

AN EVALUATION OF THE BELIEF IN WITCHCRAFT AS A DEFENCE IN AFRICAN JURISDICTIONS

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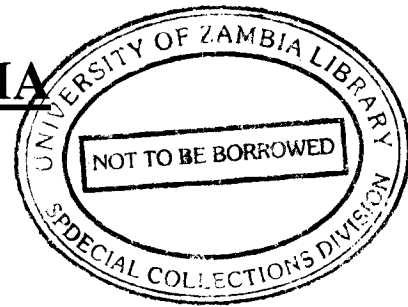
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**An Evaluation of the Belief in Witchcraft as a Defence in
African Jurisdictions**

By

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**A Dissertation submitted to the School of Law of the University
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I recommend that the directed research paper under my supervision by Mweshi Charmaine Chibangulula entitled-

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Be accepted for examination in partial fulfilment of the requirements for the award of the Bachelor of Laws degree of the University of Zambia.

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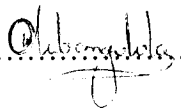
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Date

Declaration

I Mweshi Charmaine Chibangulula, do hereby declare that this dissertation presents my own work, and where other people's work has been used, due acknowledgements have been made. This paper has not been previously submitted for any academic awards to the best of my knowledge.

Signed.....

Date.....05/02/08

Abstract

This Essay attempts to offer an analysis of the possibility if any, of the “belief in witchcraft” being admitted as a defence in Sub Sahara African Jurisdictions, relating to murder cases where the accused pleads to have killed as a result of the fear of witchcraft. The analysis highlights the difficulties which the belief in witchcraft as a defence would face. The first difficulty pertains to the position that witchcraft as a cultural belief has in these Sub Sahara African legal systems as determined by the colonial legislators. The colonial legislators deemed it unreasonable and non-existent as is evident from the anti Witchcraft legislation still applicable in this region. Although this is the main difficulty underlying the impediment of the belief being a defence, the Essay also points out specific challenges that the belief is presented with in attempts to bring it under established defences. These being self-defence, provocation and insanity. Due to these difficulties, a new defence, known as cultural defence will also be analysed to determine the possibility of it being admitted as a defence, or merely considering cultural factors in mitigation of sentence. This defence, however, whether as a stand-alone defence or pleading cultural factors in mitigation of sentence cannot avoid the difficulties posed in the area of proof. The analysis will have regard to the principles of evidence which govern these legal systems in order to highlight the evidential challenges that the belief faces. In the light of these challenges, certain recommendations have been proposed.

Acknowledgements

My heartfelt gratitude goes out to my supervisor, Professor M.P. Mvunga for the professional guidance, without which this essay would not have materialised into what it is.

Special thanks to my family for making the financial provisions which were more than necessary for me to complete this dissertation. Dad, Mum, Esoko, Kanjo, Acha, Jojo, Akky and Ezzy, you are the BOMB!

To my friends, Daniel(dnl), Musonda, Jeff, Sonile, Sthembiso, Melai, Sydney, Beatrice, Womba, Muyanza, Walu, Inutu, Chiluba, Martha, Edward, Grace M and S, Mr Mwalongo, Mutale and to the rest of the class of 2007, thank you.

Dedication

To God first and foremost, for the direction and ability he has granted to me.

To my wonderful Mother, Sylvia Kabole Chibangulula for being my much needed inspiration in challenging moments and representing the smile of God upon my life.

To the rest of my Family for the love and understanding shown in challenging times.

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CHAPTER ONE

INTRODUCTION

1.1 THE PROBLEM AND INTRODUCTION

Some cases have been brought before the African courts in which an accused, charged with murder has alleged that he killed the victim because he believed that the victim was about to kill him or was about to kill a member of his family. Therefore, accused pleads the defences of self defence or provocation. In other cases, the accused has sought to argue that the belief that he was about to be killed through witchcraft affected his mind to the extent of being unable to understand the consequences of his actions or unable to control his actions, thus pleading the defence of insanity or the mitigating factor of diminished responsibility. In yet other cases the accused seeks to rely on the belief in witchcraft in the mitigation of his sentence after being found guilty on a charge of murder.

The agreeable stance taken by the courts across Africa has been to disregard such attempts of pleading the belief in witchcraft under the established defences. This is because the belief in witchcraft is generally deemed to be unreasonable in African modern states. This position of the belief in witchcraft under these African jurisdictions is attributed to the perception of the colonial legislators and adjudicators who regarded it as a mere passing phase and that with the education of an African mind, there would be a shift towards scientific explanations. This is evident from the anti witchcraft Acts passed by the colonial government organs, which have continued on to this day, and the

decisions passed in cases involving elements of the belief. Their goal was to eliminate the belief in witchcraft from existence.

However, the belief still persists with witch murders being reported across Africa.

Suggesting that the position of the belief in witchcraft was based on a mistaken assumption that it would die out with the education of the African mind. This in essence raises the question of whether it is right to maintain the same position, when it is realised that the beliefs are still part of the African mind, especially in the area of defences to criminal culpability? Psychologists and anthropologists have criticised the stance which the law has taken of playing a blind eye to witchcraft beliefs. Rather than the belief should be considered in the determination of criminal culpability, it is this possibility that the Essay seeks to evaluate.

1.2 SPECIFIC RESEARCH QUESTIONS

The research focuses on answering the following enlightening questions:

- a) Why is the belief considered generally as being unreasonable?
- b) How meritorious are the arguments against the long standing position of the law on the belief in witchcraft?
- c) What are the specific reasons given for rejecting the belief under the established defences?
- d) Are the reasons tenable?
- e) Can the belief fall under the broad scope of cultural defence?
- f) What challenges would be posed by admitting the belief in witchcraft as a defence with particular reference to evidence?

1.3 SIGNIFICANCE OF THE STUDY

Firstly, it is important to note that the belief in witchcraft is an area of study where vast literature has been written, however, most of it, related to the law, has focused on the anti witchcraft legislation, a legacy of colonial governments. Not much has been written on its relation to criminal culpability in terms of the offence of murder.

Secondly, in the light of the overwhelming evidence that the belief is still prevalent in African societies and the well acclaimed principle that law is not formed in a vacuum, the non cognizance of the belief is questionable.

Thirdly, the reasons by the courts have to be checked to determine their validity or whether courts so decide for mere convenience.

1.4 METHODOLOGY

The research is basically an analysis on the topic stated and will concentrate on sub Saharan African States. It will involve desk research in the form of analysing key decided African cases which have for long set the position as well as examining the phenomenon of Cultural defence in order to determine whether the belief in witchcraft can fall there under. Reliance will be had on written material of learned authors as well as set principles of criminal culpability and canons of evidence.

The first chapter of this paper will seek to evaluate the nature of the belief in witchcraft and will look at the position it has at law in these Sub Saharan Jurisdictions.

Chapter two will assess key cases from the African Jurisdictions where the accused has sought to rely on the belief as an excuse for the offence of murder.

Chapter three focuses on the advanced defence of Cultural Defence, highlighting the arguments for admitting it as a full defence and those advanced in favour of it as a mere mitigating factor.

Chapter four will highlight difficulties that the belief in witchcraft as a defence or a mere mitigating factor would present to the canons of evidence and chapter five will conclude on the subject as well as offer recommendations in needed areas if the belief is to be considered as a defence or in mitigation of sentence.

1.5 THE NATURE OF WITCHCRAFT

This Essay will not ascribe any definition to the term witchcraft but will basically highlight the elements that are associated with the term so as to bring out the nature of witchcraft.

From the Witchcraft Act, witchcraft is associated with the act of throwing bones, use of charms and supernatural powers.¹ Thus witchcraft in the Act is deemed as encompassing sorcery which involves use of charms and throwing of bones.² The difference between witchcraft and sorcery is deemed to lie in the fact that the latter involves use of acquired powers, spells and rites whilst the former involves use of inherent power.³ Therefore, some authors have tended to look at witchcraft as only involving the supernatural. For

¹ Sections 2 and 5 of Chapter 90 of the Laws of Zambia

² Crawford, J.R. 1967. Witchcraft and Sorcery in Rhodesia. London: Oxford University Press. p1

³ Reynolds, B. 1963 Magic, Divination and Witchcraft among the Barotse of Northern Rhodesia. London: Chatto and Windus. p14

instance, to Mittlebeeler witchcraft is seen as the use of non-natural means to cause misfortunes.⁴

Note that this paper takes the term witchcraft as encompassing both 'sorcery' and 'witchcraft' in the strict sense as proposed by some authors. Thus witchcraft is taken as including use of supernatural power and physical phenomena as bones and charms. The purpose of such power is to cause harm to the person they are directed at. This can be in the form of disease, or any other kind of misfortune. As rightly stated above, witchcraft is taken to be the cause of misfortunes. Ashforth puts it in this manner,

“conjectures, suppositions and hypothesis framed within the terms of the witchcraft paradigm are premised upon the conviction that suffering and misfortune are a sign of the action of invisible power.”⁵

This ultimately means that witchcraft is understood as a mechanism of explaining misfortunes such as death or suffering. It has been advanced that every misfortune that is incapable of rational explanation is attributed to witchcraft by a person who believes in it.⁶ Thus witchcraft to the person possessing the power serves the purpose of harming others by causing misfortunes to them whilst to the mere believer, it provides answers to inexplicable misfortunes.

Therefore, such a believer aware of his source of misfortune, which may have occurred or imminently yet to occur, will seek ways of preventing the recurrence of the misfortune or the occurrence of the misfortune as the case may be. His actions will depend on whether

⁴ Mittlebeeler, E. 1976. African Custom and Western Law. London: African Publishing Company. p135

⁵ Ashford, Adam. 2001. AIDS, Witchcraft and the Problem of Power in Post-Apartheid South Africa. Paper number 10, unpublished. p.9 Accessible through <http://www.google.com>, accessed on 18th July, 2007

⁶ Gordon, Neal. 2001. “Conflict between State Legal Norms and Norms underlying popular Beliefs: witchcraft in Africa as a Case study.” Duke Journal of Comparative and International Law, volume 14, p.351

he has a legal mechanism to look to or to take the matter in his own hands. The latter is the likely option as highlighted by the state of law and the happenings across Africa.

1.6 HISTORICAL POSITION

The position of the belief in witchcraft is attributed to the colonial legislators who mainly refused to acknowledge the existence of witchcraft. Anti witchcraft legislation is a sign of such refusal. The legislation was passed in African countries, with the purpose of wiping out the primitive beliefs of witchcraft, as they are known in the western world. Dirk Kohnert observes that,

“the legislature enacted anti- witchcraft laws which stipulated that both witchcraft and the accusation of witchcraft was punishable according to the law, thereby effectively preventing colonial courts from taking an active part in resolving the witchcraft fears of their subject. The present jurisdiction in most African countries is still based on these biased colonial anti-witchcraft laws.”⁷

A clear illustration of the objective of such legislation is taken from the provisions in the Witchcraft Act of Zambia.

The preamble of the Act broadly states its purpose of providing penalties for the practice of witchcraft. The Act by making the practice of witchcraft punishable seeks to deter people from engaging in witchcraft. Section 5 in particular, places a fine or a prison term on a person who professes to exercise witchcraft, thereby causing fear in others. The activities of witch doctors or witch finders are also punishable, despite the fact that such persons are seen as vital in the fight against witchcraft, in that they help identify the person practicing witchcraft and help in the reformation of witches and wizards. Further,

⁷ Dirk, Kohnert. 2006. On the Renaissance of African modes of thought: The Example of Occult belief systems. Munich Personal Repec Archive Paper no 982. p10. Accessible through <http://www.mpra.ub.uni-muenchen.de/982/>, accessed on 11th June, 2007.

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any person who accuses another of practicing witchcraft is liable to a fine or to a term in prison of less than a year.⁸ This provision tends to leave a victim of witchcraft without any protection at law, in that as soon as he raises the complaint of either a member of his family having been killed through witchcraft or a complaint of being in danger of being killed through witchcraft, he accuses the perpetrator of witchcraft thus committing a crime as under the Witchcraft Act. The author of this work asserts that the non-protection was not contemplated by the legislators as they were working on the premise that the Act through its provisions would prevent witchcraft activities and therefore, a person would not find himself in this situation. Of interest is the framing of section 9, which stipulates that,

“whoever, on the advice of any person pretending to have the knowledge of witchcraft or of any non-natural processes or in the exercise of any witchcraft or of any non-natural means, shall use or cause to be put into operation such means or processes as he may have been advised or may believe to be calculated to injure any person or any property shall be liable...”

The use of the word pretending highlights the views of the legislators who saw witchcraft as non-existent and persons who professed to have the power merely pretended and those who believed merely deluded or deceived.⁹

However, in reality, the African mind still believed in the power of witchcraft as the Act failed to prevent witchcraft acts. With no protection from the law, a victim of witchcraft resorted to self-help. Cases involving people who had killed as a result of the fear in

⁸ The Witchcraft Act, section 3, Chapter 90 of the Laws of Zambia

⁹ Another example would be the Witchcraft Act of Kenya, Chapter 67 of the Laws of Kenya, enacted in 1925, amended in 1962. The Act is still in force; it prohibits the practice of witchcraft and prohibits individuals from pretending to exercise witchcraft powers. Accusing another person of engaging in witchcraft activities is also criminalised.

witchcraft went before the courts that had a similar conception on witchcraft as the legislators.

In the case of *R v Gadam*,¹⁰ the accused's wife had a miscarriage and was mortally ill. The accused attributed the illness to having been bewitched by two women, as a result of which, he struck one of them on the head with a hoe handle in the belief that striking her would destroy the spell. She died of the blows. The defence pleaded provocation but the court rejected and held the belief in witchcraft as being unreasonable.¹¹ That,

“it would be a dangerous precedent to recognise that because a superstition which may lead to such a terrible result as is disclosed by the facts of this case, is generally prevalent among a community, it is therefore reasonable. The courts must I think, regard the holding of such beliefs as unreasonable.”¹²

The West African Court of Appeal while accepting the prevalence of the belief in witchcraft in that society held it unreasonable because recognition would lead to undesirable results. It is, however, submitted by this work that despite the non recognition of the belief as reasonable, killing as a result of the belief is still going on. Thus the reason given by the court falls short, in that it did not achieve what was its intended purpose of eliminating the belief in witchcraft. Rather it is advanced that the perception of the Court in terms of reasonable belief was influenced by the English point of view. As held in *Attorney General for Nyasaland v Jackson*,¹³ that,

¹⁰ (1954) 14 WACA p.442

¹¹ The matter relating to defence of provocation will be discussed in chapter two

¹² *R v Gadam* (1954) 14 WACA p.443

¹³ (1957) R&N p.443

“the standard of reasonableness of mistake in the killing of a witch in imagined self defence, is what would appear reasonable to the ordinary man in the street in England...the law of England is still the law of England even when it extended to Nyasaland.”

However, in the case of *Mutambo and five others v The People*,¹⁴ the Court refuted this test of reasonableness and took the stance that the view with which a belief must be in accordance with is the reason of the law. The court stated that the reason of the law is derived firstly from the positive rule of law that dictates that only an act done according to the positive rule of law can be reasonable. When assistance cannot be derived from a positive rule of law, the reason of the law is that a belief or act, in order to be reasonable must be one which a person of average knowledge, perception, judgment and self control would have held or done in the particular circumstances.

As regards the positive rule of law, it is submitted that it is in line with the *Jackson case* just referred to. In that, the positive rule of law merely reflects the reason of the legislators. Being English, the law reflected the reason of an English ordinary man and ultimately reverting back to how an English ordinary man would deem the belief.

Further on, the positive rule of law with which the belief of witchcraft should accord to, as stated above, generally tends to deny the existence of the phenomenon of witchcraft. Therefore, the belief assumed the position of being unreasonable and still maintains this position. Due to this position, in cases where the accused killed someone as a result of the belief in witchcraft, attempts to rely on established defences and mitigating factors have miserably failed with such accused being committed for murder.

Note that this position was based on the objective of eliminating witchcraft activities and belief in witchcraft from existence. However, witchcraft activities and the beliefs still

¹⁴ (1965) ZR p.15

persist as is evident from reports on witch violence and witch murders being reported across Africa.

In 2006, a mob of ninety youths set alight thirty-nine houses in Limpopo, South Africa, accusing the occupants of practicing witchcraft and later in March, another group of boys burnt a house of a sixty-six year old woman accused of witchcraft.¹⁵ In Tanzania, there were reports of witch killers who willingly confessed to killing suspected witches.¹⁶ In Democratic Republic of Congo, over eight hundred people were killed due to the witch violence.¹⁷ Between 1997 and 2000, the eastern part of Tanzania reported four hundred witch killings whilst the western part reported more than five hundred killings.

The extent of the belief is so grave that even children are subject to violence if they are alleged to be involved in witchcraft activities. In Nigeria, two children had their fingers burnt by their father so as to get them to confess to the alleged witchcraft powers which they had been using to bewitch him, causing misfortune. In Malawi, two three year old boys were murdered by their parents in the hope of cleansing the children of witchcraft. The parents shoved a sharpened rod into each child's anus to rid him of witchcraft.¹⁸ The horror of the way the killing was done reveals how convinced the believers are of the existence of witchcraft and its harmful effect. Thus in the light of no other protection, they protect themselves by getting rid of the source of the harmful power in whatever manner, which mostly is killing.

¹⁵ The newsletter of the pagan federation international, Issue 1, 2007. Accessible through www.google.com, accessed on 8th of June, 2007

¹⁶ reported on 23rd October, 2003, www.bbc.com, accessed on 8th June, 2007

¹⁷ Richard Petraits. 2003. "The witch killers of Africa." Accessible through www.google.com. Accessed on 8th June, 2007

¹⁸ www.news24.com, accessed on 11th June, 2007

These reports reveal the failure of legislation on witchcraft to stop the practice of witchcraft and the beliefs in witchcraft. Thus the position that the belief is unreasonable, being premised on the non existence of witchcraft, is also questionable. The existence of witchcraft in the African society calls for law which will regulate witchcraft activities and not one which ignores its existence and strives to eradicate it. By reflecting the existence of witchcraft the belief in witchcraft will be considered reasonable at law as per reason of the law principle espoused earlier on, in that it will accord with the positive law.¹⁹

This being so, would the belief in witchcraft be a defence or mitigating factor to criminal culpability or sentence, as the case may be. The following Chapter will attempt to evaluate a selected number of cases from Sub-Saharan African jurisdictions, which will bring out the possibility, if any, of the belief falling under any of the established defences.

¹⁹ Examples are the amendments made to the suppression of witchcraft Act of Zimbabwe. They allow one to turn to the law if he believes to be under a threat of witchcraft activities. It is not a crime as the case is under the anti witchcrafts Acts across Africa, which is a legacy from colonial era. As reported on www.bbc.com, accessed on 10th July, 2007.

CHAPTER TWO

AN EVALUATION OF DECIDED CASES

This Chapter focuses on decided cases in the African Jurisdictions pertaining to murder, where the accused alleges that he killed so as to protect himself or his family from being killed through witchcraft by the deceased or that the belief that he was about to be killed through witchcraft had affected his mind to the extent that he was unable to understand the consequences of his actions or that because of the belief, he was unable to control his actions. Also, the accused may seek to rely on the belief in witchcraft in mitigation of his sentence after being found guilty on a charge of murder.

Thus this chapter will look at selected cases where self defence, insanity and provocation have been raised and cases in which the belief has been sought to be used as a mere mitigating factor. This is to examine and find out the validity of the reasons given for the refusal to admit the belief under the established defences.

2.1 Self defence

It is asserted that a party who acts in defence of himself or another is acting in self defence.²⁰ The provision under the Common Law is that the force used in defending oneself must be reasonable and the question of reasonable force is a matter of fact. That is, what would be considered the reasonable act to do in the particular circumstance?

²⁰ Halsbury's Laws of England, paragraph 1180, volume XI, p630

In the South African decided case of *S v Mokonto*,²¹ the appellant was charged with the crime of murder. He admitted to having killed the deceased because she was a witch who had killed his two brothers. On the material day, the deceased had issued a death threat to the effect that the accused would not see the setting of the sun, as result of which the accused killed the deceased. The accused pleaded self defence and the court of first instance held that he was guilty of murder with extenuating circumstances. The extenuating circumstances being, the accused's belief in witchcraft and his belief that the deceased had killed two of his brothers. On appeal against the conviction, the appellant accused argued that the deceased had threatened him with death, and believing that she possessed effective supernatural powers as a witch, slew her in self defence and therefore he should be acquitted. It was held that for the defence to stand, it had to be shown as a reasonable possibility on the evidence that the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury. That is, whether the accused's belief that his life was in danger would have been shared by a reasonable man in his position. That the plea of self defence is usually raised in the context of immediate danger. That the physical situation was absent in this case and further, as the law was based on western civilisation, it could not regard belief in witchcraft as reasonable. That to hold otherwise would be to plunge the law backward into dark ages.

The case brings out three conditions which had to be satisfied as being; one has to be unlawfully attacked, the accused has to show that he had reasonable grounds to believe that his life or that of another was in danger and that the belief could be held by a reasonable person in the position of the accused.

²¹ [1971] A.D. p319

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²¹ [1971] A.D. p319

As regards the first condition, it is clear that the court required such an attack to be a physical attack, visible to ordinary human eyes. There are two reservations on this requirement. Firstly, what counts as an attack? There are cases where there is clearly a definite physical attack, but the courts have held otherwise, that there was no physical attack. As was the case of *Kakomba v R*²², where the appellant believed the deceased had killed one of his brothers by witchcraft and was responsible for the illness of another brother, whom he was in the process of killing. He asked the accused, who had been summoned to relieve the patient, to administer some medicine for relief. Upon refusal to do so, the appellant struck the deceased with an axe which led to death. On an appeal against the conviction of murder, the court had no doubts that the appellant honestly believed when he struck that he was striking a man who had already killed one of his brothers and was in the process of killing another. Despite the court bringing out factors that fall under self defence, it held that the plea for self defence in the circumstances could not stand in law.

Another reservation pertains to the Witchcraft Acts in African Jurisdictions; which state that any witchcraft related act towards another is unlawful.²³ Note that such a claim, that one is being attacked by another through the use of witchcraft would mean or imply that the other is a witch and under the Witchcraft Acts of Africa, this constitutes a crime.²⁴ Thus this condition as set tends to go against the Witchcraft Acts in African Jurisdictions and this questions the possibility of this condition being satisfied.

²² [1952] 14 W.A.C.A. p236

²³ For instance, the Zambian Witchcraft Act prohibits witchcraft practices and by implication, any attack on a person through use of witchcraft is unlawful.

²⁴ The Zambian Witchcraft Act, section 3, Chapter 90 of the laws of Zambia

The second and third conditions are related, that is the accused has to show that he had reasonable grounds to believe that his life or that of another was in danger and that the belief could be held by a reasonable person of the position of the accused. Take note of what was stated in *Attorney General for Nyasaland v Jackson*,²⁵ the test of killing a witch in imagined self defence, is not what would appear reasonable to the ordinary man in England. To a man in England, beliefs in witchcraft are foreign, which is in contrast to an African man as illustrated in the number of witch killings in Africa, thus to use this standard of reasonableness is misplaced and clearly, the belief in witchcraft will always be held as not being reasonable. As it has been submitted above that in African Jurisdictions for a belief to be reasonable, it has to be in accordance with the reason of the law which is derived from positive law. Note however, that the positive law merely reflects the reason of the legislators. The legislation in question is the Witchcraft Act that was enacted by colonial legislators. These legislators being English, the law reflected the reason of an English man and ultimately reverting to how the belief in witchcraft is deemed by an ordinary English man. Thus having no regard to the reasonable man in Africa.

The conditions thus set are quite impossible to satisfy that any attempt to bring the killing of a witch under self defence is bound to fail. Note however, that the case of *Mokonto*, just referred to, was firmly decided as regards the physical element in that it would be dangerous not to so require, as people would kill any suspected person and get away with it. Thus self defence under the belief of witchcraft should be limited to a few cases where there is physical attack. However, note the supernatural nature of witchcraft, the act of killing may not always be visible as where accused perceives the attack in his dreams,

²⁵ [1957] R& N p.443

how is he to prove the physical attack on him by the deceased? It is clear that such are cases which may never be covered under the defence of self defence.

2.2 Provocation

At Common Law, provocation is not a full defence but rather a mitigating factor, in that all it does is reduce a would-be conviction of murder to that of manslaughter. It consists of some act done which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self control, making him so subject to passion that he is not master of his mind.²⁶ For an act to be provocative it must cause provocation in any reasonable man and it must have amounted to provocation in the accused to the extent that he acted under the heat of passion and hence was not in control of his mind. The first case to be examined is *Rex v Fabiano Kinene and Another*.²⁷ In this case, a group of villagers suspected a village headman named William of using witchcraft to kill their relatives. One night, they found William crawling naked in their compound, and fearing he was attempting to bewitch them, they killed him by forcibly inserting twenty raw green bananas into his anus. According to the court, William's act of crawling naked in the villagers' compound at night, and their belief that he was trying to bewitch them, constituted grave and sudden provocation. The court stated,

“we think that if the facts proved establish that the victim was performing in the actual presence of the villagers some act which they did genuinely believe, and which an ordinary person of the community to which they belong would genuinely believe, to be an act of witchcraft against him or another person under his immediate care . . . he might be angered to such an extent as to be deprived of the power of self-control and induced to assault the person doing the act of witchcraft. And if this be the case, a defence of grave and sudden provocation is open to him.”

²⁶ Halsbury's Laws of England, paragraph 1164, volume XI, p620

²⁷ [1941] 8 East Africa Court of Appeal, p 96

This case explicitly refers to the reasonableness of an accused's belief in witchcraft. The deciding court found the villagers' provocation by an apparent act of witchcraft to be reasonable, provided an ordinary and reasonable person from the villagers' community would share the same belief. Note that in an African society the belief in witchcraft is prevalent and therefore in such a society, ordinary and reasonable persons are bound to hold such a belief. The court's reliance on the African standard of reasonableness was very commendable. This case it must be stated is one of the few cases in which the belief in witchcraft has been held to fall under provocation.

In the colonial case of *Eria Galikuwa v Rex*,²⁸ where the accused appealed against his conviction of murder, the court laid down the conditions under which killing by virtue of the fear of witchcraft can fall under provocation. The facts of the case were that, the accused had hired a reputed witch doctor in the hope of recovering money stolen from him. The witch doctor demanded exorbitant fees that the defendant could not afford, but which he promised to pay in a few days. The witch doctor threatened that his witchcraft medicine would eat the accused up if he did not pay. Later, the accused claimed he heard death threats emanating from the witch doctor's medicine. As a result, the accused killed the witch doctor by beating him with a stick. The court rejected the accused's defence of provocation, because a mere threat to cause injury to health or even death in the near future could not be considered as a physical, provocative act. The accused's fear of, and genuine belief in, witchcraft was not enough for the court to find his provocation reasonable. The court found that,

²⁸ [1951] 18E.A.C.A. p175

"he was motivated not by anger but by fear alone. He struck, not in the heat of passion, but in despair arising from the recognition of his inability to raise the money demanded and his hopeless fear of the consequences . . he was not suddenly deprived of his self-control."

The court laid down the following elements as requirements for a successful defence of provocation:

1. The act causing the death must be proved to have been done in the heat of passion, which is in anger: fear alone, even fear of immediate death is not enough.
2. The victim must have been 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.
3. There must be an immediate provocative act and the provocative act must amount to a criminal offence under criminal law.
4. The provocation must not only be grave but sudden and the killing must have been done in the heat of passion.

On the first element it is important to echo the words of learned authors on this subject that people who kill under the belief of witchcraft do it out of fear rather than anger.²⁹

This assertion then questions the decision of *Fabio Kinene* already referred to. It is therefore more acceptable to common sense and natural man that the accused in that particular case killed out of fear than anger. Whether fear causes one to lose control over

²⁹ Aremu, L.O. 1980. 'Criminal Responsibility for Homicide and Supernatural Beliefs', The International and Comparative Law Quarterly, Oxford: Oxford University Press, p125, states that in witch-killings, the main reason is fear rather than anger, and to apply a doctrine based merely on sudden grave anger is to miss the mark of the whole problem.

his mind, so as to have the same effect as anger, is questionable. Thus the requirement of killing in anger may be stated as the greatest impediment to the belief in witchcraft being admitted under provocation.

On the element pertaining to the need of the provocative act being a criminal offence, it is observed that, as much as witchcraft practice is criminalised, claiming that someone practices witchcraft is also criminalised. This then suggests an inconsistency between the Witchcraft Acts and the requirements of the defence of provocation.

The element of killing in the heat of passion for the accused to be deemed as having lost control, brings out the point that the accused must have had no time to deliberate over the killing. In *Joseph Kamiliango and Others v R*,³⁰ the victim was brutally murdered by her four sisters who argued that they had acted under provocation arising out of their firm belief that the deceased was practicing witchcraft and was determined to kill all the family members. The court of appeal found that the four had not been provoked because they had the opportunity to deliberate about how to kill her and had therefore acted with cool minds and in full possession of their faculties.

As for the element of the provocative act being done by the deceased in the presence of the accused, it is clear that one cannot plead the defence based on the belief alone; there must be a physical act of provocation. As decided in *Rex v Akope Kaman and Another*³¹, where the Court of Appeal stated that,

“a mere belief that witchcraft has been or is being exercised may be an honest belief in an accused person’s mind but when that belief is founded on nothing but suspicion of the person holding the belief, it cannot be said

³⁰ [1983] TLR 185 (CA)

³¹ [1947] 8E.A.C.A. p96

to be both reasonable and honest. To hold otherwise would be to supply a secure refuge for every scoundrel with homicidal tendencies.”

In yet another case of *Herman Nyingo v Republic*³², the accused appealed against his conviction for murdering a person whom he accused of practicing sorcery. The appellant Court rejected the accused’s defence of provocation because the accused attacked in an unprovoked manner and the fact that the accused’s utterances that he was killing because of sorcery showed that he had the required malice aforethought, he was in control of his faculties.

Thus provocation, as the requirements stand, can not cover killing under the belief of witchcraft because of the need for a provocative act, creating anger in the accused leading to loss of control over the faculties and acting in the heat of passion.

2.3 Insanity

This defence is concerned with the accused’s legal responsibility at the time of his alleged offence and not simply with whether he was medically insane at the time.³³ The defence as set out under the M’Naghten Rules is guided by two rules, that is, everyone is presumed sane until the contrary is proved and that the accused has to show that he was labouring under such a defect of reason, due to disease of mind; such defect causing inability to know the nature and quality of his act or, if he did know this, not to know that he was doing wrong.³⁴

³² [1995] TLR 178 (CA)

³³ Cross and Jones, 1963. *An Introduction to Criminal Law*. London : Butterworths and Co. Ltd.p149

³⁴ M,naghten’s Case (1843) 10 CI and FIN 200,

Insanity has been pleaded by way of the accused claiming that the belief in witchcraft prevented him from knowing the consequences of his action or, that what he was doing was wrong. In an earlier case of *Rex v Magata Kachehakana*³⁵, the accused was charged with the murder of his father whom he had killed because he believed that his father had bewitched his deceased wife and was responsible for all the ills in his life. The Court held on the advice of assessors that an African living far away in the bush may be 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 mind.

It is observed that the ruling in the case above was based on the assumption that an African living in a secluded area, away from civilisation, is the only person who can be so affected. However note that belief in witchcraft still persists in civilised areas of Africa.

Another observation is the requirement that the defect in reason should stem from a disease of the mind, this directly eliminates the belief in witchcraft which is a mere product of the environment rather than an internal state of the mind. A person is nurtured in an environment or community which believes in such phenomenon. Also, the accused always knows the consequences of striking the alleged witch or wizard, to kill so as to get rid of the danger. In the alternative, the accused, if aware of the consequences of his actions, deems it right to kill the alleged witch and cannot be said not to know that his killing is wrong.

³⁵ (1957) E.A. p330

Further on, regard is had to what the Kenyan courts stated in the case of *Philip Muswi s/o Musola*,³⁶

“even if the accused 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.”

Therefore, the defence of insanity also falls short, that is, unable to cover killings perpetuated by the belief in witchcraft.

2.4 Mitigation of sentence

The accused who so kills may plead the belief in witchcraft in mitigation of sentence. In the case of *Rex v Kajuna Mbake*,³⁷ the accused killed his father, whom he believed to be in the process of causing the death of his child by witchcraft. The trial judge convicted the accused of murder. In dismissing the appeal, the Court stated,

“a 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 may be, has not so far as we are aware been regarded by this court as mitigating circumstances in law.”

The main point in the case bordered on the lack of a physical element proving the belief in witchcraft, had it been present, the Court would have decided as *S v Ndlovu and Another*,³⁸ where the appellants appealed successfully against a sentence imposed for murder of fifteen years with hard labour. The deceased being the appellants' father who was believed to be a wizard and that by the use of supernatural powers had deliberately

³⁶ [1956] 23 E.A.C.A. p622

³⁷ [1945] 12 E.A.C.A. p104

³⁸ [1971] (1) SA 27 (RA)

caused a series of misfortunes upon his family. The Court in considering the sentence examined the appellants' community which was steeped in witchcraft and its evil practices. It observed that as a result the appellants believed implicitly in the power of witches and wizards intentionally to cause physical harm to others by the use of supernatural means. The Court also had considered the fact that the attack on the deceased was triggered off by the apparent fulfilment of a threat issued by the deceased in that it tended to reinforce the fears of the appellants. Being that the deceased had threatened the accused that he would burn their hut with lightening, which in fact happened. Thus the Court decided that the appropriate sentence was ten years with hard labour.

It must be observed firstly that the Court's reference to the appellants' community was very commendable, as the law must be alive to the community in which it operates.

More importantly, the Court looked at the manner in which the attack on the deceased came about, in that, the fears of the appellants had been provoked by the threat that had materialised. This tends to suggest that the belief should only operate as a mitigating factor if there was a provocative act, physical rather than metaphysical, stemming from the deceased.

However, it can be argued that by virtue of the nature of witchcraft, most provocative acts are bound to be metaphysical than physical. Thus, it is difficult to determine the provocative act. This requirement is needed for convenience sake in evidence as well as to cut down on instances where witch killers can get away with lighter sentences, which

could be undesirable as it would encourage witch killings with no proof upon which the court can rely to establish how genuine the belief in witchcraft is.

In *R v Enock*,³⁹ the appellant had killed his brother who he believed had attempted to bewitch his wife. The Court refused to admit the belief in witchcraft as a mitigating factor because there was no reason to believe that any harm would befall him, in that, no threat to do harm by supernatural means had been made against the appellant. In yet another case, *Herman Nyingo v Republic*,⁴⁰ the appellant sought to rely on the belief in witchcraft as a mitigating factor. The Court looked at the fact that the appellant attacked the deceased in an unprovoked manner and rejected the appellant's appeal for a lesser conviction.

Having examined the decided cases from Sub-Sahara African Countries, it is clear that the belief in witchcraft cannot fit under the established defences of self defence, provocation and insanity. The option would be to make alterations to certain conditions under such defences, for instance, under provocation; the condition of acting under anger would have to be expanded so as to cover fear as well.

Another option would be as will be explored in the following Chapter of coming up with a distinct defence for such killings, such as the phenomenon of cultural defence, which is merely a call on the Courts to cultural factors when determining the criminal culpability of the accused.

³⁹ Cited in *S v Ndlovu and another* [1971] (1) SA (R.A.D.)p.27

⁴⁰ [1995] TLR 178 (CA)

It might also be suggested that such beliefs should only be considered in mitigation of sentences rather than a ground for a complete defence, so as to curb witch killings across the African continent.

CHAPTER THREE

CULTURAL DEFENCE

This Chapter focuses on the phenomenon of cultural defence and its applicability in terms of the belief in witchcraft. It will highlight the elements and basis of the cultural defence so as to assess its suitability as a stand alone defence for the accused who kills because of the fear of witchcraft. It is important to bring out the fact that there is a debate of whether the cultural defence must be a stand alone defence or a mere use of cultural factors in mitigation of sentence and this debate is still on going in Western Jurisdictions. There are arguments for both positions which will be highlighted in the course of this analysis.

The debate on cultural defence emanates from the American and English systems of law.

This is because of the cultural diversity prevalent in these societies due to immigrants.

The purpose of the debate is to ensure that the Criminal Law takes into account the various cultures in these jurisdictions. The core of this defence is the need to take cultural factors into account in determining the criminal culpability of the accused.

Though it must be stated that no such defence has been formally admitted in these jurisdictions and the cases referred to will show that courts in these jurisdictions merely consider the cultural issues pleaded as ordinary evidence.

For this paper to be more enlightening the cultural defence will first be discussed in the broad sense as proposed in the American and English systems of law and a more specific view, with special reference to witchcraft as a cultural factor in African jurisdictions, will be undertaken later on in the Essay.

3.1 CULTURAL DEFENCE AS PROPOSED IN THE WESTERN LEGAL SYSTEMS

Cultural defence is a proposed criminal defence that would allow an immigrant or minority defendant to claim either that he was unaware of the illegality of his actions in a particular jurisdiction or that the cultural environment in which he was raised mandated that he can act in a particular manner.⁴¹ Thus as proposed, it is meant for immigrants rather than the indigenous people of these societies. The assumption is that the formulation of the law in these societies does not reflect the cultural beliefs of the immigrants, thus the law might prove to be foreign to these foreigners. It is expressed that,

“the values of individuals who are raised in minority cultures may at times conflict with the values of the majority culture. To the extent that values of the majority are embedded in the criminal law, these individuals may face the dilemma of having to violate either their cultural values or the criminal law.”⁴²

One wonders whether this proposed defence is an indirect way of pleading ignorance of the law, which as trite law dictates is not a defence.

⁴¹ Damian Sikora, 2001 “Differing cultures differing culpabilities? A more sensible Alternative: using cultural circumstances as a mitigating factor in sentence.” Ohio State Law Journal, Volume 62, p1695

⁴² Robert, B.1986 The Cultural Defence in the Criminal Law, Harvard Law Review, Volume 99, no 6, p1293

Cultural defence thus looks at the role of cultural factors in the accused's behaviour so as to establish whether they caused him to act as he did or not. It is argued that the cultural environment under which the accused was raised mandated that he act in the way he did.⁴³ The argument then follows that because an accused acted in a culturally motivated manner; he is not morally blameworthy and hence should be partially excused. This argument makes use of a common assumption in criminal law that if the accused cannot control his or her actions, he or she generally should not be held responsible for them.⁴⁴ A point to note is whether this does apply to an immigrant who has stayed in these jurisdictions for a long time; can such a one plead to be under the influence of cultural factors as well and to be unfamiliar with the law of these jurisdictions? This is not logically in line; this then definitely means that the defence is limited to immigrants that have not spent much time in these jurisdictions.

The basis of the defence is that the accused's cultural background negates the essential elements of criminal liability with specific reference to unlawfulness therefore he or she should not be culpable.

There are two portions to the proposed defence, the cognitive cultural defence which attempts to argue that the accused while perfectly sane and rational was incapable of committing an act satisfying all elements of the crime because cultural differences prevented him from being aware of a necessary fact or law.

The other portion is volitional cultural defence, under which it is argued that the accused knows his or her conduct is legally wrong but, due to cultural influences, cannot refrain

⁴³ Robert, B. 1986 Harvard Law Review Volume 99, no 6, p1293

⁴⁴ Gordon, N. 2001 "The Implications of Memetics for the Cultural Defence" Duke of Law journal, volume 50, p1809

from such conduct. The accused claims that he is not as culpable as he would be had he not been compelled by cultural factors.⁴⁵

Thus the cognitive argues that since the accused was nurtured in an environment where the act was not considered a crime but was encouraged, he would be under the same perception in the new jurisdiction where it is an offence and would not deem it to be wrong. Under volitional cultural defence, the argument borders on the inability of the accused to act independently because of his cultural background which dictates his actions.

As was stated above, no formal cultural defence has been admitted in these jurisdictions and practically it must be stated that the defence covers pleading cultural factors in mitigation of sentence. That is, an accused's cultural background could entitle him to advance cultural factors in mitigation of sentence. This reasonably raises the question of terming the phenomenon as "cultural defence."

It has been advanced in favour of a stand-alone defence that fairness and equality require the tailoring of punishment to fit the degree of the accused's personal culpability. That this would enable the courts to better understand the accused's situation so as to ensure individualised justice and assessment of moral blameworthiness. The accused may commit a crime out of a sense of obligation based on the norms of their cultural former environment.⁴⁶

This raises questions of how long the accused has been in the new jurisdiction. It is argued by this Essay that the longer the duration the weaker the argument of

⁴⁵ Gordon, N. 2001 "The implications of Memetics for the Cultural Defence." Duke of Law Journal, volume 50, p1809

⁴⁶ Damian Sikora, (2001) "Differing Cultures different culpabilities? A more sensible Alternative, using cultural circumstances as a mitigating factor in sentence." Ohio State Law Journal, volume 65,p1697

individualised justice as the accused is then influenced by the new jurisdiction. However, it is yet again recognised that cultural orientations are deep rooted and the argument of them still being operative cannot be dismissed easily.

Secondly, crimes linked with cultural beliefs tend to be based on moral compulsion that threat of punishment is ineffective as a deterrent therefore, to argue that admitting the cultural defence as a stand alone defence would defeat the deterrent principle upon which punishment is based is not tenable.⁴⁷

This argument simply put asserts that even though the accused will be severely punished it will not deter others who strongly believe in the culture from acting as it dictates. This is evident in the African Jurisdictions as regards the belief in witchcraft.

It has further been argued that accepting the defence of cultural defence would encourage cultural diversity.⁴⁸ Does this warrant giving up societies interests of security? Definitely not, there is need to strike a balance between encouraging cultural diversity and society's security. There must be measures that limit any cultural practice that threatens the security of society.

On the other hand the arguments against stand alone defence tend to stress the fact that it would unjustly protect the accused from being held accountable for one's actions.⁴⁹ It is important to note that the argument of the proponents of the defence border on refuting the fact that such accused persons are responsible for their actions and therefore, cannot be held accountable for these actions.

⁴⁷ Damian Sikora, (2001) "Differing cultures different culpabilities? A more sensible alternative: using cultural circumstances as a mitigating factor in sentence." Ohio State Law Journal, volume 65,p1698

⁴⁸ Damian Sikora, (2001) "Differing cultures different culpabilities? A more sensible alternative: using cultural circumstances as a mitigating factor in sentence." Ohio State Law Journal, volume 65,p1698

⁴⁹ Damian Sikora, (2001) "Differing cultures different culpabilities? A more sensible alternative: using cultural circumstances as a mitigating factor in sentence." Ohio State Law Journal, volume 65,p1699

Further on, using cultural circumstances as a mitigating factor would ensure that a defendant would be convicted of the crime he actually committed and not a diluted version because if the accused is convicted of a lesser crime because of a stand alone cultural defence, justice is not served.⁵⁰

In order to assert the defence, the accused must have been socialised in a distinctly different culture and this foreign culture must encourage or at least sanction, the behaviour which has been deemed illegal.⁵¹

An examination of key cases bordering on the cultural factors in these jurisdictions includes the *People v. Chen*,⁵² where a Chinese immigrant to the United States of America killed his wife for infidelity. He successfully argued that cultural pressures provoked him into an extreme mental state of diminished capacity leaving him without the ability to form intent necessary for more serious charges of premeditated murder. He argued that in his culture, husbands were permitted to take out their shame on their wives. The charge was reduced to manslaughter and a sentence of five years was imposed. The judge relied on testimony that Chinese culture condemned adultery. Chen argued that his rage was governed by his cultural predispositions to such an extent that he became mentally unstable, and that he purposefully acted his part in a culturally rational traditional practice.

In this case the accused would be deemed as relying on both the cognitive and the volitional portions of the proposed defence. In that he argued that according to his culture

⁵⁰ Damian Sikora, (2001) "Differing cultures different culpabilities? A more sensible alternative: use of cultural circumstances as a mitigating factor in sentence." Ohio State Journal, p.1700

⁵¹ Damian Sikora, 2001 "Differing cultures differing culpabilities? A more sensible Alternative: using cultural circumstances as a mitigating factor in sentence." Ohio state law journal, volume 65, p 1696

⁵² (1989) No.87-7774 New York Supreme Court

there was nothing wrong in his taking shame out on his wife and even as he killed his wife he did not deem it unlawful. As a matter of fact he deemed it obligatory to do as he did. Volitional on the other hand, as he argued, he was under the influence of the cultural beliefs and therefore the actions were not independently his.

In another case of *The People v Kimura*,⁵³ after hearing of her husband's infidelity, Kimura, a Japanese-American woman, walked into the ocean holding her two children. Her children drowned, but she survived. On trial for murder, she used cultural evidence to argue that she was following the Japanese ritual of parent-child suicide.⁵⁴ The evidence relied on consisted in part of a petition of twenty-five signatures from the Los Angeles Japanese community explaining the ritual. Kimura was sentenced to one year in prison on the ground that she was temporarily insane.

Reliance in this case would be deemed to have been on the cognitive portion of the defence, as the accused was merely following her cultural practice and saw nothing wrong with this. However it is of interest to note that the court deemed this as temporary insanity, would it be that every believer in this cultural practice is insane? Definitely not, the court must have just relied on the influence of the cultural factors affecting her perception of the unlawfulness of the act and not deducing insanity from her belief.

The two cases above illustrate that the western jurisdictions have opted to merely use the cultural factors in mitigation of sentence. That is after the culpability of the accused is determined, then cultural factors are used in mitigation of sentence. As was expressly stated in *Illinois v Galicia*⁵⁵, where the accused was charged with murdering his girlfriend. He claimed he murdered her because she was a witch who had cast a spell on

⁵³ (1985) no. A-091133 Los Angeles Supreme court

⁵⁴ This ritual is also known as *oya-ko shinju*

⁵⁵ (1994) Illinois Appeal court, no. 659 N.E. 2 d 398

him. The judge refused to admit expert testimony regarding the cultural beliefs about witchcraft of those in the area of Mexico where the accused was raised. In making her decision the judge said that such evidence was irrelevant in the trial phase but was more appropriate for sentencing.

It must be added that this stance by the court enables retention of the basic principles of fairness and individualised justice that a trial phase cultural defence is advanced to offer as doing so would allow the judge to tailor the defendant's punishment to his or her circumstances.⁵⁶

Having examined the essentials of the cultural defence as advanced in western jurisdictions, regard is now had to the African jurisdiction. Why would such a defence arise in African Jurisdictions?

3.2 CULTURAL DEFENCE IN AFRICAN JURISDICTIONS

Focus is on the cultural phenomenon of witchcraft. It is not doubtful that witchcraft is a cultural aspect that has been entrenched in the African society for a long time and therefore, it falls under those factors which should be considered if the cultural defence is to be discussed in the context of African jurisdictions.

The African Jurisdictions rely on systems of law which were inherited from the colonial legislators who were not familiar with the cultural environment of Africa. It is under this law that these African Jurisdictions operate. Therefore, the cultural factors are alien to the legal system and as is the argument in western jurisdictions there is need for cultural consideration in determining criminal culpability. With special reference to the

⁵⁶ Damian Sikora, (2001) "Different cultures different culpabilities? A more sensible alternative: use of cultural circumstances as a mitigating factor in sentence." Ohio State Journal.p.1700

phenomenon of witchcraft, as was highlighted in Chapter One, it was ignored by the legislators in the colonial era.

Note with interest that these believers of witchcraft have had disposal to law that does not encourage their belief in witchcraft for a long time, they however do not change their perception. This is because cultural factors, one of which is witchcraft, are deeply rooted in individuals nurtured in witchcraft believing communities that mere legal provisions will not erase them. These factors affect one's actions that the believers lack the knowledge of unlawfulness during the commission of the crime or if aware of the unlawfulness of their action, do not identify with it.⁵⁷

Thus the first argument in favour of the proposed cultural defence in African Jurisdictions is that the accused's cultural belief of witchcraft prevents them from appreciating the unlawfulness of their actions. It is argued that the mental abilities which a person must have in order to have criminal capacity are the ability to appreciate the wrongfulness of his conduct and to act in accordance with such an appreciation of the wrongfulness of his conduct.⁵⁸ The accused that kill under a belief of witchcraft, however, deem it as service to themselves and the community to get rid of the source of misfortune.

The second argument is that a denial of the cultural defence erodes the notion of justice in the African cultural context. Too often cultural pluralism is equaled with being primitive and uncivilised.⁵⁹ Related to this argument is the notion that it would be advantageous to recognise cultural defence because it would be a way for Africans to reclaim the beauty

⁵⁷ Pieter Carstens, 2004 Paper on Cultural Defence: South African Perspectives, 2 Dejure p.312, accessible through <http://www.google.com>, accessed on 8th June, 2007.

⁵⁸ Pieter Carstens, 2004 Paper on cultural Defence: South African Perspectives, 2 Dejure p.332

⁵⁹ Pieter Carstens, 2004 Paper on cultural Defence: South African Perspectives, 2 Dejure p.331

of their heritage.⁶⁰ In that the African cultural beliefs will be recognised by the law rather than ignored in the hope of eliminating the cultural belief. Note however the cost, at which this will come, is it at surrendering the security of the society and the rights of children and women? Note that victims to witch murders and violence have been women and children.

It is apparent from the previous Chapter that though some courts allow for these factors to be considered in mitigation, it cannot be generally stated that these cultural factors are taken into account. The case of *S v Ndlovu and Another*⁶¹ is one of the exceptional cases, where the court considered the cultural environment of the accused in mitigation of sentence rather than ignoring it as is the case in most instances.

The appellants appealed successfully against a fifteen year sentence imposed for murder. The deceased was the appellants' father who was believed to be a wizard and was alleged by use of supernatural powers to have deliberately caused a series of misfortune upon his family. The Court examined the appellants' community which was steeped in witchcraft and its evil practices. It observed that as a result the appellants believed implicitly in the power of witches and wizards intentionally to cause physical harm to others by the use of supernatural means. Thus the court decided that the appropriate sentence was ten years imprisonment.

The reluctance of the African Courts to allow the cultural factor of the belief in witchcraft in mitigation of sentence, as is clear from the few cases in which this cultural factor has been considered, can be explained by the fact that they try to discourage cases where witch killers can get away with lighter sentences, which could be undesirable as it would

⁶⁰ Pieter Carstens, 2004 Paper on cultural defence: South African perspectives. 2 Dejure, p.323

⁶¹ (1971)(1) SA 27 (RA)

encourage witch killings. Therefore, the Courts have to ensure that the belief was genuinely held and this is done by looking at the manner of the attack on the deceased, was it provoked or unprovoked?

In the case referred to above, the court looked at the manner in which the attack on the deceased came about, in that, the fears of the appellants had been provoked by a threat that had materialised.⁶² This tends to suggest that the belief should only be considered as a mitigating factor if there was a provocative act, physical rather than metaphysical, stemming from the deceased.⁶³

Having examined the proposed defence of cultural defence and having evaluated the suitability of cultural factors being considered in mitigation of sentence, it can be stated that there are merits for the arguments for a stand alone defence as well as against it. The Chapter is not taking any sides but is alive to the dangers that a stand alone defence would pose as well as lightly, admitting cultural factors in mitigating of sentences. That is, it would result in an influx of witch killers getting away their crimes. Thus the Courts in considering the cultural factor of belief in witchcraft would have to show caution and as rightly expressed by Carstens,

“ultimately the effective application of the defence will be in the hands of the judiciary objectively and free from preconceptions and prejudices.”⁶⁴

However with this come various challenges which will be looked at in the following Chapter.

⁶² The detailed facts were laid out in the previous chapter.

⁶³ This is evident in the cases of *R v Enock* and *Herman Nyingo v Republic*, referred to in Chapter 2.

⁶⁴ 2004 *Cultural Defence: South African perspectives* 2 Dejure, p.333, accessible through <http://www.google.com>, accessed on 8th June, 2007.

CHAPTER FOUR

EVIDENTIAL CHALLENGES POSED BY THE BELIEF

This Chapter will seek to highlight the challenges that would arise if the belief in witchcraft was to be a defence, either under the established defences or as a stand alone defence or in the instances where the belief is admitted in mitigation of sentence. This is in particular reference to issues of proof. The Essay will also consider briefly, spectral evidence and assess how it violated the canons of evidence. Regard will first be had to general principles of evidence as under common law.

In *Mokonto v The People*⁶⁵, the accused argued that the deceased had threatened to kill him through witchcraft; the court decided that there being that no physical attack the pleaded defence of self defence could not succeed. There was no way that the court could accept that the belief was genuine apart from the testimony of the accused. This is the dilemma in most related cases as there is lack of physical evidence.

4.1 Principles of Evidence

Evidence is defined as that which tends to induce a belief in the fact's existence.⁶⁶ It is well known that the court will only deem a fact as established if the fact has been proved.

⁶⁵ (1971) A.D. p319

⁶⁶ Cross and Wilkins, 1986, An Outline of the Law of Evidence. London: Butterworths and Co. Ltd. p18

This mainly refers to the fact that sufficient evidence must be adduced in order to prove the existence of the fact. It is basically that evidence, which the court is prepared to consider before deciding whether, one of the facts in issue, is proved.

The essence of evidence is thus in the determination of the fact as alleged by the accused and the prosecution.

Related to proving the facts, especially in this context, it is vital to point out that the burden of proof in criminal cases lies with the prosecution. It is trite law that he who alleges must prove. Note there are two facets to the burden of proof; there is the legal burden which is defined as producing evidence sufficient to persuade the trier of fact that the existence or non existence of particular facts in issue is established to the requisite standard of proof.⁶⁷ This type always rests on the prosecution. The other aspect of the burden of proof is known as the evidential burden which refers to producing evidence to enable the trier of fact acting reasonably to find the existence or non existence of particular facts in issue.⁶⁸ This burden may be borne in the first instance by the prosecution, when sufficient evidence to warrant a finding has been given, the burden of adducing evidence is said to shift to the accused because he runs the risk of losing on the issue if he does not adduce any evidence.⁶⁹ Connected with the burden of proof is the standard of proof, which in criminal cases is beyond reasonable doubt unless the burden of proving something falls on the accused, for instance, under the defence of insanity.⁷⁰ Evidence can be in the form of testimony of witnesses, admissible hearsay, documents and things used in the commission of the crime.

⁶⁷ Hatchard and Ndulo, 1991, Law of Evidence in Zambia. Lusaka: Multimedia Publications, p22

⁶⁸ Hatchard and Ndulo, 1991, Law of Evidence in Zambia. Lusaka: Multimedia Publications, p22

⁶⁹ Hatchard and Ndulo, 1991, Law of Evidence in Zambia. Lusaka: Multimedia Publications, p29

⁷⁰ *Miller v Minister of Pensions* (1947)2 ALL E.R. p372

Testimonial evidence and the things used in the commission of the offence will be looked at in depth so as to assess how the belief of witchcraft poses the evidential challenges.

Testimony is a principal item of judicial evidence as is clear from the use of witnesses in almost every case, especially in criminal law cases. It is highly relied on by both the prosecution and the defence. Testimony is an assertion of a witness in court offered as evidence of the truth.⁷¹ Note that an accused can be a witness as well, especially in cases where he is raising the belief in witchcraft as a defence; he would have to adduce some evidence to prove that the belief was genuine.

However the problem is posed by the nature of witchcraft, which as already stated is supernatural and not physically perceivable by the ordinary eye. Thus there are cases where the accused might be the only witness to attest to the practice of witchcraft by the deceased causing fear in him which subsequently leads him to killing in self defence.

In *Eria Galikuwa v Rex*⁷², the accused advanced the defence of provocation based on the fear of the witchcraft powers of the deceased. The evidence constituted a testimony by the accused to the effect that he heard threats emanating from the deceased's medicine.

Note the absurdity of this as regards logic as well as in terms of proving that indeed there were such threats. In ordinary life, only human beings are capable of talking and a suggestion that medicine talks must be substantiated with other evidence apart from the testimony of the accused. What should be pointed out is that because of the nature of the assertion it is unlikely that there can be another witness to testify to this. It can as well be said to be in the mind of the accused.

⁷¹ Cross and Wilkins (1986) Outline on the Law of Evidence. London: Butterworth and Co.ltd. p52

⁷² (1951) 18E.A.C.A. p175

With exceptional cases as *Rex v Fabiano Kinene and Another*⁷³ where the deceased was found crawling around naked in the compound, it was very easy to establish to some degree that the fear was genuine, perhaps this explains why the defence of provocation, though erroneous, was upheld.⁷⁴ However, in most cases, there being no way of establishing the fact asserted, it is a puzzle to the canons of evidence and would prove difficult to come up with physical evidence to establish the metaphysical assertion. The general rule is that courts may act on the testimony of one witness; however there are occasions where there is need for corroboration especially where there is a danger of fabrication as in witchcraft cases. If the accused would easily prove the fear in witchcraft which led to the killing, it would cause an influx of witch killings and the accused getting away or being given lighter sentences. Thus the need for corroboration, to act as a safeguard.

Corroboration has been defined as,

“independent evidence which supports the evidence of a witness in a material particular.”⁷⁵

It can be other testimony confirming the assertion of the accused pleading the fear of witchcraft, which as has been observed is rare. It can also be physical objects, for instance, the articles that the deceased sought to use to perform the witchcraft practices upon the accused or had used already.

Note that the objects as evidence also cause some problems as regards their assessment as articles used in witchcraft; there is need for assessors who are knowledgeable in the area of witchcraft to determine whether these are tools of witchcraft or not.

⁷³ (1941) 8 East Africa Court of Appeal, p96

⁷⁴ Provocation is based on acting under anger and not fear as observed in Chapter 2 of this Essay

⁷⁵ *Shamwana v The People* (1985) Z.R. p41

The difficulties expressed in this Chapter concerning lack of physical evidence raises the thought that may be; regard should be had to the type of proof known as spectral evidence.

4.2 Spectral evidence

Spectral evidence has been known in history as being testimonies about supernatural visitations from a demonic creature that appears in the shape of an accused witch. A witch doctor sees the image or specter and this is seen as confirming that the accused is a witch.⁷⁶ It is metaphysical type of evidence, which can be explained by the nature of witchcraft. It includes testimony about dreams and visions, accepted as evidence in court, which are the visions and dreams of the accused's witch's spirit.⁷⁷

This is an aspect which cannot go without being mentioned in this Essay especially this part of the work as it cannot be doubted that the use of such evidence arose because of the lack of other ways of proving the supernatural acts of the phenomenon of witchcraft. This evidence has been adduced in cases of witchcraft accusations and Courts have relied on it. The effect of this type of evidence was felt in the famous Salem Witch Trials.⁷⁸ This type of evidence is no longer admissible.⁷⁹

Spectral evidence only constituted the testimony of one party, for instance a witchdoctor who would attest to seeing the image of the accused witch in his dream and this would be

⁷⁶ Neal A. Gordon, 2001, "Conflict between State Legal Norms and Norms underlying popular beliefs: Witchcraft in Africa as a Case study." Duke Journal of Comparative and International Law, Volume 14, p361

⁷⁷ www.wikipedia.com, accessed on 18th july, 2007

⁷⁸ Salem witch trials were a series of hearings before local magistrates followed by county court trials to prosecute people accused of witchcraft in Massachusetts in the 17th century. Over 150 people were arrested and imprisoned, some of whom were hanged.

⁷⁹ Jennifer Widner, 2001, "Courts and Democracy in Post conflict Transitions: A Scientist's perspective on the African case." American Journal of International Law, volume 95, no.1, p171

considered as confirmation of the allegation made of the accused. It placed fate of an accused in the hands of a witch doctor or possessed person.⁸⁰ Because of the ease with which proof of witchcraft practice was established, there was an influx in witchcraft accusations with innocent people being charged and hanged because of the accusations which were easily proved.

One characteristic of spectral evidence was that it could not be verified. The vision of the witch's image was deemed to be directed to a specific person to whom the visitation was intended.⁸¹ Being that they were visions and dreams, they were not perceptible to other people. The Courts had to be satisfied that the possessed person or witchdoctor did not have opportunistic motives for providing the spectral evidence. They had to be satisfied that the person who provided the spectral evidence did not make a mistake when identifying a spectator image as the accused witch.⁸² Thus reliance was on one witness, and note the inherent danger of this evidence by one person without corroboration. Clearly such evidence in vision form could easily be conjured by the said witness. To prevent such, the principles of evidence require corroboration on the material particular, that is, if the witness' testimony points to the fact that the vision or dream confirmed the accused as a witch there must be independent evidence confirming the assertion. However, independent evidence to confirm the fact brought out by the visions was never available and this explains why spectral evidence is no longer admissible as proof of witchcraft practice.

⁸⁰ During the Salem witch trials, allegedly possessed girls relied on visions to detect the presence of witches among the general populace.

⁸¹ Neal A. Gordon, (2001) "Conflict between State Legal norms and norms underlying popular Beliefs: Witchcraft in Africa as a case study." Duke Journal of Comparative and International Law, Volume 14, p363

⁸² Neal A. Gordon, (2001) "Conflict between State Legal norms and norms underlying popular Beliefs: Witchcraft in Africa as a case study." Duke Journal of Comparative and International Law, Volume 14, p363

This Chapter has highlighted the challenges that the accused would face in his quest to present evidence to suggest the pleaded defence grounded on the fear of witchcraft or the challenges he faces in producing the evidence he so requires in order to plead the fear of witchcraft in mitigation of sentence. The challenge is in the fact that due to the nature of witchcraft which is metaphysical, only in rare cases will there be physical evidence to establish the existence of its practice by the deceased. Spectral evidence is no longer admissible in court and this means that without the physical manifestation, which is rare, there will not be other proof. As the courts will not deem as established any fact without being satisfied of its existence by way of proof. These challenges prove to be obstacles to the belief in witchcraft falling under any established defence later on relying on the belief as a mitigating factor.

CHAPTER FIVE

5.1 CONCLUSION

The Essay has attempted to assess the possibility if any of the belief in witchcraft being a defence, either falling under established defences or under cultural defences, complete or as mitigating factor in sentencing. From the analysis, the Essay has highlighted the legal difficulties that the belief has been faced with.

Witchcraft is deemed as the source of misfortune, a believer aware of his source of misfortune, which may have occurred or imminently yet to occur, will seek ways of preventing the recurrence of the misfortune or the occurrence of the misfortune as the case may be. His actions will depend on whether he has a legal mechanism to look to or to take the matter in his own hands. The latter is the likely option as highlighted by the state of law and the happenings across Africa.

The law as stipulated in anti witchcraft Acts across Africa was passed with the purpose of wiping out beliefs in witchcraft. These Acts stipulate that both witchcraft practice and the accusation of witchcraft was punishable according to the law, thereby effectively preventing colonial courts from taking an active part in resolving the witchcraft fears. In the light of no other protection, the believer in witchcraft protects himself by getting rid of the source of the harmful power in whatever manner, which mostly is by killing the suspected witch or wizard.

Therefore, the stance taken by the colonial legislators of considering the belief as unreasonable has been and will be ineffective in curbing the belief in witchcraft. It was argued that taking this belief as reasonable would encourage the belief, thus through legislation it was thought to eradicate the belief. It is submitted that it is the ignoring of the belief by the law across Africa through the anti witchcraft Acts which has led to believers in this phenomenon resorting to self help. The anti witchcraft legislation, taking the Witchcraft Act of Zambia as an example tend to suggest that witchcraft was non-existent and the believers were merely deluded and in time the belief would wear out. However this has not been the case. This then has created a gap between these witchcraft Acts and the realities of the communities within which they operate.

This being the state of the law it is not surprising that the courts in these jurisdictions have gone on to hold the belief unreasonable and not tenable. As was suggested in *Mutambo and five others v The People*,⁸³ for the belief to be considered reasonable, it had to accord to the reason of the law. That is the belief to be reasonable had to be in accordance with the positive law. The anti witchcraft legislation deny the existence of witchcraft and therefore, the belief as per positive law revealed through the witchcraft Acts would be unreasonable.

This then is the underlying and most formidable problem that the belief faces and if there are to be any head ways in terms of the belief in witchcraft and the law, the first step is to look at the legislation in question.

⁸³ [1965] Z.R.p14

However regard should also be given to the specific difficulties presented by attempts to admit killing because of the belief in witchcraft under established specific defences. The failure lies in the fact that various elements under the established defences are not satisfied.

Pertaining to self defence, the condition laid down in *S v Mokonto*⁸⁴, stated that there was need for an unlawful attack by the deceased for the accused to raise the defence successfully. Note however, that asserting that a person is attacking one by use of witchcraft constitutes a crime under the various anti witchcraft Acts. Another condition is that of the unlawful attack being physical. This acts as an impediment as witchcraft by its nature concerns the supernatural activities, rarely will a physical element be present. This clearly tends to prevent the belief from falling under self defence.

The case of *Eria Galikuwa v Rex*,⁸⁵ set out conditions which must be satisfied before an accused can successfully plead provocation. There is need for a provocative act, which must be physical. As in the cases of *Rex v Fabio Kinene and Another*⁸⁶, where the deceased was found crawling naked in the accused's house. This act was deemed adequate to constitute a provocative act. This eliminates cases lacking the physical element which is usually the case. The provocative act must be a criminal offence, this then presents issues of inconsistency between the anti witchcraft Acts and the requirements of the defence of provocation. Yet another element is the need to act under the heat of passion that one has lost control over his actions. This being interpreted as

⁸⁴ [1971] A.D. p319

⁸⁵ [1951]18 E.A.C.A. p175

⁸⁶ [1941]8 East Africa Court of Appeal, no.96

acting in anger. It is clear; however, that fear is behind the killing of the supposed witch or wizard rather than anger.

Under insanity it can be observed that even sane people hold the belief in witchcraft. It would be folly to suggest that every member of these Sub-Saharan African countries is insane by virtue of them holding the belief. A further point to note, in the light of an attempt to argue that the belief falls under the defence of insanity is the source of the disease of mind. The belief in witchcraft emanates from the environment that one is nurtured in and not from an internal source. It is of interest to also note that a person who kills because of the fear of witchcraft cannot be taken as not knowing the consequences of his actions; he as a matter of fact deems it as a means of getting rid of the source of danger.

Due to failure of the belief to fall under established defences there has been an advancement of the theory of cultural defence. This dictates consideration of cultural factors in determining the criminal culpability of the accused. There have been arguments of admitting it as a stand alone defence or a mere mitigating factor in sentencing. But as the law stands, no formal stand-alone cultural defence has been formally admitted in these Sub-Saharan African countries and thus these cultural factors are only to be used in mitigation of sentence.

Another difficulty highlighted is the element of proof, either in pleading the belief in witchcraft as a defence or as a mitigating factor. There is need for proof of the belief in witchcraft as being genuine. As stated above the witchcraft activities in most cases are not visible by the supernatural nature of witchcraft, thus evidence is rarely available in

these cases. However, the need for this evidence to prove that the belief is genuine is important so as to safeguard against accused persons in such cases from taking advantage of such a defence or mitigating factor.

The challenge is in the fact that due to the nature of witchcraft which is metaphysical, only in rare cases will there be physical evidence to establish the existence of its practice by the deceased. Spectral evidence is no longer admissible in court and this means that without the physical manifestation, which is rare, there will not be other proof. As the courts will not deem as established any fact without evidence proving its existence these challenges prove to be obstacles to the belief in witchcraft falling under any established defence let alone relying on the belief as a mitigating factor.

In the light of the difficulties highlighted the author of this work now turns to state certain recommendations in certain needed areas.

5.2 RECOMMENDATIONS

There is need first and foremost for the anti Witchcraft legislation to be amended so that instead of ignoring the existence of the belief it must regulate its practice. As Zimbabwean legislators have done, that is, recognise the existence of the belief so as not to leave the believers of witchcraft without protection. This in turn will prevent the incidents of self help across Africa. Further on, by reflecting the existence of witchcraft the belief in witchcraft will be considered reasonable as it will accord with the positive rule of law, this would then pave way for the belief to be used in mitigation of sentence.

It must be stated that considering the belief reasonable is not to promote witch killings but to assert a reality in the African communities for which such legislation is formulated. This will tend to reduce the rate of witch killings as a genuine believer in fear of witchcraft will know that he has recourse to the law rather than self help. As a matter of fact if the law does not offer protection, the more justified self help will be, but in the light of the protection, there will be no excuse for the self help and stiffer punishment can be recommended for such witch killers.

Secondly, attempts to bring the belief under the established defences should stop in that these established defences possess elements which cannot be satisfied by the accused that kill under the belief in witchcraft. As regards the phenomenon of cultural defence, as a stand alone defence, as the law stands, it is recommended that recourse should be had to merely relying on the belief as a mitigating factor and not as a complete defence.

However, matters of proof must not be disregarded when the belief is pleaded in mitigation of sentence. The courts have to be alert in determining how genuine the belief in witchcraft is so as to prevent unwarranted witch killers from getting away with lighter sentences. This will also call for the need of assessors, well abreast with witchcraft practice, to help examine the proof in terms of determining whether the things advanced as objects used in the witchcraft attack are used in witchcraft.

Finally, it must be stated that other ways of eradicating the belief in witchcraft which has haunted these Sub-Saharan African countries must be sought so as to get rid of the undesirable gap between the legal rules and the social realities. This would also do away with the witch-killings happening across the region. The Essay has highlighted that the use of legislation which ignores the phenomenon does not offer any assistance but instead perpetuates self help and further unwarranted witch killing. Recourse should be had to educational and religious strategies to relieve the members of these communities from the belief of witchcraft as was the case in western countries in the earlier centuries when the belief was also prevalent there.

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