



Republic v Ogutu (Criminal Case 61 of 2019) [2025] KEHC 4447 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4447 (KLR)

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

CRIMINAL CASE 61 OF 2019

AC BETT, J

APRIL 8, 2025

BETWEEN

REPUBLIC PROSECUTOR

AND

BRASIA OTIENO OGUTU ACCUSED

RULING

1. The Accused Brasia Otieno Ogutu was charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). It was stated that on the 20th day of September 2019 at Lusheya Village, Lusheya Sub-location, Musanda Location in Mumias West Sub-County within Kakamega County, the Accused murdered Felix Omondi.
2. The Accused, who was arrested on 20th September 2019 was arraigned in court on 8th October 2019 where the Deputy Registrar of the court noted that the medical report indicated that the Accused was unfit to take plea.
3. After several appearances in court for Mention, the Accused was committed to Mathari Mental Hospital for treatment vide an order dated 22nd December 2019.
4. Despite the order committing the Accused to Mathari Mental Hospital, the Accused was not committed as directed and on 18th October 2021, the Principal Secretary, State Department for Correctional Services invoked the powers vested upon him by Section 162 (5) of the [Criminal Procedure Code](#) and directed the Officer-in-Charge, Kakamega Prison to remove the Accused from Kakamega G.K. Prison and deliver him into the custody of the Chief Consultant Psychiatrist in-Charge Mathari Hospital, Nairobi for treatment.



5. Further to the said directive, the court delivered a ruling on 15th March 2023 in which it made the following orders:-
 - “(1) The Officer in Charge Kakamega Main G.K. Prison shall personally ensure that the Accused, Brasia Otieno Oguti is transported from Kakamega Main G.K. Prison to Mathare Teaching and Referral Hospital in Nairobi.
 - (2) As soon as the Accused arrives at Mathare Teaching and Referral Hospital, he shall be placed in the custody and care of the Chief Consultant Psychiatrist in Charge, Mathare Teaching and Referral Hospital (“hereinafter referred to as “the Hospital”).
3. During his stay at the Hospital, the Accused shall be detained as a Criminal Mental Patient for treatment until further order. Such further orders may be made on the Application of the Accused, his family and/or next of kin, the Office of the Director of Public Prosecution and the Consultant Psychiatrist.”
6. After the orders of the court, the Accused was committed to Mathari Mental Hospital under Section 162 of the *Criminal Procedure Code* where he underwent treatment and on 29th June 2022, the Medical Superintendent, Mathari National Teaching and Referral Hospital forwarded a certificate of capability to make defence under Section 163 (1) of the *Criminal Procedure Code* to the ODPP asking that the ODPP seeks directions on the matter.
7. On 25th October 2022, the Accused was presented before the court which made an order that the Accused be taken to Kakamega County Referral Hospital for mental assessment to ascertain whether the Accused was mentally fit to take plea.
8. Mental assessment was not undertaken until 18th July 2023 when the Psychiatrist Consultant, Kakamega County General Hospital did perform a mental assessment and filed a report in which she stated that in her opinion, the Accused was not fit to stand trial. She noted that the Accused had been re-initiated on medication. My conclusion is that the cause of the relapse in the Accused person’s mental condition was the failure to adhere to the prescribed medication.
9. Faced with the dilemma of an Accused person who is mentally unstable, the prosecution on 31st October 2024 urged the court to invoke Section 162 of the *Criminal Procedure Code* in dealing with the Accused.
10. In order to assist me make an appropriate determination, I called for a social inquiry report, which was prepared and filed on 14th January 2025.
11. Although Mr. Munyendo for the Accused said that he would file written submissions to the prosecution’s application, he did not do so.
12. Section 162 of the *Criminal Procedure Code* provides that:-
 - “(1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.
 - (2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case. Powers delegated to the Cabinet Secretary and to the



Principal Secretary of the Ministry for the time being responsible for prisons, by L.N. 579/1963.

- (3) If the case is one in which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.
- (4) If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit, and shall transmit the court record or a certified copy thereof to the Cabinet Secretary for consideration by the President.
- (5) Upon consideration of the record the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody, and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections 163 and 164.”

13. The social inquiry established that the Accused’s family is prepared to embrace him and reintegrate him to the society. To that end, they have renovated his parent’s house. The family members expressed their commitment to ensure that the Accused adheres to his prescribed medication and attends regular clinic appointments. The Probation Officer who conducted the social inquiry opines that there appears to be a conducive environment to facilitate his rehabilitation and minimize the risk of re-offending.
14. The victim’s family, though still grieving the loss of their loved one, are said to acknowledge the need for the Accused’s rehabilitation. The community is also willing to support the rehabilitation efforts and are not opposed to the Accused’s reintegration to the society albeit with some cautious reservations.
15. Article 27 of *the Constitution* provides that:-
 - “(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
 - (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”
16. Looking at the proceedings, the Accused has been in custody since 2019 yet he has never taken plea due to the finding that he is not mentally fit to plead. His right to a speedy trial as provided in Article 50 (1) (e) and his right to be released on bond as provided by Article 49 (1) (h) of *the Constitution*, have been breached by reason of the delay. To that extent, the right of the Accused to equal treatment has also not been observed. Be that as it may, it is evident that the procedure set out in Section 162 of the *Criminal Procedure Code* is aimed at protecting both the Accused and the public.
17. I have considered the prosecution’s application while paying careful attention to the social inquiry report. I have also considered the fact that the Accused had undergone treatment at the Mathari Hospital and was considered to have recovered but on being transferred back to Kakamega, was found



to have relapsed. It is common knowledge that persons with mental disabilities require constant clinical review and medication.

18. Sadly, the County Assembly of Kakamega enacted a statute in the year 2024 that had the effect of denying all remandees and prisoners access to free medical treatment. The continued retention of the Accused in custody will therefore deny the Accused access to treatment for his condition which he would otherwise access for free if he was out on bond.
19. While the court has the option of committing the Accused to Mathari Hospital for further treatment, I have perused the report by the National Council on Administration of Justice on the status of persons with mental illness which paints a sad picture of the state of the hospital which is suffering from inadequate and dilapidated infrastructure, serious congestion and inadequate modern medicine. In my view, the said hospital should be the last call for a person liked the Accused herein.
20. Moreover, referring the Accused to Mathari Hospital may be a precursor to an endless cycle of referrals due to the high possibility of relapse as a result of inability to access medication. Such a move is likely to result in the Accused being held in custody for an extended indeterminate period and that would amount to subjecting the Accused to cruel, inhumane and degrading treatment contrary to Articles 25 and 29 of *the Constitution*.
21. As observed earlier, the Accused should not be treated differently from the other persons who do not have mental disability.
22. Having painstakingly considered the Accused persons' condition and having determined that in his current mental state, he is of unsound mind and consequently incapable of taking plea or making any decision, I therefore postpone further proceedings herein as provided by Section 162 (2) of the *Criminal Procedure Code*.
23. Pursuant to Section 162 (3) of the *Criminal Procedure Code*, I hereby admit the Accused to bail on the following terms and conditions:-
 - a. That the Accused shall be released on a personal bond of Ksh. 300,000/= with one surety of similar amount.
 - b. That the surety shall execute an undertaking to ensure that the Accused attends a Psychiatric Clinic monthly and that he strictly adheres with medical prescriptions until further orders of the court.
 - c. That the surety shall produce the Accused, alongside evidence of monthly clinical attendance and review to this court every three (3) months until further orders of the court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF APRIL 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the Prosecution

No appearance for Mr. Munyendo for the Accused

Court Assistant: Polycap

