



REPUBLIC OF KENYA



**Director of Public Prosecutions v Mwatzenze (Criminal Case
E330 of 2021) [2023] KEMC 267 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEMC 267 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E330 OF 2021
ZK KAGENYO, RM
JULY 27, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

OMAR HAMISI MWATZENZE ACCUSED

JUDGMENT

1. The accused person was on 15th November 2021 arraigned for the offence of injuring animals contrary to section 338 of the Penal Code.

The particulars were that on the 22nd day of October 2021 at Kafichoni village in Kinango sub-county within Kwale county of the Coast region willfully and unlawfully wounded eight (8) cows all valued at Ksh. 240, 000/= the property of Mrisa Nyondo.

2. The accused denied the charge and a trial ensued.
3. The Prosecution's case was partly conducted by learned prosecution counsel Ms. Luseno and partly by learned PPC Ms. Mwaura. The accused person was not represented. At all times of the trial, he was present in court. He conducted his case while out on surety bond of Ksh. 100, 000/= with one personal surety. The matter was conducted in Kiswahili language, the language of choice by the accused.

Prosecution's Case

4. The Prosecution marshalled a total of 4 witnesses.
5. PW 1, Mrisa Nyondo Mbaao told this Court that on the material day, he had gone to graze his cows at the fields in the forest and as he was going back home, he realized that 8 of his cows were missing. He retreated to search for his cows and on his way to the forest, he heard the mooing of cows. As he was going towards the direction of the mooing, he saw the accused chasing the cows towards his direction, cutting them aimlessly and uttering the words, "hamtarudi tena" and upon asking the



- accused why he was cutting the cows, the accused retorted to him that, “wacha nimalizane na hawa ng’ombe halafu nianze na wewe” and as the accused was armed with a panga, PW 1 in fear retreated. Upon his withdrawal, the complainant called the village chairman over his phone to intervene and before the village chairman’s arrival, PW 1 proceeded to Vigurungani Police Station where he reported and given 2 police officers to accompany him to the scene of crime. He said that on the same date, he sought for the services of the veterinary officer who attended to his cows and photographed the same. In his cross examination, he informed the court that the accused was chasing the cows, while driving them out of his land.
6. PW 2, Samson Nyamawi Mang’ale said that at the material morning, he was at the homestead of Mrisa Nyondo, PW 1, looking for the cows of PW 1 of which he had a stake as he had given him one of his cows to graze. He said that when PW 1 informed him that his cows were missing, they went out there to look for the cows and as a strategy, they went on the opposite directions to each other, himself going to the place he referred to as Mamadi area while PW 1 went to Mwakijembe area. As PW 2 was looking for those cows, it was his evidence that he heard mooing of a cow in distress. He said that this mooing came from the direction that he was headed. PW 2 told this Court that he proceeded to where the cow was, and it is when he saw the accused cutting the animals. He said that once he identified the person cutting the animals, he hid himself and went back home to wait for the cows whereat he found PW 1. It was the evidence of PW 2 that the two, PW 1 and PW 2 waited for the cows together at home until the cows came back home and when the cows came back home, they had injuries next to their tails and when the duo saw that all the 8 cows had been injured, it called the village chairperson who referred them to the police. On cross examination, PW 2 told the Court that he saw the accused cut the cows and that this was done at the accused’s home and that he was not in the company of PW 1. He further told the court that once he spotted the accused cutting the cows, he went back to PW 1’s house where they together waited for the cows.
 7. PW 3, Jakan Mwanyalo Kimari, the Puma Ward Veterinary Officer told the Court that on the material day, he received a report from Kinango Police Station of injured animals. Upon receipt of this report, he accompanied the police to the scene and found 8 animals which had been injured, two of which had severe injuries while the other six had minor injuries. PW 3 further testified that he took the photographs attached to his report. On cross examination, he stated that the cuts were too fresh to be livestock branding by the owner.
 8. NPS Service No. 117714 PC Rotich Kimtai of Vigurungani Police Station testified in his capacity as the investigating officer. PC Rotich told this Court that on the material day at about 1300 hours, he noted that this case had been reported at their station and had to be investigated. He said that he booked out of the Station to the scene whereat he established that 8 cows all valued at ksh. 240, 000/= had been injured. He proceeded to the scene, photographed the injured animals and interrogated the complainant and his witness. Upon interrogating the complainant, the complainant informed PW 3 that on this fateful day, he was getting back home from the grazing fields together with his cattle whereby he met the accused by the roadside holding a panga. The accused then asked the complainant why he had grazed his cows inside the accused’s land and he immediately started injuring the cows. On cross examination, PW 3 told this Court that the matter was reported at their station and booked at the OB at 1230 hours. He further retestified that even though he took 8 photographs, he produced 3 of the 8 only which were for the animals which were critically injyered and the only photographs which were certified by the scenes of crime officer. The other 5 were not produced.
 9. After the evidence of PW 4, the prosecution closed its case.



Defence case

10. The accused person was placed on his defence under section 210 of the Criminal Procedure Code, and section 211 of the Criminal Procedure Code and Article 50 (2) (i) of *the Constitution* of Kenya having been explained to the accused person, he, in person, elected to defend himself by way of tendering sworn evidence and without calling any 3 witnesses even though he presented just two of the promised 3.
11. DW 1, the accused himself denied the charges in toto. He maintained his innocence. He attributed these charges to jealousy, tribal profiling and a hatched scheme to deprive him of his property, the land he was given by his father-in-law. The accused's said father-in-law is the father to the accused's wife and PW 1 and hence PW 1 and the accused person are brothers-in-law. It was his evidence that since the land given to him by his father-in-law is larger than that of the complainant, the complainant who is aggrieved decrees that the accused, being from the Digo community should go back to Digo land and should not inherit the land. He stated that he was not mentioned at the Investigations Diary and this case must have been a witch-hunt as the person named as the suspect bore a different name. He produced as exhibits the statements of the prosecution witnesses and the investigations diary and the photographs that the prosecution had not produced but had supplied to him.
12. DW 2 Mwavadu Ndolo told the Court he is related with the complainant as cousins and the accused being his in-law. DW 1 stated that he is the village chairman in Kafichoni village. He told the Court that the case before it is one of revenge by a disgruntled disputant to a land row who upon losing at the village level and electing not to explore other forums for dispute resolution, resolved to use the police to harass and intimidate the accused person. It was his evidence that two days after the complainant lost in a land dispute that DW 2 presided over, the police officers came knocking to his village looking for the accused person alleging that the accused had injured some animals. DW 2 further testified that he has never seen the allegedly injured cows and despite the request by the accused's relatives to be shown the injured cows, the complainant was not yielding to their request. On cross examination, DW 1 said that the complainant does not rear cows but is just but a herder who owns no cows. Further, he told this court that he is the one who had presided over the land dispute between the accused and the complainant in which the complainant lost and he advised him on his right to appeal to the area chief.
13. DW 3 Hamisi Matano Chitsanji gave the background of the accused person describing him as once their father's employee back in 1986. He testified on how the accused person sought for their help after he was arrested and detained at Shimo La Tewa prison. It was his evidence that he tried following up with the complainant on the injured animals but he was never shown any animal. After a series of back and forth by the complainant, he testified that he established that the charges were a fabrication and the complainant was never interested to resolving this matter outside court as there was an ulterior motive behind the charges.
14. After the evidence of DW 3, the accused closed his case.
15. The Court invited the parties to put in their closing arguments. The DPP elected not to file the same while the accused who had the same ready filed on the same day.
16. Having heard both parties at their full lengths, the court retired to make its decision.
17. I have read and considered the submissions by the accused and appreciated his analysis, analogies and deductions therein. I have also looked at the record and evidence in its entirety and made my findings as hereinbelow.



Analysis and Determination

18. In criminal cases, it is trite law that the burden of proof lies on the Prosecution and hardly shifts to the accused who on his part is to be presumed innocent. The standard of proof is well settled to be beyond reasonable doubt which has been time and again been said not to be beyond a shadow of doubt as doing so would fail to protect the society over flimsy reasons.
19. The accused person is charged under section 338 which states thus,

Any person who wilfully and unlawfully kills, maims or wounds any animal capable of being stolen is guilty of a felony and is liable, if the animal is an animal such as is referred to in section 278, to imprisonment for fourteen years, and, in any other case, to imprisonment for three years.
20. On its part, section 278 provides thus,

If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years. (underline mine)
21. The question this court is called upon to answer is whether the accused injured the cows as accused of.
22. In my analysis I found the evidence by the prosecution witnesses bearing telltales that called for a deeper analysis.
23. The accused person invited this court to find that the locus in quo was not apparent from the evidence of the prosecution and that in any case, that there were no animals that were injured at all.
24. When PW 1 was testifying, he told this Court that he had come back from grazing the cattle and was retreating back to the grazing field to look for his 8 missing cows and it is when he found the accused person injuring his cows. It was at around 0600 hours and he forthwith proceeded home and called the village chairman but before the village chairman arrived, he proceeded to Vigurungani Police Station and lodged the report. This report was made at 1230, despite the complainant stating that the cows were injured at 0600 hours and he proceeded to the Police Station almost immediately. Be that as it may, the accused person produced the Investigations Diary, one of the documents that was supplied to him by the prosecution in compliance with Article 50 (2)(j) of *the Constitution* of Kenya. In the investigations diary, at 1230 hours, the entry that was recorded as OB No. 07/22/10/02021 stated in part,

He submits a report that on the 22nd day of October 2021 when he was returning home with his cattle at around 0600 hrs, he met one person well known to him as Omar Juma at the roadside while armed with a panga . he then started cutting the said cattle thus injuring eight (8) of them valued at Ksh. 240, 000/=.....
25. The accused person contested that he was not the Omar Juma complained of and that he is being crucified for the wrongs of Omar Juma if at all the said Omar Juma committed the stated offence.
26. However, I have looked at the evidence and I appreciate that PW 1 and the accused person are relatives who have known each other for long. His identification by the pw 1 would be by recognition of a person one has known for long. While giving their evidence PW 1 and PW 2 gave out the names of the accused person in their aliases and it is my view that the identification of the person the complainant wanted



prosecuted is not in doubt but whether that person was the one who committed the act of injuring the animals, if at all there were injured animals, is a different thing. The person at the dock was not a case of mistakenly identified person and mistakenly prosecuted person but was a case of prosecution of a person well known to the other for a certain cause.

27. It is my observation that the account given to the police station as the initial report was different from the one given by the accused to the court. When interrogated by PW 4, PW 1 told PW 4 that the accused person was along the way as PW 1 was driving the cattle home from the grazing fields and the accused confronted him over driving his cattle into his land and immediately started attacking the animals. This was akin to waylaying the other to attack, which was not the version given to the court by PW 1.
28. PW 2 was presented to corroborate the evidence of PW 1. However, I find that the account given by PW 2 was equally not to be trusted and believed by this Court. PW 2 told the court that they were together at the home of PW 1 when they strategized on how to look for the missing animals. They went different ways. These different ways were said to be opposite to each other and indeed PW 1 advanced to Mwakijembe direction while PW 2 advanced to Mamadi direction. I would presume that these two named places are opposite each other in that if you are standing in between the two areas/ villages, if you head to one, the other would be behind you. While towards Mamadi, PW 2 heard the mooing of the cows and when he approached to the place the mooing sound was coming from, he found that it was from the home of the accused. I therefore make an inference that if I were to believe PW 2, then the cows were found being injured at the accused's home (area) which is on your way towards Mamadi area and at that time, PW 1 had proceeded to Mwakijembe, opposite direction. Recalling the evidence of PW 1, he testified that he saw the accused cut the cows at his home (area) and while contrasting these two versions, I found some impossibility as one cannot be physically in two totally different places at the same time. This begs the question, where is the home of the accused located? Is it on your way to Mwakijembe or on your way to Mamadi? It is for the foregoing that I found credence in the accused's contestation on the locus in quo.
29. The Court could not resist the urge to interrogate on the reaction by PW 2 when he found the cows being cut by the accused person. PW 2 stated that when he saw the accused cutting the cows, he hid and retreated to PW 1's house where he found PW 1. The two then waited for the cows to come back home, of which they did finally. While appreciating that PW 2 could have been afraid and traumatized in the first instance as the accused is said to have been armed with a panga, I in equal measure posed the question, is this the most natural reaction that one would have if he found his cows being recklessly cut by another? And if one would hide and go back home, would one just sit at home, together with the other owner of the cows and wait for the cows to come home by themselves without taking any urgent action? Does one just call the village chairman after the cows have come back home, not from the grazing field but from maiming ground that one has just witnessed?
30. Turning on to the evidence of PW 1 and the lodgment of the report to the Police Station where he said that he reported at Vigurungani Police Station. According to D.Exh 1, the Investigations Diary, the Investigating Officer booked out of the station at 1340 and returned to the station at 1526 hours to imply that for the period between 1340 and 1526 hours, he was at the scene of crime if not on the way to and fro. However, PW 3, the veterinary officer stated that he was informed by Kinango Police Station of the injured animals on the material day and on the same day, he proceeded to the scene in the company of two police officers whom he was accorded upon receipt of the report. It defeated my understanding how Kinango Police Station just popped up and yet the report was said to have been made at the Vigurungani Police Station. While appreciating the police protocols and respect for jurisdiction, and while appreciating that the report had been made at Vigurungani Police Station and indeed the officers from Vigurungani were at the scene almost immediately after the reporting, I could



- not understand how the police officers from Kinango reported to the scene and were not mentioned anywhere by the investigating officer PC Rotich in his testimony. Could PW 3 have dealt with different animals reported at Kinango Police Station as opposed to those reported at Vigurungani Police Station?
31. Be that as it may, I interrogated on the person who informed PW 3 of the injured animals. PW 1 testified that he informed PW 3 of the injured animals who in turn showed up and treated the animals. PW 1 did not testify that PW 3 reported in the company of police officers as PW 3 did. However, even though PW 1 could have omitted the mention of the police accompanying PW 3 or could have failed to see them on that day, it is my inference that it is PW 1 who informed PW 3 of the injured animals and not Kinango Police Station and if that is not the case, then an explanation ought to have been given on how Kinango Police Station got the report and acted on it by-passing Vigurungani Police Station where the report was made. This chain of events trickles down to the credibility and trustworthiness of the witnesses, while appreciating the assertion by the accused that there were no animals injured at all and the resistance by the complainant to let DW 3 and his team to see the injured animals ab initio.
 32. The accused took issue with the animals that were injured asking the investigating officer why he just chose to present 3 photographs and yet he had captured all the allegedly injured animals. In response, PW 4 informed the accused that he only presented 3 photographs for certification to the scenes of crime officer bearing the images of the animals which were severely injured. On his part, the accused produced the other photographs which were said to have been taken by PW 4 but not produced by the prosecution. In my analysis, I could not understand why the investigating officer would charge the accused person of having injured 8 animals but limit the evidence to that of just 3 animals, from the point of the certification of the photographs to the presentation in court. In any case, some of the photographs produced by the accused bore more severe injuries than some of those produced by PW 3, for instance P. Exh 4 (b) which appeared to have been marks for the livestock branding.
 33. Lastly, the defence gave evidence that the complainant refused to show them the allegedly injured animals. The motive they had when asking for a view of the cows is to have an out of court settlement and recompense the complainant for the losses he had incurred if any. The defence further testified, through the village elder that there were no such injured animals and immediately before the arrest of the accused, there had been a land row between the accused and the complainant, in which the complainant had lost to the accused. such acts by the complainant casts an element of a complaint made mala fide as a complainant who has encountered a pure economic loss would be ready to give negotiation a chance once approached by the offending party unless good cause is shown to the contrary.
 34. From the foregoing, I make a finding that the evidence by the prosecution bore substantive doubts that tore the prosecution's case apart and could not withstand the beyond reasonable doubt test.
 35. However, on the issue of a vendetta arising from the previous land row and the vengeance by the complainant, I choose not to descend to that arena but I will advise parties that if they have any underlying conflict, they amicably settle the same or through the well-established channels, and while avoiding to comment on the stated conflict, I will leave the parties to read a verse in the Bible in Mathew 5:25.

Disposition

36. Having found so, 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 injuring animals which is proscribed by section 338 of the Penal Code.



37. The accused person who has been out on surety bond is hereby discharged forthwith. The Surety Khamisi Matano Chitsangi is equally discharged, and I direct that the security document being title deed No. Kwale/ Kombani Scheme /2340 be returned to the Surety forthwith.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 27TH DAY OF JULY 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of:

Mr. Archibald Kimbada - Court Assistant.

Ms. Nandi, ADPP, for the State.

Omar Hamisi Mwatzenze - The Accused person.

