



**Director of Public Prosecution v Kithome (Criminal Case E299 of 2021)  
[2023] KEMC 276 (KLR) (29 December 2023) (Judgment)**

Neutral citation: [2023] KEMC 276 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
CRIMINAL CASE E299 OF 2021  
ZK KAGENYO, RM  
DECEMBER 29, 2023**

**BETWEEN**

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

**AND**

**EMMANUEL KITHOME ..... ACCUSED**

**JUDGMENT**

1. They say that blood is thicker than water, but I think that that is not a default position and requires to be qualified with a proviso. For instance, in the biblical times such as the stories in the Bible, we say betrayals and heinous acts being done amongst siblings. Cain is said to have killed his brother, Joseph was said to have been sold to slavery by his brothers after the brothers contemplated killing him and throwing his remains into a cistern and blaming a wild animal for his death and mauled body while Jacob and Esau could not withstand each other's visions.
2. Emmanuel Kithome, the accused herein and Wambua Kithome, the complainant herein are blood brothers among other siblings. Their father died 5 years ago. In August 2021, another of their brother died and while at that grieving period, the accused, in the presence of everyone, accused the complainant of being a witch.
3. According to the prosecution, in the morning of 26<sup>th</sup> day of September 2021, being a Sunday, the complainant was preparing his children for a church service when he received two unexpected guests, being the accused and his wife. The accused is said to have carried a panga in a concealed manner and when the duo got at the complainant's homestead, the accused started cutting down a tree that was standing at the said homestead. The complainant requested him not to cut down the tree but he told the complainant to shut up which he timidly did and went back to the kitchen to carry on with his chores.



4. While carrying on with his chores, the accused's wife attacked him from behind and cut his right shoulder by use of a panga that was initially with the accused. After this attack, the accused's wife threw the panga aside and the accused collected it. Thereafter, the accused came towards the complainant, and as the accused's wife was holding the complainant's hands from behind under the directions of the accused, the accused decreed, according to PW 1, Mtu kama huyu mchawi hukatwa panga moja la kichwa na story zinaisha, and according to PW 3, hukumkata vizuri, mchawi hukatwa mara moja tu story zikaisha....mshike mikono..... and as he said such last word, he simultaneously caused the panga to cut through the flesh of the complainant centrally at the head causing him to lose consciousness and collapsed on the ground.
5. These despicable and beastly acts happened in full view of the complainant's children whom after seeing that things were getting out of hand, they struck the air with screams and helplessly called the neighbours for help. Thereafter, the complainant was taken to hospital at Kinango and later to Msambweni hospital wherefrom a referral to Coast General Hospital was issued the latter hospital whereat the complainant recuperated.
6. After the investigations, the accused was arraigned for plea taking on the 13<sup>th</sup> day of October 2021 whereby according to the amended charge sheet that was amended on the 3<sup>rd</sup> day of October 2022, the accused is facing an indictment of grievous harm contrary to section 234 of the Penal Code whereby it is said that on the 26<sup>th</sup> day of September 2021, at Mwangoni village, Kinango sub-location, Kinango subcounty, Kwale county within Coast region, the accused, jointly with another not before court unlawfully did grievous harm to Wambua Kithome.
7. The accused was placed on his defence and he opted to defend himself by way of tendering unsworn evidence, without calling any witness. According to the accused person, the charges were a falsehood, and the truth of the matter is that on that day, he was carrying on with his business elsewhere when he heard that people had fought at his brother's mangwe (drinking den.) As a concerned brother, he went to that point of the alleged fight but found no one and he decided to go to his house. While at his house preparing to go and see the sick brother, he heard noises from outside and when he walked out an irate mob armed to the teeth and baying for his blood was outside his house. Amongst them was his uncle cum his father figure who caused his citizens' arrest and thereafter was handed over to the police. He denied the charges before court.
8. Having listened to both parties and considered the evidence presented before court, it was my finding that the accused and the complainant were not strangers before the incidence and they knew each other since childhood, as siblings.
9. I further note that the incidence was said to have occurred at 0800 hours or thereabout and undoubtedly recognition of a person known to you, during the day, under the conditions of the natural lighting of the day when the sun has just freshly risen, cannot be with error unless for other factors such as poor eyesight, interference with the mental faculties or such other factors but none was suggested to have affected the complainant in identifying the accused person and in any case, it could not have been the case with the accused's nephew, PW 3 as a coincidence.
10. Regarding the credibility and trustworthiness of the prosecution witnesses and more particularly PW 1 and PW 3, I saw them as they testified. They were straightforward and appeared to be truthful witnesses. PW 3 was a straightforward master who irrespective of the abominable atrocities his uncle had committed to his father in his presence, he responded to his uncle with utmost respect and knowledge that the accused remained to be his uncle and his children his cousins. His was the true character of "I will face you and tell you the truth to your face" for that is what he did, fearlessly



but respectfully. The two witnesses spoke with the honesty desired by any adjudicating tribunal and I choose to believe them.

11. This is a case in which the account by the prosecution witnesses was one that was easy to understand and as such, I made a finding that on that material day and time, the accused person and his wife were at the locus in quo at the invitation of no one but their desire to cause harm, which they did. They came armed with a panga, used the said panga to hurt and as unannounced as they had come, they left fleeing after what they believed was having killed the witch. In my view, they were indeed after killing the old man and not just to harm him and let him live.
12. Regarding the defence by the accused person, in all honesty, I lack to see the genius and influence that would be employed to fabricate such an incidence and formulate such evidence with such precision, and I undoubtedly believe the case by the prosecution against the accused person. Indeed, going by his narrative over his arrest, without being seen to be underestimating the mobilizing capabilities of the complainant, I fail to see the influence wielded by the complainant to cause such an irate mob to accompany his uncle to arrest the accused over a fabricated story. In any case, the accused did not blame the said uncle over any malice, scheme or ill-will and it would appear that were it not for the said uncle, the accused would have been hurt by the irate mob who seemed disgusted by his unfathomable, reckless and abominable acts.
13. In the end, I find that the prosecution has led sufficient evidence proving without any reasonable doubt that on the 26<sup>th</sup> day of September 2021, the accused person jointly with another not before court cut the complainant twice, once at his shoulder and once at the head causing him injuries that were medically classified as grievous harm.
14. Turning on to the charges the accused is facing, the accused is charged under section 234 of the Penal Code which states that;  
  
Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
15. Section 4 of the Penal Code has defined grievous harm as;  
  
means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense
16. I find that, just as the medical practitioner classified the injury as grievous harm, the same meets the standard under section 4 of the Penal Code and I classify the same as much.

## **Disposition**

17. Trickling from the foregoing, I make a finding that the Prosecution has furnished evidence before this court proving beyond reasonable doubt that indeed the accused person attacked, injured and caused grievous harm to the complainant one Wambua Kithome and I thus find him guilty of the same and convict him under section 215 of the Criminal Procedure Code for the offence of causing grievous harm to another which is proscribed by section 234 of the Penal Code.
18. The accused person is hereby informed of his right to lodge an appeal against this judgment and the conviction in the High Court within 14 days from today's date if dissatisfied with this court's finding.
19. Cautious not to be seen to be overstepping on the independence of the Inspector-General of the National Police Service under Article 245 (4) of *the Constitution* or that of the Director of Public Prosecutions under Article 157 (10) of *the Constitution*, I dare decree that the said wife to the accused



person remains a person of interest and should be caused to have her day in court for the actions she is said to have committed.

**JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF DECEMBER, 2023.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

This Judgment has been Delivered in Open Court at Kwale on this 15<sup>th</sup> 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 11<sup>th</sup> September 2023.

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In the presence of:

Mr. Khamis the Prosecutor

Mr. Hud the Court Assistant

Accused

