



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**Criminal Case 7 of 2004**

**REPUBLIC.....**  
**PROSECUTOR**

**VS**

**BENARD KHAMALA MAFUKO.....**  
**.....ACCUSED**

**JUDGMENT**

The accused person in this case, Benard Khamala Mafuko is before this court facing a charge of murder contrary to section 203 as read with section 204 of the Penal code. The particulars are that on the 17<sup>th</sup> day of December, 2000 at Bunjosi Village, Misikhu Location in Bungoma District within western Province, murdered Edward Wanyama Wafula.

The prosecution's case against the accused is supported by the evidence of 5 witnesses. On the 13<sup>th</sup> day of December 2000 Jackson Wanyama (P.W2) received information from his wife, Grace Namulongo that the accused was mentally sick and that he had threatened to kill his wife who had just given birth to a small child. P.W2 said he went to talk to the accused and came back. Again on 16.12.2000, P.W2 received information that the accused was still mentally unstable and that he has continued to threaten to kill his wife.

This information prompted P.W2, to send his wife to stay with the accused's wife. At about 6.00 p.m on 16.12.2000 P.W2 went to take his wife from the accused's house leaving behind his son, Edward Wafula Wanyama (deceased) to assist the accused's wife. At about 7.00 p.m, P.W2 received information that Edward Wanyama (deceased) had been slashed by the accused. He rushed to the accused's home but he did not find him at home. He was found in the farm of one Jesse Makali. P.W2 said he found the accused killing Edward Wanyama (deceased) at the farm of Jesse Makali. P.W2 screamed and neighbours came. P.W2 reported the incident to the chief and then to the police. P.W2 said he was with the accused in the morning of 16.12.2000 and that he was mentally sound. P.W2 said that the accused had a mental disturbance at the time of committing the offence. P.C. Ezekiel Lulei (P.W1) confirmed booking the report of the deceased's murder on 17.12.2000 before leaving for the scene. At the scene P.W1 managed to re-arrest the accused who appeared to P.W1 to be mentally disturbed. P.W1 said he took him to Kakamega Provincial Hospital where he was adjudged to be mentally unsound to stand trial. P.W1 took possession of the murder weapon, a panga which he produced in evidence as an exhibit.

William Murefu (P.W3) told this court that he met Barasa Wanyama and Mary Samwel on 16.12.2000 morning. The duo told him that the accused had killed Edward Wanyama. P.W3 saw the accused who was in possession of a panga while standing besides the deceased's body at the farm of Jesse Makali. P.W3 said he knew the accused had a mental disorder for days before the date of the incident. P.W3 informed the village elder who then mobilized the youths to disarm and arrest the accused. P.W3 said he knew the accused was mentally unstable and that the accused's family had a history of mental illness. Mark Barasa (P.W4), who is a brother to the deceased confirmed that the accused was mentally disturbed 3 days before the incident. P.W4 said he visited the scene soon after the incident on 16.12.2000 whereby he found the accused while armed with a panga standing besides the deceased's boy while singing.

Doctor John Ouma Juma (P.W5) produced the post mortem report prepared by Dr. Aswani as an exhibit in evidence. The post mortem report indicates that the deceased's body had multiple cuts all over the body. The cause of death was stated to be external haemorrhage due to deep multiple cuts. P.W5 also produced the medical examination report (P3) dated 19.12.2000 prepared by Dr. Aswani in respect of the accused. In the P3 revealed that the accused was mentally unstable. The doctor notes that the accused had gone bizarre, disoriented in time, place and person.

When placed on his defence the accused gave an unsworn statement in his defence. He said he did not know how and when he killed the deceased. He said he came to learn of the incident while he was admitted at Kakamega Provincial General Hospital. He claimed he used to receive both conventional and traditional medicine over his mental illness which he says he has had for a while.

The parties opted to rely on the submissions made at the stage of no-case to answer under section 306 of the Criminal Procedure Code. It is the submissions of the defence that the accused committed the offence when he was insane hence his is not criminally liable under section 12 of the Penal Code.

On his part, the learned Principal State Counsel is of the view that the accused if found to have been insane at the time of committing the offence then he should be convicted and be dealt with under section 166 of the Criminal procedure code.

At the conclusion of the submissions, I summed up the evidence to the assessors. I then asked for their opinions. The assessors were unanimous in their opinion that the accused is guilty but was not criminally liable for the offence of murder because he was insane at the time of the offence.

I have considered the evidence, the submissions and the assessors' opinion. I have come to the following conclusion in this matter. The evidence of all the 5 prosecution witnesses are in agreement that the accused was a person with a mental illness. The evidence further revealed that at the time of committing the offence, he was mentally disturbed and unstable. His condition at the time of arrest is summarized in the medical report dated 19.12.2000 prepared by Dr. Aswani and produced by Doctor John Juma (P.W5). Dr. Aswani made the following remarks:

*“The patient is not mentally stable. Has gone bizarre, disoriented in time, place and person. Shouting a lot about biblical things and songs. Cannot stand trial because he is insane”.*

The medical examination report was made only 2 days after the report of murder. I am convinced and in that regard agree with the assessors that the accused was insane when he killed the deceased. I find him guilty but he is criminally not liable under section 12 of the Penal code.

In view of my aforesaid findings, I consider that it is a fit and proper case in which I should make the special finding under section 166 (1) (a) of the Criminal procedure Code that the accused was guilty of the charge of murder against him but was insane when he did the acts. Pursuant to section 166 (1) (b) of the Criminal Procedure Code, this case shall be reported for the order of His Excellency the President of the Republic of Kenya and in the meantime the accused shall be kept in G.K Prison custody.

Dated and delivered this 14<sup>th</sup> day of September 2006.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Onchiri for the accused and in the presence of Mr. Onderi for the state.