



**Republic v Muteti (Criminal Case 64 of 2017)  
[2024] KEHC 17161 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17161 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL CASE 64 OF 2017**

**TM MATHEKA, J**

**MAY 7, 2024**

**BETWEEN**

**THE REPUBLIC ..... PROSECUTION**

**AND**

**JOSEPH MUTETI ..... ACCUSED**

**JUDGMENT**

1. Joseph Muteti was charged, vide a charge and information dated 13/08/2010, with murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on 2/8/2010 at around 3:00 pm at Muembeni village Ndetani sub-location – Kibwezi District within Eastern province he killed Joseph Kanyola Nzioki.

2. When he appeared before the Judge on 25/8/2010 he was referred for mental assessment. The report came on 26/11/2010 via the

letter from Dr. D A Kokonya , Machakos Level 5 Hospital. It stated:

Re: Joseph Muteti

Thank you for referring the accused to me for mental status assessment. Today I have assessed him in the presence of a prison officer accompanying him, a social worker and nurse counsellor.

Findings:

Poor eye contact Selective responses

Dysfunctional family background

Suffered neglect and hardship during childhood Careful working and concealment of information

Suffers from mood disorder without incapacitation Deliberately refuses to verbally communicate.

Opinion: Can plead in court though he tends to behave as if he cannot talk.



Recommendation:

To be treated for mood disorder Thank you

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Dr. D. A. Kokonya Psychiatrist

3. He had to be referred for assessment again and in February 2013, he was found to be stable and the psychiatrist concluded that he understood the charges and would follow proceedings. The matter proceeded for hearing that August of 2013 and two witnesses testified.
4. In December 2013, he had been referred for mental assessment once again, and *vide* letter dated 10/12/13 the psychiatrist at Machakos Level 5 hospital found the accused having “lack of insight, inability to follow court proceedings, not fit to plead”.
5. On 28/9/2015, he was committed to Mathari Mental Hospital.
6. He was still there when the matter was transferred to High Court of Kenya at Makueni *vide* letter dated 1/3/2017.
7. By letter dated 13/7/2017, received and 12/1/2018 the Medical Superintendent, Mathari Hospital confirmed that the accused who had been in his care and treatment from 18/2/2016, was now capable of making his defence.
8. The matter never took off again and he appears to have relapsed and on 9/4/2019 another order was made for the accused to be sent to Mathari Hospital for assessment.
9. A report dated 1/8/2019 from Mathari Hospital (Dr. Mary Karanja) reported he was fit to plead.
10. On 15/10/2019 and 10/8/2020 orders were made for his admission to Mathari Hospital but he was not admitted. On 14/6/2021 he assessed by Psychiatrist at Makueni Referral Hospital not competent to plead and was recommended for treatment for 3 months.
11. On 6/9/2021 he was found fit to continue with trial and later a letter from Mathari Hospital dated 12/10/2021 reported that he was mentally fit, not requiring any admission.
12. It was during this period that a Plea Bargain Agreement was entered into between him, his counsel and the DPP and signed on 31/10/2022. In this one he negotiated a plea to the lesser charge of manslaughter c/s 202 as read with 206 of the [Penal Code](#). The first time it was read to him after several mentions he told the court the charge was not true.
13. The matter remained that way until the 4<sup>th</sup> July 2023 when his mother stood up in court and pleaded with the court to release her son to her. She told the court that the more he stayed in custody the worse his mental health got and that she was ready and willing to shoulder all the responsibilities of ensuring he got his treatment and took it.
14. This accused had been in custody since 25<sup>th</sup> August 2010 almost 13 years.
15. A social inquiry report revealed that the accused was not a danger to himself or the community and there was general sense of acceptance in the community and the family for him including the family of the Victim. He was realised on the undertaking of his mother that he would attend court, and he did.
16. Efforts to record the PBA were not successful as he was not talking.
17. He was once again committed to custody for purposes of further mental assessment.



18. On 6/5/2024, the report came back that he was fit to plead.
19. On 7/5/2024 he was put in the dock to take the plea.
20. Asked whether he signed the PBA, he told the court he was aware of the signing of the PBA and wondered whether it was wrong to do so. The court assured him it was not wrong to do so unless he was coerced to do so
21. Thereafter, he would not speak except to ask the court to let him go home.
22. I have anxiously considered this matter and on the heavy question on what to do. This is an accused person whose state of mind is not stable all the time as clearly demonstrated by the numerous reports from psychiatrists over the 13 years period he has been in remand custody.
23. He admitted to committing the offence at some point when his mind was ok and signed the plea bargain agreement where he admitted committing the offence. He told the court that he aware of signing it and wondered whether there was anything wrong with the signing.
24. Paragraph 3 of the PBA states that the accused agrees to plead to the charge of Manslaughter c/s 202 as read with 205 of the [Penal code](#) and the particulars of the charge and that he admits committing the offence and agrees to the facts.
25. The accused person was 13 years younger when he committed the offence. Mental health issues are still a maze to the lay person. The criminal justice system in Kenya does not have the wherewithal to deal with offenders who have serious mental health issues. Merely holding them in remand custody, or holed up at the Maximum ward of the Mathari Hospital cannot be the end solution. There must be more solutions for such offenders. A diagnosis telling us lay persons what the accused is suffering from would a good beginning. As it is now I would not be able to say what mental health disorder the accused is suffering from. And this consternation is evident from the Social Inquiry report, where everyone at home was of the view that witch craft was involved. It is this ignorance that fuels the stigma that denies the accused persons with mental health issues the support of their families, leaving them to languish for long periods in remand prison , even compromising their chances of getting better.
26. So in this case, it is my considered view that the peculiar circumstances of this case call for an outcome that amounts to what is referred to as ITO/individual treatment order akin to the ITP/ICP (Individual treatment /care plan) for children in contact with the law.
27. To do so I have to accept the accused persons' admission of the offence through the plea bargain though the plea was not recorded.
28. However, I cannot treat him the same way as the person who has pleaded guilty and has been convicted of the offence. This is because, I cannot tell how long it will take for him to enter that space in his mind to enable us take a plea of guilty as envisioned by the [Criminal Procedure Code](#). In the meantime, he will be denied of the positive outcomes of his having taken responsibility for his actions.
29. Drawing from the [Katiba](#) Articles 159, 165 and:
  - 19(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings,
  - 20 (3) In applying a provision of the Bill of Rights, a court shall— (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and



- (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

30. I am of the view that justice will be served by this court accepting the accused's persons acceptance for the responsibility of committing the offence of manslaughter and crafting an outcome that would serve the interests of justice. Two parts of the Procedure for the plea agreement stand out, that the accused may negotiate it, and the court under s. 137G of the *CPC* The court shall, before recording a plea agreement, satisfy itself that at the time the agreement was entered into, the accused person was competent, of sound mind and acted voluntarily.
31. I cannot state here with certainty that at the time the PBA was entered into the accused was of the kind of sound mind envisaged by the *CPC*, but the record shows he was aware and he signed it voluntarily. The record will show he weaves in and out of the lucid moments and due to his relapse in and out of mental disorder, he cannot sustain his lucid moments long enough to complete the processes set out by the system. Subjecting him to those processes without the necessary supporting structures for his mental health issues does not appear to uphold his right to human dignity.
32. It is for the foregoing reasons that I find refuge in section 4 of the *Probation of Offender's Act* cap 64. It states;

Power of court to permit conditional release of offenders

- (1) Where a person is charged with an offence which is triable by a subordinate court, and the court thinks that the charge is proved but is of the opinion that, having regard to age, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—
- a. convict the offender and make a probation order; or
  - b. without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.
2. Drawing from this court's unlimited jurisdiction as provided for under Article 165(3) (a) of the *Katiba*, it is my view that this provision of the Probation of Offender's Act is applicable to the accused person in this case. The offender accepted responsibility but considering all the circumstances of the case, I particular his mental health and the period he has been in custody, and the Social Inquiry Report by PACs, it is my view that this case calls for the accused to be placed on Probation Supervision without conviction.
3. The Offender has been in custody for almost 13 years, he has been punished for his wrong doing.
4. An outcome that acknowledges the reconciliation both the family of the accused and that of the deceased have gone through through AJs, and also enables family who are ready to support his treatment to do so is what would be appropriate. Justice will have been served in both circumstances.
5. I order therefor, on the basis of the Social Inquiry Report before me that the offender is placed on Probation Supervision for three years during which period he will continue with his medication.
6. His mother continues to commit herself to his care



7. Orders accordingly

**DATED SIGNED AND DELIVERED IN OPEN COURT ON 7<sup>TH</sup> MAY 2024.**

CA Ms. Nelima/Ms. Elizabeth Mr. Muthama for Accused Accused Present

Accused's Mother present

Ms. Mwalewa for Probation and After Care Services Mr. Tanui for State

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**

**THE JUDICIARY OF KENYA.**

**MAKUENI HIGH COURT**

**HIGH COURT DIV**

**DATE: 2024-05-09 23:11:45**

**The Judiciary of Kenya**

