



**Republic v Kivuva (Criminal Case 68 of 2017)
[2023] KEHC 22587 (KLR) (24 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 22587 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 68 OF 2017
TM MATHEKA, J
AUGUST 24, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

AMSTRONG MUSYOKA KIVUVA ACCUSED

RULING

1. This matter comes up for review of the accused person's bond status
2. The accused Armstrong Musyoka Kivuva is charged with murder Contrary to section 203 as read with section 204 of the *Penal Code*. It is alleged that on 31/12/2011 at Ngawani Village, Kithangathini Sub location, Kikoko Location, Kilungu District within Makueni County he murdered Jacob Kivuva his father.
3. From the record the accused was examined by Dr. Kokonya on 13/7/2012 and was found to be mentally stable, able to follow proceedings, understand charges facing him, advice counsel and plead to the charges.
4. There was a re-examination in 2015 by Dr. Munga Edgar where it was found that he would have difficulty following proceedings/advising counsel.
5. On 2/3/2017, the matter was transferred to High Court at Makueni.
6. When the matter was before Hon C. Kariuki J on 22/5/2018 he noted that the accused could "neither recognise his mother nor know why he was arrested or in custody". It was ordered that he be escorted to Mathari Hospital for treatment.
7. On 8/3/2021 - he was found not competent to plead by Dr. Joseph Masila. On 14/6/2021 the doctor noted that it was difficult to ascertain competence and started him on treatment. On 20/9/2021 - he concluded that the accused was not competent to stand trial and take plea. He now had a module on its



right orbit margin. On 6/12/2021 - he was on review and further review for 2 months. On 14/2/2022 - he was found not fit to take plea /stand trial. On 1/8/2022, he was found to be competent to stand trial/ take plea. The doctor however noted that “he has been giving approximate answers and estimates in what is called prison psychosis (Gander syndrome)

8. Doctor Masila noted that time the first interview he had with the accused in 2021, he had a history of giving approximate answers.
9. At the time I took over the matter on 30/5/2023 the accused had been found competent to plead and there was a plea bargain agreement in process. However by then the member of the Law Society of Kenya who had signed up to take up pro bono cases of murder suspects were on court boycott pursuant to a disagreement between them and the Office of the Chief Registrar with regard to their payments. They had downed their tools and these matters have ground to a sad halt, leaving these persons without legal representation.
10. In a bid to alleviate the issue I decided to review bond terms. Upon perusing the file I found that the accused person was never admitted to any bond term.
11. I sought a pre-bail report from probation after care services, Makueni.
12. The report was filed on 8/8/2023.
13. I have carefully perused the report.
14. I gather from the report that the Accused was an administrative police officer(AP) from 2004 to the time in 2011 when he is alleged to have committed the offence. According to the report he developed some mental health issues while at work, was admitted to Mathare, and was later escorted home by his colleagues. That his family tried to get him treatment including, traditional treatment, all in vain.
15. His mother confirmed that the main problem was when the accused failed to take his medication, he would suffer erratic behaviour and bouts of violence and stated that it was during one of those episodes that he hit his father with a stool.
16. The family of the accused are not willing to have him at home because according to them - they are too poor to manage provision for mental drugs for him, that he will be at home with his elderly mother, they fear he may turn against her in the event that he fails to take his medicine and be violent towards her, that he has not healed, and is a risk to the community and himself. Hence - the accused is not welcome home until he heals/or is fully recovered.
17. In a nut shell, the PBR indicates that the accused is not suitable for release on bail because of his mental illness.
18. The 1st thing that must be stated to the family and that the probation after care service officer ought to have made clear to the family is that remand is not a mental hospital. It is a prison - it is not even conducive to the healing of the accused. Already he has developed another mental health issue induced by his long stay in remand – prison psychosis. It is evident that for as long as he stays, in custody, he is not going to get well – they are simply saying - it is okay - he can stay there we do not want him, neither do we want to solve the problem.
19. I cannot totally blame the family - because ever as the court - I do not know what exactly the accused has been diagnosed with - what mental illness/condition he is suffering from - is it something that makes him a danger to himself and other people? Is it manageable outside a hospital - or must he remain in prison confinement? The family are not psychiatrist - neither is the court - and this information is necessary when determining what orders as to bond the court can make.



20. I think it is not sufficient for a court before which such a matter is pending not to know the condition the accused is suffering from. It is important that the illness be disclosed to the court and for the court to be advised by the psychiatrist/mental health experts on what can be done with respect to the treatment of the accused – so as to either expedite the trial/for the ODPP to decide what to do with the charges.
21. The state must be advised by psychiatrist/mental health experts when it is necessary - that the accused person remains under treatment until such a time that he is ready to proceed with the case - But to have to keep the accused in custody for over 10 years because of a mental illness whose diagnosis the court does not know, on whether it is treatable, how best it can be dealt with and whether the accused will ever recover from it.
22. The criminal justice system is not immune from the provision of article 159 (2) (a) of *the Constitution* where it states that “justice shall be done to all, irrespective of status” The accused mental health status cannot be a reason to delay a determination of any aspect of his case - yet he is not in control.
23. There must be a way to move the process forward. It is there for my view that the family’s position is taken out of fear and ignorance of the process - and the false sense of security that their kin is behind bars, he could be sentenced, and complete his sentence or for any reason he is released, he would still have to go home - what happens then?
24. This is where the weakness of the *Victim Protection Act* shows itself. Victims such as the family of the deceased herein require psychosocial support which is not forth coming. These are the gaps it was intended to fill but whence cometh the help of these persons?
25. This court is empowered with the tools to do the right thing to ensure that the accused person’s right to fair trial is not violated or infringed on account of his mental health issues. Being a remandees does not reduce his right to access mental health services.
26. In the circumstances- I take judicial notice of the recent commitment by the mediators and counsellors from Lower Eastern to offer pro bono psycho social support services to families like this one - to manage underlying issues in the family – even as the prosecution of the Criminal Case is on-going and direct as follows.
 - i. That the accused be escorted to the psychiatric at Makueni Level 5 Hospital for a report on the diagnosis of his mental illness so that the family and the court can understand the accused’s mental status, treatment needs etc.
 - ii. The report be availed within 14 days hereof
 - iii. The court assistant High Court to flag this matter for psycho social support/ counselling with the family and for the accused person.
 - iv. The matter be referred for counselling within the prison for the accused person
 - v. The order for hospital be extracted and served on prison authorities at Makueni GK prison and the psychiatrist for compliance.
 - vi. The determination of the accused person bond/bail is deferred until the report from the psychiatrist is received.
27. Mention on 7/9/2023 Before the Deputy Registrar for the report from the Psychiatrist and for compliance.

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



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MUMBUA T. MATHEKA

JUDGE

