



**Republic v NK (Criminal Case E004 of 2022)  
[2024] KEHC 1200 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1200 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE E004 OF 2022  
JN ONYIEGO, J  
FEBRUARY 9, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**NK ..... ACCUSED**

**JUDGMENT**

1. The accused person herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence are that on January 19, 2022 at around 2010 hrs at [particulars withheld] Refugee Camp in Daadab Sub County within Garissa County he murdered one ASM.
2. The accused pleaded not guilty to the charge and the case proceeded to full hearing with the prosecution calling five witnesses.

**Prosecution’s evidence**

3. PW1, SAA stated that on January 19, 2022 at around 8:30p.m. after Isha prayers, he went to visit one of his relatives. Upon arrival, he found the relative’s wife and children present but Mzee had gone to see his other wife. When he went back to his home, he found his wife and daughter and shortly, he heard his neighbor Ali the deceased herein, calling for help. That he sent his daughter to go check on the deceased. On arrival, the daughter raised alarm by screaming as she had found the accused holding a knife and sitting on top of the deceased thus prompting her to scream.
4. He further testified that, he again sent his wife who also screamed on arrival thus forcing him to rush to the scene where he found the assailant holding a knife with the deceased on the ground. That the accused who was known to be a sick man told him not to interfere. It was his evidence that out of fear, he stood aside and took a stick as he directed the accused person to leave.



5. It was his evidence that the assailant chased him away while holding a knife thus forcing him to scream seeking for help. That when he returned in company of Hussein, they found their neighbour dead and had visible cut injuries to the mouth and legs. He confirmed to have seen the accused kill the deceased.
6. PW2, ISA, a daughter to PW1 testified that on the material day, she was at home together with her parents and siblings when they heard a neighbour scream. She stated that her father sent her to go find out what was happening. That on arrival at the neighbour's homestead, she found the accused on top of the deceased. That the accused upon seeing her drew a knife thus prompting her to scream.
7. She testified that her screams prompted her dad to run towards the said house in her defence. She identified the accused herein as having been on top of the deceased while stabbing him with a knife. On cross examination, she stated that she did not know the accused prior to the incident.
8. PW3, Hassan Muhumed Thore testified that he was a police reservist. That on February 23, 2022, while from Amuma, he was informed that the accused person had killed the deceased and so, he shared the information with the intelligence officers at Hagadera. He stated that he got information that the accused was seen taking tea in a hotel within and that he had gone to block A1 and so he made his way to the said place where he found him walking on the road side.
9. That he in company of Sgt Rage, Ahmed Siyat and Abudullahi Hassan managed to arrest the accused person who had on him a Somali sword stained with blood. He stated that accused person who was his cousin admitted killing the deceased but sought not to be killed as well. On cross examination, he stated that the accused person looked somewhat disturbed upon the death of his wife. He reiterated that they read him Quran verses to help improve his state to no avail. It was his case that he knew the accused person as well as the deceased as they were all related.
10. PW 4, Dr. Marion Ngao, testified that she conducted postmortem on the body of the deceased and formed the opinion that the cause of death of the deceased was cardio pulmonary arrest secondary to hypovolemic shock caused by laceration of the right external carotid artery and right jugular vein. That the body had two penetrating injuries on the neck and one on the right side of the chest.
11. PW5, Cosmas Mbai testified that he was the investigating officer and that on January 19, 2022 at about 2040hrs, he was informed of an incident of someone who had been stabbed at Hagadera. That he went to the scene and found a crowd gathered in the deceased's house. He went further to state that the preliminary investigations indicated that the deceased had sustained six stab wounds. He thereafter took the body to the mortuary for post mortem. According to him, the cause of death was as a result of bleeding secondary to stab wounds.
12. That the body was released to the family for burial and thereafter, he proceeded to carry out further investigations. He reiterated the testimonies of the prosecution witnesses and that of the area reservist who aided in the arrest of the accused herein. He produced the knife and a sheath recovered from the accused at the time of arrest as PEx 1(a) and (b) respectively.
13. He stated that upon conducting interrogation, the accused stated that he had differences with the deceased whom he believed had bewitched him. That on the material date, he had confronted the deceased over the same thus leading to a fight hence the stabbings. He testified that he preferred the charges herein against the accused person. On cross examination, he stated that the accused was responsible for the attack leading to the death of the deceased person. It was his further evidence that the mental assessment conducted found the accused not fit to stand trial.
14. Upon closure of the prosecution case, the court delivered a ruling on July 6, 2023, putting accused on his defence.



## Defence's case

15. The accused in his defense gave sworn evidence that he knew the deceased as he was his neighbour. He stated that he could not recall what happened on the material date and that he was not aware why he was charged before the court. It was his evidence that he had never been taken to the hospital for mental treatment. On cross examination, he stated that he was read a Quran in response to his mental challenges and further stopped working at G4S due to poor health. He conceded that he did not have any mental records to support the claim.
16. Ms. Roble for the accused person made an application seeking to produce an assessment report dated February 3, 2022 without calling the maker of the same. Mr. Kihara, learned counsel for the prosecution did not oppose the said application thereby prompting counsel for the accused to recall the accused herein. The accused in response stated that he was aware that he was taken to the hospital while in custody and further, the mental assessment report showed that he suffered mental illness. Ms. Roble thus proceeded to produce the assessment report as Dex 1.

## Submissions

17. Parties proceeded to file their respective written submissions. The prosecution in their submissions dated August 3, 2023 contended that the evidence tendered was sufficient to sustain a charge of murder and that the elements of the said offence had sufficiently been proven beyond reasonable doubt. The prosecution placed reliance inter alia on the case of *Republic v Tubere* 1945 EACA 63 where it was held that malice aforethought in murder maybe established by ascertaining the nature of the weapon used. Further, that there is both direct and circumstantial evidence which was never rebutted.
18. The defence on its part via their submissions dated 25.09.2023 submitted that death of the deceased was not in question and further, that there was evidence placing the accused at the scene of murder but no evidence was led to the effect that there was malice aforethought.
19. It was contended that the evidence before the court pointed to the fact that the accused person suffered a mental illness and therefore could not be said to have acted with malice aforethought. Reliance to that end was placed on the case of *Wakesho v Republic* Criminal Appeal No. 8 of 2016 KECA 223KLR where the accused was found to have been suffering from a mental illness and therefore a special finding was entered that the accused was insane at the time he committed the offence. This court was therefore urged to adopt the Court of Appeal decision mentioned herein and therefore enter a special finding of guilty although insane.

## Analysis and determination

20. I have considered the evidence tendered before this court both by the prosecution and the defence and the rival written submissions thereof. The accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The offence of murder is defined under section 203 of the *Penal Code* in the following terms; -

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

21. From the above definition, it is clear that for the prosecution to secure a conviction on a charge of murder, it has to prove, beyond reasonable doubt, three ingredients stated hereunder: -
  - a. the death of the deceased and the cause of death;



- b. that the accused committed the unlawful act which caused the death of the deceased; and
- c. that the accused had malice aforethought.

(See *Anthony Ndegwa Ngari v Republic* [2014] eKLR and *Johnson Njue Peter v Republic* [2015] eKLR).

22. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with, and in this case, prove that the accused herein murdered the deceased (see *Woolmington v DPP* [1935] AC 462). Therefore, the onerous duty to be discharged by the prosecution and which does not shift is that of proof “beyond any reasonable doubt” (See *Miller v Ministry of Pensions*, [1947] 2All ER 372). The question therefore is whether the above ingredients were proven to the required standards.
23. As for the proof of the death of the deceased and the cause of the death, PW1, PW3, PW4 and PW5 all testified as to having seen the body of the deceased with stab wounds. PW4 further testified as to having conducted post-mortem on the said body and upon which she formed an opinion that the deceased died as a result of cardio pulmonary arrest secondary to hypovolemic shock caused by laceration of right external carotid artery and right jugular vein. As such, the death of the deceased is not in dispute hence proved.
24. Right to life is protected by our *Constitution* under article 26 and can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. In *Guzambizi Wesonga v Republic* [1948] 15 EACA 63 the court 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 under justifiable circumstances, for example in self-defence or in defence of property.”
- (See also *Sharm Pal Singh* [1962] EA 13 and *Daniel Nzioka Mbuti & another v Republic* (supra)).
25. The cause of the death of the deceased herein was by stabbing hence not excusable or authorized by law and thus the same was unlawful.
26. As to whether the accused person committed the unlawful act which caused the death of the deceased, I noted that PW1 and PW2 testified as having seen the accused person kill the deceased while PW5 stated that from his investigations, he determined that the accused was responsible for the death of the deceased herein. Counsel for the defense did not controvert the fact that the accused person was responsible for the deceased’s death. The only defence raised is that the accused was not in his right frame of mind at the time when he killed the deceased. With that confirmation, there is no doubt that the deceased was killed by the accused using a knife and that act was unlawful.
27. The key question is whether the accused person was at the material time in his right frame of mind and knew what he was doing hence formed the intention to kill. In other words, was the accused seized of malice aforethought which is the mental element (*mens rea*) of the offence of murder? Section 206 of the *Penal Code* defines malice aforethought as follows;
206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -



- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

[See *Peter Kiambi Muriuki v Republic* [2013] eKLR]

28. The accused mounted a defence from the onset to the effect that he was suffering from a mental illness in that he was not even aware of the charges preferred against him. In his written submissions, it was submitted that the prosecution did not prove the *mens rea* for the reasons that the mental assessment report indicated that the accused person was undoubtedly unfit to stand trial in court as he had a mental illness.

29. 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.”

30. Further, from the provision of Section 11 the presumption of insanity is rebuttable. Where an accused person raises the defence of insanity, the burden of proving the same rests with him on a balance of probability (See *Marri v Republic* [1985] KLR 710 and *Muswi s/o Musele v Republic* [1956] EACA 622).

Under Section 12 it is provided: -

“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.”

31. It is thus clear that insanity is 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 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.

32. The Court of Appeal in the case of *Leonard Mwangemi Munyasia v Republic* [2015] eKLR held that; -

“if it is shown that the appellant suffered from this condition then under Section 9 & 12 of the *Penal Code* he could not be held criminally responsible for the murder of the deceased.

Both Section 12 aforesaid and the M/c Naughten Rules recognise that insanity will only be a defence if it is proved that at the time of the commission of the offence charged, the accused



person by reason of unsoundness of mind, was either incapable of knowing the nature of the act he is charged with or was incapable of knowing that it was wrong or contrary to the law. The test is strictly on the time when the offence was committed and no other.”

33. From the evidence herein, the prosecution witnesses (more so PW 3) testified that the accused had previously looked unstable thus leading to them reading him Quran. Equally, PW1 confirmed in his evidence in chief that the accused was a sick man during the material time. Additionally, the mental assessment report showed that the accused herein suffered a mental illness and therefore was unfit to stand trial in a court of law.
34. From the information above, would it be therefore safe to conclude that indeed the accused herein was at the time of the commission of the offence labouring from a mental illness?
35. Of importance to note is the fact that the offence herein was allegedly committed on January 19, 2022 and in reference to PW3’s testimony, it was stated that prior, the accused seemed unstable and that they had even read him Quran. He continued to state that the accused had even stopped working as he had health problems. That they thought he had mental problems as he depicted strange behaviours.
36. In *Leonard Mwangemi Munyasia v Republic* (*supra*), the court observed that:

“We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.”
37. Taking into account the totality of the circumstances under which the subject offence of murder was committed, it is outright that the accused person even prior to the commission of the offence herein, had previously presented signs that he was suffering from a mental illness. The same was corroborated by PW1, PW3 and the mental assessment report by Dr. Omar who categorically indicated that the accused herein was suffering from a mental illness thus was unfit to stand trial. To that extent, it is my conviction that the accused was not in his right frame of mind at the material time hence incapable of differentiating good and bad. We can therefore not conclusively state that he had the capacity to be possessed of malice aforethought.
38. Having come to the above conclusion, I find that the order that commends itself to the court is to proceed as provided under Section 166 (1) of the *Criminal Procedure Code*. Accordingly, I make a special finding under Section 166 (1) of the *Criminal Procedure Code* to the effect that the accused is guilty of murder contrary to Section 203 of the *Penal Code*, but was insane at the time he committed the offence. Accordingly, I enter a special finding of Guilty but Insane.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 9<sup>TH</sup> FEBRUARY DAY OF 2024**

.....  
**J. N. ONYIEGO**  
**JUDGE**

