



**Republic v Okwara (Criminal Case E015 of 2023)
[2024] KEHC 1360 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E015 OF 2023
WM MUSYOKA, J
FEBRUARY 16, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

BENARD OKWARA ACCUSED

RULING

1. The accused herein, Benard Okwara, is charged with murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya. The particulars are that on the 11th June 2023, at Kisoko Sub-Location, Nambale Sub-County, within Busia County, he murdered Calara Nawire.
2. 5 witnesses testified in the matter. PW1, Albina Makokha, was an aunt of the accused, and a daughter of the deceased. She testified that the accused had mental issues. She was informed by the mother of the accused, PW2, Sabella Ouma Omwayo, that the accused had been brought home, from school, where he worked as a teacher, on account of his mental illness. She went to the home, and saw the accused, leave his house with a knife, and enter the house of the deceased, from whence she heard a scream, and when she went there, she found that deceased, had been fatally stabbed. That happened as they waited for a vehicle to take the accused to hospital. PW2 testified along similar lines. PW3, No. 91602 Police Corporal Odilia Shali, was the investigating officer. PW4, Dr. Michael Odhiambo, was the medical officer who conducted post-mortem on the remains of the deceased. He opined that the death was caused by severe haemorrhage, due to assault with a sharp object.
3. The parties did not submit.
4. The principal elements of murder are proof of the death, the cause of it, the role of the accused person in the causation, and whether, if the accused caused the death, he did it with malice aforethought.
5. On whether the deceased died, I have the evidence of PW1 and PW2, who were relatives of the deceased. They all confirmed that the deceased had died. PW3, the investigator, visited the scene, and saw the



- dead body, and arranged for its removal to the mortuary. Post-mortem on the body was conducted by PW4. He said the cause of death was severe haemorrhage, caused by assault with a sharp weapon. The cause of death was linked to the accused. PW1 saw him armed with a knife, and was at the scene, when she heard a scream from the house, where the accused had locked himself, with the deceased inside, and when she forced her way into the house, the accused still had the knife, threatened her with it, and in that house, the deceased lay dead, bleeding. There is evidence pointing to the death of the deceased having been caused by the accused.
6. The other consideration would be whether he caused it with *mens rea*. *Mens rea* in murder cases takes the form of malice aforethought, and the elements are set out in section 206 of the *Penal Code*. They relate to intention and knowledge. Intention to kill or cause grievous harm or to commit a felony. Knowledge that the act or omission causing death could cause such death, and being indifferent to the consequences of the act or omission. Intention and knowledge are mental elements. One forms an intention, in their mind, to do or not to do something, and has knowledge, within his mental faculties about something. So, the mental element for the offence of murder is either intention or knowledge.
 7. Has the prosecution adduced evidence to establish such intention or knowledge, that the accused had formed an intention to kill or cause grievous harm or to commit a felony, or knew that whatever he was doing was likely to cause death, but remained indifferent to the consequences? Well, the *mens rea* of an offence is usually to be inferred from conduct or action, being a mental element, unless the intention is voiced by the perpetrator. In this case, there was no evidence of the accused making any utterance before the deed. So, the *mens rea* is to be inferred from conduct or action. The deceased was cut with a sharp object, said to be a slasher. She was cut so badly that she died immediately. One can infer, from such action, that there was an intent to cause the death of the deceased, or to cause her a very bad injury. It can also be inferred, in the absence of an intention to either kill or cause grievous harm or felony, that the person who caused that fatal injury knew or ought to have known that such an injury could lead to death.
 8. The problem here is that the accused person was said, by PW1 and PW2, to have had a history of mental illness. Indeed, he had just been brought home a day before, from his work station, a school where he worked as a teacher, when that problem manifested. He was brought home, ostensibly for the family to manage him or his situation. It was mentioned, by PW1, that efforts were being made to get transport to take him to a facility, and the killing happened as they waited for the means of transport. PW3, the investigator, stated that she got information, when she went to the scene, that the accused had mental issues, and she had to take him for mental assessment before he could be presented for plea. Indeed, the exercise of taking plea was held off from 5th July 2023 to 9th October 2023, as he was said to be unfit to stand trial. I have observed the accused during trial, and noted, from his behaviour, especially at the end of each session, that he is not fully in control of his faculties.
 9. Why am I saying all this? *Mens rea* is about mental capacity, to form an intention or to distinguish between right and wrong. Mental illness displaces or distorts the capacity to form an intention or to process knowledge. That ought to have consequences, with respect to criminal culpability. The way that is handled, under the criminal law regime that Kenya inherited from England, is that a person, who is found to have committed an offence, at a time when he laboured under insanity or mental illness, he is to be found guilty, but insane. The Kenyan courts have expressed unease, over the oddity of it, that a person who is not in control of his mental faculties, is found to be guilty of an offence arising from acts committed during that period of mental unwellness. In other words, criminal liability attaches even when the person is mentally ill, and not in control of his mind and actions.
 10. The courts in Kenya have, in recent times, spurred on by the new Constitution, 2010, no doubt, addressed the matter of insanity and criminal law, particularly regarding criminal responsibility of



mental patients. In Wakesho v Republic [2021] KECA 223 (KLR) (Kairu, Mbogholi-Msagha & Nyamweya, JJA), the court said:

“The critical point at which the mental state of the accused person is relevant for purposes of the defence of insanity is at the time of commission of the act complained of. If the appellant was suffering from a disease which affected his mind and made him incapable of understanding what he was doing or knowing that what he was doing was wrong at the time of the commission of the offence of murder, then he was not responsible for his act.”

11. So, going by Wakesho v Republic [2021] KECA 223 (KLR) (Kairu, Mbogholi-Msagha & Nyamweya, JJA), such a person would not be criminally liable, and cannot be said to have a case to answer for murder, where actus reus elements are proved against him, for he cannot be convicted in the absence of the *mens rea*. Wakesho v Republic [2021] KECA 223 (KLR) (Kairu, Mbogholi-Msagha & Nyamweya, JJA) does not answer my predicament, though, for the appeal related to a conviction of guilty but insane. At this stage, I am not required to determine whether to convict or not, but whether to put the accused on his defence. I am reluctant, for the prosecution has not adduced evidence on the mental status of the accused at the time of the commission of the offence, in view of the statements by PW1, PW2 and PW3, which pointed to mental instability at that critical time. I appreciate that section 11 of the Penal Code makes the presumption that a person is sane for purposes of criminal law, until the contrary is proven, whereupon the burden to disprove then swings to the prosecution. That would usually arise where the defence of insanity is raised, and some evidence led on it.
12. However, where some evidence emerges, from the prosecution case, as it did here, that there was real possibility that the deceased laboured under mental unwellness, so severe that he might not have known or understood or appreciated what he was doing, there ought to arise a burden on the prosecution to establish beyond doubt, that despite such evidence, the accused person still had control of his faculties. Evidence from prosecution witnesses that an accused person had a history of mental illness, and exhibited behaviour pointing to the fact that he was suffering or labouring under such illness at the time of the act, should raise a doubt as to whether such a person would have the *mens rea* to commit an offence, and such accused person should enjoy the benefit of such a doubt. Finding him guilty but insane, amounts to holding him criminally responsible, for an act that his mind had no control over.
13. However, the prevailing law is as was expressed in Leonard Mwangemi Munyasia v Republic [2015] eKLR (Makhandia, Ouko & M’Inoti, JJA), to effect that:

“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.”
14. A conviction for the offence charged requires proof of all the *actus reus* and *mens rea* elements of the offence. So that where the *actus reus* elements are proved, but not the *mens rea*, the accused would be entitled to an acquittal. Similarly, where *mens rea*, or intention to commit an offence, is established, but the intention or *mens rea* is not actualised, through the appropriate *actus reus*, the accused would be entitled to an acquittal. A conviction can only be sustained where there is a coincidence of *actus reus* and *mens rea*. It would appear that a conviction of guilty but insane, does not require *mens rea*,



and is based purely on proof of the *actus reus*. It is an oddity to hold a person criminally responsible, in the absence of *mens rea*. I hazard that a conviction under those circumstances is intended to find a justification for taking the convict away from society, not for the purpose of punishment, but either to facilitate treatment for the convict for his mental illness, or to secure the society, or both. Whatever the case, there is some untidiness around it.

15. The parties hereto did not address me on these matters. There is, however, ample caselaw, where the courts have expressed themselves that the provisions relating to not acquitting a mental patient charged with murder, but finding them guilty but insane instead, and detaining them at the pleasure of the President, as stated in sections 166 and 167 of the *Criminal Procedure Code*, are not constitutional, for various reasons. The Kenyan law on the subject is in a state of flux, going by these decisions, and the legislation on the subject. See *Republic v SOM* [2017] eKLR (Majanja, J), *Republic v ENW* [2019] eKLR (Lesiit, J), *Republic v JKN* [2021] eKLR (Mwongo, J), *Wakesho v Republic* [2021] KECA 223 (KLR) (Kairu, Mbogholi-Msagha & Nyamweya, JJA), and *Kimaru & 17 others v Attorney-General* [2022] KEHC 114 (KLR)(Mrima, J).
16. So, what should I do in this case? There is adequate evidence pointing to proof of the *actus reus* elements of the offence of murder. I am not so sure about the *mens rea*, in view of what I have stated above. I would, most reluctantly, and only due to the uncertainty in the law, find that a *prima facie* case has been established against the accused person, to warrant his having to explain himself, based on *Leonard Mwangemi Munyasia v Republic* [2015] eKLR (Makhandia, Ouko & M’Inoti, JJA), much as I feel that the accused person ought to be acquitted, and an order made to have him committed to a mental facility, until he is well enough to go back to society. I shall put him on his defence. At the conclusion of it, I hope the parties shall address me exhaustively on the contemporary philosophy on the relationship that should be there between mental unwellness and criminal law.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 16TH DAY OF FEBRUARY 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the Republic.

Ms. Sibika, Advocate for the Accused Person.

