



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v EVK (Criminal Case 12 of 2016)
[2023] KEHC 1538 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL CASE 12 OF 2016
RK LIMO, J
FEBRUARY 22, 2023**

BETWEEN

REPUBLIC STATE

AND

EVK ACCUSED

JUDGMENT

1. EVK, the accused herein, is charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars are that on March 15, 2016 at [particulars withheld] village, Mwingi Central within Kitui he murdered DKT (herein after referred as the deceased)
2. The accused person denied committing the offence and the prosecution has presented a total of eight witnesses.
3. The prosecution's case is mainly hinged on circumstantial evidence while the defence has pleaded insanity in defence stating that he was unaware or not in control of his actions at the time.
4. The following is the testimonies of witnesses presented during trial.
5. Janet Mawia Mulatya (PW1) testified that on March 15, 2016 she was at home with the deceased who was her grandson aged 5 years and the accused was her third born son. She stated that the accused asked her to prepare food for him and that she went in and prepared food and on coming out she could not see the deceased child or the accused.

She testified that, she had earlier called a pastor to pray for the accused that day and the pastor came in the evening adding that, at around 9pm, she saw the accused coming back alone with a panga and a stick.
6. The witness stated that when she asked the accused where the deceased child was, he became wild and attacked her throwing a stick in her direction which missed as she dodged. She stated that the accused



also threw a stone at her but ducked. She testified that the accused then went into the chicken coop picked a chicken and cut it before throwing it at her. She stated that the accused picked a second chicken and cut it also before throwing at her adding that he was going for the third one when the chicken managed to slip and ran away.

7. She stated that the pastor who came to pray for him tried to restrain him in vain and that it was only after his uncle named Musili came, that they managed to subdue him.
8. She testified that, the accused had removed his clothes and had tied himself with a lessa and that when his uncle slapped him, he agreed to go and show them where the deceased child was. She testified that they followed the accused with torches to a place where he showed them and that after searching around the rocks, they spotted the deceased child lying down dead. She testified that they called the police who arrived at around 10pm and carried the body of the child and the accused.
9. The witness conceded under cross examination that the accused was mentally unsound and had been treated at Migwani Hospital over mental illness.

She further testified that when the accused came back alone after disappearing with the deceased child, he had a lot of blood stained lessa which he had used to cover himself as he had no clothes adding that he was armed with a panga which the witness identified in court.
10. JTK (PW2) the mother to the deceased child testified that she had left her son (the deceased child) with her mother (PW1) and that on March 16, 2016 she received news that her son was unwell but when she got back home she found her child dead.
11. Samson Musyoka Mwendwa (PW3) stated that he had been called by PW1 at round 10.40am on the material day and she asked him to go to her house and pray for the accused. That he went to the home but found that the accused was missing. The accused then appeared at around 8.00pm carrying a panga saying that he was going to kill someone. That he proceeded to light a fire which was put out and he was finally subdued by his uncle with his assistance. The accused was then asked where the deceased child was and he led them to where the body was. He stated that the behavior exhibited by the accused was that of someone with unsound mind.
12. John Mulonzya (PW4) stated that he was called by PW1 who asked him to go to her home to assist in looking for the deceased child who was missing. That the witness arrived at the home and found the accused subdued and later he led the witness as well as some neighbours to where the body of the deceased was found.
13. Musili Malonza (PW5) testified that he was called to the home of PW1 at around 9pm. He testified that upon arrival, he saw the accused emerging from the bush with a panga and that the pastor held him as he joined in and assisted in subduing him by tying him using ropes. He stated that, the accused appeared confused and violent and that when they asked him where he had left the child, he led them to a hill and told them to search for the child there. He testified that they searched and found the child with his throat cut.
14. Bendetta Mbete Kasuva (PW6) testified that, on March 15, 2016 at around 8pm, Musili Malonza (PW5) called her on phone and requested her to ask her son named Mbithi Mutheu to go and assist them in subduing the accused who was armed with a panga. She said that she accompanied her son and went to PW1's home and found the accused having been subdued and tied with ropes.
15. She stated that they tried to plead with him to show them where the deceased child was but he was reluctant at first adding that he had a lessa that was stained with a lot of blood. The witness identified



- the lesson in court. She testified that, later the accused agreed to lead them to where the child was which was on a hill and that they found the child already dead.
16. Dr Gitonga Kakulo (PW7) testified that he was a doctor with bachelor of medicine and surgery from University of Nairobi in 2016. He testified that he was stepping in for Dr Mabeke Charles with whom he had worked with at Mwingi level 4 Hospital but had since left for further studies. He stated that, having worked with him, he was familiar with his handwriting and signature. The said doctor failed to tender evidence after the defence raised an objection to him testifying because he had not worked with the author of post mortem report long enough.
 17. Dr Ndirangu Joram (PW8) a medical officer attached to Mwingi Level 4 Hospital testified that he was a 2014 graduate from University of Nairobi with bachelors in medicine and surgery. He told the court that he worked with Dr Charles Muthoka the author of a post mortem report from 2015 to 2017 and was therefore familiar with his signature and handwriting.
 18. He testified that, the post mortem report was in respect to the body of deceased child DK and that on examination, the body of the child had a deep cut with trachea cut on the level of the neck, adding that, major neck vessels were cut.
He stated that the cause of death was severe blood loss and asplolyscia due to severe cut on the throat.
 19. CIP Isaack Kathaka (PW8) the investigating officer, told the court that he was stationed in Mwingi at the material time when the police were called and informed of the discovery of the body of the deceased child. That upon arrival at the scene, the police found the accused who had been arrested by members of the public. He stated that he was also given a panga which had blood stains and produced the same as p-exhibit 2. The witness stated that the accused was wearing a white vest and had tied a leso across his waist both of which were blood stained. He produced the items which were marked as p-exhibit 3 and 5 respectively. The officer tendered a blood stained shirt belonging to the accused as p-exhibit 6. The witness stated that the accused also had a fresh injury on his throat and shoulder.
 20. When placed on his defence, the accused never denied committing the act that caused the death of the deceased child.
 21. In his sworn statement, he told this court that he was informed that he had committed the offence of murdering the deceased child. He stated that he did not know whether he had committed the offence and did not recall what happened because he was sick. He also told this court that he had been receiving treatment from Mathari hospital and prayers because of his mental illness before the offence was committed. He testified that he could not contest the testimonies given in court by the prosecution witnesses insisting that he was no in frame of mind.
 22. In his written submissions through counsel, he submits that there were no witnesses to the offence and even though the accused was arrested by members of the public with blood stains on his neck, a leso and a panga, the same were not subjected to forensic examination to establish that the blood belonged to the deceased. He submits that there was evidence that he had slaughtered two chickens at the homestead before his arrest and discovery of the body of the deceased and as such it was difficult to ascertain whether the blood stains belonged to the deceased or the slaughtered chicken
 23. This court has considered the prosecution case and defence put forward by the accused person. As I have observed above, the accused person did not come out clearly that he was not connected with the murder but rather pleaded insanity as a defence.



24. This court finds that the element of fact of death and its cause are well established and proved. The deceased child died as a result of a severe cut on his throat which severed major blood vessels on his neck and caused severe bleeding leading to death.
25. Whether the accused caused the death of the deceased child.
26. There was no eyewitness account of how the deceased met his death. The prosecution relied on circumstantial evidence. The evidence tendered shows that the accused and the deceased were missing from their home on the material day. The accused returned in the evening. He was carrying a panga which was blood stained and his clothes were blood stained too. Upon his return, he began acting violently and attacked his mother (PW1) with a stick and a stone. He also slaughtered 2 chickens and threw them at PW1 and also damaged PW3's motor bike in the process. The accused was finally subdued by members of the public who had been called to the home and he was interrogated about the deceased's whereabouts, he led the search team to an area where his body was discovered having fatal injuries to the neck. The circumstantial evidence strongly created a link between the accused and the disappearance and the death of the deceased child.
27. Circumstantial evidence can be a basis of a conviction where the evidence tendered irresistibly points towards the guilt of the accused. In the case of *Erick Odhiambo v Republic* [2015] eKLR the Court of Appeal set out three tests to guide courts on circumstantial evidence. These are;
- i. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
 - ii. Those circumstances must be of a definite tendency unerringly pointing towards the guilt of the accused.
 - iii. The circumstances taken cumulatively should join a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.
28. The circumstances obtaining in this case given the witness account and the exhibits tendered in, clearly connect the action that caused the death of the deceased with the accused herein and this court is satisfied that the prosecution has established and proved the element of actus reus.
- 29.
- (ii) *Mens rea*
- The accused had pleaded insanity as his defence contending that he was mentally ill at the time and was unaware at the time about what he was doing or the consequences of his actions.
30. PW1, the mother of the accused told the court that the accused had a mental illness which he had suffered from for years. She stated that she had asked a pastor (PW3) to go to her home and pray for him. She also testified about the wild manner in which the accused acted on the material date stating that he was violent and threw a stick, a stone and 2 dead chickens at her. PW3 also testified about that behavior as well, adding that he had previously been called by PW1 to pray for the accused who she believed was possessed by evil spirits. According to PW1, the accused loved the deceased because he was his nephew.
31. From the record the accused was first arraigned in court on April 1, 2016. On April 14, 2016, the court took notice of a psychiatrist's report and ordered the relatives of the accused to avail themselves



at Machakos level 5 hospital to provide information on the accused. The report dated April 6, 2016 had the following findings;

“The above is a suspect in a murder case. He has no recollection of the events and says that he was told by his mother that he had killed someone. He also had a healed scar on his neck and reports not knowing how he got it. He says that late last year he was taken for prayers after he was seen talking to himself.”

The report then proceeded to opine as follows:-

“Owing to the history of talking to himself and the non-recollection of events, I kindly request the court to avail the suspect’s relatives to provide additional information. In his current state, he is not fit to plead in a court of law.”

32. Following the court’s directions, the record shows that the accused was admitted at Mathari hospital (August 24, 2016) and (September 28, 2016). The case was mentioned in court severally after September 28, 2016 but it not clear from the record whether the accused was in custody during that time or in hospital.

33. Another mental assessment done on February 14, 2018 before the accused took his plea. The second report is dated June 22, 2017 and had the following findings;

“The mother claims that since 2015, he started displaying features of mental illness while in Miwani upon which he was treated with some relief. The illness record again and this time at home in which the incident happened though the mother was not at home at that time. The accused behaved in a suspicious manner linking him to the death. The recent assessment was found to be dressed in prison uniform, was sober, calm and normal mood. He had normal cognitive features but not able to recall the events of the material day since he was ill. He is currently on medication.”

34. Under section 12 of the *Penal Code* provides that mentally sick patients are not responsible for their actions;

It States;

“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.”

35. Court of Appeal in the case of *Leonard Mwangemi Munyasia v Republic* [2015] eKLR discussed situations where the defence of insanity is raised and provided guidelines on duty of the trial court under such circumstances when it observed; -

“under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under section 167 (1) (b) of the *Criminal Procedure Code* he would be convicted and ordered to be detained during the president’s pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.



Both section 12 aforesaid and the *McNaughten Rules* recognize 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 law. The test is strictly on the time when the offence was committed and no other. Yet it would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the time of the commission of the crime.

We are of the view that a court cannot, as the trial judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.

What must be avoided and what this court has warned against in the two decisions relied on by the appellant's advocate in this appeal, is the likelihood of sentencing to death a person with a mental disorder. Therefore, it is the duty of trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question. Indeed, it would serve as a good practice, like it is in England, to call evidence based on the opinion of an expert in such cases in terms of section 48 of *Evidence Act* to explain the state of mind. It is the duty of both the investigating officer and the defence, to have the accused person subjected to a medical examination to establish whether he suffered from the disease of the mind that affected his mind and made him incapable of understanding his action. In addition, and in order to ascertain the accused person's state of mind at the time of the offence, the expert opinion of a forensic psychologist, may also be sought. The field of forensic psychology has become a popular field of psychology in Kenya, yet their expertise is hardly sought in criminal trials." (emphasis added)

36. The medical reports provided though admittedly not well detailed, indicates clearly that the accused was treated for mental illness. The record also shows that the accused was taken for treatment at Mathari hospital a renowned medical facility attending patients with mental illness and/or disorders. It is not very clear from the medical records how long the accused had been treated there, but when the accused was presented for plea, the court was informed that he was unfit to plead. Later, another report was presented showing that the accused was then mentally fit to plead. The mental state of the accused at the time of commission of the offence is not captured but the actions made by the accused on the material day as narrated by PW1 is indicative of a person with a mental disorder. PW1 stated that he slit two chickens by the neck and threw them at her and took PW5 (his uncle) with the help of other villagers to subdue him. That in my view, shows that the accused at the time, was suffering from a disease of the mind and was not in control of his action at that time.
37. The evidence of PW1 and PW3 shows that owing to his abnormal behaviour, PW3 (a pastor) had been called to pray for the accused prior to the incident. This element is a relevant consideration because it happened immediately before the incident and the pastor arrived unbeknown to him or PW1 the unfortunate incident had already taken place. The behavior exhibited of tying a lessa was also strange given that, he was a man and this court takes judicial notice that normal men do not walk around with lessos tied around their waist or chest.
38. In sum, this court finds that though there was evidence that the accused committed the offence of killing the deceased child, he was insane at the time. His state of mind at the time was such that, he was incapable of knowing what he was doing or the consequences of his action and he cannot be held to account.



39. Section 166 of the *Criminal Procedure Code* provides for the procedure when a defence of lunacy is adduced during trial as follows;

- i. Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.
- ii. When a special finding is so made, the court shall report the case for the order of the president, and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct
- iii. The president may order the person to be detained in a mental hospital, prison or other suitable place of safe custody
- iv. The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the president under subsection (3) shall make a report in writing to the minister for the consideration of the president in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the president's order and thereafter at the expiration of each period of two years from the date of the last report
- v. On consideration of the report, the president may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the president thinks fit.
- vi. Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the president may, at any time after a person has been detained by order of the president under subsection (3), make a special report to the minister for transmission to the president, on the condition, history and circumstances of the person so detained, and the president, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the president thinks fit.
- vii. The president may at any time order that a person detained by order of the president under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.

40. This court is alive to the decision in *Kimaru & others 17 v AG & Another and Kenya National Human Rights and Equality Commission (Interested party)* [2022] eKLR which declared the above



provisions unconstitutional. This court is also alive to the quagmire of where to place the accused because on one hand this court is minded about the safety of family members and the community at large because of the possibility of a repeat of what happened and on the other hand, I am minded about the constitutional rights of the accused.

41. The court dealt with a similar situation in the case of *Republic v JNK* [2020] eKLR, where Mwongo judge, made the following decision: -
- a) “The accused shall be placed under a mental and psychological rehabilitative programme, and whenever he suffers mental instability, he shall be facilitated to see a mental health doctor.
 - b) The prisons service shall maintain a detailed record of the accused’s life and conduct while he is incarcerated which shall be availed to the court after his first three (3) years of incarceration, to determine whether the sentence shall be reviewed.
 - c) The accused shall be brought to court on completion of his third year of incarceration for review of his sentence at the court’s discretion.”
42. This court finds that the interest of justice will be served by the following orders: -
- i. The accused person having been found guilty but insane, this court cannot order for his discharge immediately, but the following orders are issued: -
 - a) The subject shall be escorted to psychiatrist who shall examine him and make comprehensive report regarding the safety of the family and community if he is released from custody.
 - b) This matter shall be mentioned in court on May 11, 2023 and in the meantime, the subject shall be kept in a mental hospital for close observations/supervision and treatment as may be required from time to time.

He has 14 days right of appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 22ND DAY OF FEBRUARY, 2023.

HON. JUSTICE R. K. LIMO

KITUI HIGH COURT

