



**Republic v Ndungu (Criminal Case 131 of 2014)  
[2023] KEHC 2656 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2656 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL CASE 131 OF 2014  
RB NGETICH, J  
MARCH 29, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**GAITHO NDUNGU ..... ACCUSED**

**JUDGMENT**

1. The accused herein Gaitho Ndungu was charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the [Penal Code](#). The particulars are that on the night of 23<sup>rd</sup> and December 24, 2014 at Mona Area in Molo District within Nakuru County, Murdered Samuel Karanja Muhindi. He denied the charges when he appeared before Justice Mulwa for plea taking. The prosecution availed six witnesses to prove their case.
2. PW1 Paul Gikuri Kimani testified that he received a call from his niece informing him of the death of Karanja. He phoned PW2 the brother of the deceased and together they went to the scene of the crime. He stated that he saw the deceased's body lying under the bed of the accused and the legs of the deceased were protruding. He informed the deceased's father and later went to the Molo Police Station to report the incident. He positively identified the accused as the man on the dock.
3. PW2 Paul Mbugua Muhindi corroborated the evidence of Pw1. He said he accompanied PW1 to the scene of the crime where he saw his brother's (deceased) lying under the bed of the accused's house. He positively identified the accused as the man on the dock.
4. PW3 James Muhindi Muhuni testified that he saw the body of the deceased lying under the bed of the accused. He informed the court that the previous day the deceased and the accused were together until around 2.00 am when they both went to the accused's house. He said the accused lived only 1km away from his home.



5. PW4 Dr Mariga Kamau testified that on December 28, 2014, he performed an autopsy on the body of Samuel Karanja. On examination of the body, he noted the following: -
  - i. Bruises on the chin and neck,
  - ii. Midline scar, old scar, and both limbs cyanosed
  - iii. Internally he noted respiratory and cardiovascular system normal
  - iv. Harmonica under the neck muscles on both sides of the neck
  - v. Carotid arteries constricted and thyroid bone fractured.
6. The doctor opined that the cause of death was asphyxiation secondary to strangulation. In support, he produced the postmortem report marked as PExh 1.
7. PW5 Joseph Ndungu who is the father of the accused testified that on December 23, 2014, he had a circumcision ceremony at his home and the deceased and the accused were present until late at night as he had heard them chanting before he went to bed. He said on December 24, 2014 his daughter informed him she had seen a dead body in Gaitho's room. He said he did not see blood in the room. On Cross-examination, he said the accused smokes bhang and took narcotic drugs.
8. PW6, Nyamori Thomas No xxxx who was the Investigating Officer testified that he visited the scene in Mona area and at the scene which was a single room and found the deceased's body lying under the bed. He said on examining of the body, he found bruises on the neck and from their investigations, the accused and the deceased were the only people in the room during that night and that was the reason why he apprehended the accused.
9. After close of the prosecution's case, the court found that prima facie case had been established to warrant accused be placed on his defence.
10. The accused chose to give sworn statement and called three witnesses. In his defence, the accused denied being involved with the killing of the deceased. He said on 23<sup>rd</sup> and December 24, 2014, he was at Keringet. He denied being with the deceased on the day of his death. He further stated that he had a mental illness and was taking medication for a year.
11. DW2 Alex Mwanini Njoroge testified that he is a Health Officer at Molo Sub-District Hospital and that accused had been treated for a psychotic disorder in the facility on 18<sup>th</sup> and May 19, 2014. He said the accused only visited the facility on those two days.
12. DW3 Inspector Edward Kerindo stationed at Nakuru Main Prison confirmed that the Accused is suffering from a mental illness and is confined in Ward 1 where inmates with psychiatric conditions are confined. He produced treatment documents and a consultation note from Dr Oseko.
13. At the close of the defence case, the defence counsel chose to file written submissions while the state counsel Ms Rita Rotich indicated she will rely on the evidence on record.

#### **Accused's Submissions**

14. The defence counsel Mr Orege filed written submissions on May 10, 2022. He submitted that as per Section 12 of the Penal Code, a person is not criminally liable for an act or omission if at the time of the act he is suffering from a disease affecting his mind and incapable of understanding what he was doing.



15. He submitted that the accused was suffering from a mental illness at the time of the commission of the act as was corroborated by Pw5, Pw6, DW2 and DW3, and as per the medical record submitted by DW2 and DW3.
16. Counsel contends due to the mental state of the accused, there was no mens rea and urged this court to find the prosecution failed to prove the case beyond a reasonable doubt that the accused person committed the offence and acquit him.

### **Analysis And Determination**

17. I have considered evidence adduced by prosecution and defence and the submissions filed by defence counsel. What I wish to consider is whether the ingredients for the offence of Murder listed hereunder have been proved beyond reasonable doubt.
  - a. Proof of death.
  - b. Cause of the death of the deceased.
  - c. Whether the deceased met his death as a result of an unlawful act or omission on the part of the accused person.
  - d. Whether, in committing the unlawful act or omission, the accused person did so with malice aforethought.
18. There is no doubt that the deceased died. Pw1, Pw2 and Pw3 testified that they saw the deceased lying dead under the accused's bed. Their evidence was corroborated by PW4 who produced the post-mortem report which confirmed the death of the deceased. The Doctor who performed the autopsy testified that the cause of death was strangulation.
19. On whether the deceased met his death as a result of the accused's unlawful act, evidence adduced was that the accused was the last person seen with the deceased and the deceased was found dead in the accused's house.
20. Pw3 testified to have heard the deceased and the accused chanting in the kitchen on the night he died; he was found dead the following morning.
21. Even though the accused raised defence of alibi by stating that he was at Keringet the material night, he did not adduce evidence to support his allegation. In my view that was an afterthought to escape liability.
22. In view of the above evidence to the effect that the accused was the last person to be heard and seen with the deceased before the deceased died was not rebutted.
23. Lastly on the issue of malice aforethought, Malice aforethought is defined in Section 206 of the Penal Code in the following terms:
  - (a) An intention to cause death or to do grievous harm to any person whether such person is the person killed or not.
  - (b) The knowledge that the act or omission causing death will cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may be caused.
  - (c) An intent to commit a felony.



- (d) An intention to facilitate the escape from custody of a person who has committed a felony.

24. The accused testified that he is suffering from a mental condition and was under medication. He contends he is remanded separately from other inmates due to his condition. His evidence was corroborated by DW2 and DW3 who testified that indeed the accused suffered from a mental illness and was under medication. DW3 asserted the accused was being treated by Dr Oseko while in custody though no evidence was adduced to confirm that.

25. The court will consider the surrounding circumstances before determining whether the accused was in a proper state of the mind at the time of the offence. In the case of [Leonard Mwangemi Munyasia v Republic, MLD CA Criminal Appeal No 112 of 2014 \[2015\] eKLR](#). The court observed that:

' 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 a mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence which 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 immediately preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also the medical history of the accused person to be considered as the backdrop.'

26. The defence counsel's argument is that the accused did not have the intention of committing the offence. From the record, PW3 stated he heard the deceased and the accused chanting in the kitchen before they retired to bed. He confirmed that the deceased and the accused were friends for sometime.

27. I have perused the treatment record and note DW2 indicate that the Accused visited the facility for treatment on 18<sup>th</sup> and May 19, 2014; he never went for treatment any other day. The treatment notes adduced herein by DW2 do not give a brief history of the mental illness of the deceased, it is not clear what the deceased was suffering from. I further note the commission of the offence occurred on the night of 23<sup>rd</sup> and December 24, 2014.

28. Before the accused took plea he was examined on January 14, 2015, at Nakuru Provincial General Hospital and as per the Medical Report, Dr Njau JW found the accused was fit to stand trial as per the report dated January 21, 2015. A further report was filed on April 16, 2018 and it confirmed that the accused was fit to understand charges he was facing and defend himself. The accused was also examined on July 11, 2018 and as per the Psychiatric report filed on even date, the report confirmed he is fit to stand trial. The report hereunder states:

' I found the accused to be mentally sound, he had no behaviour or speech problems. His thoughts and perception were essentially normal, he had good concentration and attention and he understands the charges he is facing and he is capable of following the court proceedings and defending himself.'

In conclusion, the doctor said the psychotic disorder is currently well controlled on medication and in my (Doc) opinion he is fit to plead to the charges he is facing.

29. There is no evidence that his condition of mental illness raised by the defence affected the accused at the commission of the act. In order for the accused to plead the defence of mental illness as per the Provisions of Section 12 of the Penal code, the accused should prove he had the mental illness at the actual time of the commission of the offence.



30. Further for the defence raised to qualify the accused must plead that mental illness affected the accused mind to be incapable of understanding what he was doing or knowing he ought not to do the act. From the three subsequent psychiatric reports, the Doctor opined that the accused understood the charge he is facing and is capable of defending himself.
31. During the trial, the accused maintained a state of stable mental health. I have evaluated the surrounding circumstances of the case and I note the defence of insanity does not stand.
32. According to Pw3, he stated that the accused was an alcoholic. Despite him verbally stating the accused suffered from a mental illness, it was not proved that at the time of the commission of the act the accused was not in a state of mind not to understand what he was doing.
33. Therefore, the defence of insanity is unfounded. In the circumstance, I find the prosecution has proved the case against the accused person beyond a reasonable doubt.
34. From the foregoing, I find the accused guilty of Murder Contrary to Section 203 as read with Section 204 of the Penal code as charged and he is convicted accordingly.
35. **Final Orders**
  1. The accused is convicted for the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.
  2. Presentence report to be prepared by Probation Officer.
  3. Right of Appeal 14 days.

**JUDGMENT delivered, dated and signed virtually at Nakuru**

\*\*This 29<sup>th</sup> day of March, 2023.

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

**Daisy – Court Assistant**

**Mr. Kihara for State**

**Ms. Kabaliko holding brief for Orege for Accused**

**Accused – Present**

