



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Republic v TGW (Criminal Case E002 of 2022)
[2025] KEHC 2476 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E002 OF 2022
RM MWONGO, J
FEBRUARY 19, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

TGW ACCUSED

JUDGMENT

1. The accused was charged with murder contrary to Section 203 as read together with Section 204 of the *Penal Code*. The particulars of the offence are that on the night of 10th/11th January 2022 at Rung'ang'a village, Embu West sub-county within Embu County, the accused person murdered his grandmother JKW. The accused person pleaded not guilty and the matter proceeded to full hearing.
2. The prosecution's case was that on the night of the incident, the accused person entered his grandparents' house and attacked both of them with a knife. His grandfather sustained 15 stab wounds, but survived. Unfortunately, the accused's grandmother succumbed to the stab injuries while undergoing treatment at Embu Level 5 Hospital.
3. After hearing 9 witnesses, the accused and 2 defence witnesses, it was established that the accused suffers from a recurrent mental illness which had belabored him at the time of the incident. Ultimately, the accused was found guilty of murder, but held to be insane. A special finding was entered as such under section 166(1) of the *Criminal Procedure Code*.
4. The court has heard the accused's mitigation and taken it into consideration. A further mental examination was conducted following conviction. The report is dated 22nd January 2025. In the said report, Dr. J.N. Thuo has found the accused person to be mentally sound but that he still cannot remember the events leading to the night of the incident.
5. Defence Counsel stated in mitigation that the accused is a 37-year-old first offender with a mental illness. That the accused is under medication for his mental condition as indicated in the mental



- assessment report dated 22nd January 2025. He stated that the accused is a father to an 11-year-old boy who needs his parental guidance. That his son lives with his (the accused's) mother, given that he separated from his son's mother. He urged the court to consider that he was found guilty but insane.
6. In response to this mitigation, the prosecution stated that given the circumstances of the case, the accused should be sentenced to the maximum prescribed death penalty. It was their argument that the deceased met her gruesome death following an attack by the accused when she was asleep in her house with her husband. The prosecution stated that prior to the incident, the accused had shown violence towards the deceased and he been demanding money from her and her husband in a cruel manner.
 7. According to the Probation Officer's pre-sentence report dated 24th January 2025, the accused person was born out of wedlock before his mother got married and had 5 other children. He was raised by his maternal grandparents since he was 3 years old until the time of the incident. The accused obtained tertiary education but has never been employed. He was helping his grandparents with their businesses until the time of the offence. The accused's grandfather who is the victim refuses to believe that the accused was encumbered by a mental illness at the time of the offence. His plea is that the accused be sentenced as the court deems fit.
 8. The views of the community are divergent, some believing that the accused was always well and that he is feigning mental illness, while others believe that he was mentally ill. Some members of the community are apprehensive that if the accused is released on a non-custodial sentence, he will kill his grandfather since he had always planned to kill his own mother and grandparents but so far, he had only managed to kill one of them. They preferred that he be held in custody away from his family and the community at large.
 9. The accused's family members stated that they do not know the accused to have a mental illness and that he is lying by saying that he does not remember the events of that day. They preferred that the court gives him a punitive sentence.
 10. The punishment for a person convicted of the offence of murder is prescribed under Section 204 of the [Penal Code](#) which provides:

“ Any person convicted of murder shall be sentenced to death.”
 11. The court in this matter is guided by the provisions of the Judiciary Sentencing Policy Guidelines 2023 as amended on the direction of the Supreme Court in the case of *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated))* [2017] KESC 2 (KLR). Paragraph 2.2.6 of these guidelines provides:

“ Following *Muruatetu II*, the mandatory nature of the death penalty is still applicable to other capital offences, except murder.”
 12. The court has considered the circumstances of the case and how the deceased met his death. It has also noted that the accused was found guilty but insane. In *Leonard Mwangemi Munyasia v Republic* [2015] KECA 382 (KLR) the Court of Appeal held:

“ Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a 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. In such circumstances, the accused person will not be entitled to an acquittal but under section 167 (1)(b) of the [Criminal Procedure Code](#) he would be convicted and ordered to be detained during the President's pleasure because



insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.”

13. However, this jurisprudence has since evolved. The High Court in Nairobi, in exercise of its jurisdiction to hear any question respecting the interpretation of the Constitution under Article 165(3) (d) of the Constitution, in *Kimaru & 17 others v Attorney General & another*; Kenya National Human Rights and Equality Commission (Interested Party) (Petition 226 of 2020) [2022] KEHC 114 (KLR) (Constitutional and Human Rights) (1 February 2022) (Mrima J.) declared sections 162(4)&(5), 166(2),(3),(4),(5),(6)&(7) and 167(1)(a)(b),(2)(3)&(4) of the Criminal Procedure Code unconstitutional for contravening various Articles of the Constitution.

14. That court stated that the special finding of “guilty but insane” resulted in the convicted person being held at the pleasure of the President. Such holding interfered with the independence of the Judiciary and the doctrine of separation of powers. It was held:

“ a) A declaration hereby issues that detaining of persons with mental challenges who are facing criminal trials or who have been tried and special findings made that such persons were ‘guilty but insane’ in prisons at the President’s pleasure pursuant to 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 or under any other law constitutes a threat to the doctrine of separation of powers and the independence of the Judiciary.

b) A declaration hereby issues 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 or any other law providing for the detaining of any person with mental challenges who face a criminal trial or has been tried and a special finding made that such a person was ‘guilty but insane’ at the President’s pleasure contravenes 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(1) of the Constitution. Such provisions are hereby declared unconstitutional, null and void.

c)

15. Prior to this finding, Courts would order that the accused person be held in custody awaiting the President’s pleasure or order on his sentence. Following the case of *Kimaru & 17 others* this court must be guided by the Judiciary Sentencing Policy Guidelines 2023 which provide for instances where the accused is found guilty but insane, as follows:

“For offenders who are found ‘guilty but insane’

3.4.18 The cases cited in the footnotes above make clear that the basis for any finding of ‘guilty but insane’ must be clearly expressed by the courts, pending further clarification and/or amendment in the law.

3.4.19 On the question of sentence following findings under Sections 166 or 167, the court must be guided by relevant expert opinion based on the thorough examination of the offender. Among other things, courts should specifically request for advice on the treatment and care regime suitable for the offender.

3.4.20 The court should then determine where the offender should be placed and give a direction that he or she be detained until a psychiatrist responsible



for that facility, at such time certifies the offender as no longer a danger to society. The court should expressly state that upon making such a finding, the psychiatrist responsible for the facility must refer the matter back to the court before any release is made for further directions/order. This would also apply where treatment is failing, whereupon the court may make further orders on treatment.”

16. The spirit of these guidelines is that where a special finding of guilty but insane has been entered, there must be a thorough examination of the offender to determine the most relevant punishment in light of the mental illness. At the same time, the rights of the victim’s family should be balanced against the rights of the accused person who has been found guilty but insane.
17. In the case of *Wakesho v Republic (Criminal Appeal 8 of 2016)* [2021] KECA 223 (KLR) (3 December 2021), the Court of Appeal found that the appellant had been mentally ill at the time of the offence and set aside the death penalty imposed upon him. It held:

“For purposes of the present appeal, however, we are satisfied that the learned judge ought to have made a special finding of guilty but insane. We therefore allow the appeal. We quash the conviction and set aside the sentence of death. We substitute therefor, a special finding that the appellant did the act charged but he was insane at the time he did it. We order that the appellant, who has been in custody since his arrest on May 18, 2012, shall immediately be taken to a mental hospital for medical treatment where he shall remain until such time as a psychiatrist in charge of the hospital certifies that he is no longer a danger to society or to himself.”

Conclusions and Directions

18. The route taken by the Court of Appeal in the above case offers good guidance on the issue at hand. In light thereof, the prudent thing is for this Court to order and it is hereby so ordered, that the accused be held at Mathari National Hospital for a period of 3 months for observation and treatment. This is because the Psychiatric Report of 22/1/2025 indicates that the offender, despite being on treatment for mental illness, has an otherwise alert, normal and oriented mental status with good judgment and that he is fit to plead.
19. Upon his return with a medical report, the Court will be able to determine an appropriate sentence based on the report of the offender’s treatment, and any recommendations on the mental state. The matter will be mentioned at the end of four (4) months from today when a comprehensive mental examination report and opinion with recommendations from the head of the Mathari Mental Hospital is availed together with the accused’s medical records of the treatment offered.
20. If at the end of this period the court is of the view that the offender’s medical condition can be managed, the Court will decide on the nature of the sentence to impose. At present the Court is of the view that a custodial sentence is appropriate.
21. If at the end of this period the court thinks that the offender’s mental state cannot be contained in Prison, or that he will be a hazard to other inmates and himself, the offender may be held at a mental institution until such time as his mental condition will be manageable.
22. The offender shall be brought before Court after four (4) months with a comprehensive medical/mental report from Mathari Mental Hospital for final sentence.
23. Orders accordingly.



DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 19TH DAY OF FEBRUARY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Mageto holding brief for Musyoka for the accused

Accused Present in Court

Karuri for the State

Francis Munyao - Court Assistant

