



Republic v Mulili (Criminal Case 9 of 2018) [2025] KEHC 10182 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL CASE 9 OF 2018**

TM MATHEKA, J

JULY 4, 2025

BETWEEN

THE REPUBLIC PROSECUTOR

AND

KIOKO MULILI ALIAS KYUMBE ACCUSED

JUDGMENT

1. The accused person is charged with murder contrary to section 203 as read with section 204 of the *Penal Code* – that on 30/3/2018 at Enguli Market, Wathini Sublocation, Kasikeu Location Mukaa District, Makueni County he murdered Francis Muthoki Kimilu.
2. The information filed on 3/4/2019.
3. The accused was not mentally competent to take plea/stand trial and spent time at Mathari Hospital undergoing treatment.
4. ON 22/4/2021 – the court (Dulu J) received the report declaring him fit to plead. He appeared on 14/6/2021 – and when the charge was read, he replied – “it is true, I was sent by Commander.”
5. A plea of not guilty was entered.
6. Ms Kemunto appeared for the accused person.
7. The matter was fixed for hearing on 26/1/2022 when Mr. Hassan appeared for the accused. He informed the court that he could not get clear instructions from accused person because apparently the accused person had relapsed - and required another mental health assessment. There were three witnesses in court – and matter was adjourned with orders that a fresh mental assessment be conducted over the accused.



8. The matter was later fixed for hearing on 7/6/2022 after the assessment came back that he was fit to stand trial. His counsel told court that he had not received clear instructions dispute the Doctor's findings. After some consultations with the accused person the matter proceeded at 1.10pm.
9. PW1 James Mwangangi Muthiani testified that he was a primary school teacher at the material time and he and the deceased had gone to the same school, the accused was a neighbour. On 30/3/2018 at 10.00am he went to the deceased's hotel and ordered for tea. He sat at a corner, in the hotel, waiting for the tea, while the deceased sat at the other side of the counter where the tea was being prepared.
10. He saw the accused person appear, suddenly wet to the counter and stood – then he heard a hitting sound – He saw deceased fall from the chair. The accused emerged with the Machete which was now blood stained. The accused then walked out. PW1, scared went to where the deceased was.
11. He had cut on the head and was bleeding profusely. He tried to lift him, he could not manage. He went out to call for help and they took deceased out and had tied the wound with a scarf. A boda boda person took him to Sultan Hamud Hospital while he and one George Matheka went to report at Kasikeu AP Camp – the accused was beaten by members of the public and the APS found him – then they all – PW1, the accused and the APS went to Sultan Hamud to see the deceased – next day they learnt that deceased had died. He said when accused came in, he PW1 did not notice that he had a machete – and only saw the machete when he was leaving. That the accused did not speak to deceased before cutting him, but as he left he pointed a finger at the PW1. On cross-exam he said accused did not finish school, that he used to fetch water with donkeys, that he had good relation with people – that the PW1 was surprised by the act.
12. PW2 Godfrey Mwasia Musaka was rang by Daniel who told him that his cousin Francis had been cut. He told the court that the accused was related to him because his mother came from his family.
13. PW2 testified how he went to Sultan Hamud Hospital and they were referred to Kenyatta National Hospital. They were given an ambulance and doctor. They stopped by Machakos Hospital where X-rays were done and they left for Kenyatta National Hospital. On the way – around Small World Area, the doctor told them that the deceased had died – they went back to the junction and told the police officer there – who rang Sultan Hamud Police Station – the body was taken to Machakos Hospital Mortuary. On 3/4/2018 he attended the Post Mortem Examination and the doctor told them that the cut was deep. On cross-examination he said he did not know about accused's mental state.
14. PW3 Dr. Steven Musembi – produced the post mortem report on behalf of Dr. Waithera who conducted the post-mortem at Machakos Hospital on 3/4/2018.
15. It was body of African Male. He had catheter, and needle for passing medicine Head cut right side near the ear extending to the other side Laceration of right forearm, laceration on right upper chest There was fracture of the skull, blood in the brain. Cause of death head injury secondary to deep cut wound. He produced the report as Pex.2.
16. PW4 George Matheka Ngei knew the deceased as Mani, he had hotel at Enguli Market. On the material day 30/3/2018 he was at 10.00am, he was standing two shops from Mani's hotel when he saw the accused (Kyumbe) came out of the hotel and wipe a panga on the ground. He put it in his side, then eyes met, and the PW4 fell uneasy – and tried to enter the shop. The accused person left.
17. Soon thereafter the PW1 came out screaming for help – He PW4 ran there and saw that the deceased had a cut on his head. They took deceased out. He told PW4 to call for him his in law by name Kamui - PW4 went to get Kamui – they went and took deceased to hospital – went to report at Kasikeu – Accused was arrested by people – and later went to see the deceased at hospital. He later died. He



- identified the panga in court. On cross-exam he said there were people saying that the accused head was not okay, he would be seen picking and eating insects.
18. PW5 was Margaret Wahu Maina, Government Analyst. She received the samples from the Investigating officer, blood sample of deceased, panga with blood stains. She said that the DNA Profile from the panga blood stains was partial.
 19. PW6 No. 74675 PC Johnstone Changole was the Investigating Officer. He received report of assault at Sultan Hamud Police Station on 30/3/2018 at 1552 – that a person had been assaulted at Enguli Market, and had been admitted at Sultan Hospital. He visited the victim, visited the scene – and found the accused at Kasikeu Police Post. The accused was taken to Sultan Hamud where he – PW6 placed him in custody.
 20. A report came later that deceased had died –while enroute to Kenyatta National Hospital.
 21. He recorded statement took over the panga, took the samples for DNA analysis produced the exhibit memo. He attended the post mortem report. He produced the panga as exhibit.
 22. After the investigations he charged the accused person with murder.
 23. On cross-examination he was shown a medical record for the accused form Sultan Hamud Subcounty Hospital. It was dated 7/6/2016 and indicated that “known psychosis patient who is on medication.” He said it meant that the accused had known mental health issues. That the report of 23/4/2019 it showed that the suspect was unfit to take plea. He said he could confirm that the accused had mental health problem at the time of the offence.
 24. Upon closure of the case for the prosecution the accused was put on his defence.
 25. He called Dr. Joseph Masila, specialist Psychiatrist at Makueni County Referral Hospital. He made reference to medical report dated 5/4/2018 form Dr. Eric Kibui – another dated 20/5/2019 by Dr. John Mburu from Mathari Teaching and Referral Hospital. He testified that the reports were to be effect that the accused was hearing voices from nowhere instructing him to do things, e.g use a panga on someone. He was admitted for treatment. He had auditory hallucination, admitted for treatment. That these hallucinations – one hears voices where there is no stimulant voices are a kin “to listening to a radio” caused by brain disease. He said that this disease alters reality, as what one hears is what the real life is for that person – and until it is treated – that is what the person thinks is true.
That the treatment can make the hallucination go away. However if this person does not take his medicine then there is a relapse which means that he goes back to your reality that within his disease.
He testified that the 2 reports were consistent with Psychiatric disorders. He confirmed that he had not personally evaluated the accused person. He produced the reports as Dexh. 1 (a) and (b).
On cross-examination he said that he had not attended the patient but relied on his colleague’s reports.
On re examination he said that the disease in chronic.
 26. The accused testified and gave unsworn statement of defence. He said he was told he had killed a person. That he was told this while he was at Mathari Hospital.
He produced a bundle of hospital documents dated 17/3/2017. He said that he sought the courts forgiveness, was taking medicine 2x a day – and that a fellow prisoner and would ensure he takes his medicine.
 27. The defence closed its case.



28. Counsel - Mr. Hassan filed submissions.
29. Citing *R v Nicholas Onyango Nyolo* [2014] eKLR set out the ingredient of murder;
- a. Proof of the fact and the cause of death of the deceased.
 - b. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the “actus reus” of the offence.
 - c. Proof that the said unlawful act or omission was committed with malice after-thought which constitutes the “mens rea” of the offence.
 - d. In *Peter Mwangi Mwangi Kariuki v Republic* [2015], the Judge observed that:

“...Thus the legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial the prosecution has failed to establish these to the appropriate standard, the prosecution will lose. It is clear the legal burden of proof in criminal cases is only one and rests on the shoulders of the prosecution. The burden of the prosecution in criminal cases is to establish its case beyond reasonable doubt...”
30. He submitted that the prosecution need to establish all the ingredients of the offence of murder.
31. He submitted that accused was suffering from a disease of the mind, that affected his mind to the extent that he did not understand that what he was doing was wrong. He submitted that the accused was entitled to an acquittal but that under Section 167 (1) (b) of the *CPC* he would be convicted & ordered to be detained during the president’s pleasure.
32. He submitted to relying on *NMG v R* (Criminal Appeal E003/2022)[2023] KEHC 355 KLR 26/1/23 – where the court dealing with the provisions of section 166 and 167 of the *CPC* In *NMG v Republic* (Criminal Appeal E003 of 2022)KEHC 355 (KLR) 26 January 2023) the court while dealing with the question whether persons convicted under sections 166 and 167 of the *Criminal procedure Code* on a special verdict of guilty but insane were to be held in a mental hospital at the pleasure of the president was unconstitutional for taking away the judicial function to determine the nature of the sentence. It was submitted that under the provisions of section 166 of the *Criminal Procedure Code* (CPC), the court’s duty came to an end when it entered that special verdict against the accused and directs the accused’s detention pending the president’s decision.

That the Constitution separated the powers of the legislature, the Executive and the Judiciary. Judicial power was reserved to the Judiciary. The imposition of a punishment in a criminal matter which included the assessment of its severity was an integral part of the administration of justice and was therefore the exercise of judicial, not executive power.

That the vesting of discretion on the president on how the accused was to be treated after conviction was inimical to the fundamental duty of the judiciary to determine the guilt of the accused and determine the terms upon which he or she serves the sentence. The fact that the statute provided for a periodic review by the president upon advice of executive functionaries further buttressed the point.

Further in *Republic v S O M* [2018] eKLR the Judge determined that Section 166 of the *CPC* unconstitutional to the extent that it took away the judicial function to determine the nature of the sentence and violates the right to a fair trial protected under Article 25 of the *Constitution*. That the provisions of section 166 of the *CPC* were unconstitutional to the extent that it took away the judicial



function to determine the nature of the sentence or consequence of the special finding contrary to article 160 of the *constitution* by vesting the discretionary power in the executive. It also violated the right to a fair trial protected under article 25 of the *Constitution*.

In Conclusion counsel submitted that the prosecution has the legal obligation to prove the critical ingredients of the offence of murder but from the evidence on the record the prosecution had failed miserably. That the defence had demonstrated that the accused was not in his right state of mind and in his own reality and unaware of the incidence. The defence had made out a case with consistent testimony. Counsel submitted in conclusion that;

- i. The prosecution did not satisfy the ingredients of the preferred offences.
- ii. The prosecution did not discharge their legal and evidential burden of proof.
- iii. The prosecution did not prove its case beyond reasonable doubt.
- iv. The prosecution case should fail and the accused acquitted.

33. I have carefully considered the evidence before me, the submissions – and the issues is whether the prosecution has proved the charge against the accused.

34. There is no doubt that the accused killed the deceased – there are eye witness of the act-

35. There is no doubt that the deceased died from the said injuries. The question is whether accused had malice afore thought.

36. The *Penal Code* provides at s. 11. Presumption of sanity

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.

37. And at s. 12. Insanity

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..

38. The defence of insanity available to a person who can establish the fact of mental illness that he is unable to understand whether what he was doing was right/wrong.

39. There is undisputed evidence that the accused person had a mental illness when he committed the offence – even the investigating officer confirmed that the accused had a mental illness. The committal at the pleasure of the president has been declared unconstitutional – and the justice system has accepted that such a person needs to be in hospital and not in a prison. I find that the prosecution proved and killed the deceased but from the medical evidence before me he had a mental illness that amounts the defence of insanity.

40. The Court of Appeal's spoke in *Wakesho v Republic* [2021] KECA 223 (KLR) thus;

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. Further in in *KLA v Republic*[2024] KECA 1176 (KLR) the Court of Appeal continued to uphold that position emphasizing the need to move away from the ‘special finding of guilty but insane’ stating;

Having found that a strict reading of the provisions of the *Penal Code* does not support a finding of guilty in the circumstances of this case, we believe that the correct conviction ought to be not guilty by reason of insanity as opposed to guilty but insane. That would distinguish it from the second scenario where the accused person was, at the time of the commission of the offence, under no mental disability but, by the time of his arraignment in court, was not able to apprehend the nature of the proceedings facing him.

A finding of not guilty for reason of insanity would be more legally sound in the circumstance where an accused person is suffering from a defect of reason caused by disease of the mind at the time of the commission of the offence”

42. The Court of Appeal proceeded to agree with Kiarie Waweru Kiarie J in *Hassan Yussuf v R* [2016] eKLR that a person found guilty but insane was a sick person who needed treatment and Majanja J in *R v Som* [2018] eKLR – that the outcome provided by the law upon a finding of guilty but insane was unconstitutional. The court stated.

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 recognised 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.

It is so ordered.

43. I am bound and guided by these decisions of the Court of appeal upholding the decisions of the High Court. I find that the accused killed the child in this case. There is sufficient evidence that the accused person was not in control of his faculties when he committed the offence. I find and hold that the is not guilty for reason of insanity.

44. The special finding required by s. 166(2) to have such a person held at the pleasure of the President has been found to be unconstitutional.



45. However, such a finding does not lead to an automatic acquittal. The person did commit an offence and an appropriate disposition is required. The Court of appeal gave guidance in [KLA](#) above for the disposition of such cases.
46. In this case, for purposes of disposition I make the following orders:
- i. That Probation After Care Service to prepare and present a Social Inquiry report about the accused person akin to pre-sentence report for purposes of appropriate placement
 - ii. A Report from the Psychiatrist at Makueni Referral Hospital with a recommendation of suitable disposition be availed to court. To enable this, the accused on Monday 7th July 2025 be subjected to mental examination by the psychiatrist at Makueni Referral Hospital
 - a. For the present diagnosis
 - b. to determine whether he poses danger to the public or to himself
 - c. to determine whether he requires further treatment, and if so, a recommendation on what that would entail.
47. The order be served upon Probation After Care Services Makueni and the Officer in Charge Makueni GK Prison, and the Psychiatrist Makueni Teaching and Referral Hospital for compliance.
48. Mention on 16th July 2025 for the reports

DATED SIGNED AND DELIVERED VIRTUALLY THIS 4TH JULY 2025

MUMBUA T MATHEKA

JUDGE

Chrispol

Accused present

Mr. Kazungu for the state Mr. Hassan for accused

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2025-07-05 22:02:10

