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SELF-DEFENCE AGAINST METAPHYSICAL WITCH ATTACKS: A LEGAL CONUNDRUM IN ANGLOPHONE AFRICA

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ABSTRACT. Superstition-driven homicide is a frequent occurrence in many African societies. People charged with homicidal acts supposedly perpetrated under the influence of belief in witchcraft and juju sometimes raise the plea of self-defence or self-defence in conjunction with mistaken belief. Hence, since the latter part of British colonial rule in Africa, particularly the 1930s, the courts in Anglophone Africa have on several occasions been invited to address the question of whether killing suspected witches to repel supposed metaphysical attacks avails to accused persons the plea of self-defence or self-defence based on mistaken belief and, if so, under what conditions. Drawing on case law, statutes, and a range of pertinent academic literature, the present study explores the historical development of the self-defence based on mistaken belief plea in witchcraft-related homicide cases in English-speaking Africa. It examines the African courts' attitude towards the self-defence against metaphysical witch attacks defence, highlighting the divergent perspectives of various national and regional courts.

I INTRODUCTION

Research shows that homicide is prevalent in contemporary African societies.[1] In a study believed to be the first global report on violence and health, Etienne G Krug and others found that approximately 520,000 people (8.8 per 100,000 population) across the globe fell victim to intentional homicide in 2000. Alarmingly, about 116,000 (approximately 22.3 per cent) of the homicides recorded that year

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[1] Etienne G Krug, Linda L Dahlberg, James A Mercy, Anthony B Zwi and Rafael Lozano, *World Report on Violence and Health* (World Health Organization 2002); Shanaaz Mathews, Naeemah Abrahams, Rachel Jewkes, Lorna J Martin and Carl Lombard, 'The Epidemiology of Child Homicides in South Africa' (2013) 91(8) Bulletin of the World Health Organization 562; United Nations Office on Drugs and Crime (UNODC) *Global Study on Homicide 2019* (United Nations 2019).

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occurred in Africa.[2] A recent study released by the United Nations Office on Drugs and Crime (UNODC) suggests that about 163,000 people were murdered in Africa in 2017; and this figure represents approximately 35 per cent of all the intentional homicides chronicled globally that year.[3] In sub-Saharan Africa, a considerable proportion of intentional homicides is triggered by superstitions such as witchcraft and juju beliefs,[4] and this has been the case since the colonial, if not the pre-colonial, era.[5] The number of people believed to have been murdered in Africa as a result of witchcraft beliefs over the last few decades is estimated to be in the tens of thousands.[6]

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[2] Krug and others (n 1).

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

[4] see, for instance, Aaron R Denham, Philip B Adongo, Nicole Freydberg and Abraham Hodgson, 'Chasing Spirits: Clarifying the Spirit Child Phenomenon and Infanticide in Northern Ghana' (2010) 71(3) Social Science & Medicine 608; Natalie Idehen, 'Tackling Witchcraft Accusations in Tanzania' (*HelpAge International*, 4 July 2014) <https://www.helpage.org/blogs/natalie-idehen-23204/tackling-witchcraft-accusations-in-tanzania-724/#:~:text=In%20Tanzania%20between%202005%20and,to%20witchcraft%20accusations%20in%202012> accessed 20 July 2020; Chima Damian Agazue and Helen Gavin, 'Evil and Superstition in Sub-Saharan Africa: Religious Infanticide and Filicide' in RG da Noiva, D Farnell and K Smith (eds), *Perceiving Evil: Evil, Women and the Feminine* (Inter-Disciplinary Press 2015); Mensah Adinkrah, *Witchcraft, Witches and Violence in Ghana* (Berghahn Books 2015); Ines Kajiru and Isaack Nyimbi, 'The Impact of Myths, Superstition and Harmful Cultural Beliefs Against Albinism in Tanzania: A Human Rights Per spective' (2020) 23 Potchefstroom Electronic Law Journal 1; Emmanuel Sarpong Owusu, 'The Provocation by Witchcraft Defence in Anglophone Africa: Origins and Historical Development' (2022) 11(2-3) Oxford Journal of Law and Religion 263; Emmanuel Sarpong Owusu, 'Exploring the Magnitude, Characteristics and Socio-Economic Contexts of Witchcraft-Related Eldercides in Kenya' (2023) International Annals of Criminology <https://doi.org/10.1017/cri.2023.29>.

[5] Mary Kingsley, *West African Studies* (Macmillan 1901); Robert B Seidman, 'Witch Murder and Mens Rea: A Problem of Society Under Change' (1965a) 28 The Modern Law Review 46; Robert B Seidman, 'The Inarticulate Premiss' (1965b) 3(4) Journal of Modern African Studies 567; Onesimus K Mutungi, 'Witchcraft and the Criminal Law in East Africa' (1971) 5(3) Valparaiso University Law Review 524; Daniel N Nsereko, 'Witchcraft as a Criminal Defence, from Uganda to Canada and Back' (1996) 24(1) Manitoba Law Journal 38; Richard D Waller, 'Witchcraft and Colonial Law in Kenya' (2003) 180 Past & Present 241; John Alan Cohan, 'The Problem of Witchcraft Violence in Africa' (2011) 44(4) Suffolk University Law Review 803.

[6] Gerrie ter Haar (ed) *Imagining Evil: Witchcraft Beliefs and Accusations in Contemporary Africa* (Africa World Press 2007); Silvia Federici, 'Witch-Hunting, Globalization, and Feminist Solidarity in Africa Today' (2008) 10(3) Journal of International Women's Studies 21; Annie Singh and Norah Hashim Msuya,

Killers of alleged witches and juju practitioners in Africa at times invoke the plea of self-defence or self-defence in conjunction with mistaken belief (or mistake of fact) when charged and prosecuted. These defences, in witchcraft-driven homicide cases, are raised where individuals accused of murdering suspected witches or juju practitioners claim that they committed the homicidal act because they genuinely believed that the deceased was bewitching or about to bewitch them and/or close family members, or because the deceased had threatened to kill them and/or their close family members by witchcraft or juju spells, putting them in fear of danger to their lives and/or the lives of close relatives. One major legal problem that the courts in Anglophone African countries (AACs) have on several occasions been invited to resolve is thus the issue of whether killing a reputed witch to repel a perceived metaphysical attack, avails to an accused person the plea of self-defence or self-defence based on mistaken belief and, if so, under what circumstances.

Surprisingly, the nature and intricacies of the self-defence and mistaken belief pleas in witchcraft-related homicide cases have not received ample attention in the literature. The pertinent existing studies either focus on the colonial period only or largely address the subject of witchcraft's effect on homicides without adequately discussing the possible defences for witchcraft-related killings.[7] The present study bridges the knowledge gap. Drawing on a wide range of pertinent academic works, statutes and, more importantly, case law, the present article explores the historical development of the self-defence based on mistaken belief plea in witchcraft-related murder cases/proceedings in English-speaking Africa since the 1930s. It discusses the nature and intricacies of and the African courts' attitude

Footnote 6 continued
åWitchcraft Accusation and the Challenges Related Thereto: Can South Africa Provide a Response to this Phenomenon Experienced in Tanzania?' (2019) 40(3) Obiter 105.

[7] see for instance Seidman, 'Witch Murder and Mens Rea' (n 5); Seidman, 'The Inarticulate Premiss' (n 5); Robert B Seidman, 'Mens Rea and the Reasonable African: The Pre-Scientific World-View and Mistake of Fact' (1966) 15(4) The International and Comparative Law Quarterly 1135; Mutungi (n 5); Waller (n 5); Nsereko (n 5); Hallie Ludsin, 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law' (2003) 21 Berkeley Journal of International Law 62; Nelson Tebbe, 'Witchcraft and Statecraft: Liberal Democracy in Africa' (2007) 96 Georgetown Law Journal 183; Solomon Rukundo, 'Witch-Killings and the Law in Uganda'' (2020) 35(2) Journal of Law and Religion 270.

towards the said defence, highlighting the divergent viewpoints of various national and regional courts.

Section II of this article provides a succinct description of major witchcraft and juju concepts in Africa and how such beliefs impact homicides. This is important as an understanding of the concept of African witchcraft and juju facilitates a better appreciation of the subject under discussion. Section III offers a concise general description of the self-defence and mistaken belief defences, highlighting the general boundaries of their application. Section IV discusses the Anglophone African courts' attitude towards the plea of self-defence and mistaken belief in witchcraft and juju related murder cases during the colonial period. Section V examines the present state of the law relating to the belief in witchcraft defence in Anglophone Africa. This is followed by a brief discussion and a conclusion. It is worth clarifying that the terms 'Anglophone Africa' and 'Anglophone African countries' (AACs) are employed in this study to refer to the English-speaking African countries that were formerly colonised by Britain and whose laws are significantly modelled on the British legislation and the English common law.

II THE AFRICAN CONCEPT OF WITCHCRAFT AND JUJU

Witchcraft and juju beliefs are among the most widespread superstitions in Africa – they are held by all manner of people irrespective of their socio-economic status, education level, profession, or religious affiliation.[8] It is thus important to offer a brief description of the general concept of witchcraft and juju in African communities, and an overview of the environment in which witchcraft and juju believers operate. This general background will facilitate an understanding as to why some people inflict pain and lethal violence on people accused of being witches.

[8] Edward Evans-Pritchard, *Witchcraft, Oracles, and Magic Among the Azande* (Abridged with an introduction by Eva Gillies, Oxford University Press 1976); John Middleton and Edward H Winter (eds), Witchcraft and Sorcery in East Africa (Taylor & Francis [1963] 2004); Henrietta L Moore and Todd Sanders (eds), *Magical Interpretations, Material Realities. Modernity, Witchcraft and the Occult in Postcolonial Africa* (Routledge 2001); Aleksandra Cimpric, *Children Accused of Witchcraft: An Anthropological Study of Contemporary Practices in Africa* (UNICEF/WCARO 2010); Adinkrah (n 4); Emmanuel Sarpong Owusu, 'The Superstition that Dismembers the African Child: An Exploration of the Scale and Features of Juju-Driven Paedicide in Ghana' (2022) 60(1) International Annals of Criminology 1.

2.1 *A Description of Witchcraft and Witch*

Admittedly, the terms 'witchcraft' and 'witch' signify different things in different societies. As Simeon Mesaki rightly notes, '[w]itchcraft means different things to different people corresponding to historical developments, distinct cultural meaning systems and language variations'.[9] Evidently, the different ideas or concepts of witchcraft and witches pose definitional problems.[10] This notwithstanding, several academics, experts, and researchers have proposed various definitions and descriptions that largely reflect the witchcraft notions held by the majority of communities in Africa. Drawing on the traditional beliefs and religious practices of the Azande of Sudan, Edward Evans-Pritchard describes witchcraft as the use of innate, inherited mystical powers to manipulate people or events, and to cause calamity, including death.[11] Adam Ashforth opines that in the South African context, witchcraft 'typically means the manipulation by malicious individuals of powers inherent in persons, spiritual entities and substances to cause harm to others'.[12] A study conducted in Ghana by the Ghana National Commission for Civic Education (NCCE) shows that most Ghanaians perceive witchcraft as the use of supernatural powers by certain human entities to harm or kill others.[13] Alexander Paul Isiko describes witchcraft from the perspective of the Basoga of Uganda as 'the use of mystical powers for wicked purposes and is usually applied or practised in secrecy'. He further notes that the motives of witchcraft are generally to cause harm, pain, and/or death.[14] Witchcraft thus generally 'constitute[s] a system for the personification of power and evil'.[15]

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[9] Simeon Mesaki, 'The Evolution and Essence of Witchcraft in Pre-Colonial African Societies' (1995) 24 Transafrican Journal of History 162.

[10] *ibid*; Jeffrey Burton Russell, *Witchcraft in the Middle Ages* (Cornell University Press 1972); Cimpric (n 8).

[11] Evans-Pritchard (n 8).

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

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

[14] Alexander Paul Isiko, 'An Expository Study of Witchcraft among the Basoga of Uganda' (2019) 6(12) International Journal of Humanities, Social Sciences and Education 83, 86.

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

According to Evans-Pritchard, the Azande group perceives witches as people who 'can injure [or kill others] … in virtue of an inherent quality'.[16] Robert LeVine describes a witch or wizard (a male witch), from the perspective of the Gusii of Kenya, as 'a person with an incorrigible, conscious tendency to kill or disable others by magical means'.[17] To Roma Standefer, a witch is 'a person who is thought capable of harming others supernaturally through the use of innate mystic power, medicines or familiars'.[18] Closely related to Standefer's definition is that of Pieter Carstens who describes witches as people who 'through sheer malice, either consciously or subconsciously, employ magical means to inflict all manner of evil on their fellow human beings'.[19] It could be inferred from the above-mentioned individual definitions and descriptions that many if not most communities in Africa perceive witchcraft as the tendency and ability of certain people to secretly harm or kill others, using supernatural powers.

2.2 *A Description of Juju and Juju Practitioner*

The term 'juju', sometimes used by some authors and Africans as a synonym for sorcery and black magic, generally describes the common African belief that incantations and/or certain objects such as leaves/plants and animals can be used as part of rituals meant to manipulate events in life. In other words, it 'is the African belief system and religious practice involving the use of objects and/or words to psychically manipulate events or alter people's destiny positively or negatively'.[20] Such magical feats or rituals are usually performed by specialists who claim to possess supernatural powers to diagnose people's problems and find their causes, counteract spells, detect witches responsible for their clients' predicaments, and to find remedies to their clients' problems.[21] Figures such as witchdoctors, medicine-men, fetish priests, traditional healers, diviners, and magi-

[16] Evans-Pritchard (n 8) 1.

[17] Robert A LeVine, 'Witchcraft and Sorcery in a Gusii Community' in John Middleton and Edward H Winter (eds) *Witchcraft and Sorcery in East Africa* (Routledge [1963] 2004) 221–255, 225.

[18] Standefer (n 15) 32.

[19] Pieter A Carstens, 'The Cultural Defence in Criminal Law: South African Perspectives (2004) 37 De Jure 312, 315.

[20] Owusu (n 8) 3.

[21] Nsereko (n 5) 45–46; see also Tebbe (n 7) 186–187.

cians may all be classified as juju practitioners/specialists, depending on how they realise the desired effect.[22]

Juju practitioners are widely consulted in Africa for a variety of reasons, including economic and material prosperity, political and sporting success, healing and good health, the enhancement of fertility, longevity, spiritual protection against witches and evil machinations, destruction of enemies, and so on.[23] Due to their supposed supernational powers and the important role they play in the enhancement and promotion of human wellbeing, juju practitioners are 'treated with a mixture of respect, caution and fear' in many African communities.[24] Unlike juju practitioners who usually perform physical rituals or use their supernatural powers in conjunction with physical objects, witches act entirely psychically (without the performance of a physical ritual).[25] Like witches, juju practitioners can use their supposed supernatural powers to harm and destroy or kill others; however, the general belief is that they mostly use such powers for a good cause.[26]

2.3 *The African Witch: Features, Detection and Punishment*

The general view among many groups in Africa is that witches are the embodiment or prototype of evil, and that witchcraft is used chiefly for malevolent purposes.[27] In most witch-believing African communities, witches are generally believed to be cannibals who operate,

[22] Owusu (n 8).

[23] Mesaki (n 9); Simon Fellows, *Trafficking Body Parts in Mozambique and South Africa* (Human Rights League in Mozambique 2010); Tebbe (n 7); Owusu (n 8).

[24] Mesaki (n 9) 174.

[25] Evans-Pritchard (n 8) 1.

[26] James H Neal *Juju in My Life* (George G Harrap 1966); Owusu (n 8).

[27] Evans-Pritchard (n 8); Middleton and Winter (n 8); Mary Douglas, *The Lele of the Kasai* (Oxford University Press 1963); Standefer (n 15); Mesaki (n 9); Birgit Meyer, *Translating the Devil: Religion and Modernity Among the Ewe in Ghana* (Edinburgh University Press 1999); Ludsin (n 7); Justus M Ogembo, *Contemporary Witch-Hunting in Gusii, Southwestern Kenya* (Edwin Mellen Press 2006); Ter Haar (n 6); Cimpric (n 8); Adinkrah (n 4); Samantha Spence, *Witchcraft Accusations and Persecutions as a Mechanism for the Marginalisation of Women* (Cambridge Scholars Publishing 2017); Emmanuel Sarpong Owusu, 'The Superstition that Maims the Vulnerable: Establishing the Magnitude of Witchcraft-Driven Mistreatment of Children and Older Women in Ghana' (2020) 58(2) International Annals of Criminology 253.

usually in a group, at night in an invisible form.[28] The common belief is that they eat living human beings. As John Mbiti explains: 'the spirit of the witches leave them at night and goes to eat away the victim, thus causing him to weaken and eventually die'.[29] However, among other groups such as the Gusii of Kenya and the Basoga of Uganda, witches only eat human cadavers – they dig up corpses that have recently been buried to eat them and use certain parts of the dead bodies for medicine.[30] Another popular notion of witches is that they can transform themselves into various deadly animals or induce dangerous animals to harm or kill people.[31] Among some ethnic groups in Africa, witches bewitch only relatives and acquaintances; but for other groups, a witch can attack anyone.[32]

As the prototype of evil, purported witches are blamed for all kinds of calamities, including untimely or unexplained deaths, inexplicable illnesses, financial or economic hardship, barrenness or infertility, mental disorder, and alcoholism, among others.[33] Many believe that the principal motivations for bewitchment or acts of witchcraft are envy or jealousy and revenge.[34] In typical indigenous African communities, when people suspect that others are witches and bewitching them and/or their close family members, they would usually consult a witchdoctor for validation and to seek a remedy.[35] Others may report suspected witches to the traditional leaders of the community who may then invite the accused person to appear before the traditional court/tribunal to be tried. The commonest procedures

[28] LeVine (n 17); E Bolaji Idowu *African Traditional Religion: A Definition* (SCM Press Ltd 1973); John S Mbiti *Introduction to African Religion* (Heinemann 1991); Victor K Ametewee and James B Christensen, '"Homtodzoe": Expiation by Cremation among Some Tongu-Ewe in Ghana' (1977) 47(4) Journal of the International African Institute 360; Susan Drucker-Brown, 'Mamprusi Witchcraft, Subversion and Changing Gender Relations' (1993) 63(4) Journal of the International African Institute 531.

[29] Mbiti (n 28) 167; see also Idowu (n 28).

[30] LeVine (n 17); Isiko (n 14).

[31] Hans Werner Debrunner, *Witchcraft in Ghana: A Study on the Belief in Destructive Witches and its Effect on the Akan Tribes* (Waterville 1978); Gabriel Bannerman-Richter, *The Practice of Witchcraft in Ghana* (Gabari 1982); Mbiti (n 28); Ludsin (n 7); Adinkrah (n 4).

[32] Middleton and Winter (n 8); Adinkrah (n 4); Owusu (n 27).

[33] Evans-Pritchard (n 8); Spence (n 27); Adinkrah (n 4); Owusu (n 27).

[34] Evans-Pritchard (n 8); Adam Ashforth, 'Witchcraft, Violence, and Democracy in the New South Africa' (1998) 38 *Cahiers d'Études Africaines* 505.

[35] LeVine (n 17); Mesaki (n 9); Ogembo (n 27); Cohan (n 5).

or techniques for establishing causes of misfortunes and detecting witches are divination and trial by ordeal.[36]

The practice of witchcraft is considered a heinous offence under many indigenous African customary systems; consequently, people found guilty of witchcraft may be severely punished.[37] However, in most witch-believing societies, individuals convicted of witchcraft (or bewitching others) by the traditional tribunals/leaders are generally not killed. In most cases, they are 'given a medicine to eliminate the power of witchcraft from their person'.[38] Some may receive corporal punishment in certain communities and under certain circumstances; others may be banished from the community or subjected to public humiliation.[39] Unfortunately, some perceived victims of witchcraft at times take the law into their own hands to kill people that they believe to be witches and the cause of their predicaments.[40]

2.4 *Anti-Witchcraft Legislation*

Witchcraft-driven violence, including murder, was so common during the colonial period that the English criminal law could not ignore such crimes – anti-witchcraft legislation was deemed necessary and unavoidable. Thus, anti-witchcraft statutes were formulated and en-

[36] Ametewee and Christensen (n 28); Mesaki (n 9); Cohan (n 5).

[37] Thomas Edward Bowdich, *Mission from Cape Coast Castle to Ashantee* (Routledge [1819] 1966); Nsereko (n 5); Mutungi (n 5); Waller (n 5); Mohammed A Diwan, 'Conflict Between State Legal Norms and Norms Underlying Popular Beliefs: Witchcraft in Africa as a Case Study' (2004) 14 Duke Journal of Comparative & International Law 351; Katherine Angela Luongo, 'Conflicting Codes and Contested Justice: Witchcraft and the State in Kenya' (PhD thesis, University of Michigan 2006).

[38] Ametewee and Christensen (n 28) 361; see also, Evans-Pritchard (n 8); Middleton and Winter (n 8); Owusu (n 27).

[39] see Natasha Gray, 'Witches, Oracles, and Colonial Law: Evolving Anti-Witchcraft Practices in Ghana, 1927-1932' (2001) 34(2) The International Journal of African Historical Studies 339; Leo Igwe, 'The witch is not a Witch: The Dynamics and Contestations of Witchcraft Accusations in Northern Ghana' (PhD thesis University of Bayreuth, Germany 2016).

[40] Kingsley (n 5); Mutungi (n 5); Nsereko (n 5); Gray (n 39); Waller (n 5); Jennifer Dumin, 'Superstition-Based Injustice in Africa and the United States: The Use of Provocation as a Defense for Killing Witches and Homosexuals' (2006) 21 Wisconsin Women's Law Journal 145; Owusu, 'The Provocation by Witchcraft Defence in Anglophone Africa' (n 4).

forced by the colonial administrators in almost all AACs.[41] In fact, the witchcraft statutes (both the colonial and post-independence versions) generally criminalise witchcraft and juju related activities. Thus, exercising or pretending to exercise any kind of supernatural power, including witchcraft and juju or enchantment, was/is deemed a criminal offence. The statutes also proscribe witchcraft accusations and concomitant mistreatments. Trials/proceedings bordering on witchcraft-related crimes (including homicides) were thus common during the colonial era. Since murder attracted a mandatory death sentence under the penal statutes of the British colonies in Africa, killers of alleged witches were almost always handed the death penalty when convicted. Interestingly, the defences that have frequently been employed by killers of people accused of being witches since the 1900s are: (1) self-defence, (2) mistaken belief or mistake of fact, (3) mistake of law, (4) insanity, diminished responsibility or mental delusion, and (5) provocation. The present study, as already indicated, focuses on the self-defence based on mistaken belief plea.

III SELF-DEFENCE AND MISTAKEN BELIEF: MEANING AND SCOPE

3.1 *A Brief Exposition of the Self-defence Plea*

The laws of every civilised society restrict the freedom of each person to satisfy his/her wants and desires in any manner they wish. The restrictive elements in law are not unjustifiable as they ensure the

[41] See, for instance, Swaziland (now Eswatini) Witchcraft Act, Part VII, Chapter 4 of the Criminal Law and Procedure: 6 of 1889 (now Eswatini Crimes Act: 6 of 1889), amended in 1952; Malawi Witchcraft Act 1911, Chapter 7:02, revised and consolidated in the Forth Revised Edition of the Laws of Malawi in 2015; Kenya Witchcraft Act 1925, Chapter 67, amended in 1981 and 2012; Botswana Witchcraft Act 1927, Chapter 09:02, amended in 1959; Tanzania Witchcraft Act 1928, amended in 1935, 1956 and 1998; Namibia Witchcraft Suppression Proclamation: 27 of 1933; South Africa Witchcraft Suppression Act: 3 of 1957, amended by the Witchcraft Suppression Amendment Act 1970; Uganda Witchcraft Act 1957, Chapter 124, amended in 2009; Nigeria Criminal Code Act 1990 (derived from the Nigeria Criminal Code Act 1916 and the Nigeria Penal Code Act 1960) Section 210 (subtitled 'Offences in relation to witchcraft and juju'); Zambia Witchcraft Act 1994, first enacted in 1914; Zimbabwe Criminal Law (Codification and Reform) Act 2004, chapter 5, sections 98–100 (subtitled 'Witchcraft, witch-finding and crimes related thereto' which is an amendment of the Zimbabwe Witchcraft Suppression Act 1899).

maximum protection and freedom for each and every human entity.[42] AJ Ashworth suggests that '[p]erhaps the most fundamental and universal restriction is that placed on the use of force by one individual against another'.[43] However, legal systems also recognise that 'the instinct towards self-preservation is so strong and basic to human nature that "no law can oblige a man to abandon" it'.[44] Therefore, in instances where the maintenance of a person's right to life or physical security conflicts with his obligation or duty to refrain from violence, the law may permit the individual's right to life to prevail over or override the social duty to be non-violent (or not to use force).[45] Such a principle begets the defence/plea of self-defence.

In other words, '[w]here the attack or threat is sudden, the protection of society and its laws is no longer effective, and the individual alone may be left to protect his right to life and physical security'.[46] As Ashworth explains, '[i]f a legal system is to uphold the right to life, there must be a liberty to use force for the purpose of self-defence. The corollary of this is that an attacker may, by threatening the life of another, forfeit his own right to life'.[47] However, the liberty to use force for the purpose of self-defence 'is restrained to cases in which no other probable means of preserving our life remain, as flight, calling for assistance, disarming the adversary, etc.'[48] Generally, self-defence is available as a defence to offences committed by use of force, provided the accused persons acted 'reasonably and in good faith to

[42] AJ Ashworth, 'Self-defence and the Right to Life' (1975) 34(2) Cambridge Law Journal 282.

[43] *ibid*.

[44] *ibid* 282, citing Thomas Hobbes' *Leviathan*.

[45] see William Paley, *The Principles of Moral and Political Philosophy* (Cambridge University Press 2013); Boaz Sangero, *Self-Defence in Criminal Law* (Hart Publishing 2006).

[46] Ashworth (n 42) 282–283.

[47] *ibid* 283.

[48] *ibid*, citing Paley (n 45).

defend themselves, their family, their property or in the prevention of crime'.[49]

3.2 *A Brief Exposition of the Mistaken Belief Defence*

It is an incontestable fact that the voluntary act requirement is a foundational component of criminal law. In other words, the general principle in criminal law is that a person can be criminally culpable only for crimes committed voluntarily.[50] One major defect (or destroyer) of voluntariness is mistaken belief or mistake of fact. As Matthew Hale argues, an act done in ignorance of the true facts is morally involuntary.[51] Blackstone explains that for a criminal act to occur, the deed and the will must act together. However, wherever there is a mistake of fact, 'the deed and the will … [act] separately, there is not that conjunction between them, which is necessary to form a criminal act'.[52] Mistaken belief thus makes it impracticable for prosecutors to establish that the accused possessed the necessary *mens rea* at the time of the offence.

The essential factor in the mistaken belief doctrine is that 'the person relying on it would have been justified if the true state of affairs had been as imagined'.[53] However, like self-defence, there are basic conditions that must be satisfied before the mistaken belief defence can succeed, and the conditions vary from jurisdiction to jurisdiction. Among the common ones are: (1) the alleged mistaken belief of the accused must be honest (honestly held), (2) the mistaken

[49] Crown Prosecution Service (CPS) 'Self-Defence and the Prevention of Crime' *CPS* (30 September 2019) <https://www.cps.gov.uk/legal-guidance/self-defence-and-prevention-crime> accessed 10 June 2022.

[50] Sanford H Kadish, Stephen J Schulhofer, Rachel E Barkow, *Criminal Law and Its Processes: Cases and Materials* (9th edn, Aspen Publishers 2012); Emmanuel Sarpong Owusu, '"Guilty of Having Been Obedient": A Fresh Dissection of the Superior Orders Controversy' (2021) 12 Journal of International Humanitarian Legal Studies 279.

[51] Matthew Hale, *The History of the Pleas of the Crown* (In the Savoy 1736); see also Edward Hyde East, *A Treatise of the Pleas of the Crown* (Strahan for Butterworth Bookshops 1803).

[52] cited in Richard Singer, 'The Resurgence of Mens Rea: II – Honest but Unreasonable Mistake of Fact in Self Defense' (1987) 28 Boston College Law Review 459, 461.

[53] Mutungi (n 5) 535.

belief must be reasonable, (3) the offence resulting from the mistaking belief must be justifiable.[54]

3.3 *The Applicable Criminal Statutes in Anglophone Africa*

The self-defence and mistaken belief (or mistake of fact) defences are enshrined in the criminal/penal codes of virtually all AACs. These penal codes are largely modelled on the Indian Penal Code of 1860 and the Queensland Criminal Code of 1899.[55] This means that the criminal codes of AACs owe their origins to the English criminal law.[56] Writing in the early 1960s, James Read notes that '[t]he influence of English criminal law throughout the English-speaking areas has been universal: even in southern Africa where the legal systems are founded upon Roman-Dutch law, criminal law is to a great extent English in character'.[57] Clearly, the criminal statutes drafted for the colonies have undergone significant amendments and revisions to bring them in line with changing political, socio-cultural, economic, and religious conditions in the respective independent States. However, the phrasings of the current provisions relating to self-defence and mistaken belief remain significantly identical to the colonial versions.

It is not possible to reproduce the self-defence and mistaken belief provisions in the criminal codes of every AAC here due to limitation of space. However, to facilitate a better appreciation of the discussion, it has been deemed reasonable to use the current Kenyan version as a model. This is for three reasons: (1) the Kenyan version has

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[54] Margaret F Brinig, 'The Mistake of Fact Defense and the Reasonableness Requirement' (1978) 2 International School of Law Review 209.

[55] James S Read, 'Criminal Law in the Africa of Today and Tomorrow' (1963) 7(1) Journal of African Law 5; HF Morris, 'How Nigeria got its Criminal Code'' (1970) 14(3) Journal of African Law 137; Nsereko (n 5).

[56] Taslim Olawale Elias, 'Colonial Courts and the Doctrine of Judicial Precedent' (1955) 18(4) The Modern Law Review 356; Read (n 55).

[57] Read (n 55) 5; the claim that criminal law in Southern Africa is to a great extent English in character is supported by several relevant literature such as, HR Hahlo and Ellison Kahn, *The South African Legal System and its Background* (Juta 1968), 584; AJGM Sanders, 'The Characteristic Features of Southern African Law' (1981) 14(3) The Comparative and International Law Journal of Southern Africa 328; Joe W Pitts, 'Judges in an Unjust Society: The Case of South Africa' (1986) 5(1) Denver Journal of International Law and Policy 49; Francois du Bois (ed), *Wille's Principles of South African Law* (Juta 2007); Christa Rautenbach, 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 60 Journal of Legal Pluralism and Unofficial Law 143.

largely not departed from the earliest drafts (the colonial models), (2) Kenya is one of the epicentres of witchcraft-related murders in Africa, and (3) many of the earliest high-profile witchcraft-related homicide cases in which the self-defence and mistaken belief defences were raised, occurred in Kenya and other East African countries. The self-defence and mistaken belief defences are enshrined in sections 17 and 10 of the current Kenyan Penal Code Act, respectively. Section 17, subtitled 'Defence of person or property', provides that:

> Subject to any express provisions in this Code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law.

It must be stressed that, today, most AACs, including Ghana, Nigeria, and Tanzania, have omitted the part that mandates domestic courts to determine self-defence cases according to the English common law principles.

Elaborating on the principles relating to the plea of self-defence, the UK Court of Appeal, in *Palmer v R*, stated that '[i]t is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary'.[58] The fundamental principles of self-defence as far as the English criminal law is concerned are: (1) that a person threatened with attack must avoid conflict if reasonably possible, (2) that a person under attack must withdraw or retreat if reasonably possible, and (3) that the amount of force used must be reasonably proportionate to the harm threatened or amount of harm likely to be suffered by the defender/accused.[59] In assessing the reasonableness of the force used, two key questions must be addressed: (1) was the use of force necessary in the circumstances? and, (2) was the force used reasonable in the circumstances?

Section 10 of the Kenyan Penal Code, subtitled 'Mistake of fact', also contains the following stipulation:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally

[58] *Palmer v R* [1971] AC 814, 832, this pronouncement was approved in *R v McInnes* [1971] EWCA Crim J0729-655.

[59] Ashworth (n 42); see also Helen Frowe, 'A Practical Account of Self-Defence' (2010) 29(3) Law and Philosophy 245; Sangero (n 45).

> responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

It is worth mentioning that during the colonial period, the established position of the UK superior courts on the mistaken belief doctrine was that an honest mistake by an accused person would avail him the mistaken belief defence only if the mistake was made on reasonable grounds.[60] Thus, in the courts' view, there was nothing 'unreasonable in requiring a citizen to take reasonable care to ascertain the facts relevant to his avoiding doing a prohibited act'.[61] The reasonable belief school of thought held sway unchallenged for decades if not centuries in Britain. However, since the mid-1970s the UK courts have explicitly rejected or revised the reasonable belief approach and placed emphasis on the honest belief test, as shall be seen later in this discussion.[62]

It has been argued by several academic that '[t]he most difficult problems in criminal theory are generated by dissonance between reality and belief, between the objective facts and the actor's subjective impression of the facts'.[63] One particularly challenging instantiation of this problem is the question of whether the use of defensive force or lethal force by individuals who genuinely but mistakenly believe that they are being spiritually attacked or their lives are being metaphysically threatened by a malevolent witch, should be excused. The subsequent sections delve into the nature and intricacies of this metaphysical legal conundrum, exploring the perspectives of the superior courts in colonial and post-independence Anglophone Africa.

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[60] *R v Turn* [1862] 9 Cox CC 145; *R v Horton* [1871] 11 Cox CC 670; *R v Tolson* [1889] 23 QBD 168; *Bank of New South Wales v Piper* [1897] AC 383 at 389–390; *R v Chisam* [1963] 47 Crim App 130; *R v Gould* [1968] 1 All ER 849 (CA); *Sweet v Parsley* [1970] AC 132; see also Glanville Williams, 'Notes On Cases: Mistake in Criminal Law' (1950) 14 Modern Law Review 485, stating that it is a 'hoary error that a mistake to afford a defence to a criminal charge must be reasonable'.

[61] *Parsley* (n 60) 164–165.

[62] *R v David Michael Kimber* [1983] 1 WLR 1118; *R v Williams (Gladstone)* [1984] 78 Cr App R 276; see also Mike Molan, *Cases & Materials on Criminal Law* (4th ed, Routledge-Cavendish 2007).

[63] George P Fletcher, *Rethinking Criminal Law* (Oxford University Press 1978) 683; see also Russell L Christopher, 'Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights' (1994) 85(2) Journal of Criminal Law and Criminology 295.

IV THE COLONIAL PERIOD, 1930S–1960S

4.1 *The Courts' Perspectives on Self-defence Against Metaphysical Attacks*

As already mentioned, self-defence and mistaken belief were among the common defences raised by killers of alleged witches during the colonial epoch. However, the major problem in raising such defences is that the law only deals with physical or verifiable offences and not metaphysical phenomena.[64] But the so-called malevolent witches typically do not perform a tangible act or pose a tangible threat that would justify or excuse lethal force against them by supposed victims whose accusations are mostly based on mere suspicion and intuition. As the East African Court of Appeal (EACA) remarked in *Galikuwa v R* (Uganda):

> in no case that we know of has this Court ever considered or decided whether an act of witchcraft which the victim honestly believes will occasion immediate death or injury can bring into play the doctrine of *se defendendo* …. In these territories self-defence as an answer or a partial answer to a homicide is governed by the principles of the English Common Law … so that it is difficult to see how an act of witchcraft unaccompanied by some physical attack could be brought within the principles of the English common law.[65]

The EACA's pronouncement suggests that since bewitchments or attacks by witches were viewed by the courts as imaginary, killing an alleged witch to repel supposed spiritual attacks could not be justified or excused.[66] This posture of the national and regional courts made the mistaken belief defence almost unavoidable. Thus, since witchcraft and witches were considered by the colonial administrators and,

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[64] *R v Kajuna Mbake* [1945] 12 EACA 104.

[65] *Eria Galikuwa v R* [1951] 18 EACA 175, 179; The country placed in brackets after the case title, is the place or colony in which the case originated and tried. This has been done, where necessary, throughout the discussion. It must also be mentioned that in many AACs, judgments usually do not have numbered paragraphs. For this reason, it has largely not been possible to pinpoint a specific paragraph, even where a direct quotation is used. Some of the cases and judgments discussed in this study, particularly the post-independence cases/decisions, were retrieved from the online law databases or portals of various credible legal information bodies such as the African Legal Information Institute which convenes a network of about 16 legal information institutes in English-speaking Africa. These online databases usually include otherwise unpublished cases.

[66] Waller (n 5).

indeed, the courts as imaginary or non-existent, the self-defence in conjunction with mistaken belief plea became a necessary and reasonable line of argument in several witchcraft-related homicide cases. The question as to whether the accused's genuine/honest but mistaken belief in witchcraft excused the lethal force used, thus became a legal issue that the courts in colonial Anglophone Africa had to grapple with.

One of the earliest high-profile witchcraft-related murder cases in which the self-defence based on mistaken belief plea was raised is *R v Kumwaka wa Mulumbi and others* (Kenya). In this case, 70 defendants were convicted by the Supreme Court of Kenya for beating to death a suspected female witch with sticks. Sixty of the convicted persons were subsequently handed the death penalty; the remaining perpetrators received custodial sentences since they were juveniles. The perpetrators' despicable act was prompted by the belief that the deceased had bewitched the wife of Mr Kumwaka, the gang leader, by making her ill and mute. It was evident that their act was provoked by their genuine belief that the victim was bewitching their colleague's wife and other community members – a form of self-defence.[67]

To bolster their self-defence based on mistaken belief argument, counsels for the accused persons cited the English case of *R v Rose* in which a young man shot his father when he honestly believed that his father was cutting his mother's throat. It turned out that the accused's father was, in fact, not slashing his (the accused's) mother's throat as he had imagined. Acquitting the defendant, the court stated that since 'the accused had reasonable grounds for believing and honestly believed that his aid was necessary for the defence of his mother, the homicide was excusable'.[68] However, the Kenyan Supreme Court and the EACA dismissed the relevance or applicability of *Rose* to *Kumwaka*, arguing that unlike the latter case (*Kumwaka*), the act of the accused in *Rose* was necessary and, therefore, excusable.[69] Onesimus Mutungi remarks that 'in a society that adheres to the belief that the only defence to witchcraft is the death of the witch, it is questionable whether what the appellants did was not necessary'.[70]

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[67] *R v Kumwaka wa Mulumbi and 69 others* [1932] 14 KLR 137.

[68] *ibid* 139, citing *R v Rose* [1884] 15 Cox 540.

[69] *Kumwaka* (n 67).

[70] Mutungi (n 5) 534.

Another notable case is *Konkomba v R* (Ghana). In this case, one of the accused's brothers died under suspicious circumstances. He then consulted a juju practitioner who identified the deceased as a witch responsible for his brother's death. Shortly after this episode, the defendant's second brother fell seriously ill. Believing that the deceased had caused the death of his first brother by witchcraft and was about to kill the second brother by the same supernatural means, the accused inflicted ferocious blows on the victim's head, resulting in death. It was established that he killed the deceased to prevent him from killing his sick brother by witchcraft. Dismissing his appeal against a conviction of murder, the West African Court of Appeal (WACA) expressed no doubt that the appellant's belief was honestly held. However, it stressed that killing someone to repel metaphysical attacks is no defence in law as such beliefs are unreasonable.[71]

The 'reasonableness' test became an important and defining factor in self-defence based on mistaken belief pleas in witchcraft-related homicide proceedings. In other words, the crucial element that the courts had to consider was the reasonableness in killing an alleged witch to repel a metaphysical attack and the reasonableness of the belief, though mistaken, that the accused's life or the life of a person under his immediate care was threatened by an act of witchcraft. Thus, in most cases, the courts accepted that the witchcraft belief was honestly held by the accused. But on the question of reasonableness, the defendants almost always failed to sway the courts with their arguments. This, according to Mutungi, was 'primarily because of the application of the ''English reasonable man'' as the standard in judging the African's behaviour'.[72]

For instance, in *Attorney General of Nyasaland v Jackson* (Malawi), the deceased, a reputed female witch, had a row with the accused during which she told him that he would not see the sun that day. The accused, interpreting this statement to be a threat to kill him by witchcraft before sunset, killed the deceased with an arrow to save himself from dying by her witchcraft. The trial court allowed the defence after finding that his witchcraft belief, though a mistaken one, was honest.[73] However, the Rhodesia and Nyasaland Federal Supreme Court reversed the verdict, stating that the appellant's belief that the deceased would kill him by witchcraft before sunset, even if

[71] *Maawole Konkomba v R* [1952] 14 WACA 236, 237.

[72] Mutungi (n 5) 535.

[73] *Attorney General of Nyasaland v Jackson* [1956] Rhodesia and Nyasaland Law Reports 666.

genuine/honest, was not reasonable.[74] The question as to what the interpretation of the term 'reasonable' should be, became the subject of differing views among judges and other legal experts as well as national and regional courts.

4.2 *The Superior Courts' Interpretation of Reasonableness*

Interestingly, the regional and other superior courts in colonial Anglophone Africa expressed significantly divergent views on how reasonableness should be determined or interpreted and whether a belief in witchcraft or killing a person because of belief in witchcraft can ever be reasonable. In the *Jackson* case, the Rhodesia and Nyasaland Federal Supreme Court reasoned that the applicable reasonableness test was 'one that is constantly invoked in English law' – that a belief was reasonable if it 'would appear reasonable to the ordinary man in the street in England',[75] insisting that 'the law of England is still the law of England even when it is extended to Nyasaland'.[76] On this basis, the court concluded that the appellant's belief that the deceased would kill him by witchcraft before sunset, was not one that an ordinary Englishman in the streets of England would entertain; therefore, it was not reasonable. This standard was heavily criticised by several experts who viewed it as an unfair test to apply in a less enlightened society.[77]

Interestingly, the English case of *Wilson v Inyang* furnishes an instructive contrast. In this case, an African (Nigerian) who had studied and been awarded a diploma in Naturopathy, was sued for using the title of 'Physician'. He had used the title, genuinely believing that he was entitled to do so, which he was not. The court held that such a belief would have been unreasonable if the accused was brought up in England. Since he was brought up in Africa and had lived in England for only a short period (approximately two years), his belief was not unreasonable, and that he was acting honestly. The

[74] *The Attorney General of Nyasaland v Jackson* [1957] Rhodesia and Nyasaland Law Reports 443.

[75] *ibid* 448.

[76] *ibid* 449.

[77] Seidman, 'Witch Murder and Mens Rea' (n 5); Seidman (n 7); Mutungi (n 5); Nsereko (n 5); Tebbe (n 7).

prosecutor appealed against the decision, but the appeal was dismissed.[78] Robert Seidman wonders why an African in England was judged on the basis of the reasonable African, but the African in Africa was 'measured by the standard of the reasonable Englishman'.[79]

In a case that raised issues similar to those considered in *Jackson*, the Court of Appeal of Zambia agreed that there should be an objective standard for determining reasonableness. However, it rejected the standard of the average Englishman in the streets of England, and instead used the standard of the average 'member of a modern society who has average modern knowledge, average perception, average intelligence, average judgment and average self-control'.[80] This standard also raised other pressing questions – the problem of determining who an average 'member of a modern society' was, and what 'average modern knowledge' encompassed, among others. There were questions about the fairness and aptness of such a vague standard. In the view of the EACA, a belief was reasonable if 'an ordinary person of the community to which the accused belongs would genuinely' have the same belief under the circumstances.[81] The Court of Appeal of Botswana adopted a similar and even more specific approach in *Manjesa v S*, stating that a belief was/is reasonable if 'an ordinary person of the class of the community to which the accused belongs' would have the same belief under the circumstances.[82]

The WACA took a more radical position, stating that the fact that an overwhelming majority of the community to which an accused person belongs believes in witchcraft would not render the accused's belief reasonable. In *Gadam v R* (Nigeria), the accused who genuinely believed that the miscarriage and subsequent fatal illness of his wife were caused by an elderly woman using witchcraft, killed the woman. The court accepted that the belief was honestly held; however, it dismissed the appeal against the accused's conviction for murder on the ground that belief in witchcraft, though prevalent in the accused's

[78] *Eric Wilson (on behalf of the Medical Defence Union) v Okon Inyang* [1951] 2 All ER 237 (Divisional Court), it must be clarified that the appeal court only considered whether or not the belief was honest, stating that the question as to 'whether he acted reasonably or not is not the deciding feature'.

[79] Seidman (n 7) 1144.

[80] *Mutambo and others v the People* [1965] Zambia Law Reports 15 (CA).

[81] *R v Fabiano Kinene s/o Mukye and others* [1941] 8 EACA 96 at 101.

[82] *Innocent Manjesa v S* [1991] Criminal Appeal 30 of 1991; see also Nsereko (n 5) 48.

community, was not reasonable. The Court cited the following passage from an earlier unreported case to cement its position:

> I have no doubt that a belief in witchcraft such as the accused obviously has is shared by the ordinary members of his community. It would, however, in my opinion be a dangerous precedent to recognize that because a superstition, which may lead to such a terrible result as is disclosed by the facts of this case, is generally prevalent among a community, it is therefore reasonable. The Courts must, I think, regard the holding of such beliefs as unreasonable.[83]

It could be deduced from this language that in the view of the WACA, belief in witchcraft and concomitant criminal acts could not be reasonable and excusable under any circumstances – not even if the entire community were immersed in witchcraft beliefs.

In the Union of South Africa and associated territories, the courts, in *R v Magabeni* (Natal), suggested that a reasonable person does not believe in superstitions such as witchcraft and juju; hence, the belief in witchcraft cannot be reasonable under any circumstances.[84] However, it seems that the courts in Southern Africa generally focused their attention not on the interpretation of reasonableness, but rather its relevance in determining guilt or innocence in cases bordering on mistaken belief.[85] The pronouncements of several senior judges, some of which were stated *obiter*, suggested that reasonableness was immaterial in determining the merit or otherwise of the defence of mistake of fact where the crime charged requires *mens rea*.[86] The reasonableness test thus seemed to have been disregarded, consciously or unconsciously, in several superstition-related murder cases in the region.

One prominent case that cannot be ignored in this discussion is *R v Mbombela* (Transkei).[87] The facts of this case are that a group of

[83] *Muhammedu Gadam v R* [1954] 14 WACA 442, 443, citing *lfereonwe v R* (unreported).

[84] *Rex v Magebeni and others* [1911] Native High Court 107. This case concerned a group of people who stabbed and burned a man suspected of using witchcraft to cause sickness and death in their village.

[85] see, for instance, *R v Mosago* [1935] AD 32; *R v Myers* [1948] (1) SA 375; *R v Ndara* [1955] (4) SA; *S v Griffin* [1962] (4) SA 495 (E); *R v Geddes* [1964] RLR 288 (AD); *R v Nkomo* [1964] (3) SA 128 (SR); *R v Breingan* [1966] (3) SA 410 (RAD).

[86] see, for instance, *Griffin* (n 85); *Geddes* (n 85); EM Burchell, 'Unreasonable Mistake of Fact as a Defence in Criminal Law' (1963) 80 South African Law Journal 46.

[87] *R v Mbombela* [1933] AD 269.

native Transkeian children (who were playing at night) sighted in a hut, which was supposed to be empty, what they thought was a *tokoloshe* – a popular evil entity believed to be capable of causing the death of anyone who looks it in the face. The children got frightened and called the accused (a young man aged between 18 and 20 years) who, also believing that the object was a *tokoloshe*, struck it with a hatchet several times only to realise, after dragging the object out of the hut, that he had killed his own nine-year-old nephew who had fallen asleep in the hut. At trial, the self-defence in conjunction with mistake of fact plea was raised, but the accused was found guilty of murder, and he appealed.

Because the charge against the accused was laid under the Transkeian Penal Code,[88] the decision did not turn upon the common law. The Court of Appeal noted that the accused's belief that the entity in the hut was a *tokoloshe* may not be reasonable; however, it was not necessary to discuss what the position on the reasonableness element 'would be under the common law, for in this case the question must be decided under the provisions of the Penal Code'.[89] The court concluded that 'homicide committed under a bona fide mistake of fact (even if, as in this case, the mistake is not ''reasonable''), does not fall within any of the four classes of murder defined in section 140' of the Transkeian Penal Code.[90] Consequently, the accused's appeal succeeded, and the murder conviction was commuted to culpable homicide. It must be noted that the mistaken belief in this case did not result in a complete acquittal.

Another important case is *R v Mkize*.[91] In this case, the accused obtained from a juju practitioner what she thought and believed was a love potion – a juju medicine meant to induce her husband to love her more. She then placed it in her husband's beer, but unfortunately, the administration of the potion turned fatal as the substance contained a large amount of arsenic. She was tried and found guilty of murder. However, she appealed, and her appeal succeeded. In determining whether the accused had the intention to kill her husband, the appellate court took little account of the unreasonableness of her belief, and rather placed emphasis on its genuineness.[92] Even

[88] Transkeian Penal Code, Act No. 24 of 1886.

[89] *Mbombela* (n 87) 274.

[90] *ibid*.

[91] *R v Mkize* [1951] (3) SA 28 (AD).

[92] *ibid* 33; see also Burchell (n 86) 50.

though the accused was found not guilty of murder, she did not escape liability entirely, as the court found that she had been negligent for unreasonably believing that the potion was a love philtre and putting it in her husband's beer. The murder conviction was commuted to culpable homicide. The court's ruling suggested that if the unreasonableness of the accused's belief had not reached the level of negligence (and had been moderate), she would have been entirely acquitted.

In fact, the self-defence against witch attacks plea almost always failed in AACs. They failed primarily because in these jurisdictions, self-defence as a defence or partial defence to a homicidal act was governed largely by the principles of the English common law which did/does not recognise witchcraft and the existence of witches, and which dealt/deals with only physical (not metaphysical) attacks. In other words, because alleged metaphysical witch attacks could not and still cannot be empirically verified, the self-defence plea for a complete acquittal or a lesser conviction persistently failed. However, in cases where the judges or superior courts believed and were satisfied that the defendants' genuine, though mistaken, belief in witchcraft had been established, a plea for clemency from the relevant governors was made on behalf of the accused persons. By this, the African courts handed 'over the impossible task of deciding between the claims of legal guilt and moral innocence to the executive arm, the Governor-in-Council, who could make a decision based on policy, not law'.[93] In the majority of cases, the relevant governors commuted the death sentences to varying jail terms with hard labour.

4.3 *Controversies Surrounding the Anti-Witchcraft Statutes*

It has been stressed in this discussion that even though to the indigenous African, witchcraft and witches are real and a social evil,[94] the colonial administrators and judges never believed in the existence of witchcraft and juju. It was therefore surprising that the British colonial administrators drafted and passed laws, known as the witchcraft acts or anti-witchcraft legislation/ordinance, that criminalised witchcraft and juju related activities in most of the colonies. As already noted, generally, the colonial versions of the anti-witchcraft statutes stipulated that it was an offence for any person to exercise or pretend to exercise any kind of supernatural power,

[93] Waller (n 5) 248.

[94] Nsereko (n 5); Waller (n 5).

including witchcraft and juju. Section II of the Tanzanian colonial version states that '[w]itchcraft includes sorcery, enchantment, bewitching, the use of instruments of witchcraft, the purported exercise of any occult power and the purported possession of any occult knowledge'.[95] The statutes also criminalised the teaching or learning of the art or purported art of witchcraft. Besides, it was an offence to accuse or threaten to accuse others of being witches or of practising witchcraft.

Commenting on the stipulation of section II of the colonial version of the Tanzanian Witchcraft Ordinance (cited above), Mutungi argues that defining a term by listing its coverage is not unusual; however, 'where the ''inclusions'' are themselves subjects deserving of definition, it is doubtful whether the definition serves much purpose'.[96] For instance, since the colonial government claimed witchcraft did not exist, how was one supposed to know what constituted 'bewitching'; and how was one supposed to identify 'instruments of witchcraft'? Ironically, by using such terms or phraseology, the British colonial administrators were indirectly or unconsciously suggesting that witchcraft was a reality. Aside from the statutes' definition of witchcraft being vague and inadequate, they seem 'to deny the existence of the very subject matter of the crimes they aim to prevent'.[97]

There is no question that the rationale/intention behind the witchcraft or anti-witchcraft legislation was to discourage witchcraft beliefs and curtail the high rate of witchcraft and juju motivated crimes (including murder) in Anglophone African communities. Ironically, however, the statutes ended up unintentionally endorsing the very superstitious beliefs that they sought to discourage. As one local lawyer argued in a letter to a provincial commissioner in Kenya, 'by prosecuting someone for possession of a cow's horn [(an object classified as a witchcraft article)] whose contents were empirically harmless, the British were leaving the natives present with the impression that such articles were genuinely dangerous and that their power was real'.[98] Mutungi argues that:

[95] Witchcraft Ordinance Chapter 18, Laws of Tanganyika (1954), para 2.

[96] Mutungi (n 5) 529.

[97] *ibid* 530.

[98] cited in G Lambert, "'If the Government Were not Here, We Would Kill Him'' – Continuity and Change in Response to the Witchcraft Ordinances in Nyanza, Kenya, c. 1910–1960' (2012) 6 Journal of Eastern African Studies 613, 622.

> It is unbecoming to the integrity of any legislature to enact against offences that are impossible of commission. Either witchcraft exists, or it does not; if the latter be the case, the penalties prescribed by the witchcraft statutes are superfluous since the offences can never be committed in the first place.[99]

To some academics, experts, and indigenous folks, if it was possible for government to promulgate laws that punished people for practicing crafts that it claimed were non-existent or imaginary, then it should also be possible for the law to acquit people who killed under the honest belief that they were repelling imminent attacks or threat occurring in the imaginary or supernatural world. The courts' reluctance to accept as reasonable a witchcraft belief that triggered fatal attacks, thus generated a series of contradictions.

V THE POST-COLONIAL PERIOD, 1970–PRESENT

As already discussed, during the colonial era, the reasonableness test became the most controversial aspect of the self-defence in conjunction with mistaken belief plea in witchcraft-related homicide cases. Interestingly, various post-independence AACs have adopted varied approaches for determining the merit or otherwise of the belief in witchcraft defence in homicide cases. Many have stuck by the reasoning of the respective colonial regional appellate courts, some have adopted the recent position of the UK superior courts, and others have devised a somewhat new approach independent of the English legal principles. This section offers significant insights into the various approaches that have been employed by courts in various African countries and regions to address the self-defence based on mistaken witchcraft belief controversy since independence – specifically since the 1970s.[100]

5.1 *The Courts' Perspectives on the (Un)reasonableness Test*

The post-independence Eastern African countries have somehow redefined the scope of the reasonableness test/standard offered by the EACA. Thus, the EACA had suggested that a witchcraft belief was reasonable if it would seem reasonable to an ordinary person in the

[99] Mutungi (n 5) 554–555.

[100] Admittedly, a handful of AACs, including Zimbabwe and Namibia, gained independence after the 1970s. However, it has been deemed reasonable to discuss the post-independence case law from the 1970s since the overwhelming majority of AACs had attained independence by the mid-1970s.

community to which the accused belonged. However, in the view of the post-colonial courts, a belief is reasonable if it is widespread in the accused's community. The decision in *Chivatsi and another v R* (Kenya) epitomises, to a significant extent, the perspective of the courts in Eastern African countries and some Southern African nations such as Zambia and Botswana. In the *Chivatsi* case, the son and nephew of the deceased genuinely believed that he was a wizard responsible for some of the deaths in their family. They then went to his homestead to confront him during which he supposedly admitted the allegation and threatened to kill every member of the family and community, including the accused persons, so he could live in the community alone. This threat induced them to kill him. They were found guilty of murder and sentenced to death. Substituting their murder conviction with manslaughter, the Court of Appeal made the following pronouncement:

> There are communities in Kenya where the sort of threat which the deceased administered at the appellants would be treated as twiddle-twaddle, as arrant nonsense. Not so, however, in the community to which the appellants belong. It is not the business of this or any other court to moralize. It is yet a fact that belief in witchcraft is widespread in the community of the appellants. We take that community as we find them, having regard to the law.[101]

This position has been reiterated in several other cases such as *Mwanengu v R* (Kenya).[102]

The West African countries have remained faithful to the principles enunciated by the WACA that belief in witchcraft cannot be reasonable under any circumstances – not even if the entire members of the accused's community hold that belief. For instance, in *Jonah v the State*,[103] the Supreme Court of Nigeria reaffirmed the decision in *Gadam*.[104] The *Jonah* case concerned a petty trader who killed a relative on suspicion that the deceased was spiritually tormenting him and using witchcraft to prevent people from buying his mats when he took them to the market to sell. The Supreme Court agreed with the trial judge that 'even if the accused [honestly] held the belief that …

[101] *Chivatsi Dzombo Chivatsi and another v R* [1990] Criminal Appeal 77 of 1989 eKLR.

[102] *Patrick Tuva Mwanengu v R* [2007] Criminal Appeal 272 of 2006 eKLR.

[103] *Nse Obong Jonah v The State* [1977] SC Case No. SC 145/1976.

[104] *Gadam* (n 83).

[the deceased] had used witchcraft on him, such belief would be unreasonable, and the court will not countenance it'.[105]

The courts in Southern Africa have also not substantially departed from the earlier position that no reasonable man believes in witchcraft or juju, therefore such beliefs can never be held on reasonable grounds.[106] This was stressed in *S v Mokonto* (South Africa) where the defendant claimed that the victim (the deceased) had killed his brothers by witchcraft and threatened him too with death by the same supernatural means, inducing him to kill her. The accused's self-defence and provocation pleas were rejected on the grounds that the deceased posed no immediate threat to him, and that his belief in witchcraft was not reasonable, as no reasonable person believes in such superstitions.[107] This, as Jennifer Dumin notes, 'means that a belief in witchcraft would not support a claim of self-defense, given that the defendant must establish that a reasonable person would have acted in the same manner'.[108] This notwithstanding, most courts in Southern African countries, as shall be seen, accept genuine witchcraft belief as a mitigating factor to be taken into account in determining an appropriate sentence.

In certain countries such as Zimbabwe, the witchcraft ordinance seems to render belief in witchcraft reasonable whether or not it is prevalent in the accused's community. For instance, in 2006, the Zimbabwe Witchcraft Suppression Act – i.e., sections 97–101 of the Criminal Law (Codification and Reform) Act – was amended to legalise witchcraft accusations and to allow the State to prosecute persons accused of witchcraft and punish them if convicted. The statute, however, deems witchcraft imputation illegal if it is made 'groundlessly' or it is based on 'non-natural means' (such as information obtained from diviners). Section 99 of the act, for instance, states: 'For the avoidance of doubt, it is declared that no crime is committed by a person who, without the purported use of non-natural means and having reasonable grounds for suspecting another person of committing an … [act of witchcraft], accuses that person of

[105] *Jonah* (n 103).

[106] *S v Netshiavha* [1990] (2) SACR 331 (A) at 333.

[107] *S v Mokonto* [1971] 2 SA 319 (A). The court made the following pronouncement at 324: 'the beknighted belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the Dark Ages'.

[108] Dumin (n 40) 159.

committing that offence'.[109] Threats to harm or kill others by witchcraft or by other magical or supernatural means are also criminalised under the witchcraft act. The above-highlighted statutory language seems to suggest or presume that witchcraft is a reality and, by extension, a reasonable belief.

5.2 *Relevance of Reasonableness and Honest Belief: The Present State of the Law*

In the 1970s, a few years after the independence of most AACs, the UK House of Lords reasoned in *DPP v Morgan* that an honest mistaken belief can be a successful defence irrespective of whether or not the belief was reasonable. *Morgan* was a case in which the accused persons had sexual intercourse with the victim after 'mistakenly' believing that she had consented, which she had not.[110] Even though this case borders on rape, the application of the House of Lords' reasoning may extend to non-sexual offences. The apex court's decision has, in fact, generated numerous interesting commentaries, and has been criticised by several experts, academics, and activists for its subjectivist view of *mens rea*.[111] Thus, even though *Morgan* was welcomed by some academics such as Glanville Williams as a logically sound approach,[112] many have strongly condemned the decision, particularly its application in cases relating to sexual offences and consent.[113]

Dolly F Alexander argues, inter alia, that the primarily subjective standard of proof tends to disregard 'the fact that a crime has been committed'. Such a standard of proof sends 'the message that the legal rights of the accused … [are] to be protected to a greater degree than the legal rights of the victim'.[114] In other words, *Morgan*'s

[109] Zimbabwe Criminal Law (Codification and Reform) Act (n 41).

[110] *DDP v Morgan* [1975] UKHL 3.

[111] See, for instance, MV Sankaran, 'Mens Rea in Rape: An Analysis of *Reg. V. Morgan* and Sections 375 and 79 of the Indian Penal Code' (1978) 20(3) Journal of the Indian Law Institute 438; Dolly F Alexander, Twenty Years of Morgan: A Criticism of the Subjectivist View of Mens Rea and Rape in Great Britain' (1995) 7(1) Pace International Law Review 207; Kenneth J Arenson, 'The Queen v. Getachew: Rethinking DPP v Morgan' (2013) 77 Journal of Criminal Law 151.

[112] See the letter of Glanville Williams on the *mens rea* standard set forth in the *Morgan* case, *The Times* (London, 8 May 1975) 15; see also Sankaran (n 111) 450.

[113] Yvonne Marie Daly, 'Knowledge or Belief Concerning Consent in Rape Law: Recommendations for Change in Ireland' (2020) Issue 6 Criminal Law Review 478.

[114] *Ibid* 232.

assessment of criminal liability does not appropriately consider the legal rights of the victim and the objective evidence presented, and that a subjective standard of proof is likely to 'allow the legal rights of a victim to fall through the cracks of the criminal justice system'.[115] Other academics and jurists have suggested that *Morgan* may be justifiably applied in some but not all criminal cases in which the mistaken belief defence is raised.[116]

In *The Queen v Getachew*,[117] the High Court of Australia argued that there is 'a thin, but clearly discernible, line between a strongly held belief and a belief that excludes any possibility of error',[118] stressing that the *mens reas* of knowledge and belief, which may appear similar in certain respects, are separate and distinct mental states; hence, *Morgan* was incorrect in treating them as though they were identical.[119] In brief, many maintain that judges and juries should, in certain cases, have regard to the presence or absence of reasonable grounds for the accused's alleged honest belief.[120]

In 1983, the UK Court of Appeal, in *R v Williams (Gladstone)*, reaffirmed the decision in *Morgan* but made the following clarification:

> The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant.[121]

A similar conclusion was reached in *R v Kimber* (UK).[122] The UK courts' pronouncement in *Williams* and *Kimber* suggests that in trials where the honest belief defence is invoked, the decisive question is a subjective one (what the accused genuinely believed); however,

> the deliberative process to arrive at an answer to that question requires the jury to engage in objective consideration of what others would have believed in the circumstances, what they themselves would have believed, what characteristics

[115] Alexander (n 111) 232.

[116] Sankaran (n 111); Arenson (n 111).

[117] The Queen v Getachew [2012] HCA 10.

[118] See Arenson (n 111) 161.

[119] Getachew (n 117); see also Arenson (n 111).

[120] Alexander (n 111); Arenson (n 111); Daly (n 113).

[121] *Williams (Gladstone)* (n 62) 281.

[122] *Kimber* (n 62).

> of the accused might have made him think differently from others, and so on.[123]

One of the main arguments underpinning the UK courts' rejection or partial rejection of the reasonableness approach is that the mistake of fact doctrine primarily serves to negate the existence of *mens rea*. Therefore, logically, to succeed as a defence in criminal proceedings, mistake of fact need not necessarily be reasonable but genuine, 'for a person lacks intention to do act A if, through mistake, he genuinely believes that he is doing act B, no matter how unreasonable that belief may be'.[124] As Williams argues, if a crime requires *mens rea*, then a genuine/honest mistake which negatives the *mens rea* must negative the crime, whether it be reasonable or unreasonable, stressing that reasonableness is only needed to prove the genuineness of the mistake.[125] Thus, such a doctrine (the reasonableness principle), based purely on an objective test, is inconsistent with the modern principle that the *mens rea* required by common law is a subjective element.[126]

Today, courts in most AACs, particularly those in the eastern and southern parts of the continent, generally do not apply or strictly apply the reasonableness test when determining guilt or innocence or when deciding the appropriate sentence to be imposed on accused persons in witchcraft-related homicides cases. The courts rather place emphasis on the honest belief (subjective) test. It seems, however, that most AACs have abandoned the reasonableness approach in witchcraft-related homicide cases not for the reasons enunciated in the 'recent' UK cases highlighted above, but because of the fact that witchcraft beliefs are widespread in most African communities. Applying the (un)reasonableness test in such communities is thus presumed to be an unfair approach. However, as shall be shown in this discussion, there must be sufficient or convincing evidence that the witchcraft belief was honestly held by the accused.

As a matter of fact, all the courts in post-colonial AACs recognise that people's belief in witchcraft should not be an excuse for them to take the law into their own hands and mistreat or kill alleged witches.

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[123] Daly (n 113) 484.

[124] Burchell (n 86) 48–49.

[125] Williams (n 60); see also Glanville Williams, *Criminal Law: The General Part* (2nd ed, Stevens & Sons Ltd 1961) 176–205.

[126] JW Cecil Turner (ed), *Russell on Crime* (12th ed, Sweet & Maxwell Ltd 1964) 76.

The courts also appreciate that if 'such conduct remains unpunished it would not only lead to break down of law and order but would lead to chaos in the villages as those suspected of being witches or wizards would be lynched'.[127] This notwithstanding, the courts in most AACs, particularly those in the southern and eastern parts of the continent may, when necessary, consider a belief in witchcraft as an important factor that justifies a lesser sentence than the prescribed minimum sentence in the relevant jurisdiction. Thus, the self-defence against metaphysical witch attacks plea and, indeed, other related witch-murder defences, are largely treated as a mitigating factor rather than a proper or complete defence to homicidal acts. Section 101 of the Zimbabwe Criminal Law (Codification and Reform) Act reflects the general position of the courts in Southern and Eastern Africa on the subject:

> It shall not be a defence to murder, assault or any other crime that the accused was actuated by a genuine belief that the victim was a witch or wizard, but a court convicting such persons may take such belief into account when imposing sentence upon him or her for the crime.

This provision re-echoes the pronouncement of the South African Supreme Court of Appeal in *S v Netshiavha*:

> Objectively speaking, the reasonable man so often postulated in our law does not believe in witchcraft. However, a subjective belief in witchcraft may be a factor which may, depending on the circumstances, have a material bearing upon the accused's blameworthiness.... As such it may be a relevant mitigating factor to be taken into account in the determination of an appropriate sentence.[128]

In the *Netshiavha* case, the accused killed the deceased by striking him with an axe on the head and neck, claiming that he had mistaken the deceased for a bat that was charging at him, and that he killed the entity in self-defence. It was only later that he realised that what he had struck was a human being. He was convicted and sentenced to 10

[127] *S v Ashton Musindo* [2020] (HMA 27-20, CRB 22-29/20) ZWMSVHC 27 (Zimbabwe); a similar pronouncement was made in *Maphutu Mogaramedi v S* [2014] (A 165/2013) ZAGPPHC 594 (South Africa) para 35.

[128] *S v Naledzani Petrus Netshiavha* [1990] (2) SACR 331 (A) at 333 (South Africa); see also *S v Moses Himelundilwa Alfred* [2016] CC 11/2013 NAHCMD 15 (Namibia).

years' imprisonment, but the sentence was reduced to a 4-year jail term on appeal because of his genuine belief in witchcraft.[129]

In *the People v Taulo and another*, the Supreme Court of Zambia suggested some criteria for determining whether a witchcraft belief was honestly held by the accused.[130] This case concerned two men who were convicted of murder but received a reduced sentence of life imprisonment instead of the prescribed death sentence, after the trial judge had considered their witchcraft belief argument. They appealed against the sentence, claiming that it was excessive. The Supreme Court stated that, besides testimony by others, evidence of honest belief in witchcraft should include:

> a [previous] visit to a witchdoctor, a visit to a witch finder or advice from either of the two; a visit or advice from a traditional healer or consultation about witchcraft or some other reasonably suspicious event or admission believed to have been authored by the deceased in the murder case; or indeed, a demonstration of strong belief in a local ritual ordinarily associated with witchcraft.[131]

The apex court determined that there was no evidence that the accused persons' homicidal act was influenced by an honest belief in witchcraft or juju. Therefore, the finding by the trial court that there were extenuating circumstances in favour of the accused persons was a perverse finding of fact. The Supreme Court subsequently quashed the life sentence and imposed the mandatory death sentence in its place.[132] It must, nevertheless, be emphasised that in some countries, particularly those in West Africa, a mere honest belief in witchcraft, as shall be demonstrated in this discussion, is neither a defence nor a mitigating factor in terms of sentencing.

5.3 *Relevant Cases from Eastern and Southern Africa*

In *S v Mampa and others* (South Africa) a group of three young men in a rural community abducted and burned a young female to death on suspicion that she had bewitched or cast spells on their relative – i.e., caused him to be unconscious and to experience loss of speech.

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[129] *Netshiavha* (n 128).

[130] *Donald Taulo and another v the People* [2018] SCZ Appeal 527 of 2013 ZMSC 346.

[131] *ibid*.

[132] *ibid*, a similar decision was made in *Francis Daka v the People* [2022] SCZ Appeal No. 19/2022.

At trial, they argued that they killed the deceased because they were convinced that she was a witch and 'that their lives, and those of their family, were endangered by the occult powers she possessed and was exercising'.[133] In other words, they killed the deceased to protect themselves from being victims of her witchcraft. The court rejected their argument, convicted them of murder, and sentenced them to death. However, on appeal, the death sentence was commuted to 10 years' imprisonment. The Supreme Court of Appeal placed emphasis on the question as to whether the witchcraft belief was honestly held by the accused, and not the reasonableness or unreasonableness of the belief. It was satisfied that the appellants' 'conduct was prompted by deeply-held beliefs and genuine fear, and it was not regarded by themselves, or by the community in which they lived, as morally reprehensible'.[134] This decision was informed by the court's own earlier ruling in *S v Nxele* where it stated that 'a belief in witchcraft, if genuinely held by an accused and directly associated with the crime which he has committed, remains a factor to be taken into account in assessing an appropriate sentence'.[135]

A similar decision was reached in *S v Hamunakwadi*[136] (Zimbabwe) and *S v Musindo*[137] (Zimbabwe). In the *Hamunakwadi* case, the accused killed his mother on suspicion that she was a witch and the cause of his predicaments, including a supposed erectile dysfunction. He was found guilty of murder but received a reduced sentence. Drawing on the provisions of sections 98–101 of the Zimbabwe Criminal Law Act, the court suggested that since witchcraft is recognised under criminal law and, by extension, a reasonable belief, 'accused persons could reduce their crimes or punishments upon proof that they [honestly/genuinely] believed they, or persons under their immediate care, were being bewitched'.[138]

In *Rudowiki v R* (Tanzania), the accused was sentenced to death for axing his grandfather to death when the deceased went to the accused's home and threatened to kill him by witchcraft. The Court of Appeal reduced the appellant's capital murder conviction to

[133] *S v Mampa and others* [1988] 51of 88 ZASCA 100.

[134] *ibid.*

[135] *S v Nxele* 1973(3) SA 753(A), 757.

[136] *The State v Shingirai Hamunakwadi* [2015] CRB No. 58/15 Criminal Trial ZWHH 323.

[137] *Musindo* (n 127).

[138] *Hamunakwadi* (n 136).

manslaughter with a 12-year prison sentence after finding, inter alia, that he had an honest belief in witchcraft and genuinely believed that his life was in danger.[139] A similar conclusion was reached in *Moola v the People* (Zambia).[140] In the *Moola* case, a man who believed that his father had used witchcraft to cause not only the death of his children but also his predicaments in life, killed him by putting a poisonous substance into his locally brewed beer. He was convicted of murder and sentenced to death, and he appealed. The Supreme Court of Zambia commuted his sentence to 15 years' imprisonment with hard labour, stating that an honest belief in witchcraft must be held to be an extenuating circumstance if the belief is prevalent in the accused's community.[141]

Another instructive case is *Morake v S* (South Africa). The facts of this case are summarised by the accused himself in the following words:

> This lady bewitched my brother and my wife. She said she will finish off with my sibling.… I took my brother and my wife to a traditional doctor and on our return, that lady asked for forgiveness. We did forgive her, but she proceeded with her deeds. Yesterday I was with my sibling when we decided that we should kill her before she finishes us up. I then shot her.[142]

The trial magistrate convicted him of premeditated murder and imposed the prescribed minimum sentence for such crimes in South Africa – life imprisonment. The accused then appealed against the sentence, raising the witchcraft belief argument. Guided by the Supreme Court of Appeal's reasoning in *S v Moloto*,[143] the judge commuted the sentence to 20 years' imprisonment, arguing that 'the appellant's fear of harm for himself and others, taken cumulatively with his personal circumstances, constitute substantial and compelling circumstances, justifying a deviation from the prescribed minimum sentence'.[144]

In the *Motolo* case, the accused fell ill for quite some time and her health was not improving. She consulted two witchdoctors who told her that she was being bewitched by her grandmother. The second

[139] *John Ndunguru Rudowiki v R* [1991] Criminal Appeal TLR 102.

[140] *Mbomena Moola v the People* [2000] SCZ 35 of 2000 ZMSC 47.

[141] *ibid.*

[142] *Tsepo Michael Morake v S* [2020] ZAGPPHC (A431/2018) 692, para 3.1.

[143] *S v Kholofelo Charmaine Moloto* 2019 (2) SACR 123 (SCA).

[144] *Morake* (n 142) para 7.6.

witchdoctor further mentioned that she would soon die from the supposed witch attack. Out of fear and frustration, she encouraged her boyfriend to kill the deceased. The Supreme Court of Appeal agreed with the trial judge that the accused 'indeed laboured under the belief that her illness was as a result of being bewitched by the deceased',[145] and that her honest belief in witchcraft and her trust in the prophecies of the witchdoctors were substantial and compelling circumstances that justified a deviation from the prescribed minimum sentence. Even though she was convicted of premeditated murder, the court only sentenced her to 10 years' imprisonment.

Evidently, the courts in the eastern and southern parts of Anglophone Africa are generally willing to reduce the sentence if there is sufficient evidence that the defendants genuinely or honestly believed that the victims were bewitching or threatening to commit an act of witchcraft against them or their close family members.[146]

5.4 *Relevant Cases from West Africa (Particularly Nigeria and Ghana)*

In Anglophone West African countries, particularly Nigeria and Ghana, witchcraft beliefs, as already indicated, are deemed unreasonable, and the honest/genuine belief test is generally not considered or applied by the courts in witchcraft-related homicide cases. People who kill alleged witches to repel purported metaphysical attacks are treated like any other accused killer and handed the death or prescribed penalty if convicted.[147] Thus, the fact that a mistaken witchcraft belief, resulting in the death of an alleged witch, was honestly held, is not a sufficient reason to mitigate sentence. In the view of the courts, the witchcraft belief plea is a facile defence which has no objective standard against which it may be judged.[148]

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[145] *Moloto* (n 143) para 5.

[146] Cohan (n 5).

[147] see for instance, *State v Ayanime Udo* [2022] Case Number HK/6C/2018 HC (Nigeria); also cited in Nan, 'Witchcraft: Court Sentences Man to Death by Hanging for Killing Daughters' *The Guardian* (Nigeria, 16 February 2022) <https://guardian.ng/news/witchcraft-court-sentences-man-to-death-by-hanging-for-killing-daughters/> accessed 4 November 2022; Samuel Duodu, 'Tamale: Court Sentenced Two to Death by Hanging for Murder' *Daily Graphic* (Accra, 6 January 2016), <https://www.graphic.com.gh/news/general-news/tamale-courtsentenced-two-to-death-by-hanging-for-murder.html> accessed 4 November 2022.

[148] *Benson Ihonre v S* [1987] 4 NWLR (Pt 67) 778.

The general position of the courts in post-independence Anglophone West Africa on the belief in witchcraft defence is unambiguously articulated in *Oviefus v the State* (Nigeria)[149] and *Ihonre v the State* (Nigeria).[150] *Oviefus* concerned a man who killed his wife on suspicion that she and others had rendered him impotent and were attempting to kill him by witchcraft. In the *Ihonre* case, the accused killed his grandmother and her three young grandchildren because he believed that they had caused the death of his brother and were also causing his own sickness and problems by witchcraft. The Supreme Court of Nigeria considered several seemingly possible defences, including mental delusion, self-defence, and provocation; and rejected all. The court argued as follows:

> No man's belief is on trial in a murder case .... What is on trial is the act or omission of the accused. Whether or not the accused believes in witchcraft seems quite irrelevant to the enquiry .... Therefore, a defence founded on belief in witchcraft or juju is a defence founded on the subjective belief of the accused rather than on the objective requirements of the law relating to the particular relevant defence. Such defences are untenable.[151]

The courts have further stressed that if the witchcraft or juju belief produces a state of insanity or delusion, 'then the criminal responsibility of the accused will be measured not by the tenets of his belief but by the objective standard of the law relating to such defences – vis Insanity, Delusion or Provocation as the case may be'.[152] It is evident from the court's language that genuine/honest belief in witchcraft *per se* is not a defence or an extenuating circumstance. What is rather important is the mental effect of such beliefs, if any, on the accused person. This implies that the self-defence against metaphysical witch attacks plea cannot succeed unless the accused is able to convincingly prove that the impulse to defend himself (by killing another) was triggered by a mental delusion resulting from the belief in witchcraft. As one may expect, accused persons have almost always failed to sway the courts with the mental delusion argument. A very good example is a 1999 murder case (decided in 2004) in which a 35-year-old man killed his 32-year-old wife on witchcraft allegations in Ghana.[153]

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[149] *Goodluck Oviefus v S* [1984] 10 SC 207.

[150] *Ihonre* (n 148).

[151] *Oviefus* (n 149) 261–262; see also *ibid.*

[152] *Oviefus* (n 149); see also *Ihonre* (n 148).

[153] see Adinkrah (n 4) 202–204.

The accused claimed that on the night of the murder, he had seen his wife transform into a ferocious lioness, charging at him or threatening to kill him and his daughter. He then slaughtered the vicious creature only to realise shortly after fatally striking it that he had killed his own wife. He insisted that the object he had fatally struck was a fierce lioness, and was thus astounded to see the animal revert to his wife's body shortly after killing it. At trial, he raised the plea of self-defence in conjunction with mistaken belief and mental delusion; but these defences were rejected – he was convicted and sentenced to death by hanging.[154] In fact, in *Edoho v the State*, the Nigeria Supreme Court stressed that the evidence of witchcraft as a source of mental incapacity would not be entertained 'as such defence is not given any legal credence'.[155]

Thus, in Nigeria, Ghana, and other Anglophone West African countries, when witchcraft beliefs result in the death of an alleged witch, the criminal responsibility of the killer is determined by the objective standard of the existing criminal statutes relating to self-defence, mistaken belief, and related pleas if such defences are raised. For instance, in July 2020, a 90-year-old woman was beaten to death by a group of young adults in the northern part of Ghana on suspicion of using witchcraft to cause rainfall shortage and drought. Two of the prime suspects, including a self-acclaimed traditional spiritualist, were arrested and charged with murder. Both pleaded not guilty to the murder charge. However, following a plea bargain, the murder charge was changed to manslaughter, to which the defendants pleaded guilty. In July 2023, each of the accused persons was sentenced to 12 years' imprisonment. In the instant case, the murder charge was changed to manslaughter not because of the accused persons' honest belief in witchcraft, but because the defence team was able to convince State prosecutors that there was no intent on the part of the defendants to kill the victim or cause grievous bodily harm.[156]

In brief, the fact that killers of alleged witches honestly believed that the deceased persons were bewitching or attempting to harm or kill them and/or close relatives by witchcraft, is not a legal defence

[154] *ibid.*

[155] *Okon Nsibehe Edoho v the State* [2010] Case No. SC 372/2007.

[156] Mohammed Fugu, 'Two Jailed for Lynching 90-Year-Old Woman' *Daily Graphic* (Accra, 5 July 2023) <https://www.graphic.com.gh/news/general-news/ghana-news-two-jailed-for-lynching-90-year-old-woman.html> accessed 20 September 2023.

and is also immaterial to the determination of the appropriate sentence in Ghana, Nigeria, and other West African countries. It is therefore not surprising that accused witch-killers hardly raise such defences in contemporary West Africa, particularly Ghana and Nigeria.

VI DISCUSSION

It is quite tempting to presume, on the face of it, that witchcraft is imaginary and utter nonsense. Therefore, the verdict in witchcraft-related homicide cases in which the self-defence in conjunction with mistaken belief plea is invoked should be simple and straightforward – 'guilty as charged'. However, in a society where witchcraft belief is an integral part of the people's *Weltanschauung* or philosophy, and the law's definition of witchcraft raises more questions than answers, the issue of self-defence in conjunction with mistaken belief in witchcraft-triggered homicide cases, may be more complex than thought.[157] Various judges and other experts/academics, as Seidman notes, have approached the subject from various perspectives – legal, criminological, psychological, moral-philosophical, and penological – and reached divergent conclusions. Thus, the conclusion a judge reaches depends upon his/her philosophical approach to the problem.[158]

The evidence confirms John Alan Cohan's observation that in witchcraft-related murder cases, the courts in AACs generally 'agree to reduce the charges or the sentence if there is evidence that the defendant [genuinely] believed that the victim was responsible for an act of witchcraft or was threatening to commit an act of witchcraft against the defendant or close relatives'.[159] Interestingly, however, the witchcraft defence, as noted from the examination of the relevant case law, is accepted largely in countries in Eastern and Southern Africa and not those in West Africa. It is unclear why the courts in post-independence West African countries, particularly Ghana and Nigeria, are unwilling to accept genuine witchcraft belief as a possible defence to a charge of murder or an extenuating circumstance for a lesser sentence. What is evident, however, is that the post-independence West African courts have stuck to/by the WACA's position

[157] Seidman, 'The Inarticulate Premiss' (n 5).

[158] *ibid* 579.

[159] Cohan (n 5) 852.

that belief in witchcraft is unreasonable and cannot excuse a criminal conduct under any circumstances.

Daniel Nsereko suggests that the rigid standard applied by the West African courts has some merit in that it 'underscores the criminal law's educative value, setting societal standards of behaviour and requiring members to conform to those standards'.[160] He further explains that '[i]f judges insist that the accused ought to know that witchcraft is superstitious nonsense, the law is telling him or her to strive to get educated and become more enlightened .... The village or community ought to strive and free itself from such thralldom'.[161] However, it has been argued by several academics that the West African courts' standard is unrealistic and unfair. They contend that when most or many of the people in a community are uneducated and less enlightened, it is unreasonable/unfair to expect them to behave in a way that reflects the conduct of educated and enlightened persons.[162] Nsereko thus questions whether 'the ends of criminal justice [are] subserved by standards that are too high for the ordinary member of the community to reach'.[163]

It seems that many judges and legal academics in Anglophone Africa prefer the 'ordinary person of the community to which the accused belongs' standard, as it deals with people at their own level.[164] Such a standard, in the words of Nsereko, 'recognizes the need for the law to move in tandem with the general societal beliefs of the people. It accords with requirements of fairness in that it does not demand from community members more than what can be attained by an ordinary member of that community'.[165] The problem and fear, however, is that accepting or recognising the belief in witchcraft defence, sanctions 'the opening of a window for believers in witchcraft [and other superstitions] to unleash death and mayhem on innocent

[160] Nsereko (n 5) 49–50.

[161] Nsereko (n 5) 50.

[162] Seidman, 'Witch Murder and Mens Rea' (n 5); Seidman, 'The Inarticulate Premiss' (n 5), Mutungi (n 5); Lutapimwa L Kato, 'Functional Psychosis and Witchcraft Fears: Excuses to Criminal Responsibility in East Africa' (1970) 4(3) Law & Society Review 385, 397; Kharisu Sufiyan Chukkol, 'Supernatural Beliefs and Criminal Law in Nigeria' (1983) 25(4) Journal of the Indian Law Institute 444; Nsereko (n 5); Tebbe (n 7).

[163] Nsereko (n 5) 50.

[164] *ibid*; Seidman, 'Witch Murder and Mens Rea' (n 5); Seidman, 'The Inarticulate Premiss' (n 5); Seidman (n 7), Mutungi (n 5); Tebbe (n 7).

[165] Nsereko (n 5) 50.

citizens'.[166] For instance, studies conducted in places such as Kenya and Tanzania suggest that 'witchcraft acts as a powerful weapon to settle the score against potential rivals for economic gain'.[167] Thus, some people use witchcraft beliefs and witch accusations as a weapon to kill innocent family members, particularly widows, to take over their land/farmland.[168] Therefore, accepting the belief in witchcraft defence or providing a legal cover for killers of alleged witches has the potential to encourage the weaponisation of witchcraft beliefs and concomitant killings to obtain victims' property/land or realise a selfish personal agenda/ambition.

One of the fundamental principles of self-defence, as already noted, is that the amount of force used must be reasonably proportionate to the harm or perceived harm/attack threatened.[169] However, a critical examination of the relevant case law suggests that the proportionality test is never considered/applied in witchcraft-related homicide cases. Thus, there have been several witchcraft-related murder episodes where the accused persons killed the alleged witches because they 'honestly' believed that the victims were casting a non-lethal witchcraft spell on them and/or close relatives or that they (the accused or close family members) were threatened with non-lethal acts of witchcraft, as was the case in *Kumwaka*, *Jonah*, *Mampa*, and *Hamunakwadi*, among others.[170] So, even if the genuineness of an accused person's witchcraft belief is established or the honest belief argument is accepted in such cases, the big question that must be addressed is whether the action of the accused (i.e., killing the alleged witch) was proportionate to the perceived harm suffered or the at-

[166] Emmanuel Sarpong Owusu, 'Provocation by Witchcraft: Exploring the Evolution of the Kenyan Courts' Interpretation of the Doctrine of Provocation in Relation to Witchcraft Beliefs'. (2023) 38(2) Journal of Law and Religion 265, 287.

[167] Catherine S Dolan, 'Gender and Witchcraft in Agrarian Transition: The Case of Kenyan Horticulture' (2002) 33(4) Development and Change 659, 666; see also Ogembo (n 27); Silvia Federici, 'Women, Witch-Hunting and Enclosures in Africa Today' (2010) 3 Sozial Geschichte Online 10; Owusu, 'Witchcraft-Related Eldercides in Kenya' (n 4).

[168] Dolan (n 167); Ogembo (n 27); Federici (n 167) 16, noting that 'Many accusations are manufactured to rob people of their property and particularly of their land. Indeed, land plays such a key role in the witch-hunts that it is tempting to hypothesise that they are primarily a means of land grabbing'; Idehen (n 4); Owusu, 'Witchcraft-Related Eldercides in Kenya' (n 4).

[169] Ashworth (n 42); see also Helen Frowe, 'A Practical Account of Self-Defence' (2010) 29(3) Law and Philosophy 245; Sangero (n 45).

[170] *Kumwaka* (n 67); *Jonah* (n 103); *Mampa* (n 133); *Hamunakwadi* (n 136).

tack/harm supposedly threatened. But surprisingly, the proponents of the honest belief approach (including judges, academics, activists, etc) consciously or unconsciously ignore this important aspect of the self-defence discourse in witchcraft-related homicide cases.

It is worth reiterating that during the colonial period where the death sentence was mandatory for a murder conviction in AACs, condemned persons could have their death sentences commuted to varying jail terms on honest witchcraft belief grounds. But the power to mitigate such sentences rested with the executive arm of government alone, particularly the governor of the relevant colony. However, today, that power (the power to substitute death sentences with terms of imprisonment) is largely vested in the judiciary itself in many AACs, particularly those in the eastern and southern parts of the region. It must be noted that because alleged metaphysical witch attacks cannot be empirically verified, the self-defence plea is rarely used these days in witchcraft-related murder cases in AACs. Instead, the defence often employed is provocation by witchcraft, which has had significant rate of success, particularly in Eastern and Southern Africa, since the 1970s.[171]

VII CONCLUSION

Admittedly, witchcraft belief is an integral part of the African people's philosophy. The principles encouraging such beliefs and concomitant persecutions may make little sense unless they are viewed and assessed within the context of the community and culture to which believers and witch-attackers belong. There is no question that most communities in Africa believe in witches to their bones; and know that these entities can destroy their soul and physical body in various mysterious ways.[172] The reality, however, is that belief in the existence of witchcraft and witches is unscientific. Besides, some people tend to use witchcraft accusations and concomitant killings as a weapon to pursue a personal vendetta against rivals/enemies. For these reasons, such beliefs, however genuine, should not excuse an assault to another person. It is feared that the Eastern and Southern African courts' decision to consider honest belief in witchcraft as a

[171] Owusu, 'The Provocation by Witchcraft Defence in Anglophone Africa' (n 4), this study offers a detailed – almost exhaustive – discussion of the origins and historical development of the provocation by witchcraft defence in Anglophone Africa, identifying and examining pertinent colonial and post-independence cases.

[172] Seidman, 'Witch Murder and Mens Rea' (n 5).

significant and compelling mitigatory circumstance may grant supposed victims of witchcraft and juju spells a carte blanche to unleash death and terror on anybody they consider to be a witch or sorcerer and the cause of their problems. This may ultimately increase the already widespread killings of people accused of being witches in AACs. Thus, a move to an objective construction of the self-defence based on mistaken belief plea would have an important symbolic effect of sending a message that hiding behind a façade of illogical beliefs or superstitions to commit murders and other heinous crimes is not tolerated in contemporary African society.

It is, nevertheless, submitted that belief in witchcraft should be considered as a mitigating circumstance only where the accused faces the death penalty. In other words, due to the delicate and widespread nature of the witchcraft phenomenon, capital punishment should automatically be taken off the table in witchcraft-related murder cases where an accused's alleged mistaken belief – that he was being bewitched or about to be harmed through witchcraft by the deceased – is found to have been honestly held, and the action of the accused (i.e., killing the alleged witch) was proportionate to the perceived harm threatened. Since witchcraft and juju beliefs are deeply entrenched in the culture and ethos of most communities in Africa, attempt to curb witchcraft-driven murders cannot be achieved through legislative actions and the criminal justice system alone. Thus, such efforts would involve a multipronged approach, entailing the promotion of formal education, economic improvement, provision of effective healthcare services, and extensive public education campaigns and programmes.

DECLARATIONS

CONFLICT OF INTEREST I declare that this article has not been published or submitted for publication elsewhere. I also declare that I have no conflict of interest.