



**Director of Public Prosecutions v Chiwata (Criminal Case
039 of 2020) [2025] KEMC 13 (KLR) (15 January 2025) (Judgment)**

Neutral citation: [2025] KEMC 13 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE 039 OF 2020
ZK KAGENYO, RM
JANUARY 15, 2025**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS PROSECUTION

AND

SAID MBUI CHIWATA ACCUSED

JUDGMENT

1. The accused person was on the 28th day of January 2020 arraigned to face an indictment of having caused grievous harm to another contrary to section 234 of the *Penal Code*. It was said that on the 5th July, 2019 at about 1930 hours at Lunguma village, Golini location, Matuga subcounty in Kwale county within Coast region jointly with others not before court unlawfully did grievous harm to Chiwaya Mbui Chiwaya.
2. The accused denied the charges and the prosecution marshaled a total of 6 witnesses in support of its case which was that on the fateful evening, the complainant had been comfortably seated at the corridor outside his house taking his dinner when he got a phone call but due to poor network challenging proper connectivity, he started walking further from the house to get clearer connection. While out there, the complainant was attacked by use of arrows, having been attacked by 4 people who vanished as fast as they had come. The complaint was taken to hospital and later the matter reported at the Kwale police station wherefrom this case was borne.
3. While placed on his defence, the accused admitted that indeed the complainant had been injured but denied as being the one who injured him raising a defence that he was inside his house and there is no way that he could have attacked the complainant.
4. In the matter, it is not in dispute that the complainant was injured by use of arrows, on the fateful evening. The only issue for determination in the matter is who the assailant was or contextually framed, whether the accused attacked the complainant as alleged.



5. While determining the issue, on a very preliminary issue, although I did not have access to the prosecution's case file, from the evidence of the investigating officer, I asked myself why the accused was in this court facing these charges? What informed the prosecution on who to charge?
6. I say so given that apart from the complainant while testifying in court, all the other prosecution witnesses said that they did not know who attacked the complainant. Having not been declared as hostile witnesses, I presume that that was what was reflected in the police case file. A look at the evidence of PW 6, Cpl Barno, who testified in the capacity of the investigating officer, he said thus,

The statement of the complainant does not mention accused as the assailant.

My question is, if the complainant in his statement did not mention the accused as the assailant, then what informed the prosecution to charge the accused? Be that as it may as decision to charge is a function of another independent state agency, I will work with what the complainant and other witnesses submitted while here, in court, otherwise I risk being accused of interfering with the independence of the agency mandated with the decision to charge.
7. The complainant said that he saw the accused pull the string to the bow hosting the arrow directed and fired at him and felt the pain of the penetrating sharp arrowhead as it permeated through his flesh. He said that he positively identified the accused on that night relying on the solar powered bulb that was in the vicinity. However, his wife said that the area was dark and hence could not see as much. This was the same version with their grandson who said that he could not see anyone as it was dark. On his part, according to PW 5, his mother, when asked by the mother who had attacked him, the complainant said that he did not identify anyone. From this piece of evidence, the complainant's later mention of the accused would be safely termed as an afterthought. As such, I find that the identification of the accused as an assailant lacks the qualities that would be relied by this court.
8. My finding is further fortified by the fact that, when the complainant was testifying, he said that he saw the accused firing the first arrow and that the arrow at the stomach was shot by Gidi. It is therefore safe to presume that the accused would have shot the first arrow and Gidi the second arrow, if the account was credible. According to the medical practitioner who testified as PW 3, he told the court that there was an injury at the midline of the abdomen and another at the right posterior lumbar. Going by the evidence of the complainant, it is this injury at the right posterior lumbar that would have been caused by the accused person. Such a shot must have been taken by a person from the rear of the complainant as there was no indication of the possibility of a ricochet of the arrow. The complainant did not mention an instance where he turned to see the one shooting from behind him and it would have been a different case if the arrow at the abdomen was attributed to the accused person, which was not.
9. From the evidence of the prosecution witnesses, I am tempted to believe the defence by the accused, although not tested by way of cross examination, that he was inside his house when the attack occurred. I say this because, PW 2 said that she called the accused who was inside his house and it would appear that the response by PW 2 was swift that it would seem impracticable that the accused had moved back into the house after attacking the complainant, within that fleeting moment. This was the similar finding I arrived at after assessing the evidence of PW 5 on the response of the accused.
10. The mystique that I was unable to demystify was the motive of either of the two adverse parties herein, as against the other. It was said that there was no bad blood between the two blood brothers, and this is the mystery lingering in my mind. Why would the complainant accuse his brother of such a grave offence which appears to have been calculated to end his life on earth. Why would there be such a sudden turn of events, in that at one point, according to the evidence of PW 4 and PW 5, evidence that I found to be credible, the accused took the initiative of saving his brother's life by organizing and



coordinating the logistics to take him to the hospital but suddenly the accused chased him away from his sight? What was the motive of PW 1 and PW 2 when they insisted that the accused was forced to take the complainant to the hospital, which in the first place, the complainant was unconscious and cannot give an account by himself of how he was taken to the hospital, while on the other hand- his mother gave an account of how the accused took care of the complainant? How did the complainant hear the accused direct the latter's wife to turn off the light considering that the complainant and the accused were not at close range? To me, these remains as mysteries.

11. In the end, I find that there lacks evidence to find the accused as the person responsible of the tribulations of his brother and he is for acquittal.
12. From the foregoing, this court hereby dismisses the case against the accused person and forthwith acquits him under Section 215 of the *Criminal Procedure Code* for the indictment of causing grievous harm to another which is proscribed under section 234 of the *Penal Code*.
13. The accused person who has been on the trial while on a personal bond of Ksh. 200, 000/= together with one surety of similar amount is hereby discharged forthwith. Consequently, the personal surety, one Nyamawi Rumba Nyamawi is hereby discharged, and I direct that the security document, being land parcel title number Kwale/ Golini/95 be returned to the depositor forthwith.

JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 15TH DAY OF JANUARY, 2024.

KIONGO KAGENYO

RESIDENT MAGISTRATE

This Judgment has been Delivered in Open Court at Kwale on this 29th day of January, 2024, by Hon. C. K. Auka in accordance with the provisions of section 200 (1) (a) of the *Criminal Procedure Code*, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11th September 2023.

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In the presence of:

Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

