



**Republic v DKN (Criminal Case E007 of 2021)  
[2023] KEHC 2019 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2019 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL CASE E007 OF 2021  
LM NJUGUNA, J  
MARCH 8, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**DKN ..... ACCUSED**

**JUDGMENT**

1. The accused person herein is facing three counts of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offences are as follows: on Count I, that on February 7, 2021 at Kamukuyu village, Iriamurai Sub location in Mavuria Location of Mbeere South Sub County within Embu County murdered Alice Camu; on Count II, on February 7, 2021 at Kamukuyu village, Iriamurai Sub location in Mavuria Location of Mbeere South Sub County within Embu County murdered Kennedy Munene; on Count III that on 07.02.2021 at Kamukuyu village, Iriamurai Sub location in Mavuria Location of Mbeere South Sub County within Embu County murdered Dickson Murimi.
2. Upon arraignment, he pleaded not guilty and a plea of not guilty was entered in all the counts. The case proceeded for trial and wherein the prosecution called a total of ten (10) witnesses who testified in support of its case.
3. PW1, Lucy Mbuya testified that prior to the occurrence of the offence herein, the accused had been sick for a period of one month. That on the material day, he was at home with his sister as he was supposed to go back to the hospital for review. That on the 6/2/2021, the accused's sister, one Jane Muthoni called her and requested her to accompany her to the accused person's home as he had a problem. That upon reaching the said home, they found that the door was locked and the accused, together with his wife and children were inside the house. That they requested the accused to open the door but he declined. She stated that the accused and his wife then went to the bedroom but thereafter she did not



- know what ensued. On cross examination, she stated that the accused used to be sick and that they used to take him to Hospital for treatment.
4. PW2, Bernard Mugo Nyaga testified that on February 6, 2021, as he was coming from a friend's farm, David Kariuki called him and in the company of his mother and Jane Muthoni they went to the accused person house to check on him. They found the accused together with his wife and children inside their house. It was his evidence that they requested the accused to open the door but he refused. They called the accused's mother-in-law who came at 11.00 p.m. but the accused still refused to open the door. That he (PW 2) drew the curtain and they heard the wife to the accused person screaming. Neighbours and the police came to the scene and when the accused finally opened the door, on entering the house, he saw the body of Dickson Murimi on the bed and it had a wound on the forehead, Alice Camu's body was on the corridor to the bedroom while Kennedy had serious injuries and was taken to the hospital but he later died. It was his evidence that the accused was very violent and two weeks before this incident he had started displaying signs of mental illness. In cross-examination he stated that when they went to the accused person's home, he had locked himself inside the house. That he heard steps inside the house. He did not hear any commotion and did not hear the children cry. That he did not see the accused beating any of the deceased or using any of the weapons that were produced in court.
  5. PW3, Anthony Ngiri Munyiri testified that on the material day, he received a call from Madeline Muthoni who informed him there noises in her neighbourhood. That he went to the scene and he found a crowd of people who had gathered and upon enquiring, he was told that the accused herein was fighting with his wife. It was his case that the accused was throwing stones through the windows and that no one could go near there. He thus called the OCS Kiritiri who sent his deputy to visit the scene; and under the instructions of the deputy OCS, the back door of the accused's house was broken so that they could access the house to determine what was actually happening. Additionally, he stated that upon gaining entry, the accused came out with his hands up and was thus ordered to kneel down. That when they entered the house, at the back corridor they found a woman lying down and there was a lot of blood in the children's bedroom, two children were found on the bed with injuries. One child was alive and they took him to hospital but he was pronounced dead on arrival at the hospital.
  6. PW4, Kithaka Ngari stated that he was at home with his wife when one Gachugu called his wife informing her that Alice Camu had been killed. That as they set to go to the scene, they heard gunshots which were emanating from the said homestead. He testified that he made his way to the homestead and on reaching there, found police officers and people gathered and there was someone who was throwing stones from inside the house. It was his evidence that he heard people say that the bodies of the deceased were inside the house and when he looked through the window, he saw the bodies lying there. He stated that he requested the officers if he could break the door and upon being allowed, they broke the back door and gained access into the said house. That thereafter, the person opened the door and at that point he was arrested.
  7. PW5, Nemesio Njeru testified that February 15, 2021, he attended a post mortem and identified the bodies of the deceased persons herein to the pathologist who conducted the post mortem.
  8. PW6, Dr. Godfrey Njuki Njiru testified that he conducted post mortem on the bodies of Alice Camu, Dickson Muriithi and Kennedy Munene and formed the opinion that the cause of death was multiple compound fractures on the head and massive severe head injury with multiple fractures of the skull bone; multiple compound fractures of the head and massive brain contusion and severe head injury with multiple fractures of the skull respectively.
  9. PW7Cpl Henry Kiboma stated that February 7, 2021, he attended the scene of murder herein and took photographs of the scene. He produced the same as exhibits.



10. PW8, Inspector Nicholas Muthengi testified that on February 6, 2021, he received a call from the area assistant chief, Kobo Munyiri Sub-Location, who informed him the accused herein had locked himself inside his house with his wife and his two children and all was not well. That he reached out to Senior Sergeant Abdullahi and briefed him of the same and told him to connect with the assistant chief. Further, he informed his deputy Madam Mati and the DCI who also visited the scene. He stated that upon visiting the scene he peeped through the door and confirmed that there was a body of a woman lying on the floor while the suspect who was inside the house was attacking anybody who came near. It was his evidence that at that point, he mobilised other officers and members of public to assist in pulling the door down and since the accused cautioned them, he was forced to fire in the air to scare him. That upon entering the house, they found the man who was attacking them in the children's bedroom and arrested him; they found the body of a young boy lying down dead and another boy was lying on the floor but was still alive. They took the boy to hospital but he was pronounced dead on arrival. Inside the house they found a hammer and a small metal bar which they collected and prepared an inventory.
11. PW 9, Bakali Said Muda stated that he was the investigating officer. It was his case that he was instructed to take up this matter and upon proceeding to the scene, he enquired of what was happening. That one villager informed him that the suspect herein had locked himself together with his wife and children in the house and had allegedly killed them. He stated that during that time, they were using their torches as power had gone off and that the suspect was very violent as he threw stones at them through the window. It was his evidence that they broke into the house hoping to save life but the same was in vain. That while in the house, they found everything scattered and therein, a woman was lying inside in a pool of blood. In the second room, he saw a child namely Dickson Muriithi who was also dead while Kennedy Munene was rushed to Kiritiri Hospital but unfortunately was pronounced dead on arrival. That at the murder scene, there was found an iron rod and a hammer that the accused allegedly used to kill the deceased persons. He stated that he signed an inventory that had been done by Inspector Muriithi and the same was thereafter handed over to the DCI. That he carried out investigations and thereafter, preferred the charges herein against the accused person. He further stated that on February 11, 2021, he escorted the accused herein for a mental assessment at Meru Hospital wherein the accused was found unfit to take plea. He additionally stated that on February 15, 2021, he once again escorted the accused herein for mental assessment and he was found fit to take plea.
12. PW10, Dr. Mwikamba Andrea testified that on February 11, 2021, the accused herein was presented before him for mental assessment. That he had a history of abusing alcohol, smoking cannabis and chewing miraa yet he had not been treated for any mental illness. He testified that in the year 2019, the accused had been arrested because he did not have a licence for his business work but he was not charged in court. The witness stated that the accused did not have any problem with sleep or feeding and that he was in general good condition. He stated further that, the accused had auditory hallucinations and he said he was hearing voices of people who wanted to harm him. That his judgment, abstractions and insights were poor and as a result, was found to be suffering from a mental disorder called psychosis. It was his evidence that the accused was therefore put on medication and from the above, the accused could not take plea given that he was mentally unfit. That on May 27, 2021, the accused was examined at Nyeri Teaching and Referral Hospital and upon being examined by Dr. Richard Mwenda, his mental state was found to be normal and thus fit to take plea.
13. After the close of the prosecution's case, the accused herein was placed on his defence upon the court finding that the prosecution had established a prima facie case.
14. David Kariuki Nyaga (the accused herein), testified that on February 6, 2021, he was at home all the day long and that at 7.00 p.m. he left home to a bar to have some beer and thereafter, returned home to find that his wife and children had been murdered. That he called people from home who came to his



- house; that amongst those people were his parents, mother-in-law and his brother Bernard. That his house was locked and when he opened the front door, he was arrested. He stated that he was taken to Meru Hospital for mental assessment but he did not know the outcome of the same. He denied killing the deceased persons herein.
15. After the close of the defence case, directions were given for both parties to file their submissions wherein only the defence complied with the said directions.
  16. The defence submitted that the prosecution did not discharge the burden of proof. That the accused was at first instance found not fit to stand trial and the same therefore confirmed that he was unwell and that at the time of the commission of the offence, he did not appreciate his actions. It was contended that the investigating officer could not tell whether the accused herein was responsible for the deaths herein given that he testified that he assumed that the accused was responsible for the deaths going by the circumstances of the case herein. The accused submitted that at the alleged time of the commission of the offence, he was due for his mental check-up and therefore, the same buttressed the fact that the accused was suffering from a mental illness. In reference to the above, the defence contended that the accused herein was not criminally liable for any actions or omissions committed on that day. Therefore, this court was urged to acquit the accused person herein as the prosecution failed to shift the burden of proof.
  17. I have considered the evidence presented before this court by both the prosecution and the defence. It is trite that in any charge preferred against an accused person, the prosecution has the duty to prove the elements of the same. (See section 107 of the [Evidence Act](#) cap 80 of the Laws of Kenya. The degree/standard of prove is always that of “beyond any reasonable doubt” [See was [Miller v minister of Pensions](#) [1947] 2 All ER 372 – 373].
  18. In the instant case, the accused person is facing a charge of murder contrary to section 203 as read with section 204 of the [Penal Code](#). Murder is defined as “when any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.” The elements of murder and which the prosecution ought to prove are;
    - a. the death of the deceased occurred
    - b. the death was caused by unlawful acts;
    - c. that the accused committed the unlawful act which caused the death of the deceased; and
    - d. that the accused had malice aforethought.[See [Republic v isaac Mathenge](#); [Republic v Mohamed Dadi Kokane & 7 others](#) [2014] eKLR].
  19. The question therefore is whether the prosecution tendered sufficient evidence to prove the above elements.
  20. 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 persons (See [Woolmington vs DPP](#) (1935) AC 462). The standard of proof which was required of the prosecution is that of “beyond any reasonable doubt” (See [Miller vs Ministry of Pensions](#), [1947] 2All ER 372). The question therefore is whether the above ingredients were proved to the required standards. [Also see [Moses Nato vs Republic](#) [2015] eKLR].
  21. As to whether the death of the deceased persons occurred, it is not in doubt that the deceased persons herein died. PW6 testified that he conducted post mortem on their bodies. As such, death was proven.



22. On whether the deaths were caused by unlawful acts, under article 26 of the Constitution of Kenya 2010, right to life is protected and can only be taken away under the circumstances provided therein. What this means is that every homicide is unlawful unless authorized by law or excusable under the law or under justifiable circumstances such as self-defence or defence to property. (See *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*)].

23. From the evidence on record, I note that there is no direct evidence linking the accused person with the death of the deceased. The prosecution is relying on circumstantial evidence to prove the case against him. In this regard, the Court of Appeal stated:-

“Before circumstantial evidence can form the basis of a conviction, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr App No 32 of 1990*, this court set out the conditions as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.

[See also *Sawe v Republic* (2003) e KLR and *GMI v R Cr App No 38 of 2011*; *Teper v R* [1952] All ER 480 and *Musoke v R* [1958] E.A 715].

24. Therefore, for this court to find the accused person guilty, the inculpatory facts must be incompatible with his innocence and incapable of explanation upon any other hypothesis than that of guilt.

25. In this case, the court proceeds to deal with the identified key strands of evidence together as they weave into one another. In relation to the prosecution witnesses. On his part, PW2 stated that the accused called him and in the company of his mother and Jane Muthoni, they went to the accused’s house to check on him. That they found the accused together with his wife and children in their house and that the accused declined to open the door despite the many requests. That upon drawing the curtain, (PW 2) heard the wife to the accused screaming and upon entering the house, he saw the body of Dickson Murimi on the bed and it had a wound on the forehead. Alice Camu’s body was on the corridor to the bedroom while Kennedy had serious injuries and was later taken to the hospital but later died. In the same breadth PW3 stated that he received a call from Madeline Muthoni who informed him of the noises from the neighbourhood and that upon going to the scene and enquiring of what was happening, he was told that the accused was fighting with his wife. That upon breaking the door of the accused person’s house, they found a woman lying down and there was a lot of blood in the children’s bedroom and further, the two children were found on the bed with injuries. Further PW1 in his evidence stated that when he arrived at the scene, the accused’s wife was alive. That he saw her through the window and he saw the accused and his wife go to the bedroom. The accused was requested



- to open the door but he refused and he was very violent. PW8 also stated that he was informed that the accused had locked himself inside his house together with his wife and that all was not well. That upon reaching the scene, he peeped through the door and confirmed that there was a woman lying on the floor while the suspect was inside the house and was attacking anybody who came near.
26. PW6 on the other hand testified that upon conducting post mortem on the bodies of Alice Camu, Dickson Muriithi and Kennedy Munene, he formed the opinion that the cause of death was multiple compound fractures on the head and massive severe head injury with multiple fractures of the skull bone which in my view is in consonance with the testimonies of the other prosecution witnesses.
  27. Although the accused stated that he had gone to a bar in Kamurugu area to take some drinks from around 7.00 p.m. when he left his home, he did not explain how his wife, his children and himself were found inside the house, and how he managed to access the house.
  28. From the scene created above and considering the evidence of PW1, PW 2 and PW 3, it is outright that the accused herein caused the death of the deceased persons. The accused person's defence could not hold water on the face of the prosecution evidence. There is more than sufficient evidence from the prosecution witnesses that all the while, the accused was inside the house and he is the only person who could have caused the deaths of the deceased persons. In my view, there was no other explanation. I dismiss his defence as the same cannot stand in the face of the strong prosecuted evidence.
  29. On whether the accused had malice aforethought, malice aforethought is the mental element (*mens rea*) of the offence of murder. Section 206 of the [Penal Code](#) defines it 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]
  30. The accused mounted a defence from the onset to the effect that he was suffering from a mental illness. In his written submissions, it was submitted that the prosecution did not prove the *mens rea* for the reasons that the medical history and the evidence produced by the witnesses undoubtedly proved that the accused was mentally ill.
  31. 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.”
  32. 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 insanity rests with him on a balance of



probability (See *MARRI v Republic* [1985] KLR 710 and *Muswi s/o Musele v Republic* [1956] EAC 622).

33. 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.”

34. 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.

35. 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.”

36. From the evidence herein, the prosecution witnesses and the accused person stated that indeed the accused had been suffering from mental illness and that he had been attending hospital for reasons related to mental illness. In the same breadth, PW10 also testified that the accused had a history of abusing alcohol, smoking cannabis and chewing miraa yet he had not been treated for any mental illness. He stated that the accused had auditory hallucinations and further was hearing voices of people trying to harm him. That his judgment, abstractions and insights were poor and that he was found to be suffering from a mental disorder called psychosis.

37. Of importance to note is the fact that the offence herein was allegedly committed on February 7, 2021 and when the accused was examined by PW10 on February 11, 2021, he was found to be suffering from a mental disorder known as psychosis and thus was unfit to stand trial. 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?

38. 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.”

39. In reference to the above case, it is outright that the accused herein even prior to the commission of the offence, had previously presented signs that he was suffering from a mental illness. The same was corroborated by PW10 who categorically testified that the accused herein was suffering from a mental disorder called psychosis after having a history of abusing alcohol, smoking cannabis and chewing miraa.
40. It is my considered view, based on unimpeachable evidence of PW1 and PW2 but more so PW10 concerning the historical and immediate events to the offence that the accused person was suffering from mental related illnesses.
41. Having come to that 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. I enter a special finding of Guilty but Insane.
42. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 8<sup>TH</sup> DAY OF MARCH, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Accused

.....for the State

