



REPUBLIC OF KENYA



**KENYA LAW**  
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**Director of Public Prosecution v Chakanda & another (Criminal Case  
E333 of 2021) [2022] KEMC 31 (KLR) (2 June 2022) (Judgment)**

Neutral citation: [2022] KEMC 31 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
CRIMINAL CASE E333 OF 2021  
ZK KAGENYO, RM  
JUNE 2, 2022**

**BETWEEN**

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

**AND**

**MONGO CHAKANDA ..... 1<sup>ST</sup> ACCUSED**

**SHE SHE CHAKANDA ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused persons were arraigned on the 7<sup>th</sup> day of December 2021 with an indictment of accusing another person to be a witch contrary to section 6 of the *Witchcraft Act* Cap 67 laws of Kenya.

The particulars were that on the 11<sup>th</sup> day of September 2021 at around 5.00 pm at Kideri village in Kinango subcounty within Kwale county in Coast Region, jointly accused Mulicheni Mwanziye Mumba to be a witch.

2. Each of the two accused denied the charges and a trial ensued.
3. The DPP's case was conducted by learned prosecution counsel Ms. Luseno. The accused persons were unrepresented. The matter was conducted in Kiswahili Language, the language of choice by the two accused.

**DPP'S Case**

4. The DPP, to discharge their duty under section 107 of the *Evidence Act* called a total of 5 witnesses.
5. PW 1 was the complainant herein Mulicheni Mwanziye who testified with the aid of a Duruma interpreter. She told the Court that on 9<sup>th</sup> November 2021, a ringing phone was brought to her by



- Sheshe Chakanda, 2<sup>nd</sup> accused person who directed her to speak over the phone. The caller on the other side was Mongo Chakanda, the 1<sup>st</sup> accused.
6. It was her evidence that the 1<sup>st</sup> accused told her over the said phone call, that there is a sibling (ndugu) of his who had fallen (fainted) at school and that the said sibling had written a note saying that PW 1 is a witch. She further testified that the 1<sup>st</sup> accused warned her that it would be better if that sibling of his did not die for if she died, many other people in the village would have to perish.
  7. PW 1 testified that after the 1<sup>st</sup> accused hang up the call, the 2<sup>nd</sup> accused required of her to board the motorbike he had come by and proceed to the school where their sibling had fainted so that PW 1 would do the abracadabra to save their sibling. It was her evidence that she refused to go neither to the school nor their home but opted to go and make a report to the village elder who referred her to Vigurungani police station where she made her report. Lastly, she told the court that negotiation attempts between the parties failed necessitating the matter to proceed to court. It emerged that both the accused and the complainant are relatives.
  8. On cross examination, PW 1 stated that when the 2<sup>nd</sup> accused person brought the phone to her, the 1<sup>st</sup> accused person told her that all he wanted was his sibling not to die. About how the 2<sup>nd</sup> accused came to her, she said that the 2<sup>nd</sup> accused person went to her twice, the first time he came rushing holding the phone and a panga and the second time is when he came by a motorbike requiring her to board to proceed to the school. He was clear that the 2<sup>nd</sup> accused person did not lift up the panga he had been holding or use it against her.
  9. PW 2 was the complainant's husband, one Mumba Mongo. He told the court that on 11<sup>th</sup> September 2021, at around 1700 hours, he was with PW 1 at his house when the 2<sup>nd</sup> accused person came while holding a panga and a phone. The 2<sup>nd</sup> accused person saluted PW 2 and walked past him to where PW 1 was and he gave her a phone to speak over. PW 1 heard the conversation, which was on loudspeaker, the caller on the other end telling PW 1, *Unajua Mwanapili wetu? Mwanapili wetu ni mgonjwa*
  10. It was his evidence that the complainant responded to the caller that she did not know of what the caller was telling her and it is at that time that PW 2 heard the caller require of PW 1 that the said Mwanapili had to get well (recover) failure to which many people will die. The caller on the other side lamented that he had used Ksh. 48, 000/= all along not knowing that it was PW 1 causing them all the misery. After that, PW 2 decided to go and make a report to the village elder whom he said that he did not find him home and as he was going back to his house after that failed mission, he met with PW 1, PW 3 and PW 4 headed to the village elder who briefed him that the 2<sup>nd</sup> accused had come back by a motorbike and required PW 1 to accompany him to the school but she declined.
  11. PW 3 was a minor aged 17 years. Her evidence was in sync with that of PW 1 and PW 2. She said that on that evening, she heard PW 1 talk over the phone and the caller on the other end told her, *Kama buyo ndugu yangu batapona kuna watu wengi watakufa hapo nyumbani.*
  12. It was her evidence that the 2<sup>nd</sup> accused person came running in the first instance to their home, holding a panga and a phone and after the phone call he left. It emerged that the two accused persons are her cousins.
  13. PW 4 was a minor, PW 3's brother whose evidence was a replica of the witnesses before him.
  14. NPS No. 72243, Cpl Vincent Ojuku Obare was the last prosecution witness in the matter who testified in his capacity as the investigating officer as PW 5. He told this court that on 12<sup>th</sup> September 2021, this matter was allocated to him for investigations. It was his evidence that he summoned the witnesses to his office for interrogations and in the first instance, only PW 2, PW 3 and PW 4 appeared, PW 2



explaining to him that PW 1 had fled the village in fear of the accusations of witchcraft leveled against her and hence she feared for her life.

15. Soon after recording the statements of the available witnesses at that time, he proceeded for his official leave and when he came back, his station commander briefed him that the statement of PW 1 had been recorded and in his absence, there were attempted but failed negotiations necessitating him to charge the two accused persons.
16. While justifying his finding, PW 5 stated that upon conclusion of the evidence, he had established that the 1<sup>st</sup> accused person had used the 2<sup>nd</sup> accused person to take a phone to PW 1 and through a phone call, the 1<sup>st</sup> accused person had accused the complainant of being a witch who had bewitched their sister named Mwanapili who had fallen ill.
17. On the failed negotiations, he stated that he could not confirm who had held the hard stance as he was not present during such times.
18. After the evidence by PW 5, the DPP closed her case wherefrom a ruling under section 210 of the Criminal Procedure Code was required. Before making the said ruling, the court invited both the DPP and the two Accused persons to make their respective closing submissions or arguments but all the parties opted to rely on the record in the court file and invited the court to render the ruling.
19. Each of the two accused persons was placed on his defence and section 211 of the Criminal Procedure Code and Article 50(2)(i) having been explained to each of the accused persons, the 1<sup>st</sup> and 2<sup>nd</sup> accused, in person, elected to defend themselves by way of tendering sworn evidence. None of the two opted to call witnesses in their respective defences and a defence hearing was scheduled.
20. DW 1 was the 1<sup>st</sup> accused who informed this court that his name is Mongo Chakanda Lukeman. After the charges were read over to him, he told this court that he maintained his innocence and that at the material time, he was not at home but, Mwanapili Chakanda, his younger sister had been calling him for a while.
21. DW 1 stated that Mwanapili had been fainting every time she went to school and could not talk but started acting like a snake. He said that the said Mwanapili could crawl on the ground like a snake and it reached a time that whenever she fainted, she would turn out to be too heavy, like a tonne, such that even 5 people could not lift her.
22. DW 1 stated that on that particular day, when she fainted an exorcising (kisomo) was done on her and that she responded well. After that seemingly recovery, she was taken home but at home, it turned out to be worse. She took a pen and a paper and jotted her goodbye message and she also ordered that DW 1 be summoned to come to where she was. It was his evidence that his sister said that it was mama Micheni (the Complainant herein) who was eating her.
23. When DW 1 was told that he had been summoned by the sister, he was far but he opted to call his brother, 2<sup>nd</sup> accused person and he directed him to take the phone to PW 1 which he complied. Through the 2<sup>nd</sup> accused's phone, the 1<sup>st</sup> accused asked PW 1 what she could do to help them and she responded that she could not do anything for them.
24. On that evening, DW 1 was called again, under distress and this time round, he went where he found his sister having fainted and rolling on the ground. When he saw this, he said that he did some kisomo (exorcising) for her and she responded well and immediately she recovered, she pointed to DW 1 to walk out whereupon the two boarded a motorbike to Mombasa wherefrom 3 weeks later, she recovered fully and they lived in Mombasa thereafter.



25. He denied ever calling PW 1 a witch as firstly she is his relative and secondly, he had gone to her peaceably. He said that he was summoned to the police station where they were asked to negotiate and solve this matter before a decision to charge was made but the negotiations efforts were in vain.
26. While explaining how the negotiations failed, he said that at first, the complainant demanded for Ksh. 100, 000/= and when he failed to raise that, he went down to Ksh. 50, 000/= which was equally a tall order for DW 1. When he tried to engage his father on a second attempt, the complainant demanded for Ksh. 150, 000/=, 6 sheep and 2 hens and when he failed to raise the same and delayed, PW 2 came to him one day and raised the figure to Ksh. 300, 000/=, 6 sheep and 2 hens and at that point, the frustrated DW 1 decided that enough is enough and they better resolve this matter in court and that is how he found himself at the dock.
27. After his testimony, there was no cross examination by the DPP neither did he opt to call any other witness. Before he closed his case, he told the court that he had the notes which his sister had written as the good bye messages and that he wished to produce the same as evidence. The DPP informed the court that she would not object to such application and production and the court having considered that he was unrepresented and in the interest of justice, allowed the reopening of his case and the admission of the uncontested notebook which was admitted as D. Exh 1. He thereafter closed his case.
28. DW 2 was the 2<sup>nd</sup> accused who informed this court that his name is Sheshe Chakanda. After the charges were read over to him, he told this court that he maintained his innocence and that on the material day and time, the 1<sup>st</sup> accused person called him and he told him to take his phone to PW 1 as the 1<sup>st</sup> accused wanted to talk with her. He complied and after the call between PW 1 and the 1<sup>st</sup> accused, DW 2 took his phone back and went home. At home, he found his sister in a very bad condition and he decided to go back to PW 1 to beg for her help. On this 2<sup>nd</sup> visit to PW 1, the complainant told DW 2 that she could not help them until his uncle, PW 2 came and on hearing this, DW 2 went back to his home never to return to PW 1.
29. After his testimony, there was no cross examination by the DPP neither did he opt to call any other witness. He closed his case.

### **Analysis And Determination**

30. Section 6 of the *Witchcraft Act* which the two accused persons have been jointly charged with states that,  
  
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.
31. The Court is called upon to determine whether the conduct of the two accused persons amounted to accusing another to be a witch.
32. In its character uniqueness, the statute has not defined any term within it and therefore this court took the ordinary meanings of the words to discern what would constitute the offence under the section.
33. The Concise Oxford Dictionary, 12<sup>th</sup> Edition defines the verb accuse as;  
  
Charge with an offence or crime.  
  
Claim that someone has done wrong.



The Black's Law Dictionary, 11<sup>th</sup> Edition defines the verb accuse as

To charge (a person) judicially or publicly with an offence (underline mine);

To make an accusation against.

34. The court relied on the definitions from the two cited authorities and in relation to the offence, discerned that for an act to amount to an accusation in the context of the provision, there must be a communication by one person to another about another in that if person Alpha tells person Bravo about person Charlie, person Alpha may be charged with the offence of accusing person Charlie.
35. The court found substantive agreements of facts between the DPP's case and the respective Defence cases, by the two accused persons. It however noted that the complainant had testified that the date in issue was 9<sup>th</sup> November 2021 but since the time of the offence was not contested, the court relying on the doctrine de minimis non curat lex treated the same as an error of transposition which did not occasion injustice and hence curable under section 382 of the Criminal Procedure Code, considering the interplay between 9/11 and 11/9.
36. It was this court's inference from the facts tabled that a sister to the two accused persons was ailing an undiagnosed illness, to which this court likens to schizophrenia and during her hallucinating moments, she would cite the Complainant, PW 1, as the person responsible for her suffering. She identified her by description and wrote her name down as the person who wanted her dead.
37. Through her conduct, the sick sibling made the 2 accused persons believe that indeed the complainant had something to do with the unequalled suffering of their sister and deployed all measures to get her back to her feet. This action of the two accused persons taking it upon themselves to go seeking for help from the complainant makes this court make a finding that they believed that she was practicing the sorcery their sister blamed her of. The Court ahead of us in *Chivatsi Dzombo Chivatsi & another v Republic* [1990] eKLR made an observation that influenced this Court in making this finding, by and large contextualizing this belief by the accused persons when it stated,

There are communities in Kenya where the sort of threat which the deceased administered at the appellants would be treated as twiddle twaddle, as arrant nonsense. Not so, however, in the community to which the appellants belong. It is not the business of this or any other court to moralize. It is yet a fact that belief in witchcraft is widespread in the community of the appellants. We take that community as we find them, having regard to the law.
38. The threat in that case was a threat to kill by witchcraft and the appellants had treated that as provocation.
39. In the instant case, it is Mwanapili who alleged that the complainant is a witch and all the two accused persons did was to believe her. After the two believed that she is a witch, they went to her for help which she declined and consequently felt threatened by being accused as a witch. This Court posed a question to itself on whether the subsequent actions to the complainant amounted to accusing her of witchcraft.
40. In answering this question, the court found that the two accused persons, based on their belief, they went to PW 1 and told her the purpose of their call to her and that they did not publicly broadcast their belief. The court finds that their conduct did not amount to an accusation.
41. It was this court's opinion that had the accused persons made steps towards informing another person outside their circle, that is any other person apart from the two, authoritatively and affirmatively about their belief, or reckless broadcast their belief about the complainant to another person, that would



amount to accusing the complainant of Witchcraft. This they did not. It would amount to an injustice punishing a person for believing information that he has been given by another and through that information, peaceably seeks help from that cited person. Doing so would break the society's fabric of openness, good faith and interdependence.

### **Disposition**

42. Having found so, this court hereby dismisses the case against the 2 accused persons and forthwith acquits each of them under Section 215 of the Criminal Procedure Code for the offence of accusing another person to be a witch which is proscribed under section 6 of the [Witchcraft Act](#). The 2 accused persons who are on a cash bail of Ksh. 10, 000/= each are hereby discharged forthwith. The respective cash bail shall be refunded to the depositors

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 2<sup>ND</sup> DAY OF JUNE 2022.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

In the presence of:

Mr. Felix- Court Assistant.

Ms. Lewa for the Director of Public Prosecutions.

Mongo Chakanda-1<sup>st</sup> Accused.

Sheshe Chakanda-2<sup>nd</sup> Accused

