



**Republic v Wamai (Criminal Case E002 of 2022)  
[2024] KEHC 16264 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE E002 OF 2022  
LM NJUGUNA, J  
DECEMBER 19, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**TIMOTHY GITONGA WAMAI ..... ACCUSED**

**JUDGMENT**

1. The accused was charged with murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the offence are that on the night of 10<sup>th</sup>/11<sup>th</sup> January 2022 at Rung'ang'a village, Embu West sub-county within Embu County, the accused person murdered Jones Kiringa Wamai. The accused person pleaded not guilty and a plea of not guilty was duly entered before the matter proceeded to full hearing.
2. PW1 was Dr. Sheila Shavulimo, a psychiatrist, who stated that she conducted a mental examination on the accused. At the time of the examination, she noted that the accused was a psychiatric patient on treatment but he was found to be mentally fit to plead. She produced the mental assessment report as evidence. On cross-examination, she stated that at the time of the mental assessment, the accused was fit to plead but he had a history of psychiatric treatment. That with a mental condition, there are moments of wellness and illness and there is a possibility of the accused relapsing. That the accused is the one who reported the incident before he was arrested but he did not remember all the details. That she did not know the severity of the mental illness of the accused but the condition can affect memory and recollection of events.
3. PW2 was Dr. Godfrey Njiru who produced the postmortem report authored by Dr. Philis Muhonja who was transferred to another department. The pathologist noted that the body of the deceased was severely pale and had multiple stab wounds on the shoulder, chin and back. That there was a deep stab wound on the chest above the 6<sup>th</sup> rib which had penetrated to the chest cavity causing bleeding into the left chest cavity. There was about 700mls of blood and the left lung had collapsed but the ribs were



- not broken. The pathologist opined that the cause of death was massive bleeding in the chest cavity which had caused collapse of the left lung. He produced the death certificate as evidence.
4. He also produced the P3 form for the accused person who was suspected to have taken poison. He stated that the deceased's clothes were stained with vomit and that he was admitted in hospital with the P3 form being filled 2 weeks and 6 days after the incident. That the patient told him that on the day of the incident, he was hallucinating and that he heard footsteps of somebody approaching him and he went at the person with a panga. That he went to his grandparents' place where he stayed for 2 days and then some spirits came over him and he attacked his grandparent with a knife and stabbed him severally. That after the incident, he drunk pesticides and at the time of his admission in hospital, he was unconscious and he was managed for poisoning.
  5. That by the time the P3 was filled, the accused had recovered fully and he narrated what had happened. After treatment, the patient was sent for psychiatric review and assessment. He produced the patient's medical report as evidence. On cross-examination, he stated that the deceased did not have pre-existing medical conditions and that the cause of death was stab wounds. He stated that the words that the accused was speaking indicated that he was not lucid. That prior to his admission to hospital, it was not possible to know the accused's mental status.
  6. PW3 was Cpl. Julius Kamande of Nembure police station who stated that the area chief of Gaturi South location informed him that there had been a murder incident within her area of jurisdiction. That a member of the public had told the chief that the suspect was seen somewhere but he was planning to disappear so they needed help to apprehend him. That he got permission to assist the chief and when they went to arrest the suspect, they found him locked inside a house from outside and people were surrounding the house, keeping watch.
  7. That he entered the house and arrested the suspect whose clothes were wet and he seemed uncoordinated or somehow drunk. The suspect was taken to Nembure Police Station and then he was later collected by the DCI officers. On cross-examination, he stated that when he entered the house, he found the accused sitting on the bed and he had vomited. He stated that he did not participate any further in investigating the case.
  8. PW4 was Rufus Gitonga who stated that he was at his hardware shop when he overheard Gitonga saying that he was going to the house of Benson Ndwiga who is the son of Wamai Njega. That Gitonga told Benson that all was not well at home and Benson drove out of his compound and he called him to accompany him to Njega's home. Gitonga followed them with his vehicle. He stated that when they got to the home of Wamai, there was a crowd of people and inside the house, the deceased was lying on the sitting room floor writhing in pain with stab wounds all over his body.
  9. That besides the chief, there was nobody else in the house. That they arranged to take the deceased to Embu Level 5 Hospital where he died while undergoing treatment. He recorded his statement with the DCI. On cross-examination, he stated that the deceased had injuries on his right hand and on the right side of his chest but he did not know the cause of death.
  10. PW5 was Anthony Mutua Njiru who stated that on the night of the incident, the accused called him and knocked his bedroom window. That he opened the door and saw that the accused was not wearing a shirt but he had jeans trousers on. He identified the blue jeans trouser in court. He stated that the accused told him that 'cucu amekatakatwa na mjini' ('grandmother has been cut into pieces by evil spirits') and he was referring to the deceased. That the accused had been on medication and when they used to take him to hospital, he used to say that there were evil spirits chasing him.



11. He stated that he told the accused to fetch some water but he took the water and ran to Mama Karani's house (a neighbour) who opened the door for him and he entered. That on seeing this, he went back to sleep. The following day, he received a phone call from Kago telling him that the deceased had been cut and Ndwiga had taken her to hospital. He rushed to the scene where a crowd had gathered but nobody knew if the deceased was alive. The accused lived in the same compound with the deceased but in separate houses.
12. He stated that the accused was known to hallucinate sometimes. The accused was taken away by the police as a suspect. On cross-examination, he stated that he has known the accused all his life and that he is generally a calm person. That the accused occasionally hallucinated and he was treated by Dr. Njoka. That he had never hurt anyone before this incident.
13. PW6 was Dennis Owino Onyango from government chemist who stated that he received some samples for analysis and they included the accused's clothes and liquids in 2 containers. He analyzed the liquids and found that they were pesticides which are moderately hazardous to humans if ingested. He stated that the substance is poisonous and it affects the gastric membrane of the stomach, causing a burning sensation. That when the substance enters the bloodstream, it hinders oxygen from reaching the brain. Symptoms of its ingestion are foaming from the mouth and the victim passing out and once ingested, it takes effect immediately.
14. PW7 was Henry Kiptoo Sang who stated that he analyzed samples from the crime scene including the deceased's blood sample, the accused's buccal swabs and blood samples, the accused's clothes, a blood-stained knife. He testified that an analysis of the items showed that the DNA profile generated from the knife and the beddings matched the DNA of the deceased. On cross-examination, he stated that there was no relationship between the DNA samples from the accused's blood and the deceased's blood.
15. PW8 was PC Leonard Ochola of DCI Embu West who stated that the incident was reported at Nembure Police station and he was assigned to undertake investigations. That he went to the scene and secured it. The body of the deceased was lying in a pool of blood in one of the bedrooms. The scene was documented and the photographs were produced as evidence. Some items were taken from the scene and sent for further analysis.
16. He drew a sketch plan of the scene. He produced the sketch plan and the items collected from the scene as evidence. He stated that the accused was escorted to Embu Level 5 Hospital for mental assessment and the samples recovered from the scene were sent to the government chemist for analysis. That the deceased's husband survived the attack at the scene but the deceased, who was helping him at the time, died. The deceased's husband said that they were attacked by the accused.
17. Among the items recovered at the scene was a knife which was the suspected murder weapon and it was confirmed to be after analysis by the government chemist. The accused was arrested and charged with the offence. On cross-examination, he stated that he recovered the accused's phone at the scene. That the incident occurred at 10pm and when the police arrived, the accused was not at the scene. That there was a container at the scene that had the poison that the accused drank.
18. PW9 was CI Patricia Tsindoli of digital forensics laboratory of the DCI. She stated that she received a request for data analysis of the accused's phone that was found at the scene. She stated that she retrieved call logs and messages from the device and the report was too bulky so the same was saved in a DVD which was produced as evidence.
19. The prosecution closed its case and the court found that the accused had a case to answer. He was placed on his defense.



20. DW1, the accused person, stated that the deceased was his grandmother and that he was raised by his grandparents. That his grandparents had entrusted him with their business and he used to collect rents on their behalf. He stated that he could not recall anything that happened on the night of the incident. That he has been sick since 2013 and has been on medication but he does not know what he suffers from. That since the time of the incident, he had been wondering why he was detained.
21. He stated that sometimes he loses memory of things and there was a time he was sent with his grandfather's motor vehicle but he forgot to come back home with it. He denied killing his grandmother and stated that he had left his phone at his grandmother's house to charge. It was his further evidence that he has not yet recovered but he has been on psychiatric treatment at Thika Level 5 Hospital. He produced his treatment cards and prescriptions notes as evidence. On cross-examination, he stated that he started taking medication in the year 2019. That on the night of the incident, he went to PW5's house, and he lives about 3km away. He could not recall his attempt to commit suicide.
22. DW2 was Kefa Gitonga who stated that he went to the same school with the accused and he knows him to be a calm person. That the accused developed a mental problem after his uncle died in that he became very forgetful. That the accused lived with his grandparents and he was shocked to hear that he had killed his grandmother. On cross-examination he stated that on the night of the incident, he was not with the accused and he did not know how the deceased met her death.
23. DW3 was Emily Muthoni Wamai, the accused person's mother who stated that the accused was raised by his grandparents who insisted on remaining with him when she got married. That she stayed in touch with him and he related well with his grandparents. That in 2019, the accused's uncle died and that is when he started experiencing hallucinations and saying strange things and at one time, he was walking around naked. That he had been on treatment for a psychiatric condition, on and off. That the doctor who was treating him did not tell the family what illness the accused was suffering from. On cross-examination, she stated that she did not have any medical reports showing that the accused was unwell. That the accused had been entrusted with his grandfather's business, something that the prosecution contended, given the alleged accused's mental condition.
24. At the close of the prosecution's case, the court directed parties to file their written submissions but none of them complied.
25. The issue for determination herein is whether or not the offence of murder has been proved beyond reasonable doubt.
26. Article 26 of *the Constitution* of Kenya provides that a person shall not be deprived of life intentionally, except to the extent authorized by *the Constitution* or written law. The accused person herein faces the charge of murder under sections 203 as read together with 204 of the Penal Code. It is upon the prosecution to prove beyond reasonable doubt, that the accused person murdered the deceased. Section 203 of the Penal Code provides:
  - “ 203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
27. In the case of Republic v W.O.O. [2020] eKLR (Migori High Court Criminal Appeal No. 26 of 2017) the elements of murder were explained, as guided by the Court of Appeal in the case of Anthony Ndegwa Ngari vs Republic [2014] eKLR, as follows:
  - “ For the offence of murder to be proved, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the



deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.”

28. The first element is death and cause of death. The pathologist noted that the body of the deceased was severely pale and had multiple stab wounds on the shoulder, chin and back. That there was a deep stab wound on the chest above the 6<sup>th</sup> rib which had penetrated to the chest cavity causing bleeding into the left chest cavity with about 700mls of blood and the left lung which had collapsed but the ribs were not broken. The pathologist opined that the cause of death was massive bleeding in the chest cavity which had caused the lungs to collapse. This element is fully established.
29. As to whether the accused caused the death of the deceased through an unlawful act, PW5 testified that the accused went to his house on the night of the incident and he was only wearing a trouser without a shirt. The accused told him that the deceased had been attacked and cut up by some evil spirits. He said that after the accused had spoken to him, he told him to fetch some water but he ran and went to Mama Karani’s house who was a neighbor. That he returned to sleep after he saw the accused entering the neighbour’s house. PW8 and PW9 testified that the accused’s phone was found at the scene. It was evident that the accused and the deceased lived within the same compound though in different houses. The deceased’s husband, who survived the attack, did not testify but PW8 said that from the statement he recorded, the deceased’s husband said that the accused was their attacker that night.
30. The accused denied having committed the offence and that he wouldn’t think of doing such a thing. He stated that on that night, he went to the home of PW5, his cousin. He said that he could not remember the events of that night neither could he remember trying to commit suicide. While there may not be any direct evidence placing the accused at the scene, circumstantial evidence does. PW1 and PW2 stated that the accused person, who was a psychiatric patient, had attempted suicide and while he was undergoing treatment, he narrated the events of that fateful night and that he was seeing some spirits. PW5 stated that the accused told him that the deceased had been attacked by evil spirits. In my view, the accused was at the scene of the crime and he attacked the deceased.
31. The outstanding factor from the testimonies of PW1, PW2, DW1, DW2 and DW3 is that the accused person has been suffering from a mental illness for some time. In criminal cases, there is a rebuttable presumption of soundness of mind. Section 11 of the Penal Code provides that:
- “Every person is presumed to be of sound mind and to have been of sound mind at any time which comes into question until the contrary is proved.”
32. In this case, I find overwhelming evidence to show that the accused person suffers from a mental illness. In fact, from the actions of that night, which he said he could not recall, to his attempt to commit suicide by drinking a poisonous substance, it is my view that he was not lucid at the time of the incident.
- “A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person maybe criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effect above mentioned in reference to that Act or omission.”
33. The Court of Appeal in the case of Leonard Mwangemi Munyasia v Republic [2015] eKLR held that;
- “if it is shown that the appellant suffered from this condition then under Section 9 & 12 of the Penal Code he could not be held criminally responsible for the murder of the deceased.



Both Section 12 aforesaid and the M/c Naughten Rules recognise that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused person by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to the law. The test is strictly on the time when the offence was committed and no other.”

34. It is based on the forgoing reasoning that I find that malice aforethought cannot be found in this case since the accused suffers from a mental illness and at the time of the incident, he was suffering from it. That is to say, from the evidence before the court, I find that the crime was indeed committed by the accused, but at the time of committing the offence, he was suffering from a mental illness.
35. Accordingly, I make a special finding under Section 166 (1) of the Criminal Procedure Code to the effect that the accused is guilty of murder contrary to Section 203 of the Penal Code, but was insane at the time he committed the offence. Therefore, I hereby enter a special finding of guilty but insane.
36. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

