



Wambugu v Director of Public Prosecutions (Criminal Miscellaneous Application E304 of 2023) [2025] KEHC 1284 (KLR) (Crim) (17 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1284 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E304 OF 2023
AM MUTETI, J
FEBRUARY 17, 2025

BETWEEN

CATHERINE MUTHONI WAMBUGU APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

Introduction

1. The applicant in this matter was tried and convicted by this court for the offence of murder. The applicant was charged with two counts of murder involving Katherine Nyambura Irungu and Peter Kimani Irungu. The accused person committed the offence at a time the Doctors testified she was suffering from postpartum psychosis a recognized mental condition which develops in some women after giving birth.
2. The learned Honorable Lady Justice Lesiit (as she then was) at the conclusion of the trial found that the applicant caused the deaths but that at the time she was suffering from an illness of the mind. The learned judge entered a special finding under Section 166 of the *Criminal Procedure Code* effectively confining the applicant to detention in prison at the pleasure of the president.
3. The applicant has moved this court for orders that:-
 - i. That this Honorable Court be pleased to review and set aside the orders committing the applicant to serve custodial sentence at the President's Pleasure.
 - ii. That this Honorable Court be pleased to Commute the applicant's sentence to the period already served.



- iii. That this Honorable court be pleased to issue any other order as it deems fit in the interest of justice.
 - iv. That there be no orders as to costs.
4. The applicant set out the following grounds on the face of this application;-
- a. That after a mental assessment, it was established that the applicant was suffering from post-partum psychosis after giving birth which is classified as the disease of the mind.
 - b. That after the hearing and conclusion of the Criminal Case no. 43 of 2015 against the applicant the trial court made a finding through a judgment delivered on 27th September 2018 that the applicant is guilty for the offence of murder but she was insane.
 - c. That the trial court having found the applicant guilty but insane, went ahead to sentence her under presidential pleasure pursuant to section 166 of the C.P.C.
 - d. That in the Year 2020 the applicant among others filed a constitutional petition in the High court constitutional and Human Rights Division through Petition no 226 of 2020 whose outcome through a judgment delivered by Hon Justice Mrima on the 1st February 2022 declared Section 166 of the C.P.C unconstitutional.
 - e. That the Hon Judge in his Judgment ordered that people who a finding have been made that they are guilty but insane and have been subjected to Presidential Pleasure sentence to appear before the trial court for appropriate orders and directions taking into consideration the period the applicant have been in prison and the current mental state of the accused.
 - f. That for the duration of the eight years that the applicant has been incarcerated she has recovered and she is in full mental stability.
 - g. That the applicant has undergone through immense rehabilitation programs that have had positive impact towards process of reforming including counselling, religious activities and she is now fit to positively integrate with the society.
5. The applicant has also sworn an affidavit in which she deposes that she has now fully recovered from the mental condition and is prepared for integration back in the society.
6. The applicant has further deposed that she is rehabilitated and if given a second chance she would lead a very positive life. The applicant also states that she is prepared to help other women who may be from post partum depression.
7. The applicant urged this court to set aside the sentence detaining her at the president's pleasure and substitute it with an order that meets the ends of justice. In making the order the applicant has pleaded with this court to consider the 8 year period she has spent in prison custody due to her mental state.
8. In support of the application, the applicant has submitted extensively on the issue of mens rea. To advance her argument in that score the applicant has cited the decision in Philip Muiruri Ndarunga v Republic (2016) eKLR, where the learned Judge in defining mens rea stated: -

“It is a cardinal principle of criminal jurisprudence that mens rea of the accused persons is very much essential ingredient to prove the guilty against the accused. Hence from the evidence on record, it is clear that the criminal intention to steal by clerk was not established. Mens rea or criminal intent is the essential mental element considered in court proceedings to determine whether criminal guilt is present while actus reus functions as the essential



physical element. These two elements, Latin terms for 'culpable mind' and 'culpable action' respectively, are required to establish the guilt of a defendant. The essence of criminal law has been said to lie in the maxim *actus non facit reum nisi mens ait rea*. There can be no crime large or small, without an evil mind.

It is therefore a principle of our legal system, as probably it is every other, that the essence of an offence is the wrongful intent, without which the offence cannot exist.

9. The applicant contends that Lesiit J (as she then was) addressed her mind to the mental capacity and deeply analysed the elements of malice aforethought as has been described under Section 206 of the *Penal Code*.
10. According to the applicant the learned judge held that she found the applicant to have caused the deaths but at the time she was suffering from an illness of the mind. On the basis of that finding the applicant argued that the court should have not found her guilty of the offence of murder for she lacked the requisite mental capacity to form the criminal intent necessary to be established before a finding of guilty is entered.
11. The applicant further submitted that the *Penal Code*, Chapter IV on General Rules as to criminal Responsibility; provides for intention and motive that is required to bring out criminal responsibility.
12. The applicant has further cited the provisions of Section 9(1) of the *Penal Code* which provides that; Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.
 - (2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
13. The applicant argued that due to the mental infirmity she was incapable of forming the necessary intention to commit murder thus the court should consider revising the sentence in view of that fact.
14. Although motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial in so far as regards criminal responsibility, the court should, consider it nevertheless in considering a matter as grave as this.
15. Further, the applicant cited Section 12 of the *Penal Code* which provides;-

“ A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.
16. The applicant drew this courts' attention to the evidence of the Psychiatrist. Dr Mburu, during the trial testified that the applicant had suffered severe version of depression known as post-partum psychosis and this illness rendered the applicant incapable of knowing that they were sick. He further testified that after various tests done at Mathari Mental Hospital, done on 19/2/2015, 23/2/2015 and 23/3/2015 the applicant had recovered and was fit to stand trial.



17. It is on the basis of this evidence that the applicant has faulted the decision of the court in pronouncing her guilty against the weight of that evidence.
18. The applicant submitted that she has been evaluated from Mbagathi Hospital on 5/11/2024 and the report by Dr. Kingi Mochache confirms that the applicant's post partum psychosis is in remission and recommends that she is fit to plead.
18. The applicant has urged this court to be guided by the court of appeal decision in *Akide v Republic (Criminal Appeal 39 of 2021)* [2024] KECA 1176 (KLR) (20 September 2024) (Judgment) where the learned bench of the Court of appeal was confronted with a case similar to that of the applicant and while deciding the elements under a person convicted under section 166 of the criminal procedure code held;

“... We have set out the legal provisions guiding the finding of guilt and come to the conclusion that, under the *Penal Code*, the appellant was not criminally responsible for causing death to the deceased. He could not be held to have been guilty of such an act. We therefore associate ourselves with the opinion of this Court in *Wakesho v Republic (Criminal Appeal 8 of 2016)* [2021] KECA 223 (KLR) in which it expressed itself as follows:

"We can only add our voice to the many on the reforms that are needed to the provisions of section 166 of the *Criminal Procedure Code* in two respects. First, in our view, it is a legal paradox to find a person guilty but insane, in light of the requirements of criminal responsibility and culpability, which require that for a person to be criminally liable, it must be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy mind. A finding of not guilty for reason of insanity would be more legally sound in circumstances where an accused person is suffering from a defect of reason caused by disease of the mind at the time of commission of an offence. In addition, it is our view that the court should be granted discretion to impose appropriate measures to suit the circumstances of each case, upon a finding of not guilty for reason of insanity."

41. A holistic consideration of the legal provisions underpinning a finding of criminal culpability leads us to the conclusion that, in the circumstances of this case, the trial court ought to have returned a finding of not guilty by reason of insanity.
42. That leads us to the second issue as to whether, in those circumstances, the sentence was appropriate. Section 166 of the *Criminal Procedure Code* has been the subject of several judicial pronouncements in this country. In the case of *Hassan Hussein Yusuf v Republic* [2016] eKLR, the High Court of Kenya at Meru (Kiarie Waweru Kiarie, J.) held that the provisions of section 167(1) of the *Criminal Procedure Code* requiring an accused person to be detained during the President's pleasure was unconstitutional for being discriminative to people with mental illness; that the appellant should be accorded mental treatment and be set at liberty if, in the opinion of a psychiatrist, he would not pose any danger to the public and to himself; and that, if the opinion of the psychiatrist



is otherwise, he be admitted for treatment until such time as it would be safe to release him.

...(Continued...) As regards the sentence, we find that it would be a misnomer to "sentence" a person found not guilty. We agree with the opinion of Kiarie Waweru Kiarie, J. in the case of Hassan Hussein Yusuf v Republic (*supra*) and hereby direct that:

- a. the appellant shall, as soon as practicable and within 7 days from the date hereof, be subjected to mental examination by a psychiatrist at Malindi General Hospital or at any other recognized medical facility to determine whether he poses danger to the public or to himself, and that in the event of a finding that he no longer poses such danger, be set at liberty forthwith unless otherwise lawfully held.
 - b. should the psychiatrist be of the view that the appellant requires further treatment, he shall be admitted for treatment at a mental health facility recommended by the psychiatrist until such time as it will be safe to release him.
 - c. in the event that any further directions are required to implement this order, the parties shall be at liberty to seek further orders from the High Court.
19. The applicant urged the Court to be minded to agree with the legal developments under Section 166 of the CPC being rendered unconstitutional leaves the law requiring reforms and the guiding act would be as stated in the Court of Appeal in *Akide v Republic* (Criminal Appeal 39 *of 2021*) [2024] KECA 1176 (KLR) (20 September 2024) (Judgment).
20. The applicant pleaded with this court that in the event the court is persuaded by her arguments, then an order for immediate release would be most appropriate considering the length of period she has been in custody.

Respondent's Case

21. Mr Muindi counsel for the prosecution by way of written submissions supported the applicants' application and rightly so in my view.
22. Counsel argued that the Applicant was charged with the offence of murder vide HCCR 43 of 2015. On 27th September, 2018 and she was found 'guilty but insane.' She was sentenced to be held under presidential pleasure pursuant to section 166 of the *Criminal Procedure Code*.
22. according to the prosecutor the High Court through Constitutional Petition 226 of 2020 addressed the constitutionality of section 166 of the *Criminal Procedure Code* and on 1st February, 2022, Justice Mrima declared section 166 of the *Criminal Procedure Code* unconstitutional.
23. The declaration of Constitutional invalidity of Section 166 of the *Criminal Procedure Code* rendered the continued holding of persons adjudged guilty but insane under the presidents pleasure untenable in law.



24. The petition was filed on behalf of persons who suffer from mental challenges and who were held in various prisons in Kenya at the pleasure of the President.
25. The court held that an accused person who is found to be unfit to stand or to continue participating in a criminal trial due to mental challenges or an accused who is tried and a special finding of 'guilty but insane' made, is a person with disability and ought to be accorded the necessary protection and assistance required under *the Constitution* and the law.
26. Counsel submitted that this proposition stemmed from the definition of disability in the *Persons with Disabilities Act*, No 14 of 2003 which is:

“Disability means a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.”
27. The Court declared that no prison facility in Kenya shall accept and detain any person found to suffer from mental challenges under the President's pleasure.
28. The court went ahead and issued an order that any prison facility in Kenya holding any person with mental challenges facing a criminal trial or who has been tried and a special finding made that such a person was 'guilty but insane' and be detained at the President's pleasure shall forthwith make arrangements and arraign such a person before the court that committed the person to the prison facility.
29. It is in line with that order that counsel submitted that the applicant has moved this court for appropriate orders and directions upon taking into account the mental status of the accused and the period the accused had been detained in prison at the President's pleasure.
30. The respondents reiterated the submissions made by the applicant on the issue of mens rea which I need not reproduce.
30. The respondent cited the case of Mohamed Aden Hirbo v Republic [2023] KECA 249 (KLR), in which the Court observed that;

“The import of section 11 of the *Penal Code* is that every person is presumed sane and responsible for his or her actions at all times including when he or she is alleged to have committed offence. However, even though section 11 recognizes sanity as the normal or usual condition of human beings, the criminal law realm recognizes that sometimes the human mind is afflicted by disease that renders a person incapable of understanding his or her actions. The presumption that all human beings are normal is therefore rebuttable hence the defence of insanity.”
31. In the instant case the court found as a matter of fact that the applicant at the time of the commission of the offence was suffering from post-partum psychosis a disease of the mind that by its nature renders one incapable of appreciating what they are doing and the consequences of any action or omission on their part. The respondent held the view that the applicant in this case should have been found not guilty by reason of insanity.



32. In support of that submission counsel cited the decision in *Mwachia Wakesho v Republic* [2021] KECA 223 (KLR) in which the court decried the provision of section 166 of the *Criminal Procedure Code* in addressing the 'guilty but insane' verdict and stated;

“We can only add our voice to the many on the reforms that are needed to the provisions of section 166 of the *Criminal Procedure Code* in two respects. First, in our view, it is a legal paradox to find a person guilty but insane, in light of the requirements of criminal responsibility and culpability, which require that for a person to be criminally liable, it must be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy mind. A finding of not guilty for reason of insanity would be more legally sound in circumstances where an accused person is suffering from a defect of reason caused by disease of the mind at the time of commission of an offence. In addition, it is our view that the court should be granted discretion to impose appropriate measures to suit the circumstances of each case, upon finding of not guilty for reason of insanity.”

The Court further weighed in on the fair trial in criminal cases. The Learned Justices remarked:

“... the sub-stratum of the provisions as regards the right to fair trial in criminal cases in article 50(2) of *the Constitution* is that an accused person should be fully informed, understands, and thereby effectively participates in a criminal trial. To go through the motions of a trial whose nature and effect an accused person does not from the outset understand or appreciate, and further still to be convicted on the basis of such trial as provided for in section 166 of the *Criminal Procedure Code*, is in our view manifestly unfair in light of our current constitutional dispensation.”

33. The respondent concluded by submitting that the disease of mind that affected the Applicant at the time of committing offence exonerated her in that regard. The appropriate measures to be taken was to take her through treatment and psychosocial support to redeem her state of mind.

Malice aforethought being a vital element in proving criminal responsibility lacked from the outset in the trial of the Applicant. She should neither have been taken through a criminal trial nor been held in prison.

Analysis and Determination

34. The instant application thrusts to the fore a situational challenge that Section 166 of the *Criminal Procedure Code* presents to the courts whenever they have to deal with persons who are arraigned before them while suffering one from a mental health condition or are put on trial and in the course of it getting afflicted by a disease of the mind or worse still are found guilty but insane.
35. The *Criminal Procedure Code* inherited from our colonial masters has remained largely static and unresponsive to present realities in a world where the Human rights discourse around mentally ill persons has continued to evolve.
36. The courts have pronounced the unconstitutionality of this Section but sadly no reforms have been undertaken to remedy the situation. The courts continue to be inundated with applications seeking to have persons found unfit to stand trial placed in custody as they continue to receive treatment in the hope that at some point they would be mentally fit to stand trial.



37. The question that one needs to ask is, at the stage of making the decision to charge shouldn't the prosecutor address the question of the accused persons sanity even before deciding to arraign the suspect of a crime to court? The answer to this question is an emphatic yes. The prosecutor must be able to decide whether it is in the public interest and in line with the National Prosecution Policy to prosecute a man who at the time of the commission of the offence was suffering from a mental disease depriving him of the necessary mens rea to commit the offence. It should be remembered that the prosecution in making the decision to charge must be satisfied that the case the present has a realistic prospect of success. A case that is likely to result into a finding of not guilty by reason of insanity should never be commenced in the first place.
38. The Mental Health Amendment Act 2022 introduced Section 2B into the *Mental Health Act* Cap 248 which section places a duty on persons who come into contact with persons suffering from Mental diseases. The section provides;-
- 2B. All persons under this Act shall, in the performance of their functions under this Act, be guided by the following principles—
- (a) the promotion and fulfilment of the right to the highest attainable Standard of health as enshrined under Article 43 of *the Constitution*;
 - (b) preservation of the freedom and dignity of every human being;
 - (c) the fair and equitable treatment of persons with mental illness;
 - (d) the protection of persons with mental illness from discrimination;
 - (e) accountability of duty bearers and transparency in the implementation of this Act; and
 - (f) co-ordinated public participation in the formulation and implementation of policies and plans related to care and protection of persons with mental illness; and
 - (g) that interventions for the care and protection of persons with mental illness are based on objective information and methods and monitoring mechanisms and regular evaluations are established, thus ensuring transparency in the management of facilities and care of persons with mental illness. (emphasis mine).
39. The duty is on all persons in the performance of their duties thus the prosecutors and courts alike must give effect to this provision by ensuring that at the earliest opportunity persons afflicted by a disease of the mind are not put on trial when they should be diverted to mental care institutions for purposes of care, protection and treatment.
40. The applicant in this case was tried and found guilty but insane. The applicant seeks to have this court revisit the decision and make orders that mirror the present jurisprudence in the handling of accused persons with mental issues.
41. No doubt there was psychiatric evidence that at the time of the commission of the offence the applicant was suffering from postpartum psychosis which deprived her of the necessary mens rea to commit the offence. As such therefore this upon receipt of this application called for a medical report which was availed and from the report it is clear that she is now mentally fit.
42. The court must now determine the best course to take in respect of the applicant considering her present mental condition in line with the decisions of the courts in respect of mental challenged persons. The prison certainly is not her place taking into account the fact that Section 2B of the Mental Health (Amendment Act) 2022 came into force long after she had been convicted and sentenced.



43. This court must give effect to the guiding principles of the Act since parliament intended that we must henceforth deal with persons who suffer mental disability in this country in a more humane and caring manner that guarantees their equal treatment and fosters the thinking that there must be a paradigm shift in the manner we deal with mentally disabled persons.

In view of this, this court finds that the special finding that the judge made in 2018 in respect of the applicant cannot stand in light of the recent jurisprudential developments in this country. The same is hereby set aside since this court cannot reverse the conviction, the only recourse open to this court would be to make an order that would best serve the interests of justice in the circumstances.

The applicant shall be escorted to a Psychiatrist for a final report to determine whether the applicant is fit for release back to the society or should be committed to a mental institution for further treatment and care. The report shall be filed with this court within 7 days from the date of this Ruling and this court, shall upon examination of the same, issue an appropriate order in respect of the applicant.

44. It is important for the court to propose some initiatives that this court believes can go along way in alleviating the current problem in the handling of cases involving persons suffering a disease of the mind and are held in prison. In the Union of India, the Courts have had to deal with this issue and as result several measures were taken and recommended by the courts to address the challenge.
45. In the decision reported in (2019) 7SCC 1 (Accused X vs. State of Maharashtra), the Hon'ble Supreme Court had held that the aspiration of the aforesaid Act(read the mental health care Act) is to provide mental healthcare facility for those who are in need including prisoners and that the State governments are obliged under Section 103 of the Act to set up a mental health establishment in the medical wing of at least one prison in each State and Union Territory so that prisoners with mental illness may ordinarily be referred to and cared for in the said mental health establishment.
46. The proposal of the Supreme court of India is noble in addressing the numerous cases we currently have in our prison facilities. The Prison authorities in conjunction with the County Governments must identify facilities within the counties to assist in the management and care of persons.

Section 2D of the [Mental Health Act](#) provides;- The County governments shall

- a. provide mental health care, treatment and rehabilitation services within the county health facilities, in particular ensure that level 2, 3, 4 and 5 county health facilities set aside dedicated clinics to offer outpatient services for persons with mental illness;

It is in recognition of that duty that this court observes that there is need for a deliberate effort to be made by the Commissioner General of Prisons to engage County Governments across the country to have the services provide to alleviate the current situation where accused persons have to be kept for months before the taking of plea awaiting mental assessment reports.

The courts will therefore be able to commit persons afflicted by diseases of the mind to such facilities for treatment, management and care as opposed to the outdated special finding orders under Section 166 of the [Criminal Procedure Code](#).

47. Finally, the police must also be vigilant at the time of arrest and take proactive steps to avoid having persons who are mentally ill put on trial and prison custody when they should ideally be in rehabilitative mental institutions. In *D.K.Basu vs. State of West Bengal* (1997) 1SCC 416, it was directed that the police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The police are also under an obligation to notify the next friend or relative of the arrestee if they live outside the district



or town. Such intimation must be given within a period of eight to twelve hours after the arrest. The arrestee should be medically examined.

48. In conclusion the court hereby allows the application and directs that a final medical report be prepared and submitted to the court and if the accused person is found to be fit for release back to the community, an order to that effect shall issue.

49. The application shall be mentioned in 7 days from today for final orders.

50. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF FEBRUARY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

In person for the Applicant

Ms Ogega for the Respondent

