



REPUBLIC OF KENYA



**Mwanzia v Republic (Criminal Case E21 of 2017)  
[2023] KEHC 24480 (KLR) (24 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 24480 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL CASE E21 OF 2017  
TM MATHEKA, J  
AUGUST 24, 2023**

**BETWEEN**

**LAWRENCE MUTISO MWANZIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Lawrence Mutiso Mwanzia was charged with Murder Contrary to Section 203 as read with Section 204 of the *Penal Code* in formerly Machakos HCCR. Case No 7 of 2014. It was alleged that on 20<sup>th</sup> January 2014 at Miangeni Village, Kathekani Sub location, Mtito Andei Location Kibwezi District within Makueni County jointly with another not before court they murdered Ian Mumo Mutiso.
2. The matter was heard partially by Hon Mutende L J (PW1 - PW4), Hon C. Kariuki J (PW5 - PW10).
3. Vide a ruling dated 17<sup>th</sup> December 2018 - the accused was found to have a case to answer
4. The defence was partly heard by Hon Dulu J ( he heard the accused ) and I heard the accused person's witness DW2.
5. The accused person told the court that he was an Administration Police Officer at Emali, he told the court that when he was arrested he was taken to Mathare Hospital for treatment for mental illness. He was later taken to Makueni Hospital. He gave evidence that he had been in treatment for a while and could now understand things. He testified that he had been charged with an attempt to kill - that it was said that he had killed a child by the name Ian. He denied killing Ian. He told the court that he was living with mother of Ian, one Nthamba at Mtito Andei and another child - Mumbé. He said it was the morning of 20<sup>th</sup> January 2014, he was beating a snake and the child Ian, who was 7 years fainted then the police came and arrested him, and collected the child. That he was requesting the court to release him to go back to his job.



6. On cross-examination he told the court that he had lived with PW1 for about 2 to 3 years - and that Ian was not his biological child. He said on the night of 19<sup>th</sup> January 2014 , he had one Kamene, an elderly lady from Mwingi who was a herbalist at his home with her child one Muteti. He said they had arranged to dig a borehole and the herbalist had come to advise him. He denied quarrelling with his wife that night, he denied beating or stripping his wife naked that night, he denied taking the boy Ian to the bush. He said he learnt that Ian had died at 7:30am. That at 7.00am he was chasing the animal that eats chicken. That he left the child and Nthamba at home, when he came back he was told that the child had followed him. He said he followed the path, and found the child had fainted not dead. That his heart was still beating, and the “neck veins were visible”. That when he found the child he was alive. That after he found the child he went home, picked his bags and went to his mother’s home. The police found him there and arrested him. He told the court that he heard the Doctor testify that the child had been strangled. His response was that that did not concern him. He also told the court that from the time he left home with the boy to the time he saw that the boy had fainted was 20 minutes. That he was alive. He told the court that he invited Kamene to advise him. He denied that Kamene advised him to get rid of Ian. He insisted that Ian had fainted - that if Ian was dead, he was not the one who had killed him.
7. DW2 was Dr. Johnson Maina Mburu - Medical Doctor Specialised in psychiatry and also a lecturer at University of Nairobi on mental health. He testified that on 27<sup>th</sup> October 2016 he saw a patient by the name Lawrence Mutiso Mwanzia. He had been referred from Machakos GK Prison. He evaluated and interviewed him. The accused was calm, coherent and articulate. -At that time, the accused told him that he had pressed the neck of the child - as a ritual to transit the child from being a child to being an adult. The witness formed the opinion that the accused had a delusion, a false unshakeable belief. On this particular he formed the opinion that the accused was suffering from a mental disorder requiring further medication and treatment- that the accused may have had a schizophrenic episode - that three years later he interviewed the accused who spoke of traditional rituals of killing snakes, that he was of the view that the accused had not been compliant with his medication. He formed the view that he was not fit to stand trial. He said that they needed corroborative information but they (the hospital) never got to meet any of his relatives.
8. At this stage the defence closed.
9. Mr. Mutinda for the accused submitted that “they would demonstrate that accused suffered from a disease of the mind making him incapable of comprehending the act he is alleged to have committed’, which occasioned the death of the deceased therefore incapable of criminal liability for conviction of the offence of murder. Counsel framed 2 issues for determination;
  - i. Is the accused guilty of the murder as charged?
  - ii. If the accused is convicted, what is the appropriate sentence?
10. On the 1<sup>st</sup> issue - after citing Section 203 and 206 of the *Penal Code* counsel submitted that there was the evidence that the accused was the last person to be seen with child alive - the prosecution had not established malice afore thought on the part of the accused. He submitted that from the medical reports the accused was not fit to plead - that his mental health was impaired all through the trial. He submitted further that;
  - a. That an individual suffers from a “defect of reason,”



- b. That it was caused by a disease “of mind”
- c. That as a result he or she does not know the “nature and quality” of the act or that it is wrong.

He submitted that in *Leonard Mwangemi Munyasia v R* 2015 eKLR the court held that;

“It is a rule of universal application and criminal responsibility that a man cannot be condemned if it is proved that at the time of the offence he was not a master of his mind.”

He cited Section 11 of the [Penal Code](#), it states that;

“Every person is presumed to be of sober mind and to have been of sober mind at any time which comes in question until the contrary is proved.”

11. Counsel submitted that the accused person was suffering from a disease of mind making him incapable of comprehending his action and could not be held criminally liable for his actions. That the charge of murder requires mens rea and actus reus. That mens rea or the intention to commit murder cannot be present when the state of mind of the accused is the one which suffers from defect of reason, due to disease of mind hence unable to understand the nature and quality of his acts. He submitted that the prosecution had failed to prove beyond reasonable doubt that the accused had maliciously and intentionally caused the death of the deceased as charged.
12. On the issue of the sentence counsel submitted that should the accused be found guilty, then he should be found to be a person with a disability who needs medical care under the supervision of the court - He submitted further that in the constitutional petition [Kimaru & 17 others v Attorney General & others](#) Petition No 226 of 2020, the court while declaring that sections 162(4) and (5), 166(2) (3)(4)(5) (6) and (7) and 167 1(a)(b)(2)(3) and (4) of the [Criminal Procedure Code](#) as unconstitutional thus null and void as they contravene Articles 25(a) 27(1)(2)(4) 28, 29(d) and (f) 50, 51(1) and (2) 159 (2)(a)(b) and (d) and 160 of the [Constitution](#), held that such persons like the accused are persons...with disability and ought to be accorded the necessary protection and assistance required under the [Constitution](#) and the law.
13. The state did not file any submission.
14. I have carefully considered the evidence and the submission and the issues for determination are;
  1. Whether the accused person was capable of pleading /standing trial.
  2. Whether the prosecution proved the charge against accused person.
  3. What is the appropriate sentence?

**On whether the accused person had the capacity to plead/stand trial.**

15. The record shows that on the 25<sup>th</sup> February 2014, according to the psychiatric examination report filed, the accused was found fit to plead to the charge. Upon inquiry from the court the accused told the court that he understood Kiswahili. The information and the charge was read and explained to the accused in the presence of his advocate Mr. Tamata. The accused pleaded not guilty and the matter was set for hearing on the 5<sup>th</sup> June 2014.
16. On that day the matter did not proceed due to absence of the advocate and finally took off on 17<sup>th</sup> March 2015. In fact on 14<sup>th</sup> January 2015 it is the accused who told the court that his advocate was



- one Mutiso Mutinda from Athi River. He appeared on the hearing date. On 10<sup>th</sup> December 2015 - his advocate told the court that his client appeared confused and did not understand why the case was coming up for hearing. He asked the court to order a mental assessment. The prosecution agreed.
17. From the record the offence was committed on 20<sup>th</sup> January 2014. The first mental assessment was on 6<sup>th</sup> February 2014.  

The psychiatrist a Dr. Munga Edgar told the court in the report - Ref J.10BVol.111/597 that the accused was a 33 year old man, suspect of a murder case - 2<sup>nd</sup> born in a family of four, an AP Officer, married with one child “has not been previously treated for a mental condition,,, on examination (he) is well oriented.... concentration and memory .... equally good and he did not have any perceptual disturbance (such as hallucination )” In his opinion, the accused was able to follow proceedings, understand the charges and advise counsel – he stated in the report that accused “is fit to plead”. It was on that basis that the accused person took plea and the trial proceeded. It is therefore my considered view that this evidence shows that the accused person mentally sound at the material time when the offence was committed.
  18. The 2<sup>nd</sup> mental assessment report was dated 23<sup>rd</sup> December 2015 by the same doctor - report Ref J. 10BVol. IV/1045 dated shows that the accused on assessment gave a story that “did not make sense claiming that he wanted to find out if “prisoners could walk out in court from a certain exit.” From this the psychiatrist did not draw any conclusion with respect to the accused’s mental health but made a request for additional information from relatives.
  19. The next report was Ref No.103897 by Dr. Mburu - dated 27<sup>th</sup> October 2016. The report indicated that the accused claimed that he “practiced a ritual pressing the neck of boy which he strongly believes transits a child into adult hood”. This was DW2 - he drew the conclusion that the accused was suffering from delusion and that he required further examination and treatment and put the accused on medication for three months.
  20. Thereafter the matter was mentioned severally for accused to be taken to hospital for mental assessment. On 11<sup>th</sup> July 2017 - the accused told the court what he had been taken to hospital the previous week, and he asked the court for another date.
  21. Thereafter the matter proceeded for hearing before Hon Kariuki J. Mr. Mutinda, counsel for the accused did not raise any further issues. The matter proceeded until the case for the prosecution was closed on 26<sup>th</sup> November 2018.
  22. The Defence case however, could not proceed for hearing because the accused’s mental health was reported to have suffered a downturn yet again. On 21<sup>st</sup> April 2021 there was a report that accused was not fit to plead.
  23. On 26<sup>th</sup> July 2021 the record shows a mental assessment was done and he was now ready and fit to plead.
  24. The defence hearing proceeded on 22<sup>nd</sup> July 2022 when the accused person testified. In his evidence the accused indicated that before 19<sup>th</sup> January 2014 he had never taken any drugs for mental illness and had not been treated for mental health issues.
  25. It is evident that the accused’s 1<sup>st</sup> assessment soon after the alleged offence gave him a clean bill of mental health. Then, the presumption set out by Section 11 of the [Penal Code](#) was not rebutted.
  26. The issue of mental health began to show when the accused had spent some time in remand custody and it is only a medical/psychological/psychiatric examination report that can explain what happened. It is a possible that this developed after the accused had spent considerable time in remand custody.



However the clear evidence is that at the time of the alleged offence there is no evidence that the accused had any exhibited any mental health issues and if they were underlying the medical evidence brought three years after the alleged offence was committed do not reveal that fact.

27. In light of the evidence on record the conclusion that comes up is that at the time of the alleged committing of the offence the accused was of sound mind.

**On the issue whether the prosecution has proved the charge against the accused.**

28. It is not in dispute that the accused person was the last person to be with the child Ian before he was found dead.

PW1 the mother of the child, and the wife of the accused testified how on the 17<sup>th</sup> January 2014 the accused person, had accused her of infidelity and told her he would bring a witch doctor by the name Kamene to their home to deal with that issue. Kamene did come - and some rituals were carried out. However, the accused on the night of 19<sup>th</sup> January 2014 handcuffed his wife on the windowsill and beat up her up. He also beat up the deceased. He later that night unhand cuffed her and she and her two children including Ian stayed in the children bedroom till morning - while he stayed in the sitting room with Kamene. The following morning he took a rope and a panga and after handcuffing his wife to the windowsill took Ian with him and left with Kamene.

29. She was naked save for a lessa. She did not know what was going on. She noticed that the key to the handcuffs had been left there - she freed herself and left the house. The child Ian was nowhere to be found. Around 8.00am is when the child was found near the stream under a baobab tree- he had been strangled and the rope was around his neck. No one saw the accused strangle the child , however the accused had left with the child and a rope and a few minutes later the child was found dead with a rope around his neck.
30. The post-mortem examination as evidenced by the report confirmed that death was as a result of strangulation and there were rope marks around the child's neck. The accused says the child fainted. He was alone with the child. He insisted that he was only aware of the child fainting but not dying. He is the only one who would know what happened to cause the death of the child.
31. The circumstantial evidence before me is clear that that the child died, the accused was the last person to be seen with the child he left home carrying a rope, and the child died from strangulation; the circumstances point at only one person - the accused person- as the one who did strangled the child with the rope and caused his death.

**On whether the prosecution established malice aforethought.**

32. I have looked at the evidence of the mother of the child. She testified that the accused had no issues with the child. There is no evidence that the alleged witch doctor/herbalist may have caused the accused to kill the child. However the accused left home with the child, and a rope - the child was found dead having been strangled.
33. It is instructive that after doing this, the accused left his own house and went to his parent's home - there is evidence to support his beating his wife and the child the previous night - the wife's P3 provided in evidence prove this - the child's body also had some other injuries on the body other than the strangulation marks .
34. The beating of the child and his mother, followed by the accused leaving home with the child while carrying a rope and the child ending up being strangled - is evidence of knowing what he had wanted to do and doing it.



Hence in my considered view even without any other evidence - the conduct of the accused that night and that morning fulfils the requirement of Section 206 (a) of the [Penal Code](#) on malice afore thought.

35. In the circumstances I find that the accused person is guilty as charged and convict him accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH AUGUST 2023**

.....

**MUMBUA T. MATHEKA**

**JUDGE**

Ms Nyakibia for state

Ms Mboya for accused

Accused present

