth serious consideration is why even "educated" people believe in witchcraft. One would expect the heavy statutory penalties against witchcraft to be sufficient deterrence. Such hopes are apparently not supported by the weight of evidence. Many people would associate beliefs in witchcraft with either unscientific thinking or lack of "education." Such conclusion is at best naive. The issue involved in such beliefs is in almost all cases a *search for a causal explanation of the incomprehensible and misfortunes—an attempt to penetrate behind the facade of the observable and scientifically provable world.*¹⁰⁹ Thus, it is never questioned by the believers in witchcraft that some snakes are poisonous and that *A* will die of such snake bites unless treated. That is never doubted. The question is: *Why the snake bit the particular person and not the person walking immediately in front of or behind him. It is not why tuberculosis killed A but why the disease attacked A and not B.* To the witchcraft believer, science answers the obvious, and, to that extent, may be trite learning, absolutely impotent of furnishing the requisite solution to the witchcraft menace.¹¹⁰ It is in the perspective of

109. Consider the following explanation: "We went to a witchdoctor to find out from him what had caused the death of Levi. We knew a snake had bitten him, but according to our custom (belief) we had to find out through a witchdoctor what had caused the snake to bite him." J. CRAWFORD, *WITCHCRAFT AND SORCERY IN RHODESIA* 122 (1967).

110. A recent incident in Kenya illustrates why and how witchcraft beliefs have entrenched themselves. Tsume Washe, alias Kajiwe, a coast provincial witchdoctor, offered to purge the entire coast of all other witchdoctors by driving them into oblivion. To prove his ability to do so, followed by hundreds of the faithful, he marched up to the rival witchdoctor in Kilifi District. As Kajiwe appeared, the rival witchdoctor fell

the foregoing facts that one should examine whether or not "education," Western or otherwise, can ever provide the solution to witchcraft or an answer to the future of the beliefs therein. It is humbly submitted that "education," apparently a panacea for almost everything else in the geographical region under consideration, does not seem to supply the solution to witchcraft beliefs.¹¹¹ It may be argued that with more people undergoing a Western-type of education, beliefs in witchcraft are on the decline. This may be so, but one cannot be dogmatic about that theory. There is no statistical data to support or disaffirm such a rationalization. An exercise to determine the percentage of witchcraft believers may not be very fruitful since few, if any, "educated" Africans would like to be associated with a belief which they consider "primitive" and thus damaging to their social or economic status. Only occasionally, when one's security, either of life or of job, is really threatened do we get a glimpse into the inherent beliefs of even those with a Western-type education.¹¹²

This response in times of crisis is in accord with witchcraft beliefs. Even among witchcraft believers, the beliefs become relevant only when there is social tension and hostility, and at present, the areas over which people may disagree or hate one another are on the increase. The changed economy and introduction of cash-crops together with increased shortage of land have caused fierce competition; people are forced to squeeze together as land is not available elsewhere. Living so close together, people have many more opportunities to develop hostilities.¹¹³ For instance, cows from one homestead are apt to devour the crops of another homestead's fields and that can become a source of irritation; being a father or mother of a well-to-do or educated child is a sufficient cause of hatred; in some societies, in the absence of protective measures, one may improve one's social status only at his own risk. This type of fear is found not only among the rural residents; it extends to the African urban

dead. Hospital-type "witchdoctors" said the deceased died of a heart attack. But Kajiwe claimed: "He dies because of me." Heart attack or not, the coincidence of the death with the circumstances was enough to confirm the faith of the witchcraft believers forever. See REPORTER, Aug. 26, 1966, at 30.

111. Therefore, as recently as March, 1969, three qualified primary school teachers at Jilore, Near Malindi, fled from the school in mortal fear, claiming that they were victims of witchcraft applied against them in different forms. The rest of the staff of the same school threatened to quit unless government protection was forthcoming. The victims further illustrated their faith in witchcraft when they petitioned the government to allow Kajiwe, the coast provincial witchdoctor, to use his powers to weed out the petty witchdoctor concerned or give the victims immunisation against the spells. Daily Nation, Mar. 29, 1969, at 1, col. 1.

112. *Id.*

113. Paradoxically, one would expect living together to eradicate some of the misconceptions about the neighbours as they know each other better. But the Western notion of "privacy" may be accountable for this lack of mixing and learning about one another. <http://scholar.valpo.edu/vulr/vol5/iss3/3>

societies as well. Thus, it is not uncommon to hear of accusations of witchcraft between fellow workers competing for promotion or favour with their bosses. Not a few of such accusations arise between political opponents rallying for positions in the arena of demagoguery. In such circumstances it is not surprising that some urban, self-improved workers consult witchdoctors for immunization or protective spells before retiring to the countryside for their leave. This they do in the belief and fear that the villagers, in envy of their riches, may want to bewitch them.¹¹⁴ Waking up to find oneself in the big towns does not necessarily alter one's background and deep-rooted beliefs and fears; similarly, the possession of academic credentials may not, without more, be regarded as sufficient to do away with some of the traditional beliefs. In the "civilized" (whatever that term may mean) communities, people attribute inexplicable eventualities to fate or the will of God. The native African has his explanation in witchcraft. But in both camps, the struggle is the same—a search for a causal explanation of misfortunes. How some people get the courage to label one "unscientific" or "primitive" is not easy to understand.

CONCLUSION

Witchcraft is a complicated phenomenon to comprehend—complicated because some of the beliefs and practices in witchcraft make little sense unless they are identified with the culture and background of those that are haunted by the fears therein. The problem is made no easier by the provisions of the witchcraft statutes in East Africa which, as we have seen, are both inadequate and contradictory. This is especially so in self-defence where the victims of witchcraft practices are rendered helpless since they cannot revert to witchcraft, the only reasonable means and force in the circumstances. The statutory provisions erode common law self-defence. Whether there is any justification for the limitation in the instruments concerning what a victim of witchcraft may revert to in defence is not a proper question. Accordingly, the writer has not endeavoured to answer it. Suffice it to say that it seems illogical that any good law should stipulate that one must stand idle and allow his enemy to take his life without lifting a finger to protect himself. This is what the relevant statutes in East Africa seem to have done. They acknowledge that witchcraft, like a pistol, can kill. Yet, they prohibit the use of similar weapons in self-defence.

It is unbecoming to the integrity of any legislature to enact against

114. This type of behaviour is common at Mombasa where consulting Kabwere, allegedly the most senior witchdoctor in Kenya, has become a hobby with most of the up-country migrants working at the coastal towns.

offences that are impossible of commission. Either witchcraft exists, or it does not; if the latter be the case, the penalties prescribed by the witchcraft statutes are superfluous since the offences can never be committed in the first place. The cloud of doubt cast upon the courts by these statutes is long overdue for clearance. Yet, the unclarity is bound to continue as long as the law continues to ignore the social ethos of the indigenous communities. Little is achieved by a law that flagrantly denies the existence, and thus the power, of one of the most feared forces among the African people. It may, of course, be argued that law should be progressive and guide the society to higher aspirations. This cannot, however, be stretched too far. It cannot, for instance, mean that the people become the servants of the law rather than the law serving societal needs and dictates. The law should not be too far ahead of the community's development or social tenets. The problem lies in the imposition of a law originally designed for a different culture upon what has been labeled "pre-scientific" societies.

The cultures and beliefs of Africa's indigenous peoples should be accorded the necessary legal recognition and respect (by at least independent Africa) until such time as the majority of the ordinary, native Africans, living in rural as well as urban areas, grow out of their beliefs and fears in witchcraft. Chadwick Hansen, author of *Witchcraft at Salem*, posits that Western civilization stopped executing witches when the literate and balanced portion of its members stopped believing in their capacity to harm. As we have seen, in determining whether the majority of the indigenous peoples have grown out of the fears and beliefs in witchcraft, formal Western-type of education should not, per se, be the criterion.¹¹⁵ Witchcraft fears, and all that go with them, exist and haunt a large proportion of the native Africans, both "educated" and uneducated. All courts should bear this fact in mind and seek to understand and appreciate the root of the problem and rule accordingly.

115. See note 111 *supra* and accompanying text.

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