



REPUBLIC OF KENYA



**Director of Public Prosecution v Saidi (Criminal Case  
E110 of 2022) [2023] KEMC 277 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEMC 277 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
CRIMINAL CASE E110 OF 2022  
ZK KAGENYO, RM  
JULY 4, 2023**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTION ..... REPUBLIC**

**AND**

**HARANGA CHIGUZO SAIDI ..... ACCUSED**

**RULING**

1. The accused person is facing a charge of illegal grazing upon private land contrary to section 3 (1) as read with section 11 of the *Trespass Act*.  
The particulars are that on the 15<sup>th</sup> day of October 2021 at around 0800 hours at Chifusini village Kinango subcounty, within Kwale county willingly allowed goats to graze on the aforesaid land causing loss of Ksh. 91, 200/= the property of Ruwa Chiguzo Fulusi. (sic).
2. A plea of not guilty was returned by the Court for the charges and a trial ensued, the subject of this ruling.
3. The DPP's case was conducted by learned PPC Mr. Mulama and partly by learned PPC Ms. Mwaura while the accused person was represented by Mr. Kabiaru, advocate. The matter was conducted in Kiswahili Language, the language of choice by the accused person who conducted the case while out on a cash bail of Ksh. 20, 000/=.
4. The State conducted its case and closed it on the 16<sup>th</sup> day of February 2023 wherefrom a ruling under section 210 of the Criminal Procedure Code was required.

**Prosecution's case**

5. The prosecution called a total of 3 witnesses.



6. PW 1 Ruwa Chiguzo Furusi who with great hesitation told this court that he is a blood brother to the accused person. He said that on the 15<sup>th</sup> October 2021, his wife called him over the phone as he was in Mombasa and informed him that their recently transplanted tree seedlings had been eaten by the goats belonging to the accused person. He said that over time, a total of 300 such tree seedlings had been fed on by the animals and due to this increased number of instances and rising damage, he reported the matter to the police station. He admitted to having too many conflicts with the accused person herein.
7. PW 2, Kwekwe Twenje Ruwa, the wife to PW 1 told this court that over a period of time, the accused's wife, whom PW 2 and her do not see each other eye to eye, used to drive their goats into her (PW 2's) shamba and they would eat on that land and damage her crops. On this 10<sup>th</sup> day of October 2021, PW 2 saw a herd of goats belonging to the accused having been driven into her shamba and she directed her children to chase them out of her shamba which they did. She ensured that they were driven to the accused's home, and she overheard the accused's wife direct her children to lock them up in their pen. Agitated and feeling that enough was enough with these cat and mouse games, she went to the accused's home and confronted the accused's wife and asked her to accompany her to the site of the damaged crops where they managed to count 24 damaged tree seedlings. PW 2 asked the accused's wife to cater for the costs of the damage done but the accused's wife arrogantly rolled her eyes and indicated to PW 2 to do as she pleases. She told the court that on this material day, their husbands, the two brothers, PW 1 and the accused, were not at home as the accused who is a teacher was at school and on his part, her husband was at work. On cross examination, she admitted that their lands do not have a fence and even her goats or any other goat from the village, if unchecked, could get into her farm and destroy the seedlings but qualified this by maintaining that she ensures that a close eye is kept on her goats. She further admitted that it is not the accused person who drove the goats into her farm but rather it was his wife but believed that the accused was charged as every responsibility in a family is to be borne and shouldered by the husband of the family.
8. PW 3, NPS Service No. 91935 PC Maalim Barowa Barofa testified on how the complaint was lodged at their station, how he visited the scene and found 24 tree seedlings having been bitten at the tip and later had the witness statements recorded, compiled the police file and had the accused charged for the present offence.
9. At the end of the evidence by PW 3, the DPP closed the Prosecution's case.
10. The court invited both the Prosecution and the Defence to make their respective closing submission, and while the prosecution relied on the record to speak for itself, the Defence opted to put in their written submissions which were filed on the 30<sup>th</sup> day of May 2023 and the Court was invited to give the ruling under section 210 of the Criminal Procedure Code.
11. I have read and considered the submissions of the defence which addressed three issues being;
  - i. That PW 1 was not the complainant proper;
  - ii. That the accused was not the accused proper; and
  - iii. The issue before the court is siblings' rivalry that should be solved at the community level.

### **Analysis and Determination**

12. Section 210 of the Criminal Procedure Code guides this Court at this stage that;

If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may



wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

13. At this stage, the Court is called upon to determine whether a prima facie case has been made out by the DPP requiring the accused to defend himself.

14. A prima facie case was defined in *Ramanlal Trambaklal Bhatt v R* [1957] EA 332 as

Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence (emphasis mine).

15. Section 107 of the *Evidence Act* places the burden of proof of all the accusations against the accused person on the DPP. This burden hardly shifts to the accused who on the other hand is to be presumed innocent until the contrary is proven.

16. The standard to which the DPP is to discharge the burden of proof is beyond reasonable doubt as was restated in *Joan Chebichii Sawe -v- Republic* [2003] eKLR, that the prosecution must prove the guilt of the accused person beyond reasonable doubt. This Court however reminded itself that beyond reasonable doubt does not mean that the DPP must prove every single element or accusation to perfection beyond a shadow of doubt. In his undoubted wisdom, Lord Denning shed light in this in the case of *Miller -v- Minister of Pensions* [1947] 2 ALL ER 372 where he held that;

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt but nothing short of that will suffice.

17. Having these principles in mind, this Court interrogated the evidence on record with a view of establishing if, even if the accused person opted to remain silent once placed on his defence, is the evidence on record sufficient to sustain a conviction? Thus far, does the evidence adduced by the Prosecution establish guilt of the accused beyond reasonable doubt bearing in mind that the accused person is not expected to fill in any gaps in the Prosecution’s case?

18. Section 3 (1) as read with section 11 of the *Trespass Act* which the accused is charged under states that;

Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence and shall be liable



to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding two months or to both such fine and imprisonment.

19. The prohibiting action is couched in a positive way promoting the general principle in criminal law that everyone is to carry his own cross unlike in civil cases where one can carry the cross of the other through the principle of vicarious liability.
20. The evidence of PW 2, who appeared to be the star prosecution witness gives the accused a defence of alibi as she states that the accused was not at the locus in quo at all the material time.
21. Further, PW 2 testified that the person responsible for driving the goats into her fields is the accused's wife and not the accused. In fact, PW 2 is heard from her evidence saying that if she was the one making the decision to charge, she would charge the accused's wife as the person responsible and not the accused. Cautious not to be making a finding on the culpability of the accused's wife, I nonetheless make a finding that the facts of the prosecution's case exonerated the accused person in toto ab initio.
22. However, I differ with PW 2's earlier justification that the accused is standing at the dock to carry the burden of his house as the husband of that house. That is a mistaken belief that is alien to this court.
23. The sumtotal of my analysis is that the accused person, the case against the accused person is to fail and it hereby falls on all four.

### **Disposition**

24. Having found so, this court hereby dismisses the case against the accused person and forthwith acquits him under Section 210 of the Criminal Procedure Code for the charges of illegal grazing upon private land which is proscribed under section 3 (1) as read with section 11 of the [Trespass Act](#).
25. The accused person who is has been out on a cash bail of Ksh. 20, 000/= deposited on 11<sup>th</sup> April 2022 is discharged forthwith. The cash bail deposited in court shall be refunded to the depositor.
26. Before I pen off, I will have a word or two to the accused person and his brother. To the two siblings, I will remind them that they have known each other the longest as against anyone else in these proceedings starting from the court, the prosecutor, the police, the village elders and even their present nuclear families including their respective spouses. The two were once a nuclear family under their only one mother and one father, before each moved his way and as history shall bear me witness, there is no pride in war and conflict but the two only result in destruction and widened divisions. When war comes knocking on your door, it is not a must that you win by fighting back but you may win by offering a large heart to the other. I call upon the two brothers to offer each other a large heart, extend an olive branch to the other and put back their swords back into their places and make peace with each other as they will remain brothers forever.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 4<sup>TH</sup> DAY JULY, 2023.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

In the presence of;

Mr. Archibald Kimbada - Court Assistant.

Ms. Wangari Mwaura, Principal Prosecution Counsel, for the State.



Mr. Kabiari for the Accused Person

Haranga Chaguzo Saidi – The Accused Person

Mr. Kabiari

I pray that I be furnished with a certified copy of the ruling.

Court.

Certified copy of this ruling shall be given to all the parties to these proceedings.

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

**4<sup>th</sup> July 2023.**

