



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Chengo (Criminal Appeal E038 of 2024)
[2025] KEHC 5230 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E038 OF 2024**

**M THANDE, J
APRIL 25, 2025**

BETWEEN

REPUBLIC APPELLANT

AND

ALEXANDER PENI CHENGO RESPONDENT

*(An Appeal from the judgment of Hon. Irene Thamara RM
delivered on 2.5.24 in Malindi Criminal Case No. E421 of 2023)*

JUDGMENT

1. The Appeal arises from the judgment in Malindi Criminal Case No. E421 of 2023 in which the Respondent was charged with the offence accusing another to be a witch, contrary to Section 6 of the *Witchcraft Act*. The particulars of the offence are that on diverse dates between January and April 2023, within Malindi township area in Malindi subcounty within Kilifi county, wilfully and unlawfully without reasonable cause accused Janet Nderitu to be a witch uttering the words “Wewe uko na majini ya urogi” meaning you have demons of witchcraft.
2. In is judgment delivered on 2.5.24, the trial court found the Respondent not guilty of the offence and acquitted him.
3. Being aggrieved by the decision of the trial court, the Appellant, filed the Petition of Appeal before me dated 13.5.24 against the acquittal. The summarised grounds of appeal are that the trial court erred in law and fact by:
 1. acquitting the Respondent on extraneous matters which did not form the subject matter before court.
 2. Failing to appreciate that the prosecution evidence outweighed the defence of the Respondent.



3. Failing to analyse the evidence by the Respondent against the evidence presented by the prosecution.
4. Failing to find that the prosecution proved all the ingredients of the offence.
5. Failing to comply with the provisions of Section 169 of the *Criminal Procedure Code*.
4. The Appellant urged that the Appeal be allowed and that the decision of the lower court be quashed and set aside and that a conviction be entered.
5. Respondent opposed the Appeal in submissions dated 7.1.25.
6. As a first appellate Court, I have subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial Court, I neither saw nor heard the witnesses. (See *Okeno v. Republic* [1972] EA 32 and *Gabriel Kamau Njoroge v Republic* [1987] eKLR).
7. The facts of the case according to the prosecution are that the Respondent had been employed as the Complainant's driver. In January 2023, he failed to report to work and upon inquiry, he told the Complainant that she had "majini". On seeking clarification on what he meant he said she had "uchawi" and that she was a "mchawi", a witch. She asked the Respondent's brother Martin Chengo PW2 to talk to him. PW2 told her that the Respondent told him he did not wish to work for her as she is a witch.
8. The Complainant stated that in February, Kalama's child was electrocuted and she went to the homestead for funeral arrangements and paid for the coffin. The Respondent questioned her on why she bought the coffin for Kalama's child, yet she is the one who had bewitched the child as she was a witch. As a result of these accusations, the Complainant feared for her life because at the Coast, if one is called a "mchawi", the recipe is death. The Complainant further stated that on 14th July, someone threw stones at her as she was driving from Msabaha and that the following week, there were men at her gate shouting that she withdraws case or leave Malindi. In cross examination, she stated that her relationship with the Respondent was that he was her driver.
9. In his testimony, PW2 stated that the Respondent had told him he did not wish to work for the Complainant because she is a "mchawi" (witch). He went on to state that the Respondent had told his (PW2's) mother not to accept anything from the Complainant as she has "majini". Further that the Respondent had warned him not to go to the Complainant as she would finish him just as she had sacrificed Kalama's child.
10. PW3 Wilson Timothy stated that on 25.2.23, his brother's son Joel, had been electrocuted after climbing a tree near electricity lines at the shamba. He died on the way to hospital. There was a crowd shouting "ni huyu". He did not know who was being referred to, but in June, he heard that it was the Respondent.
11. PW4 No. 71664, PC Kenneth Komen stated that on 29.5.23, the Complainant made a report at Malindi Police Station that the Respondent had accused her of being a witch. He recorded her statement and that of her witnesses. He arrested the Respondent and charged him. He stated in cross examination that the Respondent had told him that he had a relationship with the Complainant and that they lived as husband and wife but had separated.
12. In his defence, the Respondent stated that he used to work for the Complainant as a driver on need basis. She once called him and told him she had been hospitalized and had no one to assist her. He



- helped her and they lived as husband and wife. She brought the case against him when they separated. In re-examination, he stated that he never called anyone a witch.
13. DW2 Pamela Peni Chengo, stated that she knew the Complainant as the wife of her brother the Respondent for 2 years. They are now separated and the Respondent said the Complainant was harsh. She denied hearing the Respondent call the Complainant a witch.
 14. DW3 Francis Chengo also stated that he knew the Complainant as the wife to his brother the Respondent. They were not officially married but that she had been brought to their home and introduced as his wife. He stated that he did not hear the Respondent call the Complainant a witch.
 15. I have considered the submissions by both parties. The central issue for determination is whether the prosecution proved the charge against the Respondent, to the required standard, and whether the trial magistrate erred in finding the Respondent not guilty of the offence and acquitting him under Section 215 of the Criminal procedure Code.
 16. In her judgment, the trial Magistrate stated:

Looking at the Charge Sheet vis a vis the accusations stated by PW1 in her testimony, there was a “slight variation as to what the accused referred to her. The Charge Sheet reads “wewe uko na majini ya urogi” while in her testimony she stated that the accused informed her that she had “majini” and “ni mchawi”. While there is no reference to “mchawi” in the charge sheet and “urogi” in her testimony, the Court takes note that the main accusation here was that she had “majini” that is supernatural powers.
 17. In her final finding however, the trial magistrate did not make anything of the variation in the charge sheet. In any event, the [Witchcraft Act](#) does not define “witch” and does not set out the exact words that must be uttered when one accuses another to be a witch.
 18. Section 6 of the Act under which the Respondent was charged provides:

Any person who accuses or threatens to accuse any person with being a witch or with practising witchcraft shall be guilty of an offence and liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding five years:

Provided that this section shall not apply to any person who makes an accusation to a District Commissioner, a police officer, a chief or any other person in authority.
 19. From the evidence on record, both the Complainant and PW2 stated that the Respondent called the Complainant a witch. On his part, the Respondent did not deny calling the Complainant a witch in his examination in chief and cross examination. Rather, he went on a completely different trajectory of how he and the Complainant were in a relationship of husband and wife and that the Complainant brought him to court when they separated. The Court notes that it is only in re-examination that the Respondent stated, “I never called anyone a witch.” DW2 and DW3 also dwelt on the husband and wife relationship between the Complainant and the Respondent. They then stated that they did not hear the Respondent call the complainant a witch.
 20. The trial Magistrate proceeded to state as follows:

The employment dispute, allegations of a previously existing marriage and the fact that the accused’s family were pitted against each other in the case are aspects which raise an issue of their being a conflict or a grudge between these persons.



21. The trial Magistrate eventually found that “the existence of disputes between the Complainant and the Respondent is unfavourable to the prosecution’s case. It would therefore be unsafe to convict the accused based on this evidence.
22. Looking at the record, it is quite evident that the trial Magistrate did not analyse the evidence tendered to determine whether the Respondent did in fact accuse the Complainant of being a witch. The trial Magistrate focussed on extraneous matters, namely that there was an employment dispute, allegations of a previously existing marriage and conflict between members of the Respondent’s family. With respect, these factors were not in issue. She also stated that the factors raise an issue of their being a conflict or a grudge between these persons. She did not however specify the persons she was referring to. The attempted connection between these factors and the accusation against the Respondent is too farfetched to conclude that they were unfavourable to the prosecution case.
23. The claim by the Complainant that the Respondent called her a witch was corroborated by PW2. He stated that the Respondent told her that he did not wish to work for the Complainant as she was a witch. As indicated herein, the Respondent did not deny that he called the Respondent a witch. The testimony of DW2 and DW3 is that they did not hear the Respondent call the Complainant a witch. They also stated that they knew the Complainant as the wife of the Respondent. My view is that the defence witnesses did not place any evidence before the Court to negate or dislodge the prosecution case.
24. In the end after analysing and re-evaluating the evidence, this Court finds that based on the evidence on record, the Appeal succeeds and is hereby allowed. The acquittal of the Appellant is hereby quashed and the Court substitutes therefor an order of conviction. The Respondent is fined the sum of Kshs. 500/= as provided under Section 6 of the Act.

DATED SIGNED AND DELIVERED IN MALINDI THIS 25TH DAY OF APRIL 2025

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M. THANDE

JUDGE

