



**Republic v Ngochi (Criminal Case E011 of 2020)
[2024] KEHC 10950 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL CASE E011 OF 2020
RM MWONGO, J
SEPTEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

JOYCE WANJA NGOCHI ACCUSED

RULING

1. The accused 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 22nd November 2020 at Kiamutugu village in Kirinyaga County, she unlawfully murdered her son, Stephen Ngochi.
2. The prosecution alleges on 22nd November, 2020 the accused and her four-year-old son were sleeping at night when the accused suddenly took a kitchen knife and handed it to her son. She instructed the boy to defend himself. He failed to do so which provoked the accused to attack her son, inflicting several fatal stabs on his neck.
3. When first presented in court to take plea on 8th December, 2020, she could not take plea because her medical report indicated she was of unsound mind. After a series of reports with the same outcome, she has never taken plea. She is stated to be suffering from Abnormal mental illness with psychosis in relapse.
4. On 4th March 2024, the court directed both the Prosecution and the Defense to file submissions on the steps to be taken by this Court concerning the condition the accused is in.
5. The prosecution submits that in criminal proceedings such as these, the defense counsel should petition the Court for orders of habeas corpus to interrogate the legality of the accused being in custody with her current mental illness.



6. The prosecution cites Section 166(1) of the CPC that states:

“Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of the person for the offence that he/she was insane so as not to be responsible for his/her acts or omission at the time when the act was done or the omission made, then if it appears to the Court before which the person is tried, that he/she did the act or made the omission charged but was insane at the time he/she did or made it, the Court shall make special finding to the effect that the accused was guilty of the act or omission charged but was insane when he/she did the act or made the omission.”
7. The prosecution submits that the accused having not taken plea, this Honourable Court should be guided by the provisions of Section 167(b) and after the proceeding be persuaded by Section 166 (2) that stipulates;

“When a special finding is so made, the Court shall report the case for the order of the President and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct. The President may order the person to be detained in a mental hospital, Prison, or other suitable place of safe custody”.
8. The prosecution pleads that the Court should direct the officer in charge of the place where the accused is detained to make a proper report on the condition and circumstances of the accused for consideration by this Court to enable it to determine the next cause of action as envisaged under Section 167(b) which states:

“In cases tried by the High Court, the Court shall try the case and at the close thereof shall either acquit the accused person or, if satisfied that the evidence would justify a conviction, shall order that the accused person be detained during the President's pleasure”.
9. The prosecution cites the case of Leonard Mwangemi Munyasia v Re [2015] eKLR where it was stated:

“Under the rule of insanity is a defense if at the time of the commission of the act, the accused person was labouring under a defect of reason, from a disease of mind, as not to know the nature and quality of the act he/she was doing; or, if he did know it, that he did not know he/she 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”
10. Section 167 (2) provides:

“A person ordered to be detained during the President's pleasure shall be liable to be detained in such place and under such conditions as the president may from time to time by order direct, and whilst so detained shall be deemed to be in lawful custody”.
11. The prosecution submits that when this Court resumes the hearing proceedings, the Court will have the opportunity to observe the demeanor of the accused to determine whether she will express stable or disturbed mannerisms.



12. The defence submits that the medical assessment reports already on record indicate that the accused person cannot stand trial; that she cannot communicate with her Advocate; and is unable to comprehend the nature of the proceedings against her.
13. Further, counsel submits that Section 12 of the *Penal Code* provides as follows:

“ a person is not criminally responsible for an act or omission if at the time of doing the act or 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.”
14. Section 162(1)-(3) of the *Criminal Procedure Code* was relied on for the provision that where the Court has reason to believe that an accused person has a mental illness and is unable to stand trial, the Court shall postpone the matter and the accused shall be released on bail unless there are compelling reasons against granting of bail.
15. The defence further argues that Section 167 of the *Criminal Procedure Code* lays down the procedure that should be followed when the accused does not understand proceedings.
16. The defence cites the case of *Hassan Hussein Yusuf v Republic* (2016) eKLR where:

“The Court ordered the accused to be escorted to a medical facility with the capacity to evaluate his mental condition. If in the opinion of a psychiatrist, he will not pose any danger to the public and himself if he shall be set at liberty and prison authorities shall ensure that he is facilitated to his home. If the opinion is otherwise, he shall be admitted for treatment until such a time it will be safe to release him.”
17. Finally, the defence submits that a person with mental illness should be treated on an equal basis as any other offender concerning their rights and protection. As such they should not be subjected to more extended periods of incarceration than any other person based solely on mental illness.
18. The defence points out that the *Mental Health Act* (Cap 248) provides for the protection of persons with mental illness and Section 38 of the *Prisons Act* (Cap 90) provides for the protection of dignity for persons with mental illness by having Court Sessions in camera. Such persons should be moved to any mental hospital in Kenya and be detained there until they are removed or discharged. This applies to the accused.

Issues for Determination

19. The singular issue for determination is: What is to be done concerning the accused and the proceedings given the accused’s mental illness?

Analysis and Determination

20. The accused is charged with the offence of Murder, but cannot take plea given her mental illness and inability to comprehend the proceedings.
21. The Medical report filed on 3rd December, 2020 indicates the accused to be suffering from Abnormal mental illness with psychosis in relapse. Further, the medical report dated 9th January, 2024 indicates that she still has symptoms of mental illness and is not fit to plead.



22. The prosecution submits that the Court should be guided by the provisions of Section 167(b) and after the proceeding be persuaded by Section 166 (2) which stipulates:

“When a special finding is so made, the Court shall report the case for the order of the President and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct. The President may order the person to be detained in a mental hospital, Prison or other suitable place of safe custody”.

23. Section 167 (1) (b) of the *Criminal Procedure Code* which the prosecution seeks that the court apply, lays down the procedure that should be followed when the accused does not understand proceedings. The section reads as follows;

“(1) If the accused though not insane cannot be made to understand the proceedings;

(a) In cases tried by the High Court, the Court shall try the case and at the close thereof shall either acquit the accused person or if satisfied that the evidence would justify a conviction shall order that the accused person be detained during the president's pleasure.”

24. That provision is clearly not applicable to the present case as the accused had been found to be mentally unsound.

25. The case of *Hassan Hussein Yusuf v Republic* (2016) eKLR was also cited where:

“The Court ordered the accused to be escorted to a medical facility with the capacity to evaluate his mental condition. If in the opinion of a psychiatrist, he will not pose any danger to the public and himself if he shall be set at liberty and prison authorities shall ensure that he is facilitated to his home. If the opinion is otherwise, he shall be admitted for treatment until such a time it will be safe to release him.”

26. The court also held in the *Hassan Hussein Yusuf* case as follows:

“A sick person's place is at the hospital and not in prison. I find section 167 of the Criminal Procedure Code discriminative to people with mental illness for prescribing their detention to be in prison instead of a health facility and for the detention to be indeterminate. This offends articles 25 and 29 (f) of the *Constitution*. Article 25 provide as follows:

25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited--

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;”

27. I have further considered Section 162 (1)-(3) of the *CPC* which provides as follows:

“(1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.



- (2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.
- (3) If the case is one in which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.”

28. I think these provisions should be applied in this case. In terms of sub section (1) of section 162, the accused has been found, after inquiry through several medical assessments, to be of unsound mind and generally incapable of comprehending the proceedings.
29. Further, in terms of section 162 (2), the Court, being satisfied that it could not in the circumstances proceed with the case, has postponed the proceedings several times as indeed plea cannot be taken.

Conclusion

30. The court agrees with the defence that an accused person with mental illness should be treated on an equal basis as any other offenders with regard to their rights and protection. As such they should not be subjected to more extended periods of incarceration than any other person based solely on mental illness.
31. Accordingly, the court must now apply section 162(3) *CPC* and allow the accused to apply for bail notwithstanding that the accused has not taken plea. The court had observed on 8th April, 2024 that the accused appeared, on that one occasion, to be lucid and attentive, and able to follow the proceedings. The accused will be given opportunity to make a bail application at the next hearing.
32. In the meantime, and until she is able to make such application, the accused is to be held in the care of Mathari Hospital where her mental condition can be most humanely managed.
33. Orders accordingly.

DATED AT KERUGOYA THIS 19TH DAY OF SEPTEMBER, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Mamba for the State

Magara holding brief for Makworo for Accused

Accused Present in Court

Court Assistant, Murage

