



**Republic v AAI (Criminal Case E003 of 2023)
[2025] KEHC 3059 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE E003 OF 2023**

**JN ONYIEGO, J
MARCH 13, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

AAI ACCUSED

JUDGMENT

1. The accused herein is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on 11.01.2023, at Wajir Bor Trading Centre in Khorof Harar Sub County within Wajir County he unlawfully murdered one Abdullahi Ismail Ali.
2. The prosecution summoned a total of five (5) witnesses in support of its case while the defence called one witness, the accused himself.
3. Briefly, PW1, Siyad Samey Hassan, a senior clinical officer testified that on 12.01.2023, the deceased was presented at the facility having suffered serious injuries. That on general observation, the clothes of the deceased were soaked in blood and the body had multiple cut wounds. On the temporal side of the scalp, the body had a deep cut wound, nasal bridge was fractured, there was blood on the ears, a deep cut wound on the right periorbital region (along the eyes), the mandibular and maxilla bones fracture (both sides of the cheeks). He stated that noting that the institution lacked the necessary facilities, post mortem could not be performed. According to him, from his observation, the cause of death was as a result of loss of oxygen in the blood. On cross examination, he said that the cause of death was over bleeding.
4. PW2, Bulle Abdullahi Ismail, the assistant chief Wajir Bor Sub-location testified that on 11-01-23, he had travelled from Wajir to Bor when he heard some noise from the centre. That before he could reach his father’s home, he heard somebody saying that “your father had been axed.” On arrival, he found his



- father lying outside the house. He recalled that the father had injuries on the chest with blood oozing from the nose and mouth.
5. He stated that he learnt from his neighbor one Fatuma that his father had been killed by his brother, the accused herein. He went further to state that they mobilized people who took the deceased to Wajir Bor Hospital but unfortunately, the deceased succumbed to his injuries. The hospital thus gave them the body for burial.
 6. He told the court that they went looking for the accused whom they managed to apprehend in the bush. He alleged that the accused person suffered from mental illness thus prompting him to be read a Quran but nevertheless, he has never recovered.
 7. PW3, No. 120912 PC Abdulahman Roble, the investigating officer stated that on 12.01.2023 at 6.00 A.M., while at the police line, Ssgt. Mutiso informed him of a murder incident at Wajirbor. That Ssgt. Mutiso requested him to accompany him to the station in company of CPA Abdis, a crime officer in Wajir and Dr. Samuel from the Wajir County hospital. Upon reaching the scene, they found the body of the deceased covered in a white sheet and despite seeking to uncover the deceased, their request was declined.
 8. It was his testimony that, before leaving the scene, they visited the house where the deceased was allegedly murdered and saw a lot of blood on the ground and nearby, there lay a blood stained axe. They collected a blood soaked T-shirt belonging to the deceased and the axe which were forwarded to the Government Chemist. They also visited the dispensary where the deceased had been rushed to but did not find the doctor who had attended the deceased.
 9. He told the court that it was when PW2, who informed them that it was his brother who killed the deceased and that he was a victim of mental illness. On cross examination, he reiterated that no post mortem was done and that the accused person suffered from a mental illness. That the incident was recorded at the nearest police post.
 10. PW4, Ahmed Abdullahi Ismail, a butcher testified that the accused person is his brother and that he had been mentally ill for a period of seven years. He stated that on the night in question, he heard screams from the neighbourhood and upon responding, the screams led him to his father's house. According to him, he found his mother and children crying while saying that Mzee had died.
 11. That he met his brother Abdullahi accused herein coming out of his father's house while armed with a knife. That the father had collapsed and was lying down on the floor. The deceased had suffered an injury on the head and the back of the neck and upon rushing him to the hospital, he succumbed to his injuries. Thereafter, they embarked on searching the accused person whom they found in the bush. On cross examination, he said that his brother was known to be mentally sick.
 12. PW5, No. 54774 SSgt Peter Mutiso testified that he was the investigating officer in this matter. He stated that he knew the accused person as the son of the deceased. That when the matter was reported, together with PC Roble, PC Abdirizack and PC Ohore, they proceeded to the scene where they found that the deceased had already passed on. They thus proceeded to the hospital where they saw the deceased's body which had several cuts on the head and general body. Thereafter, they left for the deceased's home where they found blood on the floor of the house and further recovered a blood stained axe which they believed to be the murder weapon.
 13. He stated that, they recovered a white scarf soiled with blood which they also forwarded to Government Chemist for analysis. The accused person was subsequently arrested while hiding in a bush. That the blood in the axe when compared with the blood in the scarf was found to be that of the deceased. He produced a P3 form for mental assessment of the accused person prior to him being



- charged and the same was to the effect that he was not fit to stand trial. On cross examination, he reiterated that the accused was found unfit to stand trial as he laboured a mental illness.
14. On his defence, Mr. Bosire counsel for the accused stated that his client opted to keep quiet and therefore, the defence closed its case.
 15. At the close of the hearing, prosecution filed written submissions thus submitting that it had proved its case beyond reasonable doubt and that both the mens rea and actus reus were present. On his part, Mr. Bosire for accused the simply urged that accused had no mental capacity to commit the offence.
 16. The accused is facing a charge of murder contrary to section 203 of the *Penal Code* that defines murder in the following terms.” Any person who of malice aforethought causes the death of another person by an unlawful, act or omission is guilty of murder”.
 17. This being a criminal trial, the standard of proof is that of beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 All ER 372 described degree of proof beyond reasonable doubt to be as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
 18. It is trite that for the prosecution to sustain a conviction for the offence of murder; it must prove the ingredients of the offence which were stated in the case of *Republic v Mohammed Dadi Kokane & 7 others* [2014] eKLR as follows:

“The offence of murder is defined as follows by section 203 of the penal code: “any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” This definition gives rise to four (4) crucial ingredients of the offence of murder all of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are: 1. The fact of the death of the deceased. 2. The cause of such death. 3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused person, and lastly. 4. Proof that the said unlawful act or omission was committed with malice aforethought.”
 19. On the death of the deceased all the prosecution witnesses testified that indeed the deceased passed on after being injured by the accused person. PW1 testified that in as much as post mortem was not done, the cause of death according to him was as a result of loss of oxygen in the blood. On cross examination, he said that the cause of death was over bleeding. There was no reason to doubt the evidence of the prosecution witnesses and especially PW1 who is a medical officer. I therefore find the death of the deceased to have been proved.
 20. The second ingredient as to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. In the case of *Republic v*



Boniface Isawa Makodi [2016] eKLR the court referred to the case of *Guzambizi Wesonga v Republic* [1948] 15 EACA 65 where it was held that;

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances for example in self defence or in defence of property”.

21. In this case, the deceased was found to have died as a result of loss of oxygen in the blood. As such, this death could not be categorized as lawful as the deceased was injured and subsequently died as a result of the stab wounds.
22. The 3rd element is the identity of the perpetrator. From the evidence on record, none of the witnesses saw the accused attack the deceased. The only evidence relied on was that of pw4 who stated that when he responded to the screams, he proceeded to his father’s house where he found his mother and children crying while stating that mzee had been killed. Upon entering the house, he found his father unconscious with blood oozing from the mouth and nostrils. Further, he saw his father injured on the neck.
23. He further stated that, as he entered the house which had no door, he met with his brother Abdullahi running out with a knife. Accused ran into the bush to hide but he was caught there by members of the public.
24. Besides, pw2 also a brother to the accused confirmed that he was informed how his brother had killed their father and fled into the bush where they found and arrested him. They recovered a blood stained scarf belonging to the accused which was sent to the government chemist analyst for analysis. when compared with the blood found on the blood stained axe and the deceased’s blood they matched implying that the accused had come into contact with the deceased’s blood hence his involvement in his killing.
25. From the above circumstantial evidence, the irresistible conclusion that can be drawn is that it was the accused who was involved in the death of the deceased. See Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in *R v. Taylor, Weaver & Donovan* [1928] CR. App. R. 21:

“It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that is circumstantial.”

26. Similarly, in *Abanga alias Onyango v Republic*, Cr. App No. 32 of 1990 the Court of appeal set out conditions precedent before adoption of circumstantial evidence as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

(See also *Sawe v. Republic* (supra) and *GMI v. Republic*, Cr. Ap. No. 308 of 2011.



In addition, the prosecution must establish that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt.

(See Teper v. R. [1952] All ER 480 and Musoke v. R. [1958] EA 715). In Dhalay Singh v Republic, Cr App. No. 10 of 1997, this Court reiterated this principle as follows:

“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal”

27. From the above case law, the available circumstantial evidence is sufficient enough to connect the accused with the offence of murder.
28. The last element is that of malice aforethought., it is incumbent upon the prosecution to prove that the accused assaulted the deceased and that he had malice aforethought. In the instant case, the prosecution circumstantial evidence pointing at the accused person as having killed the deceased but with a rider that he suffered from a mental illness at the time in question. PW5 produced a mental assessment report of the accused person prior to him being charged and the same was to the effect that he was not fit to stand trial. Accused was then committed to Mathari mental hospital where he underwent treatment until he was certified fit to stand trial.
29. The procedure in cases of mental illness is laid down under Section 167(1)(a)(b) and (c) of the Criminal Procedure Code which provides as follows:-
 167.
 - (1) If the accused, though not insane, cannot be made to understand the proceedings –
 - (a) in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President’s pleasure; but every such order shall be subject to confirmation by the High Court;
 - (b) in cases tried by the High Court, the Court shall try the case and at the close thereof shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President’s pleasure.”
30. Section 11 of the Penal Code on the other hand provides as follows:-“

“ Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.”
31. In this case, the PW2, brother to the accused person stated that prior to the commission of the offence, accused had suffered from mental illness thus prompting him to be read a Quran but nevertheless, he did not recover. In the same breadth, PW5 also testified that the accused person was certified unfit to stand trial when mental assessment was carried out prior to him being charged.
32. He produced a mental assessment report form for mental assessment of the accused person prior to him being charged and the same was to the effect that he was not fit to stand trial.



33. Section 12 of the Penal Code further provides as follows:-

“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.”

34. The above section is in essence stating that a person may commit the act and at the time of doing so he may not have known that he ought not to have committed the act. Thus if a person commits an offence which due to his mental illness was ignorant of the legal position that the act was unlawful, he is protected under the law. It is clear that at the time of the mental assessment report the accused was suffering from a mental illness which required treatment in as much as the family chose to read him Quran.

35. From the facts herein, it is clear that the circumstances under which the offence was committed show that the accused was labouring under a mental illness. See 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.”

36. Taking into account the circumstances under which the offence was committed, I find the accused person guilty of the offence of murder and therefore enter a special verdict of guilty but insane.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 13TH DAY OF MARCH 2025

J. N. ONYIEGO

JUDGE

