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Witchcraft Accusations and the Tort of Defamation in Anglophone Africa

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Abstract

Witchcraft beliefs are a major cause of violence against vulnerable groups in many African countries. People accused of being witches are often ostracised/banished, physically assaulted, tortured, and/or murdered. However, there are rare instances when persons accused of being witches sue their accusers for defamation. In such cases, the courts are often invited to address whether witchcraft imputations amount to defamation and, if so, under what circumstances. The present study explores the Anglophone African courts' attitudes towards witchcraft-related defamation claims, examining how various judicial bodies in five countries—Botswana, Ghana, Namibia, South Africa, and Tanzania—have navigated the convoluted and sometimes confusing system of legal pluralism since the 1970s. The study shows that courts in various African countries apply several principles when resolving witchcraft-related defamation claims. However, they generally concur that recklessly imputing witchcraft to a person necessarily impairs that person's dignity and is actionable *per se*.

Keywords: witchcraft-related defamation, witchcraft, witch, Anglophone Africa, customary law, common law

1. Introduction

The belief in witchcraft is undisputedly one of the most widespread beliefs in African communities. It is held by all manner of people—the uneducated and educated, poor and rich, young and old, the simple trader and sophisticated business mogul, the laity and the clergy, students and teachers, litigants and attorneys.[1] The terms "witchcraft" and "witch" mean different things in different societies, and the concept of witchcraft differs from culture to culture.[2] As Aleksandra Cimpric rightly notes, "The notion of witchcraft possesses a multifaceted semiology, referring to a wide variety of representations and practices, which further vary not only within a country but also

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[1] John Middleton and Edward H. Winter, eds., *Witchcraft and Sorcery in East Africa* (London: Routledge & Kegan Paul Ltd., [1963] 2004); Kate Crehan, *The Fractured Community: Landscapes of Power and Gender in Rural Zambia* (California: University of California Press, 1997); Gerrie ter Haar, ed., *Imagining Evil: Witchcraft Beliefs and Accusations in Contemporary Africa* (Trenton, NJ: Africa World Press, 2007); Bob Tortora, "Witchcraft Believers in Sub-Saharan Africa Rate Lives Worse: Belief Widespread in Many Countries," Gallup (Aug. 25, 2010), https://news.gallup.com/poll/142640/witchcraft-believers-sub-saharan-africa-rate-lives-worse.aspx; Mensah Adinkrah, *Witchcraft, Witches and Violence in Ghana* (New York: Berghahn Books, 2015); Boris Gershman, "Witchcraft Beliefs and the Erosion of Social Capital: Evidence from Sub-Saharan Africa and Beyond," *Journal of Development Economics* 120 (2016): 182–208.

[2] Jeffrey Burton Russell, *Witchcraft in the Middle Ages* (New York: Cornell University Press, 1972); Simeon Mesaki, "The Evolution and Essence of Witchcraft in Pre-Colonial African Societies," *TransAfrican Journal of History* 24 (1995): 162–77; Hallie Ludsin, "Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of its Customary Law," *Berkeley Journal of International Law* 21, no. 1 (2003): 62–110; Aleksandra Cimpric, *Children Accused of Witchcraft: An Anthropological Study of Contemporary Practices in Africa* (New York: UNICEF/WCARO, 2010).

according to different socio-cultural groups."[3] This, evidently, poses several definitional problems, as academics are cautioned against standardizing the terminological use of "witchcraft" or "witch" as it applies to a particular society. However, several scholars and experts have offered various definitions and descriptions that they believe reflect the witchcraft notions held by many, if not most, communities in Africa.

Edward Evans-Pritchard describes witchcraft as the use of innate, inherited mystical powers to manipulate people and to cause harm or death.[4] According to Nelson Tebbe, witchcraft is "the practice of secretly using supernatural power for evil—in order to harm others or to help oneself at the expense of others."[5] And Boris Gershman defines it simply as "an ability of certain people to intentionally cause harm via supernatural means."[6] On the other hand, the term "witch" or "wizard" (a male witch) has been described by Robert LeVine as "a person with an incorrigible, conscious tendency to kill or disable others by magical means."[7] In Tebbe's view, a witch is "a human being who secretly uses supernatural power for nefarious purposes,"[8] and Pieter Carstens describes witches as persons who "through sheer malice, either consciously or subconsciously, employ magical means to inflict all manner of evil on their fellow human beings."[9] In brief, many communities in Africa perceive witchcraft as the propensity and ability of certain human beings to secretly harm or kill others through the use of supernatural powers. The witch, therefore, embodies this wicked persona, driven to commit evil deeds through the supernatural force of witchcraft.

As the embodiment of evil, alleged witches are blamed for all kinds of misfortunes or unpleasant occurrences, such as unexplained or untimely deaths, inexplicable diseases, financial or economic predicaments, road accidents, infertility or barrenness, mental disorders, droughts or crop failures, etc., and are consequently persecuted.[10] Since the colonial period, hundreds of thousands of Africans have been accused of being malevolent witches and subjected to various forms of mistreatment and violence—banishment/ostracism, discrimination, forcible confinement, enslavement, neglect, deprivation of the necessities of life, beatings, physical and psychological torture, and/or murder, among others.[11] Writing about her experiences in West Africa between the 1890s and early 1900s, Mary Kingsley stated that "[t]he belief in witchcraft […] [was] the cause of more African deaths than anything else," and that it "killed […] more men and women than the slave trade."[12] Even though Kingsley's description of the magnitude of witchcraft-related killings in African societies during the colonial period seems quite exaggerated, the pertinent extant literature and reports do not contradict the claim that witchcraft beliefs posed, and still pose, significant danger to communities in Africa.[13] Several researchers agree that over

[3] Cimpric (n2) 11.

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

[5] Nelson Tebbe, "Witchcraft and Statecraft: Liberal Democracy in Africa," *Georgetown Law Journal* 96 (2007): 183–236, at 190.

[6] Boris Gershman, "Witchcraft Beliefs Around the World: An Exploratory Analysis," *PLoS ONE* 17, no. 11 (2022): 1–19, at 1.

[7] Robert Alan LeVine, "Witchcraft and Sorcery in a Gusii Community," in *Witchcraft and Sorcery in East Africa,* eds. John Middleton and Edward H. Winter (London: Routledge and Kegan Paul, [1963] 2004), at 225.

[8] Tebbe (n5) 190.

[9] Pieter A. Carstens, "The Cultural Defence in Criminal Law: South African Perspectives," *De Jure* 37, no. 2 (2004): 312–30, at 315.

[10] Adam Ashforth, "Witchcraft, Violence, and Democracy in the New South Africa," *Cahiers d'Études Africaines* 38 (1998): 505–32, at 505; Ludsin (n2); Justus Ogembo, *Contemporary Witch-Hunting in Gusii, Southwestern Kenya* (Lewiston, NY: Edwin Mellen Press, 2006); Adinkrah (n1); Samantha Spence, *Witchcraft Accusations and Persecutions as a Mechanism for the Marginalisation of Women* (Cambridge: Cambridge Scholars Publishing, 2017).

[11] Mary Kingsley, *West African Studies* (London: MacMillan, 1901); Henrietta L. Moore and Todd Sanders, eds., *Magical Interpretations, Material Realities: Modernity, Witchcraft and the Occult in Postcolonial Africa* (London: Routledge, 2001), at 184; Ter Haar (n1); Isak Niehaus, *Witchcraft and a Life in the New South Africa* (Cambridge: Cambridge University Press, 2012); Adinkrah (n1); Spence (n10); Emmanuel Sarpong Owusu, "The superstition that Maims the Vulnerable: Establishing the Magnitude of Witchcraft-Driven Mistreatment of Children and Older Women in Ghana," *International Annals of Criminology* 58, no. 2 (2020): 253–90.

[12] Kingsley (n11) 315.

[13] Onesmus K. Mutungi, "Witchcraft and the Criminal Law in East Africa," *Valparaiso University Law Review* 5, no. 3 (1971): 524–55; Daniel D.N. Nsereko, "Witchcraft as a Criminal Defence, from Uganda to Canada and Back," *Manitoba Law Journal* 24, no. 1 (1996): 38–59; Richard D. Waller, "Witchcraft and Colonial Law in Kenya," *Past & Present* 180 (2003): 241–75; Ter Haar (n1); John Alan Cohan, "The Problem of Witchcraft Violence in Africa," *Suffolk University Law*

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23,000 people were murdered based on witchcraft allegations in sub-Saharan Africa between 1991 and 2001, and that the pace of the witchcraft-related mistreatments and murders has since accelerated.[14]

Indeed, during the colonial period, witchcraft accusations and concomitant offenses were so widespread in the British colonies that English criminal law could not overlook such conduct or occurrences. The colonial administrators formulated and passed laws, known as Witchcraft Ordinances/Acts (or anti-witchcraft legislation), which criminalized reckless witchcraft accusations and other witchcraft-related activities and conduct in almost all the relevant colonies. Most of these anti-witchcraft statutes passed during the colonial period still exist largely in their original forms, although a few have been slightly amended to bring them in line with changing political, socio-cultural, economic, and religious conditions in the respective independent nations. The punishments for recklessly accusing a person of being a witch generally range from a fine to five years' imprisonment. It must be clarified, though, that in many indigenous African communities, and under some witchcraft statutes, witchcraft accusations, as shall be shown shortly, are lawful if made through the right channel or through a recognized person or body.

Unfortunately, even though reckless witchcraft imputation is a criminal offense in most Anglophone African countries, people who recklessly or unlawfully accuse others of being witches hardly ever get prosecuted, let alone convicted; it almost never happens. This is partly because the criminal justice systems in most African countries are heavily underfunded or are strapped for resources. Investigating and prosecuting cases bordering on witchcraft imputation is thus never a priority for law enforcement authorities and the State. Besides, it is always difficult to secure a conviction in a case where the alleged criminal offense was committed verbally (or by vituperation), and the defendant denies ever accusing the alleged victim of being a witch; it thus becomes one person's word against another's. If the complainant happens to be an individual long rumored to be a witch in the community, most witnesses may be unwilling to testify against the defendant, and law enforcement personnel in the community, many of whom tend to believe in witchcraft, may show little or no interest in prosecuting the case.[15]

The situation described above (i.e., the criminal justice system's failure to address cases bordering on reckless witchcraft accusations) has compelled some victims of witchcraft imputation to seek redress and justice through civil proceedings, where the evidentiary standard or standard of proof used is "a balance of probabilities" or "preponderance of the evidence" rather than "beyond a reasonable doubt." In other words, there are some instances where alleged witches who feel let down by the criminal justice system turn the tables on their accusers with claims of defamation. However, such civil litigation tends to somehow be complicated in African settings or jurisdictions where legal pluralism is a dominant feature of the existing legal system. The courts are, in most cases, invited to address whether witchcraft imputations can ever amount to defamation and, if so, under what conditions and laws.

It must be clarified here that, in indigenous or traditional settings, people who feel that they have been falsely accused of witchcraft may lodge a complaint against their accusers with the relevant traditional authorities. In fact, the indigenous or traditional courts have been dealing with witchcraft-related defamation claims since precolonial times. However, with the introduction of State or national courts (British-based legal systems and processes), the popularity of the indigenous courts has diminished significantly, and enforcing compliance with traditional courts' decisions is becoming increasingly difficult. This has compelled some victims of witchcraft imputation to bring defamation claims/lawsuits against their accusers at the State/national courts, which have the power to enforce customary norms or laws that are not inconsistent with natural justice, equity, and good conscience.

Review 44, no. 4 (2011): 803–72; Natasha Joseph, "Critical Role: How South African Justice Deals With Witchcraft Claims," *Index on Censorship* 43, no. 4 (2014): 47–50.

[14] Richard Petraitis, "The Witch Killers of Africa," *Infidels* (2003), https://infidels.org/library/modern/richard-petraitis-witch-killers/; Silvia Federici, "Women, Witch-Hunting and Enclosures in Africa Today," *Sozial.Geschichte Online* 3 (2010): 10–27; Hamisi Mathias Machangu, "Vulnerability of Elderly Women to Witchcraft Accusations Among the Fipa of Sumbawanga, 1961–2010," *Journal of International Women's Studies* 16, no. 2 (2015) 274–84; Annie Singh and Norah Hashim Msuya, "Witchcraft Accusation and the Challenges Related Thereto: Can South Africa Provide a Response to this Phenomenon Experienced in Tanzania?" *Obiter* 40, no. 3 (2019): 105–16.

[15] N.V. Ralushai, M.G. Masingi, D.D.M. Madiba, and J.A. Van Den Heever, *Report of the Commission of Inquiry into Witchcraft Violence and Ritual Murders in the Northern Province of South Africa* (Northern Province: The Commission, 1996). It is indicated on page 63 of this report that 'most […] black policemen also believe in witchcraft and as a result of this belief, the police are sometimes reluctant to be of any assistance to people having been accused of practicing witchcraft'; a similar idea is expressed in Riekje Pelgrim, *Witchcraft and Policing: South Africa Police Service Attitudes Towards Witchcraft and Witchcraft-Related Crime in the Northern Province* (Leiden: African Studies Centre, 2003).

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Surprisingly, even though defamation lawsuits bordering on witchcraft imputations are gradually taking root in some Anglophone African settings, the phenomenon has received almost no attention in the academic literature. The present study thus explores the Anglophone African courts' attitudes towards witchcraft-related defamation claims, examining how the judicial bodies in various Anglophone African countries, specifically Botswana, Ghana, Namibia, South Africa, and Tanzania, have navigated the complex and at times confusing system of legal pluralism since the 1970s. These five nations have been selected as case study countries because a review of the relevant literature and judicial decisions suggests that some of the high-profile and landmark witchcraft-related defamation cases were decided by these nations' courts. Focusing attention on a few selected rather than all Anglophone African nations is deemed reasonable due to the huge size of the region.

The second section of this study identifies the existing laws on witchcraft accusations in the selected countries. This is important because it facilitates a better appreciation of some of the courts' decisions in certain witchcraft-related defamation cases. Section 3 offers a concise description of the terms "legal pluralism" and "defamation," highlighting key customary laws and received common law principles on the latter. Drawing primarily on pertinent judicial decisions, section 4 explores the African courts' attitudes towards defamation lawsuits provoked by witchcraft accusations, examining how the superior courts in each of the five chosen countries have navigated the complex system of legal pluralism. Section 5 presents a discussion of the study's key findings, which is followed by a conclusion that recaps key points.

It is important to mention at the outset that the phrases "received common law" and "English common law" are used synonymously in this study. The phrases "Anglophone African countries" and "Anglophone Africa" are utilized to refer specifically to the English-speaking African countries that were formerly colonized by Britain and whose laws are significantly, if not entirely, modelled on British legislation and the English common law. It should also be clarified that the term "witchcraft-related defamation claim" refers to defamation cases bordering on, or provoked by, witchcraft accusations.

2. Laws that Prohibit Witchcraft Accusations

Ghana, unlike most Anglophone African countries, currently has no legislation that proscribes witchcraft imputations. In fact, the country is one Anglophone African nation that has not passed any witchcraft legislation since the colonial period. Even though there were a few witchcraft-related prohibitions at various times during the colonial era, they were either reversed or never maintained.[16] Presently, witchcraft accusations, though generally discouraged, are not a criminal offense.[17] However, witchcraft accusations, as shall be seen in this discussion, are deemed a civil wrong under Ghanaian customary law.

In Tanzania, a witchcraft accusation is legal provided it is made to or through a proper/recognized person or body. Section 4 of the Tanzania Witchcraft Act states:

> Any person, otherwise than in the course of communicating information to or obtaining advice from a court, a member of the police force, a local government authority or any public officer […] names or indicates any person as being a witch or wizard by imputing to him the use of witchcraft or any instrument of witchcraft with intent to cause injury or misfortune to any person or class of persons or to cause damage to any property […] commits an offence under this Act.[18]

The above provision suggests that, in Tanzania, making a witchcraft allegation directly to the suspected person, or accusing someone of being a witch in the presence of other ordinary members of the community, is prohibited. The law further indicates that witchcraft accusations made through the proper/recognized authorities will be deemed reasonable and be tolerated only if the complainants reasonably believe that the accused persons are in possession of items that may be classified as witchcraft objects/articles, or they perform what may be classified as acts commonly associated with witchcraft, such as the chanting of incantations. What the so-called proper/recognized authorities generally do when a

[16] Natasha Gray, "Witches, Oracles, and Colonial Law: Evolving Anti-Witchcraft Practices in Ghana, 1927–1932," *International Journal of African Historical Studies* 34, no. 2 (2001): 339–63.

[17] On July 28, 2023, Ghana's parliament passed an anti-witchcraft bill which, as of this writing, is awaiting presidential approval/assent to become law. The bill seeks to proscribe the practice by any person as a witchdoctor or witchfinder, and to criminalize the practice of declaring, accusing, naming, or labelling people as witches. Making such an accusation may lead to a hefty fine or prison sentence.

[18] Tanzania Witchcraft Act, passed on 28 December 1928, amended in 1935, 1956, and 1998.

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witchcraft allegation is lodged, is to establish if the accused witch truly possesses objects or performs activities commonly associated with witchcraft. The accused person will then be punished if the relevant authorities are satisfied that the suspect has such objects in their possession, or performs activities commonly associated with witchcraft, and that those objects or activities cause or are likely to cause fear, annoyance, or injury (physical or psychological) to others.

Unlike the Tanzania Witchcraft Act, other laws (i.e., the Botswana Witchcraft Act, the Namibia Witchcraft Suppression Proclamation, and the South Africa Witchcraft Suppression Act) deem witchcraft imputation to be an outright criminal offense, without providing any conditions under which such allegations could be legitimately made. For example, sections 2 and 3 of the Botswana Witchcraft Act provide:

> Any person who imputes to another the use of nonnatural means in causing any disease in any person, animal or thing, or in causing injury to any person or property, or who names or indicates another as a wizard or witch, or who by means of pretended supernatural power indicates anyone as being responsible for, or the cause of, any injury to any person, animal or thing, shall be guilty of an offence and liable to a fine not exceeding P100 or, in default of payment, to imprisonment for a term not exceeding three years. […]
>
> Any person who having named or indicated another as a wizard or witch or having by means of pretended supernatural power indicated another as being responsible for, or the cause of, any injury to any person, animal or thing shall be proved to be by habit or repute a witch doctor or witch finder, shall be guilty of an offence and liable to a fine not exceeding P200 or to imprisonment for a term not exceeding five years.[19]

Section 1 of the Namibia Witchcraft Suppression Proclamation also states:

> A person shall be guilty of an offence and liable on conviction to imprisonment with or without hard labour for a period not exceeding five years, or to a fine, or […] [both] if he […] imputes to another the use of nonnatural means in causing any disease in any person or property or in causing injury to any person or property or names or indicates another as a wizard or witch.[20]

The South Africa Witchcraft Suppression Act also stipulates:

> Any person who:
>
> (a) imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;
>
> (b) in circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, imputes the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person;
>
> (c) employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard; […]
>
> shall be guilty of an offence […].[21]

As already mentioned, even though witchcraft accusations remain a criminal offense in most Anglophone African countries, the criminal justice systems have been ineffective in protecting people from such potentially lethal allegations. This has induced some victims of witchcraft imputations to seek redress or justice through the civil route. The next section looks at the general nature of the legal systems in Africa and the laws that may be applied in witchcraft-related defamation proceedings in African settings.

3. LEGAL PLURALISM AND THE TORT OF DEFAMATION

3.1. Legal Pluralism

Legal pluralism, which John Griffiths defines as "the presence in a social field of more than one legal order,"[22] is a dominant feature of most legal systems in Africa. As Muna Ndulo rightly observes, the national

[19] Botswana Witchcraft Act 1927, ch. 09:02, last amended 1959.

[20] Witchcraft Suppression Proclamation 1933 (Proclamation 27 of 1933), published in *Official Gazette* no. 538 on Dec. 1, 1933. Assented to on Nov. 24, 1933, commenced on Dec. 1, 1933.

[21] Witchcraft Suppression Act 3 of 1957 (Assented Feb. 19, 1957, commenced Feb. 22, 1957) as amended by Witchcraft Suppression Amendment Act 50 of 1970.

[22] John Griffiths, "What is Legal Pluralism?" *Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 1–55, at 1.

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legal system of a typical African State is composed of the following: "African customary law […][,] religious laws (especially where there is a significant Muslim population); received law (common law or civil law depending on the colonial history); and legislation, both colonial (adopted from the colonial state) and post-independence legislation enacted by Parliament."[23] According to Berihun Gebeye, legal pluralism "is a device which connects and incorporates pre-colonial laws into colonial legal systems […] [and also] retains and transforms colonial laws into post-colonial legal systems."[24] Thus, in almost all, if not all, African countries, laws of the State coexist with customary laws.[25] The Constitution of Ghana, for instance, states that the national laws shall comprise the constitution itself, "enactments made by or under the authority of the Parliament established by […] [the] Constitution," other existing statutes (i.e., statutes passed during the colonial period), the common law, and customary law.[26]

Julie Davies and Dominic Dagbanja define customary law in general as "a set of established norms, practices, and usages derived from the lives of people."[27] This definition is consistent with that of Ndulo, who defines African customary law as "the indigenous law of the various ethnic groups of Africa."[28] This view is also shared by Samuel Obi, who defines customary law as a "rule (or body of rules) which the members of a given community recognise as binding on themselves."[29] George Kingsley Acquah explains that each country in Africa is made up of a number of ethnic communities, "each with its own deep-rooted customary practices and offences handed down from generation to generation." He further states that some of the customary practices and offences are "related to the history of the founding fathers of the community, others to particular incidents in the lifetime of the people […] and others to the day to day life in the community."[30]

In brief, African customary law "is the indigenous law of the various ethnic groups of Africa […] having its sources in the practices and customs of the people."[31] It must be mentioned and emphasized that African customary laws, which are largely unwritten, are enforced by the courts if and when called upon to do so.[32] It is also noteworthy that, in many Anglophone African societies, courts typically apply or enforce customary law when the parties/litigants belong to the same ethnic group, and such law or custom is not repugnant to natural justice, equity, and good conscience.[33] However, where the parties are not subject to the same personal law, the courts may apply the relevant rules of their (the parties) different systems of personal law.

It is also worthy of mention that, unlike the received common law and statutory law, customary law recognizes the existence of witchcraft and malevolent witches. Therefore, suspecting and/or accusing a person of being a witch or practicing witchcraft is not unlawful under customary law if the correct or proper procedures are followed. For example, in a typical indigenous African community, alleged victims of witchcraft, or people who feel that they are being bewitched by others, are required to approach the traditional leaders or elders of the community to lodge a formal complaint. The traditional leaders/elders then investigate the allegation, and if the claim is found to be valid, the suspects' guilt or innocence is then established through divination or a trial by ordeal conducted by a traditional spiritualist (i.e., a fetish priest, medicine man, diviner, etc.). If the accused persons are found guilty, "appropriate" sanctions may be imposed on them, and if they are found to be innocent, the traditional leaders or elders mediate between the two

[23] Muna Ndulo, "African Customary Law, Customs, and Women's Rights," *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 87–120, at 87– 88.

[24] Berihun A. Gebeye, "Decoding legal pluralism in Africa," *Journal of Legal Pluralism and Unofficial Law* 49, no. 2 (2017): 228–49, at 228.

[25] Gordon R. Woodman, "Legal Pluralism and the Search for Justice," *Journal of African Law* 40, no. 2 (1996): 152–67.

[26] Constitution of the Republic of Ghana, sec. 11(1–2).

[27] Julie A. Davies and Dominic N. Dagbanja, "The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective," *Arizona Journal of International & Comparative Law* 26, no. 2 (2009): 303–33, at 303.

[28] Ndulo (n23).

[29] Samuel N.C. Obi, *Modern Family Law in Southern Nigeria* (London: Sweet & Maxwell, 1966), at 7.

[30] G.K. Acquah, "Customary Offences and the Courts," *Review of Ghana Law* 18 (1991–1992): 36–67, at 36.

[31] Ndulo (n23) 88.

[32] Obi (n29) 7.

[33] Elijah A. Taiwo, "Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian Positions—Some Lessons for Nigeria," *Journal for Juridical Science* 34, no. 1 (2009): 89–115. The 'non-repugnant, equity and good conscience' principle was introduced into all former British colonies in Africa by the colonial administrators in the 19th century. This principle recommends that the courts enforce only customary or indigenous norms, practices, and rules that are not inconsistent with the non-repugnancy doctrine.

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parties to find an amicable solution.[34] So, calling a person a witch in public without observing the required customary process and/or without any reasonable basis, may render such an allegation reckless and unacceptable.

3.2. The Tort of Defamation

The principles of defamation law and the boundaries of their application vary from country to country. However, since the legal systems in Anglophone African countries are based or modelled on the English legal system, attention is focused here largely on the English law of defamation, and only the basic elements of defamation are highlighted.

Freedom of speech or free speech is one of the most fundamental rights that democratic societies are required to safeguard.[35] The danger, however, is that this right may easily be exercised in a way that damages the reputations of others if not well checked. This gives rise to the concept or law of defamation, which serves to protect reputation by reprimanding or imposing sanctions or damages on persons who maliciously injure the reputations of others. A reputation, as G.W. Paton rightly notes, is a person's "most highly prized treasure, hard to win and easy to lose. Only by strict rules of law can a reputation be adequately protected."[36] Defamation thus serves to draw a line between healthy free speech premised on goodwill and an injurious expression occasioned by malice.

A defamatory statement has been defined as "a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to disparage him in his office, profession, calling, trade or business."[37] A defamation suit is thus "a legal claim for injury to a person's reputation as the result of [a] false [statement or] speech that is either written (libel) or spoken (slander) to another."[38] Evidently, English defamation law prioritizes the protection of reputation.[39] However, "a plaintiff cannot prevail in a libel or slander action based on an expressed or implied statement that is true or substantially true."[40] In other words, under the English law of defamation, the falsity of a defamatory statement is presumed; hence, it is a defence to prove that the statement is true whether or not it injures the claimant's reputation.[41] Failure on the part of defendants to prove the veracity of a disparaging statement thus renders them liable. In *Reynolds v. Times Newspapers Ltd*., for instance, the United Kingdom's House of Lords made the following pronouncement:

> The plaintiff is not required to prove that the words are false. Nor, in the case of publication in a written or permanent form, is he required to prove he has been damaged. […] Truth is a complete defence. If the defendant proves the substantial truth of the words complained of, he thereby establishes the defence of justification.[42]

Besides, slanderous statements or words must generally cause actual damage for liability to be imposed on the defendant. It must be clarified, though, that there are a few permitted classes of defamation in which slander is actionable without proof of special damage. It must also be noted that alleged disparaging statements or words uttered or published exclusively to the claimant and not to a third party cannot result in liability under English common law.

Unlike the English law of defamation, some legal systems, such as Roman law, protect not only the reputation but also the dignity of individuals. Under such systems, the truth of a defamatory statement by itself, although

[34] Maakor Quarmyne, "Witchcraft: A Human Rights Conflict Between Customary/Traditional Laws and the Legal Protection of Women in Contemporary Sub-Saharan Africa," *William & Mary Journal of Women and the Law* 17, no. 2 (2011): 475–507; Spence (n10).

[35] G.W. Paton, "Reform and the English Law of Defamation," *Illinois Law Review* 33, no. 6 (1938–1939): 669–84.

[36] Ibid., at 669.

[37] *Halsbury's Laws of England* (4th ed., vol. 28, Reissue, LexisNexis, 1997), para. 10.

[38] Ellyn M. Angelotti, "Twibel Law: What Defamation and Its Remedies Look like in the Age of Twitter," *Journal of High Technology Law* 13, no. 2 (2012–2013): 430–507, at 442.

[39] Vincent R. Johnson, "Comparative Defamation Law: England and the United States," *University of Miami International and Comparative Law Review* 24 (2016): 1–97.

[40] Ibid., at 22.

[41] *Reynolds v. Times Newspapers Ltd.* [2001] 2 AC 127 (HL) 192.

[42] Ibid.

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a factor that may lessen liability or mitigate damages, is no defense. It is a defense only if the defendant can show that the defamatory statement was not only true but was also made for the public benefit.[43] The protection of individual feelings or dignity is a feature that Roman law shares with African customary law.[44] Thus, under African customary law, the tort of defamation (particularly slander) serves two main functions: the protection of reputation or character and the protection of dignity. Under the English common law, defamatory statements that injure reputation necessarily injure dignity indirectly. Consequently, a person's dignity is often upheld by protecting them from defamatory statements that injure their reputation.[45]

However, abusive or insulting statements hurled at individuals may compromise their dignity without necessarily injuring their reputation. But the English common law generally fails to grant such persons a cause of action against their vituperators "since in the eyes of the law, [right-thinking members of society who hear] […] such statements should recognise that, when uttered in the heat of anger, they should not be taken seriously."[46] Again, a truthful disparaging statement may nonetheless debase an individual's personal dignity, yet the English common law generally offers the aggrieved party no cause of action against his/her defamer. However, in most African indigenous communities, certain insults and vulgar abuse that debase the dignity of others are vehemently frowned upon.[47] In fact, "[w]ords imputing witchcraft, adultery, immoral conduct, crime," and similar words that impair a person's dignity may be actionable under customary law,[48] depending on the circumstances. It must be reiterated that African customary law largely takes the position that the truthfulness of a statement that impairs someone's dignity may not necessarily amount to a defense. Thus, the fact that a disparaging or defamatory statement made about a person is true, does not necessarily negate liability if the statement damages the person's dignity.

Since the colonial period, the courts in Anglophone Africa have, on several occasions, been invited to address whether mere insults or name-calling, including witchcraft imputation, could or should amount to defamation and, if so, under what circumstances. The next section explores the Anglophone African courts' attitudes towards witchcraft-related defamation claims, highlighting the various arguments provided by the courts in Ghana, Namibia, South Africa, Botswana, and Tanzania for allowing or dismissing witchcraft-related defamation claims brought before them since the 1970s.

It should be noted here that many African courts' judgments do not have numbered paragraphs. Hence, pinpointing a specific paragraph, even where a direct quote is utilized, has generally not been possible. Some of the cases and judgments discussed in this article were retrieved from the online law portals or databases of various credible legal information bodies or institutes, such as the African Legal Information Institute, which convenes a network of over fifteen legal information institutes in English-speaking Africa. These online databases usually include otherwise unpublished cases.

4. The African Courts' Attitudes Towards Witchcraft-Related Defamation Claims

4.1. Ghana (West Africa)

In Ghana, as in other Anglophone African countries, whereas common law recognizes both slander and libel, customary law acknowledges only slander.[49] It appears that, until the 1960s, most defamation claims bordering on mere insults/vituperations or name-calling failed because the courts largely applied the English common law

[43] Herman Robert Hahlo and Ellison Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (Cape Town: Juta & Co. and Stevens & Sons, 1960).

[44] S.K. Date-Bah, "Reflections on the Law of Defamation in Ghana," *University of Ghana Law Journal* 10, no. 2 (1973): 129–48, at 134.

[45] Ibid.

[46] Ibid.

[47] Ibid., at 130; T. Olawale Elias, "Insult as an Offence in African Customary Law," *African Affairs* 53, no. 210 (1954): 66–69, at 66, noting that "[because] of the over-riding importance of the maintenance of social equilibrium in African society, customary law rigorously discourages any conduct, whether by word or deed, that is likely to lead to a disturbance of the peace of the community."

[48] John Mensah Sarbah, *Fanti Customary Laws. A Brief Introduction to the Principles of the Native Laws and Customs of the Fanti and Akan Districts of the Gold Coast* (2nd ed., William Clowes and Sons, 1904), 113; Elias (n47).

[49] *Anas A. Anas v. Kennedy Agyepong* [2023] Civil Suit no. Gt/892/2018 HC.

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principles/standards, which did not offer a remedy for such conduct. However, in 1963, the Ghana High Court's decision in *Wankyiwaa v. Wereduwaa* (a case heard by five different courts between 1959 and 1963)[50] changed the landscape of the tort of defamation—specifically slander—in Ghana.

This case concerned two women in a neighborhood who were openly hostile to each other. The defendant told the plaintiff in public, during angry exchanges, that her "vagina stinks." The plaintiff sued for slander in the local court, which awarded damages in her (the plaintiff's) favor. However, this decision was overturned by the District Court to which the defendant appealed. The plaintiff then challenged the District Court's decision in the Magistrate Court which, intriguingly, set aside the District Court's judgment and reinstated the local court's. The defendant also appealed this ruling to the Circuit Court. Dramatically, the Circuit Court reversed the Magistrate Court's judgment. Displeased with the Circuit Court's judgment, the plaintiff appealed to the Ghana High Court, which ruled in her favor—overturning the Circuit Court's ruling and restoring the Magistrate Court's.

Evidently, the major difficulty that the lower courts faced in this case was determining the appropriate or applicable law. Thus, the law each court applied, and how each interpreted the chosen legal system's principles, determined the outcome. In considering the Circuit Court's judgment, the Ghana High Court noted that the circuit judge failed to consider "which law was properly applicable to the matter in question." Apaloo J., who would later become the Chief Justice of Ghana, stated: "I feel no doubt whatsoever that this matter ought to be determined by customary law."[51] He went on to make the following interesting pronouncement:

> That brings me to the question whether customary law provides a remedy for mere vituperation which falls short of slander as defined by [John Mensah] Sarbah. I cannot think of any reason why on principle there should be none. The fact that the law of England provides no remedy is quite beside the point. The society of England is different from the society of Ghana. In this country, where words of abuse are taken seriously, it would, in my opinion, be socially intolerable if customary law provided no sanctions against a man who finds pleasure in injuring the feelings of his neighbour by vituperation. […] I am prepared to hold that abuse by itself is a wrong redressible [*sic*] by damages according to customary law. The fact that the words of abuse were spoken in the heat of a quarrel is no doubt a matter that the good sense of a tribunal would take into consideration as a mitigating factor, but it does not by itself negative liability.[52]

The court was conscious of the fact that customary law vehemently discourages any act, whether by word or deed, that impairs one's dignity and is likely to bring about a disturbance of the peace within the community. The principles enunciated in *Wankyiwaa* were affirmed by the Court of Appeal in *Attiase v. Abobbtey,* where the defendant was sued for calling the plaintiff a "prostitute."[53] *Wankyiwaa* and *Attiase* recognized that customary law best reflects the community values of a people, and in the Ghanaian context, there is stigma and impairment of dignity attached to certain insults or name-calling. Therefore, aggrieved parties or claimants deserve a remedy for the affronts to their dignity.

These two cases demonstrate that the scope of customary law on defamation is broader than that of the received common law—the latter protects reputation only, but the former protects reputation and injured feelings or dignity. It is apparent that the superior courts' decisions in the two cases clarified the scope of the tort of slander under Ghanaian customary law and somehow offered persons accused of witchcraft the needed confidence to bring legal actions against their accusers in the courts of law (or State/national courts).

One of the few reported high-profile, witchcraft-related defamation cases decided by the courts in Ghana is *Abotchie v. Nuumo*. In that case, the defendant uttered the following words to the plaintiff's sibling: "Tell your sister [meaning the plaintiff] that the reason why I do not speak to her is that she is a witch and she leads a gang of witches to come and eat me up."[54] Upon receiving the unkind message, the accused witch sued her accuser for defamation. At trial, the defendant admitted uttering the words imputing witchcraft to the plaintiff and insisted that her claim was true. She requested that the judge allow witchdoctors or fetish priests to testify as to the truth of her witchcraft claim. But the judge declined the request on the grounds that "the traditional mode or method of proving witchcraft which

[50] *Wankyiwaa v. Wereduwaa and Another* [1963] 1 GLR 332.
[51] Ibid., at 334.
[52] Ibid., at 335.
[53] *Attiase v. Abobbtey* (unreported) July 29, 1969; also cited in Date-Bah (n44) 132.
[54] *Abotchie v. Nuumo* [1974] 1 GLR 142.

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the defendant intends to adopt or follow has not gained any recognition in the courts of law."[55] The defendant was found liable and ordered to appease the claimant. Citing celebrated authorities, such as John Mensah Sarbah and Joseph Boakye Danquah, Abban J. stressed that, under customary law, words imputing witchcraft as in the instant case "are actionable and it is not necessary for the plaintiff in such a case to prove any special damage."[56]

In *Afriyie v. Dansowah,* where the defendant accused the plaintiff of being a malevolent witch and practicing witchcraft, the court justified why it is necessary to impose damages on people who recklessly accuse others of being witches. It reasoned that witchcraft is believed to be hereditary among some groups; therefore, to call a person a witch is to imply that members of their family also possess malevolent powers capable of causing irreversible harm. For this reason, words imputing witchcraft is a civil wrong and actionable *per se*.[57] This view reflects that of Sarbah, who opines that what makes witchcraft imputation "a serious offence is that witchcraft is considered *hereditary*, and to call a person […] [a] wizard, witch, implies that every member of such person's family is possessed of an evil spirit capable of doing infinite mischief, and the less one has dealings with any of them the better."[58]

Even though previous judicial decisions suggest that the legal framework applicable to witchcraft-related defamation claims in Ghana is customary law, there have been instances where judges addressing such cases there have struggled to decide which of the two sources of law (common law or customary law) is applicable to resolving the matter. One good example is found in *Afful v. Okyere and Another*.[59] This case concerned a senior nutrition officer with the Ministry of Health who, without provocation, was accused by her male co-tenants of being a witch and killing two of the first defendant's children by witchcraft. The woman sued for defamation in the Ghana High Court, but the trial judge dismissed the claim after erroneously applying the received common law principles. The plaintiff appealed on the grounds that "the trial judge had (a) erroneously interpreted the evidence on the record; and (b) confused the common law principles on defamation with that of customary law."[60] Allowing the appeal, the appellate court made the following important statement:

> Although to call somebody a witch under the common law was not actionable without proof of special damage, on the authorities under the customary law, it was actionable *per se* without proof of damage. In the instant case, the parties were Akans, and therefore the law applicable was the Akan customary law. Accordingly, the first defendant was guilty of defamation of character when he called the plaintiff "a witch" and accused her of having killed his two children. In the circumstances, the trial judge erred in dismissing the plaintiff's action.[61]

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[55] Ibid.

[56] Ibid.; see also Sarbah (n48) 113; Joseph Boakye Danquah (ed.) *Cases in Akan Law: Decisions Delivered by the Honourable Nana Sir Ofori Atta* (London: Routledge & Sons, 1928) xxiii.

[57] *Afriyie v. Dansowah* [1976] 2 GLR 172, at 175. The facts of this case are that the plaintiff and the defendant were both yam sellers at a popular marketplace in the western part of Ghana. On the day in question, someone had wanted to buy yams from the plaintiff, but one Atta (also a yam seller) called him, and the man bought Atta's yams instead of those of the plaintiff. The plaintiff accused Atta of unfairly snatching her 'customer' and a squabble ensued between the two women. The defendant suddenly jumped to Atta's defence, accusing the plaintiff of being envious. When the plaintiff told the defendant that she was not talking to her and that she should not involve herself in the matter, the defendant became upset and publicly accused the plaintiff of being a witch and using her witchcraft to kill one Atta Maame, a market woman who had died a few weeks prior to this incident and whose stall in the market, the defendant alleged, the plaintiff had taken over or occupied barely a week after her demise. The defendant further claimed that everybody in the market knew that the plaintiff was a witch. The plaintiff sued for defamation; and the defendant countersued, alleging that the plaintiff had called her a prostitute who had had sexual intercourse with all the men in the community although she was married. The magistrate dismissed both the plaintiff's claim and the defendant's counterclaim on the grounds that there was no sufficient evidence before him to believe the stories of the parties, and even if their allegations were true, it would be inappropriate to find one party liable since both parties purportedly insulted each other when their tempers were high. The plaintiff then appealed to the High Court, but the defendant did not appeal. The appellate court ruled that the trial magistrate erred in his evaluation of the evidence; besides, he proceeded on the wrong principles of law and thus misdirected himself.

[58] Sarbah (n48) 113–14.

[59] *Afful v. Okyere and Another* [1997] 1 GLR 730 (CA).

[60] Ibid., at 731.

[61] Ibid., at 732; see also Spence (n10).

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The judge further explained that, as the parties lived within a small community where all the folks knew each other, it was evident that the plaintiff had suffered impaired dignity and considerable injury to her reputation from being labelled a witch who had killed two children through witchcraft.[62] The plaintiff was accordingly awarded damages.

4.2. Namibia (Southwest Africa)

The Namibian courts do not rely solely on, or make explicit reference to, customary law in determining defamation claims arising from witchcraft imputations. Instead, they apply the so-called "objective" or "(un)reasonable person" test—a common law principle. Thus, for a witchcraft-related defamation claim to succeed, the statement complained of must not only serve to damage the claimant's good name or dignity; it must also be "objectively unreasonable."[63] One instructive witchcraft-related defamation case heard in the Namibian courts was *Claudia Mbura v. Gotlob Katjiri and Another*.[64] The plaintiff in that case was a successful businesswoman based in Windhoek, Namibia's capital city, and the first and second defendants were her stepfather and uterine sister (i.e., defendant's biological daughter), respectively.

The facts of the *Mbura* case are these: In 2013, the plaintiff's maternal half brother (the first defendant's biological son) died in Windhoek. There were rumors in the village that the plaintiff had used witchcraft to kill her half brother who had lived with her in the city prior to his demise. The plaintiff assisted financially in the preparation of the funeral and arranged for the transportation of his remains from Windhoek to their hometown for interment. The cortege from Windhoek included the plaintiff's vehicle, which was in front, followed by the hearse carrying the deceased's remains, and then another vehicle carrying some members of the bereaved family. The defendants were not part of the group that went to collect the deceased's body from Windhoek; they remained at home, waiting for the arrival of the corpse. The defendants, who were expecting the hearse to be in front, became upset when the cortege arrived in the village, and they realized that the plaintiff's vehicle was leading the procession and not the hearse—something they deemed a taboo and an abomination. This, in their view, was unmistakable proof that the plaintiff had a hand in the death of the deceased. The first defendant then made the following statement concerning the plaintiff in the presence of a multitude of sympathisers who had gathered at the funeral grounds or the family home:

> The killer (witch) has made herself known. You are such a bad child. We should make a plan for you. […] You are the one responsible for the death of this child Adolf Katjiri. You are a witch. […] You took our child […] and killed him and now you bring him with your cars. You are a witch. You bewitch people.[65]

Following this episode, some of the family members and locals at the funeral venue refused to assist in offloading food from the plaintiff's car, suspecting that the food had been infested with witchcraft. The second defendant, for instance, made the following statement: "You are a killer (witch). You can go to court if you want. In any event, with all your witchcraft, who is going to eat the food you brought?"[66]

This case was tried twice before two different judges, as the defendants were able to justify why they could not attend the first trial in which they had been found liable *in absentia* and requested a fresh trial in the interest of justice and fairness. Even though the defendants flatly denied ever uttering the statements attributed to them during the second trial, the court found them liable and ordered them to pay 70,000 Namibian Dollars (approximately US $4,700) as damages for the defamatory statements.

Drawing on its earlier ruling in *Lothar Bednarek and Others v. Mine Hannam and Another*,[67] the court stated in the *Mbura* case that the question as to whether the defendants' statements were defamatory must be determined objectively, and the standard/test to be employed is that "of a reasonable person of sober tastes and sensibilities, neither given to easy excitability nor too docile."[68] Clarifying this position, the court stated:

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[62] *Afful* at 732.

[63] *Lothar Bednarek and Others v. Mine Hannam and Another* [2016] Case no. I 2615/2013 NAHCMD 12 (Feb. 3, 2016), para. 16; *Claudia Mbura v. Gotlob Katjiri and Another* [2017] Case no. I 4382/2013 NAHCMD 103, para. 17.

[64] *Mbura* (n63).

[65] Ibid., para. 10.

[66] Ibid., para. 11.

[67] *Bednarek* (n63).

[68] *Mbura* (n63), para. 18.

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> In this regard, the statement must not only serve to impair the individual's good name but must also be objectively unreasonable or *contra bonos mores*. In this regard, the words complained of must, in the opinion of a reasonable person of ordinary intelligence and development, have the deleterious effect of subverting or denigrating a person in his or her good name and reputation.[69]

Applying this principle, the court expressed no doubt that to call a person a witch who uses witchcraft "to kill people is *per se* defamatory and serves to impugn that person's dignity and […] lower him or her in the estimation of right-thinking members of the society."[70] Justifying and accentuating why the court said witchcraft imputation would be regarded as defamatory to a reasonable person of sober tastes and sensibilities, the court stated that "in many African traditional societies […] the belief in witchcraft […] continues to rear its ugly head from time to time and normally heralds grave consequences for one 'diagnosed' or 'smelt' out as a witchcraft practitioner."[71] Thus, an accusation capable of provoking the persecution or lynching of the accused can never be deemed reasonable by a reasonable person.

The principles enunciated in *Mbura* were adopted and wholly applied in *Herman Amukete v. Ester Iiyagaya* (which bears a striking similarity to *Mbura*).[72] In the *Amukete* case, at the funeral of a relative, a school principal had been accused of being a witch in the presence of some of his relatives and other members of the community. He sued for defamation and was awarded 70,000 Namibian Dollars (US$4,700). Justifying its decision, the court reiterated that "[b]elief in witchcraft is still widespread in many African communities and [a reckless witchcraft accusation] brings about [a] breakdown in relations in those communities be it amongst family members, neighbours or members of the community."[73]

In *David Kashululu v. Joolokeni Nakale,*[74] where a police officer sued a schoolteacher for having accused him of witchcraft, the court stuck to its principles on witchcraft-related defamation that it had articulated in the *Mbura* and *Amukete* cases. The facts of *Kashululu* are these: The plaintiff (a traffic police officer) attempted to issue the defendant (a secondary school teacher) a traffic offence ticket for a dangerous overtaking that endangered the lives of other drivers or people, but the latter failed to cooperate, leading to a squabble. The teacher, who supposedly called the officer a witch during the encounter, also accused him (the officer) of physically assaulting her and accordingly opened a criminal case against him. However, the Prosecutor-General dropped the criminal case for lack of evidence. The officer then issued a summons for defamation against the teacher based on a false witchcraft imputation, among other accusations. The court was satisfied that the plaintiff had "proved on a balance of probabilities that defendant defamed him" and accordingly awarded 80,000 Namibian Dollars (approximately US$5,370) as damages. Cheda J. made the following pronouncement: "It is injurious for him [the plaintiff] to be referred to as a witch. […] [F]or plaintiff as a Police Officer to be associated with the underworld and engaging in metaphysical practices is, in my view, injurious to his *dignitas*. Defendant must therefore clean plaintiff's name."[75]

4.3. South Africa and Botswana (Southern Africa)

In southern Africa, the legal systems are founded upon Roman-Dutch law even though significant aspects of the law are English in character.[76] The *actio iniuriarum*, a significant feature of Roman-Dutch law, protects three main interests: *fama* (reputation), *dignitas* (dignity), and *corpus* (physical or personal integrity). These interests or rights have been referred to as "absolute or primordial rights and are thus inalienable."[77] The protection of

[69] Ibid., para. 17. This was a repetition of the court's pronouncement in *Bednarek* (n63), para. 16.
[70] *Mbura* (n63), para. 18.
[71] Ibid.
[72] *Herman Amukete v. Ester Iiyagaya* [2019] Case no. 2019/00047 NAHCNLD 103.
[73] Ibid., para. 1.
[74] *David Kashululu v. Joolokeni Nakale* [2018] Case no. I 132/2015 NAHCNLD 44.
[75] Ibid., para. 49.
[76] James S. Read, "Criminal Law in the Africa of Today and Tomorrow," *Journal of African Law* 7, no. 1 (1963): 5–17; H.R. Hahlo and Ellison Kahn, *The South African Legal System and its Background* (Cape Town: Juta, 1968); AJGM Sanders, "The Characteristic Features of Southern African Law," *The Comparative and International Law Journal of Southern Africa* 14, no. 3 (1981): 328–35; Christa Rautenbach, "Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law," *Journal of Legal Pluralism and Unofficial Law* 60 (2010): 143–77.
[77] *Esselen v. Argus Printing and Publishing Co. Ltd. and Others* [1992] (3) SA 764 (T), 770 F–H.

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fama and *dignitas* under Roman-Dutch law is comparable to the African customary tort of slander. Thus, although mere insults, name-calling, or vulgar abuse are not defamatory under the English common law in that they do not affect the reputation of the person to whom they are applied, such words or conduct may be actionable as an *injuria* to the plaintiff's *dignitas* under Roman-Dutch law.[78] Courts in almost all southern African countries, including South Africa and Botswana, take the position that the tort of defamation serves to protect not only reputation but also dignity, and that witchcraft imputation amounts to the impairment of dignity.

South Africa

In South Africa, the courts and other recognized adjudicatory bodies seemingly apply customary law, statutory law, and/or common law when addressing witchcraft-related defamation claims/complaints. Section 10 of the Constitution of South Africa provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected."[79] In *Minister of Police v. Mbilini*, the court made the following important pronouncement in relation to the right to unimpaired dignity:

> It is trite law that one of the rights which is protected by the *actio injuriarum* is the right to an unimpaired dignity. Dignity was defined by Melius de Villiers in 1899 in his well-known work *The Roman and Roman-Dutch Law of Injuries* at 24 as – "that valued and serene condition in […] [a person's] social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt."[80]

This pronouncement was confirmed as an accurate statement of the law concerning the concept of *injuria* in *Sokhulu v. New Africa Publications Ltd. t/a "The Sowetan Sunday World" and Others*, where Goldstein J. stated that "[t]he right to an unimpaired dignity is protected by the *actio iniuriarum*. Such can be invoked when a person is subjected to offensive and degrading treatment or is exposed to ill-will, ridicule, disesteem or contempt."[81] Thus, for an insult, name-calling, or verbal abuse/injury to be actionable, "the words complained of must impair plaintiff's dignity and must be insulting in the sense that they must amount to degrading, humiliating or ignominious treatment."[82]

In *J.B. Nyalungu v. Dumisani High School Learners and the Department of Education*, the South African Human Rights Commission suggested that reckless witchcraft imputations amount to degrading or humiliating

[78] Chittharanjan Felix Amerasinghe, *Defamation and Other Aspects of the Actio Iniuriarum in Roman-Dutch Law* (Colombo: Lake House Investments Ltd., 1968); Hahlo and Kahn (n43) 547.

[79] Constitution of the Republic of South Africa no. 108 of 1996 (date of promulgation: Dec. 18, 1996, date of commencement: Feb. 4, 1997).

[80] *Minister of Police v. Mbilini* [1983] (3) SA 705 (A), 715G–716A.

[81] *Sokhulu v. New Africa Publications Ltd. t/a "The Sowetan Sunday World" and Others* [2002] 1 All SA 255 (W), 259 (c–d).

[82] *Brenner v. Botha* [1956] (3) SA 257 (T), at 261–62. It is important to mention that even though witchcraft-related defamation claims may be dealt with under customary law, statutory law, or common law, the South African court, in *Ida Buthelezi v. Kate Msimang* [1964] 13 of 1964 BAC 105, stressed that the system of law applied to the cause of action must be the same as that applied in assessing damages. In that case, the defendant publicly uttered the following words of and concerning the plaintiff: "Let the old witch come, she has long been bewitching me and today I shall expose her in public" (at 106). The plaintiff sued for defamation in the Traditional Court which gave judgment in her favor but awarded only a fraction of the damages sought. The plaintiff then appealed to the court of the Bantu Affairs Commissioner. Applying Bantu customary law to the cause of action and common law to the assessment of damages, the Commissioner found the defendant liable and awarded damages totalling R450 (approximately US$23 at the time). The defendant then appealed on the following grounds: that the Bantu Affairs Commissioner erred in (1) applying customary law instead of the common law, (2) finding the defendant liable under customary law but using common law principles to assess the damages, and (3) finding that the alleged words were defamatory. The appellate court ruled that the words imputing witchcraft were defamatory and that the Commissioner was justified in determining liability under customary law. However, it reasoned that "the Bantu Affairs Commissioner erred in applying common law to the assessment of damages. He should have granted the remedy provided by the system of law that he applied to the cause of action" (at 108). The damages awarded the plaintiff by the Commissioner was consequently reduced to R50 (approximately US$3).

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treatment, the impairment of dignity, and, consequently, a violation of section 10 of the constitution.[83] This case concerned a former teacher at Dumisani High School who brought a witchcraft-related defamation complaint against some learners/students at the school and his employer, the Department of Education, for the former's labelling him "a witch" and the latter's ensuing failure to properly address his concerns or address his humiliating ordeal. In addressing this issue/complaint, the commission applied both statutory law and common law; no direct mention was made of customary law.

The facts of the *Nyalungu* case are the following: In September 2011, the learners in question alleged that the complainant was a witch/wizard. It was reported that on September 15, 2011, a grade-eight learner "cried and hysterically claimed that she was seeing the complainant carrying green snakes in both his hands and frightening her with the snakes as she was sitting in class." On September 20, 2011, the learners staged a protest, demanding the removal of the complainant from the school on the grounds that he was practicing witchcraft. The complainant alleged that the employer concerned itself only with restoring normality at the school and failed to address the harassment and other ordeals he suffered and experienced. He submitted, among other things, that the witchcraft imputation "defamed him and tarnished his character and public image as a human being and a worker." It also "affected his family and his image in the church where he was a pastor." He claimed that the learners and employer's conduct violated his right to dignity enshrined in section 10 of the South African Constitution.[84]

The commission found, among other things, that the complainant was indeed labelled a witch and that the witchcraft imputation impaired his dignity. Consequently, the learners "consciously violated the complainant's right to human dignity entrenched in section 10 of the constitution."[85] The commission recommended, *inter alia*, that the employer "acknowledge to the complainant that it has failed to deal with this matter properly in so far [*sic*] as it impacted on the violation of his dignity," that the employer "formulates and furnishes the commission with its policy framework on how it deals with issues around allegations of witchcraft, witch-smelling, and witch-hunting within the school environment," and that the employer formulates a program "aimed at educating learners on the impact of witch-smelling and witch-hunting, and their impact on the right to dignity of the victim(s)."[86]

Currently, there is an interesting witchcraft-related defamation case involving a traditional healer commonly known by her practice name as Gogo Dubulamanzi and the *Daily Sun* (a popular and widely read newspaper) pending before the South African High Court.[87] In that case, a naked man carrying an axe broke into the premises of the plaintiff's neighbor and butchered a forty-five-year-old man with an axe. Four days later, an article titled "NAKED AXE MAN'S RAMPAGE" appeared in the *Daily Sun*. Part of the said article stated, "'I've arrived at the black house, show me the light, Gogo Dubulamanzi, should I kill them all?'"[88]—these allegedly being the words the perpetrator uttered before carrying out the attacks. The said statement created the impression that the plaintiff was using evil spirits to possess people and such possessed people to commit murder. The publication reportedly caused the plaintiff to be ejected from her home by an angry mob and to be banned from the community.

The plaintiff then filed a defamation suit against the newspaper, arguing that the said statement was wrong and defamatory in that it was intended to mean, and was understood by reasonable persons who read it to mean, that (1) the plaintiff was "guilty of criminal conduct in that she participated in […] the murder"; (2) the plaintiff was a criminal witch who possessed people with evil spirits to cause murder; and (3) the plaintiff conspired with the perpetrator to commit the murder referred to in the article "in that she [spiritually] led the murderer to the house where the murder was committed."[89] The plaintiff further argued that such imputations infringed on her "right to dignity and reputation" as it caused her and her family to be displaced by the community which, prior to the publication of the alleged disparaging article, held her in high regard. The defendants filed an application in 2020 to have the case struck out, maintaining among other allegations that the plaintiff's claim particulars were insufficiently pleaded or

[83] *J.B. Nyalungu v. Dumisani High School Learners and Dept. of Education* [2013] Ref no: MP/2011/0035 (Human Rights Commission).

[84] Ibid., paras. 3.1–3.6.

[85] Ibid., para. 7.

[86] Ibid., para. 8.

[87] *Media t/a Daily Sun and Others v. Precious Sithole* [2022] Case no. 38734/2020 ZAGPPHC 99; *Precious Sithole v. Media t/a Daily Sun and Others*, Case no. 38734/2020 (pending at the time of this writing).

[88] *Media t/a Daily Sun* (n87), para. 9.

[89] Ibid., para. 11.

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presented no cause of action. The court, in a February 2022 ruling, ordered that the plaintiff amend parts of the claim's particulars but noted that it largely stated a cause of action.

Botswana

In Botswana, as in South Africa, a reckless witchcraft accusation amounts to the impairment of the accused person's reputation and dignity. One of the landmark cases on witchcraft-related defamation in the southern African country is *Motanalo Gobudilwe and Another v. Kesebonye Shaobuye and Another*.[90] In that case, the defendants' cattle made their way to the plaintiffs' field/farmland to graze but "mysteriously" died shortly after grazing. The defendants labelled the plaintiffs witches and accused them of using witchcraft to kill the animals. The plaintiffs sued their accusers for defamation. At trial, the defendants suggested that they did not, nor intended to, call the plaintiffs witches but rather witchdoctors and that their words had been misconstrued. However, their arguments failed to sway the court. Mokama C.J., in finding the defendants' words to be defamatory, made the following clarification:

> Any Motswana would know that there is a difference between a witch-doctor and a witch. The former is called "ngaka" and the latter is called "moloi." A witchdoctor usually advertises his skills and commands and demands respect for his special skills as a traditional doctor, erroneously called a witch-doctor. But a "moloi" or a witch is regarded as a despicable and a dangerous person who never admits to being one. He is hated, feared and nobody wishes to associate or to be seen to be associated with him/her and relatives of a witch are also shunned.[91]

The defendants further argued that even though there were people in the area when the said words were uttered, there was no evidence nor had plaintiffs proved that someone else (or a third party) heard what was said. Addressing the question as to whether there was publication of the said words, Mokama C.J. reasoned as follows:

> In my view, it is not necessary for the plaintiff in every case to prove directly that the words complained of were brought to the actual knowledge of some third person. If facts are proved from which it could reasonably be inferred that the words were brought to the knowledge of some third person, a *prima facie* case would have been established. […] In this particular case there was a gathering of people. Words were uttered during that first gathering when samples were cut from cattle and on the second occasion under the shade of a tree. Surely all the people around these cattle and that tree were within earshot and consequently there arose a presumption that persons within earshot must have heard the words uttered and it was up to the defendants to show that they did not hear the words.[92]

The court noted that being called a witch in Botswana invites ostracism or banishment, hate, fear, and humiliation. Therefore, by calling the plaintiffs witches, the defendants clearly impaired their dignity. The plaintiffs were awarded 2,000 Botswanan Pula (approximately US$150) as damages for being defamed.[93] The principles enunciated in this case were featured in another high-profile, witchcraft-related defamation case in Botswana, *Joseph Makati v. Beama Publishing (Pty) Ltd. and Another*.[94]

In *Makati*, the plaintiff (a prominent businessman and a staunch Catholic) erected giant tents to be used for his wedding reception. Unfortunately, the event was marred by rain and strong winds, which uprooted the tents, dismantled the expensive wedding cake, and dispersed the guests, bringing the event to an unceremonious end. Less than a week after this unfortunate episode, an article titled "Wedding Terror" appeared in the *Voice* newspaper published by the first defendant and which was apparently caused to be printed by the second defendant. The article stated, *inter alia*, that the plaintiff had attributed the storm that dismantled his wedding tents and disrupted the event to the work of witches—that is to say, that malevolent witchcraft forces were responsible for the storm and that he had alleged that his ex-partner (with whom he had a child) was a witch and the cause of the wedding

[90] *Motanalo Gobudilwe and Another v. Kesebonye Shaobuye and Another* [1993] BLR 56.

[91] Ibid., at 61.

[92] Ibid.; see also Peter Manda, B.D.D. Radipati, Roshana Kelbrick, Elize Delport, Isabeau Southwood, Muhawu I. Maziya, Alfred W. Chanda, I.A. Donovan, and R.A. Phillips, "Current Legal Developments," *Comparative and International Law Journal of Southern Africa* 26, no. 3 (1993): 410–32, at 415.

[93] *Gobudilwe* (n90).

[94] *Joseph Makati v. Beama Publishing (Pty) Ltd. and Another* [2008] Case no. 1469 OF 2005 BWHC 194; *Beama Publishing (Pty) Ltd. and Another v. Joseph Makati* [2009] Case no. CACLB-010-08 BWCA 89.

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nightmare. He averred that the article, which was false, embarrassed him and diminished his dignity and reputation in the eyes of right-thinking members of society. He accordingly sought an amount of 500,000 Pula (approximately US $ 37,840) as compensation.

Even though the defendants denied that they had defamed the plaintiff in any way or that the words complained of were defamatory or malicious, the court found them liable and ordered them to pay 50,000 Pula (approximately US$3,780) in damages. The defendants then appealed against the decision. The appellate court dismissed the appeal against the finding that the defendants/appellants had defamed the plaintiff/respondent but reduced the awarded damages to 7,000 Pula (about US$530). In upholding the trial court's finding that the defendants' article defamed the plaintiff, the Court of Appeal made some interesting statements in relation to witchcraft imputations. It stated, for example, that "[t]o call someone a witch or 'moloi' is serious, and renders one liable, apart from a defamation suit, to criminal prosecution under the Witchcraft Act."[95] Therefore, by claiming that the plaintiff called his ex-partner a witch and blamed her for the wedding disaster, the defendants were, in effect, saying that the plaintiff had committed a criminal offense under the Witchcraft Act. The court further noted:

> Such an allegation could have had serious repercussions, having regard to the [Botswanan society's] fear of witches. […] Similarly, a man who is said to have called his ex-girlfriend a witch, thereby committing a criminal offence, is no doubt lowered in the estimation of ordinary readers of a newspaper. […] If he had not brought this action to vindicate his reputation, more dire consequences might have followed. The woman named as a witch could have been set upon and he could have been blamed for this. Finally, he could have been set upon himself or denigrated for calling her a witch.[96]

4.4. Tanzania (East Africa)

The Tanzanian courts recognize the applicability of both customary law and common law principles in addressing defamation claims resulting from witchcraft imputations. However, in *Hassani v. Kithuku and Chali,* which appears to be the leading case in Tanzania on witchcraft-related defamation claims, the Tanzania High Court primarily applied common law principles.[97] In that case, the court determined that words that are likely to expose people to hatred, ridicule, or contempt, or are calculated to negatively impact their social standing in the communities to which they belong, are defamatory. The court further indicated that, given the catastrophic consequences that witchcraft accusations tend to have on the accused, and the chaos and insecurity they cause in the community, statements recklessly imputing witchcraft to others are actionable *per se*.

The plaintiff in the instant case was a frail elderly man who was highly respected in the community and who previously invited all manner of people to celebrate Maulid (a religious festivity celebrated among Muslims) in his house each year. The first defendant was a well-known medicine man who claimed to possess supernatural powers that enabled him to detect witches and to dismantle their witchcraft potency, and the second defendant was the first defendant's assistant. The facts of the case are these: The first defendant, accompanied by his assistant, had been moving from village to village on the invitations of some local residents to smell out "witches." The two defendants went to the plaintiff's house, accompanied by a big crowd (comprising males and females, young and old) whose members were chanting/singing war songs and carrying a coffin-like object. The first defendant sprinkled urine, collected from young female members of the chanting crowd, in every corner of the plaintiff's house ostensibly for "neutralising purposes." The first defendant then announced to the crowd that the plaintiff was a wizard and that

> there was a pot in the [plaintiff's] house which contained witchcraft; that there was a second pot with two edges in the bedroom; that the said two edges used to turn into venomous or deadly snakes which bit people; that there was a small drum in the roof which was made of female genitals […] [and] its drum stick was a penis; and that its purpose was for summoning all witches and wizards. […] [Besides,] the rice which he was preparing and feeding [or serving] people during Maulid celebrations was no rice at all; it was goats' droppings, and the meat was not beef at all but meat of baboons and hyenas.[98]

[95] *Beama Publishing (Pty) Ltd*, (n94), para. 18.
[96] Ibid., para. 20.
[97] *Hassani v. Kithuku and Chali* [1983] TZHC 34. Retrieved from Tanzania Legal Information Institute, https://tanzlii.org/tz/judgment/high-court-tanzania/1983/34.
[98] Ibid.

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The key issues that the court had to consider in this case were: (1) whether the defendants, jointly or severally, uttered the words complained of; (2) whether the said words were defamatory of the plaintiff; (3) whether they were actionable *per se* if found to be defamatory; and (4) whether the parties were entitled to any relief.

Even though the defendants did not challenge the plaintiff's version of events, the court found that the first defendant uttered the said words alone. In relation to the second issue, the judge, who referred to the event as "a somewhat disgusting and absolutely nauseating episode that befell the plaintiff at his own house,"[99] made the following pronouncement:

> I entertain no doubt whatsoever in my mind that the words which the first defendant said of the plaintiff and which the latter has complained of are defamatory of the plaintiff. They are the type of words that are likely to expose the plaintiff to hatred, ridicule, or contempt, or calculated to injure him in his social standing in his community, and I find this as a fact. There can be no doubt that these words were spoken to a crowd of villagers who believe in witchcraft—a scourge of our rural as well as part of the urban communities. […] In short, I answer the second issue in the affirmative.[100]

The court further explained that under the common law, a plaintiff in an action for slander must prove special damage. However, there are four exceptional cases where slander is actionable *per se*—namely, (1) where the words impute to the victims the commission of a criminal offence punishable by imprisonment; (2) where the words impute to them a contagious or infectious disease; (3) where they are spoken of them as professionals or businessperson[s]; and (4) where they impute unchastity or adultery to female victims. Applying these common law principles, the judge reasoned as follows:

> In the instant matter the words impute to the plaintiff the killing of human beings, of malice aforethought, which is a crime which carries capital punishment. The words also imputed to the plaintiff the possession of instruments of witchcraft, to wit, the two pots, the drum made of a female organ and its male-organ drumstick, which is a criminal offence punishable by imprisonment under the Witchcraft Ordinance. The words that the plaintiff was practising witchcraft on his fellow residents […] and that he had instruments for that purpose in his house will, therefore, support an action for slander, without special damage and I so hold.[101]

The first defendant was accordingly found liable for defamation and ordered to pay 25,000 Tanzanian Shillings to the defendant as damages.

However, in *Nyabagaya Mtani v. Nyakanyi Kabera*, the Tanzania High Court suggested that customary law principles alone may be applied in resolving witchcraft-related defamation claims.[102] In the *Mtani* case, the defendant, when passing by the plaintiff's house, called her a malevolent witch who had caused the death of her child. At the time the said defamatory words were uttered, there was no one else present except these two women. The plaintiff, who felt bitter about the defendant's statement, convened a meeting of elders and complained to them. To clear herself or prove that she was not a witch, she travelled hundreds of kilometres from her village to Ukara Island to see a well-known "powerful" witchdoctor who certified that she was "clean" or not a witch. She returned and filed a lawsuit against her accuser in the Primary Court, claiming damages, including two cows and 3,080 Shillings (being the cost of her journey to Ukara Island). The Primary Court ruled in her favor and ordered the defendant to pay two cows and 3,080 Shillings plus costs. The defendant appealed to the District Court and won part of the appeal. The District Court set aside the award relating to the two cows but affirmed the 3,080 Shillings award. Dissatisfied with this decision, the defendant again appealed to the High Court.

The High Court concluded that "[w]itchcraft is something known to local people from time immemorial. If somebody imputed witchcraft to another whom people knew was not a witch, the imputer would be told to compensate the latter […] [under the] customary law tort of defamation."[103] However, the court allowed the appeal and set aside the award of 3,080 Shillings on the grounds that the defendant's claims that the plaintiff was a witch were uttered when no one else was present, apart from the two of them, and no one else heard what was said. The plaintiff

[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] *Nyabagaya Mtani v. Nyakanyi Kabera* [1984] TZHC 39. Retrieved from Tanzania Legal Information Institute, https://tanzlii.org/tz/judgment/high-court-tanzania/1984/39.
[103] Ibid.

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"on her own initiative called a meeting and repeated what the appellant had told her." This, in the court's view, "did not amount to publication by the appellant."[104] This decision is controversial because even though the court made direct reference to customary law, it surprisingly applied common law principles. The plaintiff's decision to report the defendant's groundless witchcraft accusation to the elders was legitimate under customary law. Besides, as aforementioned, customary law frowns upon hurting or injuring people's feelings by vituperation or name-calling. This seemingly suggests that a witchcraft imputation deemed to have hurt or injured one's feelings is actionable irrespective of whether a third party heard the slanderous words or not. In the instant case, the defendant did not deny that the alleged defamatory words were uttered; therefore, the claim would have perhaps succeeded if only customary law principles had been applied.

5. Discussion

5.1. The dominant laws applied by the courts in Anglophone Africa

It is evident from the cases examined that the courts in Anglophone African countries generally apply the principles of at least two legal traditions—usually a combination of customary law and common law principles, when considering witchcraft-related defamation cases. In fact, in southern Africa, particularly in Botswana and the Republic of South Africa, the three main types of laws—customary law, common law, and statutory law—protect personal dignity, which tends to be impaired by reckless witchcraft accusations. For this reason, witchcraft-related defamation claims may be dealt with under any of the three categories of laws. In contrast, the courts in Namibia and Tanzania acknowledge that witchcraft accusations are actionable under customary law, but they largely apply common law principles when resolving these types of claims.

In Ghana, customary law would be applicable where the parties involved belong to the same ethnic group or are subject to the same personal law. The Courts Act 1993 stipulates that where the parties "are not subject to the same personal law, the court shall apply the relevant rules of their different systems of personal law to achieve a result that conforms with natural justice, equity and good conscience." Alternatively, the courts may apply principles of both the common law and customary law, provided it "will do substantial justice between the parties, having regard to equity and good conscience."[105] Indeed, the Ghanaian courts have persistently claimed that the applicable principles for resolving slander claims bordering on witchcraft imputations, where the parties are from the same group, are those of customary law. Yet, some of the courts' own pronouncements and postures suggest that they readily seek the intervention of the received common law (which does not recognize the existence of witchcraft or witches), even where the parties belong to the same ethnic group.

For instance, it is well known that the main customary or traditional means of detecting or identifying a witch in most indigenous Ghanaian communities is by either divination or trial by ordeal, which is usually conducted by traditional spiritualists such as fetish priests and medicine men.[106] Yet, in the *Abotchie* case, the Ghana High Court was unwilling to allow the defendant to use this traditional/customary method to prove the truth of her witchcraft allegation. The court's reason for declining the defendant's request was that this "traditional mode or method of proving witchcraft […] has not gained any recognition in the courts of law"—that is, common law.[107] The courts in Ghana apparently believe that, because witchcraft is a metaphysical phenomenon, and divination or trial by ordeal cannot convincingly prove whether someone is a witch, accepting or recognizing such methods would be repugnant to natural justice, equity, and good conscience.

5.2. The "recklessness" or "unreasonableness" test

Almost all the courts examined for this study seem to employ the "recklessness" or "unreasonableness" approach. Thus, they take the position that a witchcraft imputation is defamatory and actionable if it is made recklessly or unreasonably. However, the courts in various Anglophone African countries apply quite divergent tests for

[104] Ibid.
[105] The Courts Act 1993 (Act 459), art. 54, rules 5–6.
[106] Gray (n16); Quarmyne (n34); Adinkrah (n1); Owusu (n11).
[107] *Abotchie* (n54).

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recklessness or unreasonableness in the context of witchcraft imputations. In South Africa, a witchcraft imputation is always reckless because it necessarily impairs dignity and consequently breaches all the relevant laws (including section 10 of the South African Constitution), and because it has deleterious consequences.

The Ghanaian courts have suggested that any statement, whether oral or written, which has the potential power to bring about pandemonium or a "breach of the peace, mob action, mass hysteria and […] loss of lives," is reckless.[108] Witchcraft imputations are thus necessarily reckless because they are capable not only of impairing one's dignity but also triggering catastrophic consequences, including the persecution of vulnerable people, lynchings, and disturbances of the peace in the community. Even though under Ghanaian customary law witchcraft accusations are legitimate if made through the right channel (i.e., traditional leaders or elders), the courts seem uncomfortable and unwilling to recognize the validity of this system. For instance, in the *Abotchie* case,[109] the court could have found the defendant liable solely on the grounds that she did not make the witch allegation through the right medium or existing customary process, yet the court opted not to employ the customary principle. The Ghanaian courts' attitude (including the impulse to subtly merge common law and customary law principles) seemingly renders almost all witchcraft imputations reckless or unreasonable, irrespective of the medium/channel through which they were made.

The Namibian courts deem witchcraft imputations reckless/unreasonable if a "reasonable person of ordinary intelligence and development" believes that the words "have the deleterious effect of subverting or denigrating a person in his or her good name and reputation."[110] This standard is problematic because it is too vague and does not explain what "ordinary intelligence and development" encompasses. Some academics have established that witchcraft beliefs are more widespread in rural communities where literacy rates are significantly low, rather than in urban settings where literacy rates are usually high. Hence, a witchcraft accusation that may seem unreasonable to an urban educated person may be considered reasonable to a person in a witchcraft-infested rural community. Therefore, it is submitted that a fairer "reasonableness" test should adopt the standard of an "ordinary person of the class of the community to which the […] [accuser] belongs,"[111] and not a "person of ordinary intelligence and development." However, the problem with the former test is that, applying it in communities where witchcraft beliefs are widespread, may result in most witchcraft accusations (even "manifestly reckless" ones) being deemed reasonable, especially if the accused is an elderly person.

In Tanzania, at least two tests (one under statutory law and the other under customary law) have been suggested for determining reckless witchcraft accusations. Under statutory law, as already pointed out, a witchcraft allegation is reckless and punishable if it is not made to/through a recognized body, such as "a court, a member of the police force, a local government authority or […] [a] public officer," or not made to such bodies on reasonable grounds.[112] However, the Tanzanian courts have suggested through the *Mtani* case that under customary law, a witchcraft allegation is reckless if the accused is a person "whom people [in the community] knew was not a witch."[113] This test/standard is clearly discriminatory as it justifies witchcraft allegations against people who may not be well-liked in the community and who are routinely associated with witchcraft—that is, elderly women.

A report released by HelpAge International suggests that between 2005 and 2011, "approximately 500 older people were murdered [in Tanzania] due to suspicions that they were witches." The report further notes that in 2012 alone about 630 people were killed in Tanzania on witchcraft accusations, and "[t]his rose to 765 in 2013, of which 505 were women."[114] The report stressed that killings prompted by witchcraft accusations are a growing problem, and the victims targeted most often are elderly people, particularly women.[115] Considering that many, if not most,

[108] *Republic v. Tommy Thompson Books Ltd.* [1997–1998] 1 GLR 611, 644.

[109] *Abotchie* (n54).

[110] *Mbura* (n63), para. 17; *Bednarek* (n63), para 16.

[111] This standard was adopted by the Botswanan courts in *Innocent Manjesa v. the State* [1991] CA no. 30 of 1991. A similar test is used by the courts in Kenya, Uganda, and other African countries in witchcraft-related cases.

[112] Tanzania Witchcraft Act (n18).

[113] *Mtani* (n102).

[114] Natalie Idehen, "Tackling Witchcraft Accusations in Tanzania," HelpAge International (July 4, 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.

[115] Ibid.

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elderly people in Tanzanian rural communities are believed to be witches,[116] the courts' suggested test for determining what constitutes a reckless/unreasonable witchcraft accusation under customary law may only exacerbate witchcraft imputations and related violence against this vulnerable group.

5.3. Rate of success and cost of witchcraft-related defamation lawsuits

Interestingly, over 90% of the witchcraft-related defamation claims/cases filed in the courts of the selected Anglophone African countries and examined in the present study, succeeded.[117] However, the vast majority of plaintiffs tended to be people with high socio-economic status/backgrounds or adequate income—that is, businesspersons, teachers, principals, health professionals, police officers, etc.[118] Many of the very few cases involving claimants with low socio-economic status/backgrounds or with low income were filed with the help of non-governmental organizations (NGOs) or philanthropists. It seems that the main reason why claimants in witchcraft-related defamation lawsuits are predominantly high-income earners is because low-income earners and less-educated individuals, who comprise over 90% of victims of witchcraft accusations and concomitant violence,[119] are not able to afford the high costs of seeking justice or the exorbitant legal fees/costs.[120]

In Ghana, for instance, the initial legal fees for defamation litigation ranges from 30,000 to 60,000 Ghanaian Cedis (US$2,500–US$5,000).[121] In addition, attorneys charge 500 Cedis (US$42) whenever they attend court, and the plaintiff pays the application fee and all other filing fees. Defamation cases typically last two to five years and involve numerous adjournments; attorneys may attend court approximately six to eight times annually. This means that a defamation litigation that lasts two years in Ghana will cost the plaintiff no less than 66,000 Cedis (about US $5,504). This figure is excessive, considering that the average worker in the country earns between 1,500 and 3,000 Cedis (US$125–US$250) per month or 18,000 and 36,000 Cedis (US$1,500–US$3,000) per year. The situation is not different in other African countries. It must be mentioned that *pro bono* services, although available, are rare and extremely difficult to access because priority is given to accused persons in criminal cases.

It is thus unsurprising that even though the rate of success for witchcraft-related defamation claims is considerably high, such claims are quite rare even though witchcraft accusations are widespread in many African communities. In other words, only a fraction of people accused of being witches and practicing witchcraft are able to access the courts or afford the associated high legal costs. Almost all the studies that have been conducted on witchcraft's impact on crimes in African settings demonstrate that the most-often targeted victims are elderly people (particularly elderly women) with low socio-economic backgrounds in rural or semirural communities.[122] Sadly, this

[116] Singh and Msuya (n14).

[117] For the present study, a total of seventeen witchcraft-related defamation claims/cases were analysed. Of this figure, sixteen (approximately 94%) succeeded.

[118] The professions/occupations of fifteen out of eighteen plaintiffs in the cases examined were known. Of the plaintiffs whose professions or socio-economic status could be ascertained, at least eleven (approximately 73%) had high socio-economic backgrounds or reasonable incomes.

[119] Emmanuel Sarpong Owusu, "The Superstition that Maims the Vulnerable: Establishing the Magnitude of Witchcraft-Driven Mistreatment of Children and Older Women in Ghana," *International Annals of Criminology* 58, no. 2 (2020): 253–90, at 267, noting that almost all the victims of witchcraft accusations and concomitant violence, "especially the older women (over 98%), had low socio-economic status and lived in poverty. There was not a single case where a well-educated and well-to-do woman was abused."; see also Justus Ogembo, *Contemporary Witch-Hunting in Gusii, Southwestern Kenya* (Lewiston, NY: Edwin Mellen Press, 2006); Adinkrah (n1) 78, affirming that "[l]ow socioeconomic status and poverty are additional risk factors for imputation of witchcraft and victimization for violence related to witchcraft accusations," adding that indigent, elderly people "with little formal education are subject to witchcraft accusations in greater proportion to their peers in the higher socioeconomic classes. Older women who are economically well-off are seldom targets of witch accusations."

[120] Emmanuel Sarpong Owusu, "Witchcraft Imputations and the Tort of Defamation in Ghana," *Common Law World Review*, 0(0), https://doi.org/10.1177/14737795231201433 (published online Sep. 11, 2023).

[121] Ghana Bar Association, "Proposed Scale of Fees – Mid-Year Review Conference On 20th April, 2022 at Labadi Beach Hotel in Accra," GhanaWeb (Apr. 22, 2022), https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Here-are-the-new-legal-fees-issued-by-Ghana-Bar-Association-1521173.

[122] Ralushai and others (n15); Ogembo (n10); Ter Haar (n1); Silvia Federici, "Witch-Hunting, Globalization, and Feminist Solidarity in Africa Today," *Journal of International Women's Studies* 10, no. 1 (2008): 21–35; B.L. Meel, "Witchcraft in Transkei Region of South African: Case Report," *African Health Sciences* 9, no. 1 (2009): 61–64; Cohan (n13); Adinkrah

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means that elderly people, who are the most likely victims of witchcraft imputations and concomitant mistreatments in Africa, may never be able to bring defamation claims against their accusers unless they receive financial support from Good Samaritans, such as concerned NGOs and affluent philanthropists.

6. CONCLUSION

This study has sought to explore the Anglophone African courts' interpretation of the tort of defamation in relation to witchcraft accusations. Thus, it has endeavored to address whether witchcraft imputations can amount to defamation and, if so, under what conditions. This aim has been achieved largely by examining several relevant judicial decisions from five selected countries—Botswana, Ghana, Namibia, South Africa, and Tanzania. The study has shown that witchcraft beliefs are widespread in many African societies and that witchcraft accusations pose significant danger to African communities, particularly vulnerable groups. It has also demonstrated that in most Anglophone African countries there are statutory laws that criminalize witchcraft imputations. However, these laws and criminal justice systems have been ineffective in protecting people from witchcraft accusations and concomitant crimes. This has compelled some victims of witchcraft imputations to seek justice through civil proceedings.

The study establishes that courts in different Anglophone African countries employ various approaches and principles in resolving witchcraft-related defamation claims. However, the courts in the selected jurisdictions seem to agree that a witchcraft imputation is defamatory and actionable if it is deemed to have been made recklessly or unreasonably. Even though they propose quite divergent tests for reckless or unreasonable witchcraft accusations, the courts concur that a statement that recklessly or publicly imputes witchcraft to a person, whether true or untrue, necessarily impairs that person's dignity. These claims are thus actionable *per se*, and the courts emphasize the debilitating consequences that such an allegation may have on the accused witch and the community at large. For this reason, most witchcraft-related defamation claims succeed. Unfortunately, however, the overwhelming majority of people who are recklessly accused of being witches (mostly elderly women) are unable to bring defamation lawsuits against their accusers due to the exorbitantly high costs of accessing the courts and seeking justice.

(n1); Owusu (n11); Judith Bachmann, "Witchcraft and Its Implications for Women Reconsidered," *Religion and Gender* 12 (2022): 29–51.

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