REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 17 OF 2014

REPUBLIC

VERSUS

CTM.....ACCUSED

JUDGMENT

1. Background:

On the 27th day of July, 2014, R W M was heard screaming from her home in Nyeri County. Her immediate neighbours and passers-by who rushed to her home in response to her apparent cries for help found her lifeless body close to her gate; it was in a pool of blood and almost decapitated. The only other person who was in the home at the material time was her son, the accused; apparently, he was also the only one with whom the deceased lived. Against this background, the accused was suspected to have been the architect of the heinous and brutal murder of his mother and for this reason, he was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code, cap.63** on 6th August, 2014. According to the particulars of offence, on the 27th day of July, 2014 within Nyeri County, the accused murdered RWM.

The accused pleaded not guilty to the offence and so his trial began in earnest.

2. Evidence:

In support of its case against the accused, the state had sixteen witnesses testify on its behalf; of these witnesses, the first three were the deceased's immediate neighbours who rushed to her rescue when she screamed but who, as it later emerged, were just late. In particular, LWK (PW1) testified that she heard the deceased scream at about 1:30 PM on the material day; according to her, the deceased was screaming because the accused, who was then armed with a panga, was chasing her. She went to the deceased's home but while on the way there, she met LG (PW2), AN (PW7) and CW (PW3) who joined her and together, they proceeded to the deceased's home. They met the accused at the gate; he told them that, "I have finished my job" and that he was going to the police. As soon as they opened the gate, they saw the deceased's body near the gate. Besides it was a panga.

LGN (PW2) corroborated this evidence and testified that indeed when they ventured into the deceased's home, they met the accused at the gate and all he told them was that "he had finished his job" and was going to the police. They found the deceased beheaded. Similarly, CW M's (PW3's) testimony was consistent with that of W (PW1) and N (PW2) that they met the accused at the deceased's gate leaving the home; he heard him make remarks to the effect that he had finished his job and was headed to the police station. A N's (PW7's) testimony was also in similar terms.

Charles Mwangi Macharia (PW4) and Richard Maina Nguru (PW5) assisted in arresting the accused. According to Macharia's evidence, the accused told them that he wanted to sleep at King'ong'o prison and in fact urged them to take him to the police station. They handed the accused over to Samson Kendagor (PW12) and one inspector Karangi who were administration police officers and were the on their way to the scene of crime. The officers detained the accused at Ngamwa police station before he was later booked at Mukurweini police station and eventually charged.

Besides arresting the accused, Kendagor (PW12) testified that he knew the accused before and that he had even handled disputes between him and the deceased; according to him, the accused usually complained that the deceased was not giving him money to buy cigarettes.

Richard Maina Mwangi (PW13) also arrived at the scene soon after the accused's mother had been murdered; he later helped identify the body in the mortuary. It was his evidence that he knew the deceased's family well and more importantly, he was aware that the accused had a drug addiction problem; as a matter of fact, he had been taken to a drug rehabilitation centre in 2009.

The deceased bled profusely from the injuries she sustained; as a result of the bleeding, the blouse she wore at the time of attack was soaked in blood. The accused's t-shirt in which he was found at the time of arrest was also stained with blood. As part of the investigations into the deceased's murder, both the blouse and the shirt together with the panga that was found besides the deceased's body and which was also stained with blood were presented for analysis at the government laboratory in Nairobi. According to Lawrence Kinyua Muthuri (PW6), the government analyst, the DNA profile generated from the blood stains on the panga, the blouse and the accused's shirt matched the blood sample extracted from the deceased. His report to that effect was admitted in evidence.

The evidence as to the extent and the nature of the injuries the deceased sustained, and subsequently the cause of her death was given by Dr. Obiero Okoth (PW6), a pathologist at Kenyatta National Hospital.

Dr Obiero Okoth (PW6) performed the postmortem on the deceased's body and certified her death. It was his evidence that all of the deceased's clothes were heavily soaked in blood. The body had multiple injuries the major one which appeared to be a complete decapitation; the head and the torso were only linked by what the pathologist described as "a small portion of muscle". The spinal column was completely severed. In the pathologist's opinion, the death of the deceased was caused by "multiple injuries mainly respiratory, cardiovascular and spinal secondary to a sharp force trauma. He certified the deceased's death and issued a death certificate to that effect. His postmortem report was also admitted in evidence.

It would appear that the accused's state of mind was an issue of concern at the very outset. The record shows that when he was arraigned in court for the very first time to take his plea, the learned counsel for the state made reference to a psychiatrist's report and informed the court that the accused was suffering from a mental illness and was not in full control of his faculties; he could also not understand court proceedings and was thus incapable of taking plea. It was the state's opinion that the accused needed medical treatment. The court eventually directed that the accused be taken to Mathari Mental Hospital for treatment.

Later, in the course of the accused's trial, two expert witnesses testified on this specific question regarding the accused's probable mental status at the time of the offence; they identified themselves as Georgina Wangui Kamunge (PW11) and Dr. Mucheru Wangombe (PW14) both consultant psychiatrists at Mathari Teaching and Referral Hospital. It was Kamunge's evidence that on the 17th day of August 2014, the accused person was admitted at the Mathari Hospital for review, apparently of his mental health. Upon reviewing him, she concluded that the accused was mentally stable and was therefore capable of standing trial. Upon cross-examination, she clarified that the accused was admitted in hospital on the 7th day of August 2014 and not on 17th August 2014. As at the time of admission, she was not aware whether the accused person had been admitted elsewhere before.

She also admitted that the accused was diagnosed with schizophrenia as a result of what she described as "connubial polysubstance abuse." She explained this to be a long-term mental condition that affects the mind in different areas like the perception, the thought and cognitive parameters and the mood. According to the psychiatrist, schizophrenia affects the mind and the victim cannot make rational judgment where treatment is not given. She could not tell whether the accused was under any medication before the 7th August, 2014. All she was required to do, at the time he was admitted in hospital, was to ascertain whether the accused was stable enough to stand trial and, in her opinion, as of 17th September, 2014, he was stable; as a matter of fact, he was discharged, but continued with treatment, apparently as an outpatient, even after the discharge. It was also noted that he was admitted two weeks after the murder of his mother. She admitted that she was aware, one Dr. Mucheru had treated the accused previously but could not tell the last time this treatment was administered prior to the murderous incident.

On his part. Dr. Wangombe testified that he reviewed the accused person on 2nd October, 2014; he had been treated for mental illness at Masaba Hospital between the year 1993 and 1994. In 2006 and 2009 he had been treated at Asumbi Drug Treatment Centre for a total of twelve months. The accused had been using Marijuana, cigarettes and khat since 1992. He also used cocaine between the years 2002 and 2010. Although he abused drugs, the accused worked as a drug addiction counsellor at the various drug rehabilitation centres. Dr Wangombe also established that there was a history of mental illness in the family; for example, in 1975 the accused's paternal grandmother died at Mathari Hospital from a mental illness. Again, two of his cousins were suffering from mental diseases.

It was also his evidence that the accused had been seen at the facility on 2nd September, 2014; on that date, he was admitted and during the admission period, he was attended to by Dr. Kamunge and Dr Kisivuli. He confirmed that the accused was treated of schizophrenia which he testified is a chronic relapsing illness, characterised by false and unshakeable beliefs. He was also suffering from hallucinations; according to the psychiatrist, the accused could see and hear voices of imaginary people. He had a history of substance abuse including alcohol, nicotine, khat and cocaine. The last time he was attended to was on 2nd October, 2014 when he was assessed and found to be fit to stand trial. It was established at the time that he could, among other things, understand the court process, he was able to answer questions which the court would pose and was capable of instructing counsel. The psychiatrist conceded, however, that the mental state of a schizophrenia patient changes from time to time and therefore he could not confirm whether the accused was still in the same state of mind he was in at the time it was established that he was fit to stand trial. Such a patient, according to him, may lead a near normal life if he is under treatment but if he abuses substances such as cannabis, he tends to get paranoid and can harm other people in the process. In particular, the doctor could not confirm whether the accused may have been in this state when he attacked his mother. He could also not confirm whether the accused had all along been able to follow the proceedings since he had not gone back to the hospital for a follow-up treatment.

When he was put on his defence, the accused admitted on oath that on the 27th July, 2014 he murdered his mother. On the material day, after taking his breakfast he took some pills to manage his schizophrenic condition. In his words, he had been in this condition since he was in high school; he added that he had been addicted to drugs since he joined high school in 2002. At some point, he was taken to Masaba Hospital for counselling and since then, he had been on medication. He remembered the 1st August, 2014 when he was taken for assessment at Murang'a General Hospital and referred to a psychiatrist's report of the same date which showed that he was not fit to stand trial.

On cross-examination, he admitted that the deceased was his mother and that it was only when he was admitted at Mathari Hospital that he was informed that he had killed her. He also testified that between 27th of July, 2014 when she died and on 1st August, 2014, he did not take any medication. When it was suggested to him that he had been against the deceased's decision to hire casual workers, and probably that was

the cause of the disagreement between him and his late mother, he denied having stopped her from engaging them.

That is as far as both the prosecution and the defence evidence went.

3. The Law:

Sections 203 and **204** under which the accused was charged respectively define and prescribe the punishment for the offence of murder. For better understanding, it is necessary to reproduce the two provisions here; they sate as follows:

> ***203. Murder***
>
> ***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***
>
> ***204. Punishment of murder***
>
> ***Any person convicted of murder shall be sentenced to death***

Section 204 has since been held to be inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR).**

The burden on the prosecution in proving the offence of murder is primarily double sided; first, it must establish that the unlawful death was caused by an act or omission of the accused and, second, that the accused did that act or omitted to act with malice aforethought. One cannot speak of death unless it is proved that indeed a human being's life was terminated and that it was terminated unlawfully. It therefore goes without saying that the facts of death and its unlawful cause must necessarily be proved as well.

Malice aforethought is the mental element of the offence of murder; to a greater degree, it would ordinarily shed some light on the aspect of unlawfulness of the death. It may be either express or implied**. (SeeWoolmington v DPP [1935] AC 462);** it is express when it is proved that there was an intention to kill unlawfully **(see Beckford v R [1988] AC 130)**, but it is implied whenever it is proved that there was an intention to unlawfully cause grievous bodily harm **(seeDPP v Smith [1961] AC 290).**

Regardless of whether it is express or implied, the 'intent' of the accused must be brought to bear.

Malice aforethought is such a crucial element in a charge of murder that courts do not have the freedom to speculate on what it entails whenever they have to consider whether it has been proved or not; it is for this reason that **Section 206** of the **Penal Code** prescribes in express terms circumstances in which malice aforethought may be inferred; that section states that:

> **206. Malice aforethought**
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> **Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—**
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> **(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
>
> **(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually 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 not be caused;**
>
> **(c) an intent to commit a felony;**
>
> **(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

4. Analysis and Conclusions:

The case against the accused has to be considered against this legal background. To begin with, the facts of the deceased's death and that she was unlawfully murdered present no great difficulty. There was sufficient evidence from no less than five witnesses that the deceased's decapitated body was found sprawled in a pool of blood in her compound. It was positively identified during the postmortem and to cap it all, the pathologist certified the deceased to have not only died but also that she died of multiple injuries inflicted by a sharp force on the respiratory, cardiovascular and spinal organs of her body. The sharp object that must have been the murder weapon was the panga found next to her body and stained with blood which was established to be the deceased's. With this evidence, I am satisfied that the prosecution has proved beyond any reasonable doubt not only the fact of the deceased's death but also that her death was unlawful.

The answer to the equally pertinent question of who was the perpetrator of the heinous crime is also not difficult to find. Although none of the prosecution witnesses witnessed the brutal murder of the deceased, the available circumstantial evidence is so strong that it could not have been anybody else other than the accused. Reference to this sort of evidence is found in **Section 164** of the **Evidence Act, cap. 80;** It states as follows:

164. Circumstantial questions to confirm evidence

When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.

I understand this provision of the law to say that where there is proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, the court may rely on such evidence of circumstances that may have been observed at or near the time or place the fact in issue occurred. If the circumstances are proved beyond reasonable doubt, the court may convict in the absence of direct evidence; however, it is trite that circumstantial evidence must be narrowly examined before drawing any inference of guilt on the part of an accused. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on his part. The leading decisions on this issue are **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715.**

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting **Wills on Circumstantial Evidence,** held as follows:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.

In **Simon Musoke versus Republic (supra),** this principle was extended when the same court cited with approval a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that: -

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The inference that the accused fatally wounded his mother can be drawn from a string of facts which came to the fore from the evidence of several prosecution witnesses. There was, for example, consistent evidence that only the accused lived and shared the same compound with the deceased; on the material day, the two of them were together in that compound. In itself self, the fact of sharing a compound with the deceased would not be a sufficient ground to link the accused with the murder of his mother; however, it was established that the compound was protected by a live kei-apple fence and a chain link. There was no evidence, or any suggestion for that matter, that a stranger could possibly have found his way into the compound and murdered the deceased.

In addition, the deceased's neighbours who testified, heard the deceased scream for help. They responded to rescue her and rushed to her home only to find that she had been killed. They met the accused at the gate on his way out of the home and all he told them was that "he had finished his job" and was now on his way to the police station as "he wanted to sleep at King'ong'o(prison)".

Part of the accused's clothing was bloodied; the analysis of the blood stains on his clothing established this was the deceased's blood. It can only be that the accused's clothing got stained with his mother's blood when he mercilessly hacked her to death. No doubt, the profuse gushing of the blood ended up splashing on his t-shirt.

Looked at in their entirety, these facts justify the inference of guilt on the part of the accused person; they are, in my humble view, inculpatory facts that are no doubt incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Further, the defence did not suggest, and I have not found any evidence in that regard, that there could have been other co-existing circumstances which can be said to weaken or destroy that inference of guilt; if anything, the accused himself admitted having killed his mother.

The final and perhaps the only vexing question in this case is whether the prosecution established the accused's savage acts were informed by malice aforethought. In other words, did the accused consciously set out to kill his mother?

Although it was up to the prosecution to establish malice aforethought, whether implied or express, on the part of the accused, it is the prosecution itself which raised the alarm, as early as when the accused was first arraigned in court to take plea, that his sense of judgment was impaired. To quote Mr Njue, the learned counsel for the state, when the accused was presented in court (Wakiaga, J) on 6th August, 2014:

The matter is for plea today. The psychiatrist report indicates that the accused has a mental illness and is not in full control of his mental actions and therefore may not understand the court proceedings. He is in need of medical treatment. We seek directions. He cannot take plea.

The psychiatrist report that the learned counsel made reference to was by one Dr Mburu J.M., a consultant psychiatrist at Murang'a County Referral Hospital, who was not called to testify but whose report the accused made reference to as one of the documents the defence was supplied with by the state in preparation for its case.

Although Dr Mburu did not testify, the evidence by Dr Kamunge and Dr Wangombe of Mathari Mental Hospital was consistent with his evidence that due to some disease of the mind the accused may not have been capable of taking plea and follow court proceedings when he was first presented to court on 6th August, 2014.

It is necessary to recapitulate the pertinent part of their evidence, albeit in summary, in considering the question whether the accused understood the nature of his actions and whether he was conscious that they were wrong.

The two psychiatrists were both in agreement that the accused suffered from schizophrenia as a result of polysubstance abuse. The disease, according to Dr Kamunge, is a long-term mental condition which affects the perception aspect of the mind, the thought process, the cognitive parameters and the mood of the patient. The patient's judgment is impaired where treatment is not given.

Dr. Wangombe was more detailed in his testimony and went deep into the history of accused's mental illness demonstrating that it is a malady within the accused's family lineage and thus the accused's problem was not unique to him. He testified that as early as 1993 and 1994 the accused had been treated of mental illness. Between 2006 and 2009 he had been treated for drug abuse; marijuana and cocaine are amongst the drugs which he apparently abused. The abuse of drugs must have exacerbated his mental illness.

His evidence on the schizophrenic condition of the accused was that it was a chronic relapsing condition characterised by false beliefs and hallucinations. A patient suffering form this condition had the tendency to see and hear imaginary people.

Most crucially, the psychiatrist was categorical that the mental state of schizophrenia patient was subject to change from time to time; as such he could not confirm whether the accused was still stable long after he had been treated and found fit to stand trial. In other words, he could not confirm that the accused had been following the proceedings after he took plea. He was, however, certain that such a patient will lead what he described as a 'a near normal life' if he was to be placed under regular treatment. He cautioned that such treatment does not add to anything much if the patient persists in abusing substances such as cannabis, for then, he tends to get paranoid and as such, he is a threat to the safety of other people.

With this sort of evidence, I get the impression that the accused suffered from some disease of the mind that may have compromised his judgment of what is right or wrong and, in particular, whether he understood the nature of his actions and the natural consequences that would flow from such actions.

Talking of the 'disease of the mind' **section 12** of the **Penal Code** absolves from criminal responsibility any person suffering from a disease affecting his mind and who, for that reason, is incapable of understanding what he is doing, or that he does not know that he ought not to do the act or make the omission which, in ordinary circumstances, would attract criminal liability.

As noted, it is necessary in a case of murder, for the state to prove not only that the death was as a result of a voluntary act of the accused but it must also prove malice on his part; this appears to be the rationale behind this statutory provision. That the act or omission causing death must be a voluntary act is not just a requirement necessary in a murder case only; it is, as a matter of law, essential in every other criminal case.

More often than not, a disease of the mind that compromises one's capacity to make a rational judgment avails him of the defence of insanity. Where such defence prevails, the accused is said to be guilty but insane. This concept was developed in the wake of the decision in **R versus M'Naghten (1843) 8 E.R 718,** where the accused, Daniel M'Naghten was charged with the murder of one Edward Drummond by shooting him with a pistol. He pleaded not guilty. During his trial, evidence was led on his behalf, that he was not, at the time of committing the act, in a sound state of mind. His defence prevailed and was found not guilty and, accordingly acquitted.

Following this decision, the House of Lords asked a panel of judges a series of hypothetical questions about the defence of insanity. Lord Chief Justice Tindal who presided over the panel stated the primary question to be this:

> ***Whether at the time the act in question was committed, the prisoner had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of the opinion that the prisoner was not sensible, at the time he committed it, that he was avoiding violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of the opinion that when he committed the act he was in a sound state of mind, then there verdict must be against him.***

The learned judge stated that the jurors (where the trial is by jury) ought to be reminded in all cases that;

> ***"…every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused as labouring under such a defect of reason, from 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."***

This pronouncement later became to be popularly referred to as "the M'Naghten Rule" (or rules); it is codified and, more or less, encapsulated in **sections 11** and **12** of the **Penal Code**. Reference has already been made to **section 12** earlier in this judgment; **Section 11,** on the hand, presupposes the sanity of every person, and a person to have been of sound mind at the material time until the contrary is proved.

The upshot is that an act is not punishable if it is done involuntarily, without any control by the mind or rather an act done by a person who is not conscious of what he is doing because he is suffering from some mental deficiency or, to put it straight, a disease of the mind.

The immediate question that is bound to arise is this: what constitutes a 'disease of the mind' as to insulate one from criminal responsibility? Narrowing it down to the accused's case, can it be said that at the time he brutally murdered his mother he must have been belabouring under delusion as a result of a disease of the mind as understood in the M'Naghten Rule. The psychiatrists' evidence suggests that this might have well been the case. There is every reason to believe the accused's capacity to make a rational judgment was impaired.

In **Bratty versus Attorney-General for N. Ireland (1961) 3ALL ER 523 at page 532,** the House of Lords defined what constitutes a "disease of the mind" within the M'naghten rules and cited instances of diseases that would fall into this category of sickness. It stated:

The major mental deceases, which the doctors call psychoses, such as schizophrenia, are clearly diseases of the mind. (Per Lord Denning).

The learned judge went further to substantiate that:

> ***It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind.***

The accused was diagnosed with schizophrenia which, as noted, has been acknowledged by the learned judges of the House of Lords to be one of those diseases that fit the description of a 'disease of the mind' within the context of the M'Naghten Rule. There is no doubt therefore that the accused was suffering from a disease of the mind.

Turning back to the accused's defence, it is trite that in all cases where the defence of insanity is raised, the burden is on the defence to prove it. It was so stated in **R versus Saidi Kabila Kiunga (1963) E.A 1 where** Spry J., at page 2 reiterated that:

> ***when insanity is advanced by the defence, as it was in this case, the burden of proof is on the defence, although it is not a heavy burden. As Windham, J.A. (as he then was) said in Nyinge s/o Suwatu (1959) E.A. 974(C.A)***
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> ***"he must show, on all the evidence, that insanity is more likely than sanity, though it may be ever so little more likely. Merely to raise a reasonable doubt might still leave the balance tilted on the side of sanity."***

The accused himself advanced the defence of insanity but much of the evidence that brought his state of mind to the fore came from the prosecution witnesses. His testimony was nothing more than his express admission that he killed his mother but suggested that he might not have been aware of what he did until he was informed when he was in hospital.

Were it not for the evidence of the psychiatrists I would have taken his evidence with a lot of circumspection. Having declared after murdering his mother that he "had finished his work" and that he was on his way to the police station and also that he wanted to spend time at King'ong'o prison, I was tempted to conclude that the accused must have been aware and conscious that nobody ends up in prison unless he has committed some crime. He must have therefore known that what he did was wrong and most probably, he was going to end up in prison. In any event although an accused's evidence in this regard must be given due weight, it is more probable than not that the accused will take an impersonal or impartial view of his own mental stability.

Nonetheless, it is the prosecution evidence itself that raised a reasonable doubt to the effect that the accused may not have been in full control of his faculties at the material time. It must also be remembered, and as stated in **R versus Saidi Kabila Kiunga (supra),** the burden on the accused to prove insanity is not a heavy one; all he is required to show is that he was more likely to be insane than sane. And in **R versus Magata s/o Kachekana (1957) E.A.** Lyon, J. cited the head note in Archbold 33rd Edition, page 20 where it was stated:

> ***"The burden of proof which rests upon the prisoner to establish the defence of insanity is not as heavy as that which rest upon the prosecution… It may be stated as not being higher than the burden which rests on the plaintiff or defendant in civil proceedings and may be discharged by evidence satisfying the jury of the probability of that which the prisoner is called on to establish".***

The same point was stressed in **Bratty Versus A.G. for N. Ireland** (supra) (per Lord Viscount Viscount Kilmur, L.C., at page 528 that to establish a defence of insanity within the M'Naghten rules, the accused must prove on the preponderance of probabilities, first, a defect of reason from a disease of the mind, and secondly, as a consequence of such a defect, ignorance of the nature and quality (or the wrongfulness) of the acts. This, I am satisfied, is what has been borne out from the evidence, not necessarily from the accused but from the prosecution witnesses.

It should not be taken against the prosecution that it effectively laid ground for the defence of insanity because, first, it is the duty of the prosecution to present all the relevant evidence before court regardless of whether it may end up jeopardizing its own case. Secondly, it has been stated in **Bratty Versus A.G. for N. Ireland** (supra) (at page 533) that the old notion that only the defence can raise a defence of insanity is now gone; the prosecution are as much entitled to raise it because it is their duty to do so rather than allow a dangerous person to be at large.

5. Verdict:

In the final analysis I am bound to invoke **section 166** of the **Criminal Procedure Code** and make a special finding that the accused is guilty but insane. The import and rationale behind this sort of finding are better explained in the section itself and, for this reason, it is necessary that I reproduce the pertinent part of that section here; it states as follows:

> ***166. Defence of lunacy adduced at trial***
>
> ***(1) 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.***

Subsections (2) and (3) prescribe the course the trial court should take whenever the special finding is made; to be specific, the court must report the case for the order of the President; in the meantime, the court shall order the accused to be kept in custody in such place and in such manner as it shall direct. The President may eventually order the accused to be detained in a mental hospital, prison or other suitable place of safe custody.

Taking cue from these provisions, I direct that the accused remains in the custody of Nyeri main prison at the pleasure of the President. It is so ordered.

Dated, signed and delivered in open court this 23rd November, 2018

Ngaah Jairus

JUDGE