

TANZANIA / JUDGMENT

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COURT
TZHCDECIDED
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10. IN TI-LEHIGH COURT OF TANZANIA ORICINAL JURISDICTION (DOIDMA. REGICTRY) CRIiIN/L SDSSIOL\TS CASE N0 175 OF 1972 The Republic versus V 1 JUMA 5/0 ULIBLIMBJ.LI 2b ABDUI SOZI 5/0 JUJXL.Li ¶ - 200CT 1973 - Oharge Murder c/s 196 of the Penal Code0 JIJDGBMENT Originally the accused was jointly charged with another for the murder of his father Kulanbalinbali Mhogomchungu at Itumbi village in Chunya District 0 In court the accused confessed to the offence in all its ingredients 0 The only difference between his extra judicial confession, to the productions of which he did not object, and his confession in court was that whereas in the former confession he implicated the co—accused, he did not in any way refer to his friend in court G The charge against his co—accused was immediately withdrawn and he now stands charged alone There is no question that the confession is a reproduction of the truth 0 For, there is independent evidence to bear the accused out,0 It would appear that somehow the deceased, a reputed wizard, inspired fear in his son by first asking him to train in witchcraft0 According to the accused his father aroused him early one morning and took him to the bush. He then asked the accused to throw down the blanket with which he covered himself and to proceed naked o that he could take lessons in witchcraft The accused was afraid and he declined to take any such training0 The father was displeased with him, He therefore threatened to bewitch the accused0 So great was the accused's fear that he ran off to Kiwere in order to escape from the diabolical influence of the deceased.0 The luck was not with him however, At Kiwero a snake wrapped itself on his leg and when he consulted a medicineman thoro f he was told that this misfortune was traceable to his father. Sure enough, when he returned home to his father, the deceased assured him that it would not serve him to run away0 His magic would roach him wherever he chose to go 0 Thereafter tho relations between father and son grew worse One day, as the accused was drinking at a pombe shop, his father the deceased cane. The accused then, out of respect and generosity, bought him some beer. Instead of being grateful to him, the deceased became abusive and quarrelsome, The accused then moved off to some private place with his friend and ôontinued drinkiig The merriment became a problem to him that day, f or, his stomach swelled so much that he passed out next day, His mother rushed for the cell—loader on whose intervention the c' deceased revived and cured the accused his son 0 From then on the accused became convinced that his life was in danger. The threat the deceased had made to him that he would kill his son for despising him became a sword of democles to the accused. So, on the fateful day the accused drank from

morning till night,. According to him the beer he consumed cost him shs, 121=, a /11 - j considerable sum indeed, bearing in mind that one shilling can buy a whole gallon or so. When he returned home that night, he made up his mind to get rid of the deceased before the deceased made good the threat to kill him. Unfortunately for the deceased his wife was at the time away to Chunya to buy seed beans. The accused then entered the deceased's room, picked up an axe from the corner and hacked to death his father who was at the time sleeping and unsuspecting. .H5 then pulled the body to the field close to the house and only partly buried, it in grass. The upper and lower parts remained exposed. The Police officer who went to investigate the case found the body in that position. The doctor who conducted the post mortem on the spot found the body in the very same position. The widow and the sister of the accused were led to the spot by a dog. They were the first to find the body in that position. The accused could not therefore be mistaken on this point. Indeed, all that he said in explanation of his father's death must also be true. Only that his belief in the potency of witchcraft, being purely metaphysical, cannot be verified either empirically, or by corroboration. It would at this juncture suffice to say that the accused or for that matter any member of the society in which the accused lived, would have felt exactly as the accused: that the deceased, a reputed and feared wizard and medicine man, would use witchcraft and magic to kill him. Such feeling would be intensified by the harrowing experience which the accused went through. All the material particulars in the confession are corroborated. The accused even informed the Police he used the axe he used to hack his father to death. The doctor confirmed that the head injury which caused the deceased's death was consistent with such weapon. The widow confirmed the accused that he was revived and cured of a swollen stomach by the deceased. That he killed his father is unquestionable. It is likewise unquestionable that the accused harboured, and in his view he was justified to harbour, a belief that the deceased was going to kill him with witchcraft. By his conduct and utterances, the deceased left his son in no doubt that he would at any time kill him.. But, as I have already pointed out, belief in witchcraft is metaphysical, and, as was pointed out in *R v KIJUNI MBIU* (1945) 104, "The mere belief founded on something metaphysical as opposed to something physical, that a person is causing the death of another by supernatural means, however honest that belief, does not constitute in law a circumstance of excuse or mitigation for killing a person when there is no provocation". It should not be forgotten, however, that the cumulative effect of the threat and suffering of the accused must have been to enhance the mortal fear which the accused had for his life. But this is not to say that the law as it stands at present would come to the rescue of the unfortunate majority in this country who firmly believe in witchcraft. The only conditions under which the killing of a wizard would mitigate the offence of murder have been set out thus:- "(i) The act of causing death must be..... done in heat of passion.....fear of immediate death is not sufficient..... The provocation must be not only grave but sudden and the killing must have been done in the heat of passion (6) The provocative act may indicate a future intention on the part of the doer and might therefore be of such a nature as to come within the definition of legal provocation (*ERL GLIKTJWA V .R.* (1951) 18 LCA 175) If he had therefore killed his father on his return from Kiwolo at the time when the deceased threatened to kill him for his

disrespect, the accused would have been exonerated from murder and there lies the absurdity of the Law in its present form. Until all and sundry are rid of the age-old belief in magic our people will be condemned to death for holding such beliefs. That the law should be reconsidered was realised as long ago as 1945 by the East African Court of appeal in KAJIJNA MI36,11E's case (supra) when Sheridan C.J. referred this matter to the Executive. It is understandable, of course that at that time, when Colonialism used to laugh with scorn at our beliefs, Mr. Justice Sheridan's call should fall on deaf ears and be dismissed with disdain and arrogance. But times have since changed. It would not therefore be out of place to renew such call again. Our people, whether we like it or not, have believed, are believing and will continue to believe in witchcraft even if literacy were to become universal tomorrow morning, Science and technology have yet to explain the natural puzzles and phenomena which are peculiar to Africa.. And judging from the very low level and slow pace of our technological advancement, these beliefs shall remain with us for quite some time. Should we not therefore face this fact and adjust the law accordingly? It is time our Party reexamined the law on this point. In this case, like in Kajuna's case, the accused honestly though, to a Monotheist like myself, mistakenly, believed that his father would kill him at any time and had in fact started carrying out the threat by causing him considerable suffering. As the facts of this case stand, however the accused cannot be said to have either been provoked or to have killed in the heat of passions His act was cool, calculated and deliberate. It was no doubt, prompted by the accused's belief in witchcraft and his intense fear for his life. It was, to the accused or to anyone in his station in life either his death or that of his father. So he resolved to save himself by killing his father first. Unfortunately for him the law as it stands, does not allow the killing of wizards like it does the killing of snakes and other prowling beasts. This court has not but to agree with the assessors and to find the accused guilty of murder as charged and to convict him accordingly. /M. H. A. Kwikina Ag. Judge. Record: Accused is a first offender.. Mitigation: .. accused is a boy of 22 who has to maintain his mother, Accused stoutly believed in magic. Accused believed to this day that he was going to lose his life. the matter should be taken into account. Allocutus: I am unmarried. I have no relations. My aunt is my cousin. The widow is my mother. I have other relatives living at Tabora and Kiwera, Sentence: The accused has been convicted of murder for which offence the sentence of death by hanging is mandatory. At this stage it would help the accused if he was reminded that there is always a chance to win the appeal or to obtain a reprieve. It is all a question of fate really and one can only pray God that the accused be delivered from his predicament. For, the court is however, the accused has to be and is hereby sentenced to death by hanging. / N. H. A KWIKIMA AG.. JUDGE ./13

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