



REPUBLIC OF KENYA



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**Republic v Elima (Criminal Case 4 of 2021)
[2025] KEHC 10316 (KLR) (15 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE 4 OF 2021**

JN KAMAU, J

JULY 15, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

BARON MUKHEBI ELIMA ACCUSED

JUDGMENT

1. The Accused person herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) Cap 63 (Laws of Kenya). The particulars of the Charge were that:-

“On the 17th day of January 2021 at Nyang’ori Boys High School, Gamalenga Sub-Location, Tambua Location in Hamisi Sub-County within Vihiga County murdered Willy Mukanambi Luka”
2. The Prosecution’s case was heard on diverse dates between 19th July 2022 and 29th February 2024 when it closed its case. On 12th June 2024, this court found that the Prosecution had established a prima facie case against the Accused person and thereby put him on his defence. The defence case was heard on 12th November 2024.
3. This matter was partly heard by P.J Otieno J. He took the evidence of Keith Sangoro Amuchuku (hereinafter referred to as “PW 1”).
4. This court became seized of this matter on 19th December 2022 on which day the Accused person and the State indicated that they wished to proceed with the matter from where it had reached. This court therefore took the evidence of Ibrahim Kugo Bwamu (hereinafter referred to as “PW 2”), Eliazaro Okoth (hereinafter referred to as “PW 3”), Peter Abuya (hereinafter referred to as “PW 4”), Rose Sachini Keya (hereinafter referred to as “PW 5”), Dr Ombok Lucy (hereinafter referred to as “PW 6”),



Vincent Gurema Isiaho (hereinafter referred to as “PW 7”), No 109503 PC Edwin Ombui (hereinafter referred to as “PW 8”) and the Accused person who testified as “DW 1”.

5. The Prosecution’s Written Submissions were dated 30th January 2025 and filed on 31st January 2025 while those of the Accused person were dated 12th February 2025 and filed on 17th February 2025. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

6. The issues that were put before this court for consideration were as follows:-
 - a. Whether or not “Willy Mukanambi Luka” (hereinafter referred to as the “deceased”) died?
 - b. If so, was his death caused by an unlawful action(s) and/or omissions?
 - c. If so, who caused the unlawful action(s) and/or omissions?
 - d. Was there malice aforethought in the causation of the deceased’s death?
7. This court therefore found it prudent to deal with the said issues under the following distinct and separate headings.

I. Proof Of Death Of The Deceased

8. The Accused person did not submit on this issue. On its part, the Prosecution submitted that there was no dispute as to whether the deceased died as that was confirmed by the Prosecution witnesses.
9. As the Prosecution witnesses alluded to the deceased’s death, it was not necessary to seek further proof. This court found and held that the deceased’s death was proved without an iota of doubt.

II. Proof Of Cause Of The Deceased’s Death

10. The Accused person did not submit on the question of proof of the deceased’s death. On its part, the Respondent submitted that PW 6 produced an autopsy report as exhibit in this case which indicated that the cause of the deceased’s death was severe head injury with skull fracture and bleeding in the head.
11. Notably, the cause of the deceased’s death was a pertinent issue. PW 6 tendered a Postmortem Report dated 20th January 2021 in respect of the deceased herein as an exhibit in this matter which had been filled by her colleague Dr Eddy Owuor. After conducting the postmortem examination, the said doctor formed an opinion that the cause of death was severe head injury with skull fracture and intracranial bleeding.
12. PW 5 was the wife to the deceased. She confirmed that she attended the deceased’s postmortem at Jaramogi Oginga Odinga Referral Hospital together with the deceased’s brother one Juma Cherandula.
13. It was therefore clear from his evidence that the deceased’s death was not as a result of natural causes. It was therefore crucial to establish how the deceased sustained the injuries that caused his death.

III. Identification Of The Perpetrator Of Deceased’s Death

14. The Accused person invoked Section 203 and 204 of the *Penal Code* and submitted that the Section required that the prosecution proves beyond reasonable doubt that the accused by unlawful act or omission caused the death of the deceased through malice aforethought.



15. On its part, the Prosecution submitted that from its witnesses' evidence, it was clear that it was the Accused person who inflicted the injuries on the deceased. It asserted that this case was based on direct evidence of PW 1, who was an eye witness who saw what transpired. It was emphatic that it had proved its case beyond reasonable doubt and that the Accused person gave no tangible evidence to dislodge its case thus he was guilty as charged and should be convicted and sentenced accordingly.
16. The Accused person testified that he did not know the deceased but knew his teacher, PW 4 who was a Counselling and Guidance Teacher. He stated that on 16th January 2021, he went to see PW 4 as he was unwell. PW 4 asked him some questions and then took him to hospital. He told the court that his mind was taking him fast (sic) and he was feeling cold and shaking.
17. It was his further evidence that he never went back to school after being treated. He denied being in school on the material date of 17th January 2021. He said that he was only told that the matter was being investigated when he was taken to hospital and that he was never released again. He stated that there was no difference between him and the deceased because he did not know (sic). He insisted that he had never had any problem with him because he did not know him.
18. Notably, PW 1 was one of the students at Nyang'ori Boys High School. He testified that he heard noise from the first cubicle and he got curious and went to see what was happening. On reaching there, he and his fellow students were stopped by Form four (4) students who told them that they were managing the situation.
19. It was his further evidence, that he later went back since there was still some noise and on reaching the scene, he heard the Accused person saying that he had been bewitched and that his manhood had become smaller. He stated that the deceased then came and talked to the Accused person who snatched a club from the deceased and hit the deceased's head once using the club and the deceased fell down.
20. PW 2 was the Principal, Nyang'ori Boys High School. He testified that on the material date and time, he heard an unusual noise from the boarding section and while on his way to check what was happening, he received a call from Mr Abwoka who informed him that there was a serious issue that needed his attention. When he reached the dormitories, he found Mr Abwoka and a crowd of students and that Mr Abwoka informed him that the Accused person had hit the deceased and that the deceased appeared to be in a serious state.
21. It was his evidence that he wanted to go to the scene but that he was restrained by the students who indicated that it was dangerous for him since the Accused person was very hostile, armed and did not want anyone close to him. He stated that he called for an ambulance and Police from Gambogi Police Post and Tambua AP Camp and that as he was waiting for security personnel, the Accused person appeared. Sensing danger, he ordered the school's dog handlers to restrain the Accused person. The ambulance and the police arrived shortly after and the deceased was rushed to Jaramogi Oginga Odinga Teaching and Referral Hospital. He added that the Accused person had approached him on 16th January 2021 at around 6.30pm and had indicated to him that he had an issue and needed assistance.
22. PW 3 was one of the school guards and a dogs' handler. He testified that on the material date he met PW 2 who instructed him to restrain the Accused person by the help of a dog which he did. He stated that when he met the Accused person he had nothing in his hands but was demonstrating martial art moves.
23. PW 4 testified that the Accused person was referred to him by PW 2 on 16th January 2021 at about 6.30pm and told him that the Accused person had issues that were to be attended to. He said that it seemed the Accused person had an issue but he appeared reserved. He further stated that he later on



- 17th January 2021, received a call from PW 2 informing him that the Accused had done something wrong. He stated that on his arrival at the school he found someone being put onto an ambulance.
24. On his cross-examination, he testified that on the said date, 16th January 2021, he had a conversation with the Accused person and he sent him to go and see the school nurse who recommended that some tests be done. He pointed out that in his view it was not a condition that needed urgent attention.
 25. PW 7 was also a student at Nyang'ori Boys High School. His evidence corroborated that of PW 1 in that on the material date he was woken up by PW 1 who informed him that the Accused person was making noise as he did martial arts actions. He stated that he talked to the Accused person who settled down but still looked disturbed. He retreated back to his chamber to put on his uniform but before he could finish dressing, PW 1 came back and informed him that the deceased had been beaten up by the Accused person.
 26. It was his further evidence that he rushed to the scene and attempted to resuscitate the deceased who was trying to breathe and that as he did that, the Accused person said that the deceased was pretending and started stumping on the deceased's chest using his legs. He felt threatened by the Accused person and he left to seek help. He pointed out that the Accused person was shouting.
 27. PW 8 was the investigating officer in this case. His evidence corroborated that of PW 1, PW 2, PW 3, PW 4, PW 5, PW 6 and PW 7. He produced the broken pieces of the rungu and photographs of the deceased as exhibit in court.
 28. After carefully analysing the evidence that was adduced by the Prosecution witnesses, it was evident that PW 1 saw the Accused person hit the deceased with a club on the material date. PW 7 also saw the deceased bleeding and saw blood stains on the rungu that had been used to hit the deceased. PW 1 and PW 7 also saw the crude weapon the Accused person used to hit the deceased at the material time.
 29. PW 1, PW 2, PW 3 and PW 7 all placed the Accused person at the scene of crime. This court was thus persuaded to find and hold that the Accused person was positively identified by PW 1 and PW 7 as aforesaid. They each spent sufficient time communicating with the Accused person who was with the deceased at the material time. PW 7 pointed out that as he tries resuscitating the deceased, the Accused person stumped on his chest. This could not have been a case of mistaken identity. Identification was by way of recognition.
 30. Weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Accused person's evidence of denying knowing the deceased to have been watertight enough to have weakened the inference of guilt on his part.
 31. Consequently, it was this court's finding that the Accused person's defence was mere denial and did not displace and/or dislodge the consistent and cogent evidence that was adduced by PW 1, PW 2, PW 3, PW 4, PW 5, PW 6, PW 7 and PW 8.

IV. Malice Aforethought

32. Having found and held that the Accused person's defence was not sustainable as he was positively identified as the perpetrator of the deceased's death, the next pertinent question that arose was whether or not he had malice aforethought in causing his death.
33. The Accused person invoked Section 9 and 11 of the *Penal Code* and submitted that a day before the material day and on the actual date of the alleged murder, he was observed by PW 2, PW 4 and PW 7 to have appeared disturbed and behaving in an abnormal manner.



34. He further asserted that he reported to PW 2 and PW 4 that he had an issue that bothered him and lamented that his manhood had shrunk and that he had been bewitched. He pointed out that while so saying, he was performing and/or demonstrating martial art moves. He added that it was at it that the deceased confronted him and pointed at him with a club that he snatched the club and used it to hit the deceased.
35. It was his contention that his actions took a considerable time and that he had not attacked anyone and that it was only at the point when the deceased pointed a club at him that he reacted. He contended that PW 4 confirmed that he had an issue for which he referred him to the school nurse and that the school nurse recommended that he be taken for treatment. He added that it was however unclear why even after the nurse's recommendation, the school administration failed to take him to hospital.
36. He contended that it was worth noting that the Prosecution failed to avail the said school nurse as a witness and that with such failure, an adverse inference ought to be drawn against the Prosecution's case. He argued that the nurse seemed to have information/evidence which was detrimental to the Prosecution's case and that explained why he/she was not availed.
37. He was categorical that the itinerary of the events confirmed that he had no presence of mind at the material time to the alleged offence and that he did not know what he was doing and that it was wrong. He pointed out that with the historical and immediate events to the offence, it was safe to infer that his illness which was on the face of it and first raised by the doctor who assessed his mental status deprived him of the mental capacity to know what he was doing or that it was wrong hence the defence under Section 12 of the *Penal Code* should be available to him.
38. In the premises, he submitted that he could not be said to have had malice aforethought and that the Prosecution did not prove beyond reasonable doubt that he had malice.
39. On its part, the Prosecution invoked Section 206 of the *Penal Code* and placed reliance on the case of Republic vs Tubere s/o Ochen [1945] 12 EACA 63 where it was held that an inference of malice aforethought could be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack.
40. It asserted that it had adduced evidence showing that the aim of the Accused person was to kill as that was seen in the nature of injuries he inflicted on the deceased. It was emphatic that the attack on the deceased's head was an attack on his life and that the weapon used spoke malice.
41. This court had due regard to the case of Morris Aluoch vs Republic [1997] eKLR which cited the case of Rex vs Tubere s/o Ochen [1945] 12 EACA 63 where the East Africa Court of Appeal held that malice aforethought could be presumed where repeated blows were inflicted.
42. This court noted the seriousness of the injuries the deceased sustained was confirmed by PW 6 but had to consider the same against the backdrop of the Accused person's defence of insanity.
43. Section 11 of the *Penal Code* (Cap 63 Laws of Kenya) provides that:-

“ Every person is presumed to be of sound mind and to have been of sound mind at any time which comes into question until the contrary is proved.”
44. However, under Section 11, the presumption of insanity is rebuttable. Where an accused person raises the defence of insanity, the burden of proving insanity rests with him as was held in the case of Muswi s/o Musele vs Republic [1956] EAC 622.



45. Under Section 12 of the *Penal Code*, it is further provided that:-

“ 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 maybe 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 effect above mentioned in reference to that Act or omission.”

46. It was thus clear that insanity was a defence if proved that at the time the accused committed the offence he was labouring under the disease of the mind. However, for the said defence to be available, it must be shown that the accused at the time of doing the act or making the omission he was incapable of understanding what he was doing or of knowing that he ought not to do the act or make the omission as a result of the disease of the mind.

47. The test was strictly on the time when the offence was committed and no other.

48. This court had due regard to the Court of Appeal’s decision in the case of Leonard Mwangemi Munyasia vs Republic[2015]eKLR where it was held that if it was shown that the appellant suffered from this condition then under Section 9 and 12 of the *Penal Code* he could not be held criminally responsible for the murder of the deceased.

49. According to the Prosecution witnesses, they all alluded to the fact that the Accused person had not behaved normally before, during and after the commission of the offence herein. PW 2 and PW 4 had indicated that he had reported to have had issues on the day before the material date of 17th January 2021 and that he had been referred to the school nurse for medical check-up. PW 1 and PW 7 indicated that on the material time, the Accused person kept saying that he had been bewitched and that his manhood had shrunk. In his defence, he stated that on the material date, his mind was going fast (sic) and he felt cold and was shaking. Notably, during trial, this court had also noted that the Accused person’s behaviour was unusual as he would sometimes laugh between witnesses’ testimonies.

50. Additionally, a perusal of this court’s proceedings showed that when he was first arraigned in court on 26th January 2021, the Prosecution confirmed that a mental assessment had been done on his part and that through a Mental Report dated 22nd January 2021, it was found that he was mentally unfit to stand trial and further that he was need of urgent psychiatric treatment.

51. When the matter was mentioned on 27th January 2021, the Accused person addressed the court and Musyoka J noted that there was a problem with him and that it was imprudent to subject him to trial. He ordered that he be admitted to Mathare Mental Hospital Nairobi for further assessment and if appropriate, he be placed on admission and treatment. On 19th May 2021, the Prosecution noted that Mathare Mental Hospital was not receiving patients at the time due to Covid-19. On 21st September 2021, it was confirmed that the Accused person was taken for a second mental assessment and the Report indicated that he was in a position to stand trial. On 27th September 2021, he was then able to take plea and matter proceeded for hearing on 19th July 2022.

52. From the medical information stated above, this court battled with the question of whether or not it was safe to conclude that indeed the Accused person herein was at the time of the commission of the offence labouring from a mental illness?

53. In the case of Leonard Mwangemi Munyasia vs Republic(Supra), the court observed that a court could not assume without considering surrounding circumstances that the suspect was not suffering



from mental disorder at the time the offence was committed. The court further noted that thus it was permissible for the court to rely on evidence from which it could form an opinion regarding the mental status of the accused person at the time when the crime was committed and that such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person together with his medical history.

54. In the premises, this court had no doubt that it was the Accused person who killed the deceased but he was not in his right frame of mind hence malice aforethought could not be apportioned on him.
55. Additionally, this court came to learn late that the Accused person was a minor, sixteen (16) years of age at the time of the commission of the offence. Hence, that meant that in the event he was found criminally guilty under Section 215 of the *Criminal Procedure Code*, then the time he had spent in custody during trial would have informed his release. It was unfortunate that he remained in custody in a jail with adults during when he was arrested and during his trial.
56. Although the Accused person committed an offence, he was not criminally liable and hence he could not be incarcerated. Notably, where accused persons were insane, they would be sentenced at the Mental hospital at the Presidents' pleasure which several cases including declared such a sentence unconstitutional as it violated Articles 25 and 29 of *the Constitution* of Kenya that prohibit cruel, inhuman and degrading treatment. Some of these cases were B K J vs Republic, MERU HC Criminal Appeal No. 16 of 2015 [2016]eKLR. In Joseph Melikino Katuta vs Republic, Voi HC Criminal Appeal No. 12 of 2016 [2016]eKLR, this very court emphasised the point that keeping a mentally ill person in prison for an indeterminate period of time was cruel, inhuman and degrading treatment contrary to Articles 25 and 29 of *the Constitution*.

Disposition

57. For the foregoing reasons, the upshot of this court's decision was to make a special finding of guilty but insane under Section 166 (1) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) to the effect that the Accused person was guilty of murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 (Laws of Kenya), but was insane at the time he committed the offence.
58. In view of the fact that Section 166(3) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) was declared unconstitutional and the Accused person has not been reported to be insane at this time, it hereby directed that the Accused person be and is hereby discharged of the offence that he committed. It is hereby directed that the Accused person be and is hereby released from custody unless he be held for any other lawful cause.
59. The Accused person is hereby warned against committing such offences in future. He is also urged to seek medical treatment if he feels mental unwell.
60. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 15TH DAY OF JULY 2025.

J. KAMAU

JUDGE

