



REPUBLIC OF KENYA



**Republic v Wangechi (Criminal Case 4 of 2017)  
[2023] KEHC 2065 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2065 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL CASE 4 OF 2017  
F GIKONYO, J  
MARCH 22, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**AGNES NYAGUTHI WANGECHI ..... ACCUSED**

**JUDGMENT**

1. The accused herein is charged with the offence of murder contrary to Section 203 as read Section 204 of the [Penal Code](#).
2. It is alleged that on 1<sup>st</sup> February 2017 at Enesambulai Area in Narok Sub-County within Narok County he murdered one Benson Gikonyo Wanjohi.
3. The prosecution called five (5) witnesses in support of its case. The defense called two witnesses; the accused and a doctor.

**Evidence**

**Prosecution's case**

4. PW 1 -Harry Muthanga Wanjohi. He lives in Othaya Nyeri. He is the brother of the Deceased. On 3/2/2017 he identified the body of the deceased to pathologist at Narok Referral Hospital Mortuary. He stated that the deceased had a wife and one child. He knew accused as Nyaguthi, their child was between 20 and 30 years.
5. Cross-examination, he stated that the Accused and deceased were married for over ten years. He however did not know their marriage life. He did not know that the accused was mentally challenged.



6. PW 2- Martin Kariuki Nyaguthi. He resides in Nyeri. On 3/2/2017 he identified the body of the deceased to the doctor, who performed a post-mortem examination. Deceased was his father. The accused is his mother.
7. On 26/11/2018, by consent of both counsel report of the post-mortem was produced in evidence as exhibit 1. Also, by consent, the P3 form of the accused was admitted in evidence as exhibit 2.
8. On 1/7/2019, by consent, the government analyst report (original) was produced as exhibit P Exh. 3
9. PW 3 -Danson Maina. He resides in Langalanga in Nakuru town. He recalled on 1/2/ of the year which he did not remember, he left his home towards Saburai. Upon arrival at 10.00 p.m., he had to push a bicycle because it had rained. He went to his temporary house. After finishing cooking ugali he then heard the deceased arriving at the house. The deceased did not know that PW3 had arrived.
10. When he was in his house, he could hear the deceased and his wife talking in their house. The rooftop of their houses is covered with nylon paper. He then heard the deceased say, "Fungua na shika na kamata." It was as if he was carrying something that needed to be gotten half.
11. He heard the deceased being beaten. He then heard him saying, "mama Ciro anataka kua mimi." Mama Ciro – identified is the accused. He went there and entered their house. Only the accused and deceased were in the house. The deceased was lying down. He saw her beating the deceased. He saw that one stone of the fireplace had fallen down. She was using the iron bar ( Mfi – 4) in beating the deceased. He screamed. He went to the house of Kahuthu. He was not there. He left to the home of the Mzee who leased his shamba. He met him. He told him they are tired of accused and deceased because they were used to making nonsensical noise. He told him to go and sleep and that they meet the next day. He did not go to his house, instead, he went to the house of Muchiri. Accused used the iron bar to hit the deceased. He had gone to their house at 11.30 pm. He had known deceased for about two months, when he was living in their house.
12. Baba Ciro was about 40 years old. The accused was about same age as the deceased. There was tin lamp burning in their house. Their torch had fallen down, and was on. Accused was beating deceased using the iron bar which he pointed out in court. He slept at Muchiri's house and woke up at 6.00 a.m. He then went to his house to get his tools of work. He met 16 people coming towards the boma of deceased. He then accompanied them to the house of deceased. The accused then explained to a friend of the deceased as to what happened. They went to house of deceased. They found deceased had died. He was lying down on his right arm. The people who saw deceased were shocked. Those people rang police at Saburai. Police came and took accused to Sakutiek. Body of deceased stayed there at scene until 5.00 p.m. when police arrived. Police arrived at 5.00 p.m. The police collected the body of deceased. He accompanied the body with some three other Wazees. He has not had any dispute with accused.
13. On cross-examination, the deceased gave him a place to stay. He stayed in their house for 2 months. For two months the accused and deceased quarreled. When he saw and heard quarrelling that was his first time to see them doing so. He had never seen them for those two months. He heard accused was ill. The deceased used to bring her drugs for mental illness. On that day, the deceased had arrived from a funeral service. Deceased was talking as someone who was drunk. Deceased used to drink beer, although he did not know what type of beer. He was not drinking daily. Deceased told accused to open and take whatever he had in his hand. The next thing he heard was that he was screaming that "mama Ciro, unataka kunimaliza." He responded by going to see what was happening. Accused continued to beat deceased using the iron bar. He told her to stop beating the deceased. She did not heed to his request. Whenever he got hold of her to disarm, she kicked and he fell down.



14. The deceased continued to cry in pain saying. “Mama wacha mimi.” He was overpowered. He went out and raised an alarm. No one responded. There was a burning tin lamp and a torch that was lit. He did not know how long the deceased had lived in that house.
15. After he screamed no one came. He then went to call a co-worker of the deceased, and he did not find him. He never returned, since he was very scared that he might be the next victim. He went to sleep at the house of Muchiri. Muchiri’s house is about half a kilometer from that of the deceased. The following morning 16 people gathered in the plot where the deceased had been killed. The owner of the plot lived a distance of one acre away from the scene of the crime. The door to the house of the deceased was open and the deceased body lay down with the heading facing the door. The deceased was inside the house when the accused assaulted him, but in the morning his body was closer to the door.
16. On re-examination, he stated that he was living in the house of the accused and the deceased with their son. The owner of the boma was a maasai. When the police came drugs of the accused were removed from the house and given to her to take. She then took those drugs. She was the one who requested that she given those drugs. The accused pushed him aside when he was trying to separate her from deceased. The accused assaulted the deceased with the iron bar. The accused was in great anger when assaulting the deceased with an iron bar. He did not know why she was assaulting the deceased. The deceased was crying in pain. The house appeared blackish due to smoke showing that they had lived there for long.
17. PW4- Benson Lokula. He testified that on 1/2/2017 some incident occurred at 11 p.m. in his Boma. A person known to him though he does not remember his name came to his Boma to call him. He told him it was night and he will not go. He slept. He refused because the deceased and his wife are always quarreling.
18. In the morning he went to his place. He found a person had been killed. There were many people at the scene. The person who was killed was called Gikonyo. He was inside the house. There were police officers at the house. He had leased land to the deceased and his wife for 6 years. He stated he has no beef with the accused person. He saw an axe and an iron bar at the scene. The accused was at the scene.
19. On re-examination, he stated that he had leased 2 acres of land to the deceased and his wife for 6 years. The two were living in the said land. They had erected a house in the said land. Their house was 10 acres away from his house. He, therefore, did not hear anything. He knew them to always engage in quarreling. The deceased and the accused had a 13-year-old old child but the child was not home at the time of the incident. He had heard that the accused was insane and was on medication. She used to pass by his home on her way to the hospital to get her drugs. He did not see her on the material day. He stated that the deceased was of ordinary character but took beer. On the material day, he did not see the deceased.
20. On re-examination, he stated that on the material day he did not see her go for her drugs. He could not tell whether the deceased had taken beer.
21. PW5- PC Peter Githinji. He testified that he stated that on 2/2/2017 he joined other officers led by CPL Kinyanjui. They went to Ensambulai village the scene of the murder. They met Aps led by CPL Maina who took them to the scene. They entered a timber house. They found the body of the deceased lying down in a pool of blood. The body had injuries on the right side and shoulders. They recovered a metal rod (blood-stained), a piece of timber with blood stains, a panga with blood stains, and an axe. He produced the same as P Exh. 4,6,7, and 5 respectively. He was shown the suspect and they arrested her. They also took the body to Narok Mortuary.
22. He recorded the statement of Danson Maina- a neighbour of the couple. Danson stated that at about 11 p.m., he heard a quarrel in the house of the couple. He went and found the wife (the accused) sitting



- on the deceased and hitting him on the head with a metal bar. He did not receive a prompt response from the people.
23. He also recorded a statement of Zacharia Kahuthu- a neighbour. He stated that on 2/2/2017 while in his house the accused came and told him to go and check out on his friend for, she had killed him. He took other villagers with him and found the deceased had been killed.
  24. He also recorded the statement of Benson Lokula that on 1/2/2017 at 11 p.m. his neighbour called Maina came to his home to accompany him to the deceased's house. He told him he could not wake up and he was asleep. The following day he woke up at 6 a.m. and went to the house of the deceased and found he had died. He confirmed he had leased the land to the two for 6 years. He knew them well.
  25. On 3/3/2017, they went to Narok mortuary and a postmortem of the deceased was done. Henry Muthage- brother of the deceased and martin Kariuki son of the deceased identified the body. Dr. Robert Langat conducted the post-mortem. he filled in the post-mortem form (P Exh1) blood samples from the body of the deceased were taken for analysis.
  26. On 6/2/ 2017 he was arraigned in CMs court for more time to investigate. They were given 7 days. On the same date, he took the accused to Narok for psychiatric assessment by Dr. Ivan Kenya. He found her to be a mental patient since 1992 and was under treatment. He recommended she had a disorder condition. The report was produced as P Exh 8.
  27. On the same day, she was examined by Dr. Kiptoo who filled out a P3 form. Her blood samples were taken. He also identified the P3 form (P Exh2). He then charged her in court. She was committed to Matharu and a report was done.
  28. On 28/2/2017, he prepared an exhibit memo and submitted all 4 exhibits for analysis together with blood samples for the deceased and the accused as exhibit memo- P Exh 9.
  29. Results were later out (P Exh 3). He identified the accused as the one in the dock.
  30. On cross-examination, he stated that he was informed of the incident at around 2 p.m. He arrived at the scene at around 5:30- 6 p.m. he found villagers and APs at the scene. They preserved the scene and secured the accused. he processed the scene as is. The police arrived there after receiving a report. He did not know the time they arrived at the scene. He did not find the accused at the scene. She had been placed in the custody of the AP at their post to avoid her being killed by the villagers and also prevent her from fleeing.
  31. He collected all items he found at the scene. They were blood stained. He also submitted them to the government chemist and a report was done. The blood of the deceased was already dry and could not provide any DNA. However, it was the blood of a male that was on the items.
  32. The psychiatrist's report confirmed she had a mood disorder and was under treatment. She had it for 25 years. Court ordered her treatment at Mathare. She was there for 5-6 months.
  33. The accused person was placed on his defense vide a ruling of this court dated 21/03/2022.

#### **Defense case.**

34. DW1-Agnes Nyaguthi Wangechi. She gave a sworn statement. She stated that her home is Othaya. She was married to Benson Gikonyo. She however could not remember the year. She was 46 years. She has one child who is 24 years. She left Othaya for Narok about 7 years ago. She was still married at the time. They lived at Ensambuali. They grew potatoes. He farmed for about 4 years.



35. The accused person went ahead to state that she does not know why she was giving a testimony. The deceased was her husband. She could not remember what happened as she was on medication for mental health. The problem she stated started in 1992. Her medication was from Nyeri. At Narok, she was still on medication that was coming from a private dispensary called Ndorobo in Ensambulai. She could not remember what happened on 1/2/2017.
36. She stated that her husband was a drunkard and they used to fight every day. They used to fight and they could stop by themselves. The fights started when she was married. The deceased used to beat her when he is drunk.
37. She confirmed that the boy was his son but she got him before the marriage. They married officially after the boy was born. She was taking her medication every day. She could not remember what happened even after the incident. But she went to a mzee near their house. She could not remember well what happened. She knows Benson Maina (PW3). she could not remember if she spoke to him.
38. She could not remember she was charged. She remembers that the court ordered her to be treated. She was taken to Mathari hospital in Nairobi. She remained there for 6 months. She still receives injections to date. She stated that she remembers nothing. She is remorseful. She prays for forgiveness so that she can take care of her child. She was sick.
39. On cross-examination, she stated that she was taken to the hospital before she came to court. She was a mental patient since 1992. She could not remember whether she said she killed the deceased with a panga (P Exh8). The deceased was her husband. They only fought when he was drunk. She had taken medication. She could not remember whether she was angry on the material day. When she takes her medication, she feels dizzy and talks too much. She is not really well at that time. On the material day, they fought. She could not remember whether she used a piece of wood or axe or a panga. She saw Danson on the material day. She is remorseful. She loved her husband.
40. DW2- Lemeria Leposo. He testified that he is an expert in mental health at Narok level 4. He holds an advanced diploma in mental health and has so worked for 32 years. He saw the accused in 2020 in his clinic to assess her mental status. He examined her and her earlier behavior. He established in 1992 she had a mental problem after giving birth to her first child. She had been treated at Karatina and also Mathari hospitals. She suffered from what is called mental illness associated with pregnancy and childbirth.
41. In 2020 at the time of the examination, she could not make a proper judgment. She had a partial insight into her condition and previous experiences.
42. She also suffered schizoaffective a condition of two conditions (diseases). i) she does not think properly. She could hear voices in her mind or hear voices of people he could be seeing (hallucinations) and third-person hallucinations that is she could hear people talking about her yet she cannot see them. 2<sup>nd</sup> voice is dangerous because it is a command to her.
43. Sometimes a woman would kill her child upon birth to release the child of trouble or kill to protect the child.
44. She is currently under their care. They track her progress. She is compliant with medication and attendance for review. She regularly takes her medication.
45. In 2020 there was a relapse. He recommended she be taken to Gilgil where she stayed for a week and she came back. She takes her medication and injection. She is aware she must take her medication to avoid relapse due to prison conditions.



46. As one of the professionals who have treated her, he was confident she is stable for as long as she takes medication. But the family must ensure she regularly takes her medication. They should also not do things that will remind her of the previous acts. Otherwise, she can now lead a normal life as long as she takes her medication and receives psychosocial support.
47. He produced her file with all information on her as D Exh. 1. He stated he would do a summary of the file and produce it. He produced the report as D Exh2. She is aware and needs to continue with medication she may be reintegrated back into society.
48. On cross examination, he stated that from his observation she is able to know what is going on in court.

#### **Prosecution's Submissions.**

49. The prosecution did not file any submissions. Mr. Ondimu stated that they will rely on submissions on no case to answer and the evidence tendered. He was of the view that this is a case of manslaughter as there was no pre-determined intention to murder. It appears there was a fight between the accused and the deceased.
50. The submissions on the no case to answer are considered in the analysis. The prosecution relied on the following authorities
  - i. Ramanlal Trambaklal Bhatt V R [1957] EA 332.
  - ii. Section 107 (1) *Evidence Act*. Cap 80
  - iii. Section 203 and 206 of the *Penal Code*.
  - iv. *Republic v Mohammed Dadi Kokanee And 7 Others* [2004] eKLR.
  - v. *Republic v Susan Kabindi* 2010 eKLR which quoted the case of *Daniel Muthee v R* CA No. 218 Of 2005(UR)

#### **Defense Submissions.**

51. The defense filed written submissions which are also considered in the analysis. The defense relied on the following authorities.
  - i. *Republic v Andrew Mueche Omwega* [2009] eKLR
  - ii. *Leonard Mwangemi Munyasia* [2015] eKLR
  - iii. Machakos Hcr No. 21 Of 2017, *R v Juliana Wanza Mulei* [2020] eKLR.

#### **Analysis and Determination**

52. As required of my duty, I will be careful to evaluate the evidence adduced with judicious alertness in order not to miss the grace and power of the testimony of witnesses, and similarly, apply the relevant law to the facts drawing on the evidence. The evidence is already recorded and is part of the record. But what exactly should the prosecution prove to secure a conviction on a murder charge?



## **Elements of Murder Charge**

53. The accused is facing a charge of murder under Section 203 of the Penal Code which defines the offence as follows: -

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

54. Accordingly, the prosecution should prove beyond reasonable doubt the following: -

- a. The fact of the death of the deceased
- b. The cause of such death
- c. That the deceased met his death as a result of an unlawful act or omission on the part of the accused person and
- d. That the said unlawful act or omission was committed with malice aforethought.

## **Of Fact and Cause of Death of Deceased**

55. These two elements could be handled together because of their close connection.

56. The prosecution submitted that the deceased died as a result of severe intracranial hemorrhage as indicated in the post-mortem report.

57. The post-mortem report was produced as P Exh. 1. PW1 and PW2 identified the body of the deceased- Benson Gikonyo Wanjohi before post mortem was conducted.

58. In the postmortem report (P Exh 1), Dr. Robert Langat who performed examination on the body of the deceased observed the right side of the head had a large wound with a gaping skull injury with the left skull, parietal, and part of the frontal missing with a cavity measuring 10 x 13 cm with cranial cavity visible, empty. He observed a fractured right mandible with a wound on the right jaw measuring 5 x 3 cm. there was a large wound on the right shoulder measuring 12 x 14 cm with a fracture of the right clavicle.

59. As a result of the examination of the body of the deceased, Dr. Robert Langat formed the opinion that the cause of death was as a result of severe intracranial hemorrhage.

60. Thus, the medical as well as other witness evidence proves that the deceased died, and the cause of death was as a result of severe intracranial hemorrhage. Therefore, the prosecution proved the fact and cause of death of the deceased

## **Was the Death Due to an Unlawful Act or Omission by the Accused?**

61. The prosecution submitted that they proved beyond reasonable doubt that the accused murdered the deceased on 1<sup>st</sup> February 2017 because PW3, an eye witness, and a neighbour saw the accused confronting and inflicting serious injuries on the deceased which caused the death of the deceased.

62. The defense has not disputed the fact that the accused caused the death of the deceased.

63. In light thereof, the prosecution proved beyond reasonable doubt that the death of the deceased was a result of an unlawful act or omission by the accused person.



### **Was the Act Done with Malice Aforethought?**

64. The prosecution submitted that they proved malice aforethought. The accused person knew very well that assaulting the deceased on the head with a metal rod would cause death or grievous harm. The accused injured the most delicate part of the body which is the head region. The choice of weapons- a metal rod (P Exh4) axe (P Exh5) a piece of wood (P Exh 6) and a panga (P Exh 7) was indicative that she wanted to murder the deceased. Therefore, the conclusion is that the accused's acts were calculated.
65. The defense submitted that all the evidence adduced by the prosecution points to the fact that the accused committed the offence while of unsound mind drawing on the medical history adduced by the accused's doctor.
66. The defense submitted that the deceased and the accused were husband and wife, and lived together. Evidence was adduced that the accused and the deceased were in a habit of fighting every time the deceased came home drunk. The accused did not harbor any ill feelings towards the deceased, ruling out the aspect of malice aforethought.

### **Malice Aforethought**

67. Did the accused have the necessary malice aforethought?
68. Section 206 of the *Penal Code* defines malice aforethought as follows: -

“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) .....
69. Assaulting the deceased with a metal rod was likely to cause the death of or cause grievous bodily harm to the deceased. It was established by medical evidence that the deceased sustained several/ multiple severe injuries from which he died. The repeated assaults caused the severe injuries on the most delicate part of the body- the head. And, the weapons used were dangerous- a metal rod (P Exh4) axe (P Exh5) a piece of wood (P Exh 6) and a panga (P Exh 7).
  70. The question however is whether the attacks were with the intention to cause grievous harm or death. The injured part is the head region. In other words; did the prosecution prove beyond reasonable doubt that the accused's savage acts were committed with malice aforethought? Did the accused consciously set out to kill her husband?



71. Under Section 11 of the *Penal Code*: -

“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.”

### **Defence of Insanity: Essential Core and Effect**

72. The presumption of sanity is, however rebuttable under Section 12 of the *Penal Code* which provides that: -

“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 is 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.”

73. The essence in section 12 of the *Penal Code* reminds of and draws upon the famous English case: *Mc Naughten case*, 1843 – 10 C & F 200 thus: -

“...Insanity is a defence if at the time of the commission of the act, the accused person was labouring under such 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, he did not know that what he was doing was wrong.”

75. It is, therefore, a rule of general application in criminal responsibility that, a person is not responsible for his act if it is proved that, at the time of the commission of the offence, he was suffering from a disease of the mind and made him incapable of understanding what he was doing or knowing that what he was doing was wrong. See *Mwachia Wakesho v. Republic* KECA 223 (KLR).

### **Defence of insanity: Duty of Court and Prosecution**

76. And: -

‘It’s the duty of the trial court to inquire specifically into the question of insanity, not only in situations where such defence is raised but also where it becomes apparent to the court from the accused person’s history or antecedent that insanity may be an issue.’ (Mwachia case (ibid).

77. I should think this position is informed by the constitutional and statutory obligation of the court to uphold, promote and protect rights of people living with disability.

78. Of importance also is that;

‘where it emerges from the evidence that the defence of Insanity is in issue, (and the standard in that regard is on a balance of probabilities) the prosecution is required to disapprove it’ (Mwachia case (ibid)

### **Evidence to Prove Insanity**

79. Although it was up to the prosecution to establish malice aforethought, they were the ones who raised the alarm, as early as when the accused was first arraigned in court to take plea, of the mental condition



of the accused. The accused was committed to Mathari hospital for treatment. She was there for 6 months. What a professional prosecutorial approach to do justice to all and to bring forth all evidence; inculpatory and exculpatory.

80. The defence also specifically put forth a defence of insanity.
81. It is necessary to recapitulate the pertinent evidence by the prosecution as well as the defence, in considering the question of whether the accused was suffering from a disease of the mind as to make her not to understand the nature of her actions or if she did, she did not know it was wrong.
82. The insanity must have prevented her, at the time of the commission of the offence, from knowing the nature of her actions or that what she did was wrong.
83. The defense of insanity was raised by the accused's counsel at the earliest possible opportunity; immediately after the accused had taken the plea.
84. As a general rule, evidence of the state of mind of the accused as a defence to the charges should be called by the defence. But, the court as well as the prosecution have a role thereto. Nevertheless, in dealing with evidence on insanity, the English procedure as set out in the 33<sup>rd</sup> edition *Archbold* p20 should be followed unless there are special reasons to the contrary thus:

“The procedure that the defence should call any witness whose evidence is directed to that issue should be strictly followed, the duty of the prosecution being limited to supplying the defence with a copy of any report or statement of any prison medical officer who can give evidence on that issue and to making such person available as witness for the defence; *R v Casey*, 32 Cr Appeal R 91: ICLC 2171. Where evidence to establish insanity has been called for the defence, the prosecution may call rebutting evidence, *R v Smith*, 8 Cr App R 72. And where it is clear from the cross examination of witnesses for the prosecution that the defence of insanity will be raised and it is ascertained that no evidence will be called to establish this defence, the Crown may, before closing its own case, call evidence to negative insanity, *R v Abramovitch*, 7 Cr App R 145.”

85. In the instant case, it is clear from the record that the accused killed the deceased person. But, was the accused person labouring under such defect of reason, from a disease of the mind, as not to know the nature and quality of the act she was doing; or if she did know it, did not know that what she was doing was wrong?
86. Dr. Lemeria was more detailed in his testimony and went deep into the history of the accused's mental illness. He testified that as early as 1992 the accused had been treated for mental illness.
87. His evidence on the schizophrenic condition of the accused was that it was a chronic relapsing condition characterized by false beliefs and hallucinations. A patient suffering from this condition had the tendency to see and hear imaginary people.
88. Most crucially, the psychiatrist was categorical that the accused suffered from the mental state of a schizophrenia patient. The accused however was assessed to be suitable to stand trial. He was, however, certain that such a patient will lead what he described as a 'a near normal life' if she was to be placed under regular treatment. He cautioned about any triggers. In his opinion the accused may be integrated back to the society.
89. In her evidence, the accused stated that she could not remember what happened on the material day. It also emerged in evidence by the prosecution witnesses as well as the defence witnesses that she has been suffering from a mental condition and was on medication. The circumstances described by the



eye witness that she assaulted the deceased with such anger he did not understand, and the fact that she used a number of weapons; iron bar, axe, panga and a piece of wood to hit the head of the deceased was quite unusual. She even went to one of the friends of the deceased to inform him that she had killed his friend. The evidence show that her condition started in 1992 when she gave birth to her son and it has been with her and will continue to be with her, except, there is hope that with medication she may lead a near normal life.

90. Nevertheless, the mental condition described by the doctor is that a third voice is most dangerous as it was a command to her to kill. It is more probable than not that at the time of the commission of the offence she was laboring under this mental condition. The nature of mental condition is such that she did not know what she was doing or if she did, she did not know it was wrong.
91. Insanity once proved negates mens rea- intention to kill (malice aforethought). Accordingly, under section 12 of the Penal Code she is not responsible for her criminal acts due the disease of mind which made her incapable of knowing the nature of her actions, or it was wrong.
92. Although she killed the deceased, but it was not with malice aforethought envisaged under section 203 of the Penal Code.

### **Special verdict**

93. In the circumstances of this case, I enter a special verdict of guilty but insane in accordance with section 12 of the Penal Code, section 166 of the Criminal Procedure Code and as informed by the decision in *R versus M'Naghten* (1843) 8 E.R. 718.
94. Section 166 of the Criminal Procedure Code states as follows:
  166. Defence of lunacy adduced at trial
    - (1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions 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 did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.
95. In light of the Constitution, I doubt whether Subsections (2) and (3) which prescribe the course the trial court should take whenever the special finding is made; may pass the constitutional master on the role of court in sentencing and the place of sentencing as an integral facet of fair trial before a court of law. Notably also is the exercise of power of mercy, a responsibility that has been donated under the Constitution (2010) to the President acting on recommendations by the Power of Mercy Committee. See Majanja J in *Republic v S O M* [2018] eKLR, on section 166 of the Criminal Procedure Code are unconstitutional.
96. In this case, I take cognizance of the period the accused has been in custody during the pendency of this case, a period of nearly five years. This is enough punishments for the accused. I do note also that the doctors found that the accused was laboring under a psychiatric /mental condition and that requires strict adherence to treatment lest there should be relapses.
97. In the circumstances of this case, whereas the court is not oblivious of the danger posed by the people with mental disabilities to themselves and the society, I will lean towards a course that promotes, protects and upholds the right her as a person living with disability.



98. The doctor has confirmed that the accused is in now capable of being integrated back to the society. The accused is therefore discharged. But, shall be committed to responsible family member who will ensure that she is attended to medically and she takes her medication as prescribed by the doctor. Such member should also ensure that she is not a danger to herself or other members of the society. She will be set at liberty forthwith and released from prison such family member.

99. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION, THIS 22<sup>ND</sup> DAY OF MARCH, 2023**

**F. GIKONYO M.**

**JUDGE**

In the presence of:

Accused

Ms. Mwaniki for DPP

Mr. Kasaso – CA

