



**Republic v Wafula (Criminal Case 48 of 2020)
[2023] KEHC 18978 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE 48 OF 2020**

SN RIECHI, J

JUNE 20, 2023

BETWEEN

REPUBLIC PROSECUTOR

AND

JOB WEKESA WAFULA ACCUSED

JUDGMENT

- 1 The Accused Job Wekesa Wafula is charged with the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#).
- 2 Particulars of the offence are that Job Wekesa Wafula on the night of the 20th and 21st September 2020 at Chesikaki village in Cheptais Sub-County within Bungoma County you murdered Elizabeth Khwaka.
- 3 The Prosecution case is that the Accused Job Wekesa Wafula was a husband of the Deceased Elizabeth Kwaka with whom they had 4 children. On 20/9/2020 at 11 pm PW1 Jane Kise Wanyonyi was staying in a neighboring house with deceased and heard screams from the house of the accused. She called accused’s brother Eliud and informed him of the screams, and that he should come and check. Later she called Eliud who told her that he had come and thought the accused and deceased were praying. She went back to sleep. The next day accused came and asked her if she had seen deceased. She told accused she had not and later in the day received information that PW3 Ruth Kisa Maruti the wife of accused’s brother testified that on 19/9/2020 the deceased informed her that deceased had seen Job the accused at the shopping center walking from the shop to another saying politics. She informed her husband who went and brought accused home. On 20/9/2020 while with deceased, they received information that accused was at the police station. Later accused was released from the police station. The next day accused came to their house and asked if they had seen the deceased. They informed him that they had not. Shortly after they received information that a body had been found at the river. She went there and confirmed it was the deceased. She was sent to look for deceased’s identity card. She



- went to house of accused and saw blood stains on the floor and blood sheet. She informed police who commenced investigations.
- 4 On cross examination by M/S Lunani she testified that on 19/9/2020 the accused appeared confused.
- 5 PW4 Robert Naibei Ngeywa a member of Nyumba Kumi was walking across Malakisi river on 21/9/2020 at 9 am when he saw a body of a woman in the river. He saw there was blood oozing from her ears and had injury to the neck. He informed the Assistant Chief who informed Police, who came to the scene and commenced investigations.
- 6 PW6 Eliud Kingasia Wafula the brother of Accused was in his house on 21/9/2020 when Jane (PW1) called him on his mobile phone and informed him that there were screams from the house of accused. He went to accused's house which is about 300 metres away and while outside heard that they were praying. He then went back and slept. The next day at 8 am accused came and asked the witness if he had seen deceased. He then saw people running towards the river. He went with accused to the river where they found the deceased. Police were informed and came. He accompanied police to the house of accused where they found a wet truck suit and a bed-sheet that was blood-stained; which were taken by police. Accused was also arrested.
- 7 PW7 Titus Ngeiywa the Assistant Chief received information of a body of a woman found at the river. He visited the scene and confirmed the information. He called Chesikaki Police Station. Police came and commenced investigations.
- 8 PW9 NO. 77098 Corporal Geoffrey Too attached to Cheptais Police Station was in the office on 21/9/2020 when he received information that there was a body of a woman recovered from the river. He and party visited the scene where they found a body of deceased which had injuries on the ear and shoulder. They found accused had already been arrested and had injuries on the neck and both hands. He together with IP Kibuyi and Eliud the brother to the accused visited the house of accused where they recovered a wet track suit and bed-sheet. They also recovered Accused's motor cycle which they suspected was used to ferry the body to the river. The items were forwarded to the Government Analyst for examination.
- 9 PW8 Polycarp Lutta Kweyu the Government Analyst who examined the blood stains on the bed-sheet and confirmed that it belonged to the deceased.
- 10 PW5 Dr. Wanambisi Watta who performed the post-mortem testified that upon examining the body he found the face was swollen, blood oozing from the ear, strangulating marks on front of the neck, cut wound on right upper eyelid and bruises on the shoulder. Upon opening the body he found there was haematoma to the brain. He formed opinion that cause of death was due to cardio pulmonary arrest due to strangulation. He issued death certificate No. 16470070.
- 11 The accused upon being put on his defence gave sworn statement. He testified that the deceased was his wife. On 20/9/2020 at 12 pm he was with his wife where something which was a demon appeared and wanted to finish both him and his wife the deceased. He told God he had left it to Him. The deceased wanted to kill him but he killed her and kept her somewhere. He later found she had disappeared and was found at the police station. He stated they had quarreled in 2013 but had reconciled. He was attached by witchcraft. On cross examination by M/S Mukangu he confirmed he strangled the deceased but did not find the body where he had left it.
- 12 The defence called Oscar Makate who had prepared the mental assessment report. He confirmed that he had stated that accused was mentally fit to plead but stated he had wanted to indicate that he was unfit to plead. According to him accused had a mental illness which needed treatment.



13 The accused is charged with the offence of murder contrary to Section 203 of the Penal Code. Section 203 Penal Code provides:

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

The ingredients of the offence of murder which the Prosecution must prove beyond reasonable doubt are:

1. The fact and cause of death.
2. The unlawful act or omission causing death.
3. That it is accused who committed the unlawful act or omission or inflicted the injuries from which the deceased died.
4. That there was malice aforethought.

14 On the fact and cause of death PW5 Dr. Wanambisi Caleb Watta produced a post-mortem report which showed that the deceased had swollen face, strangulation marks on front of neck, bruises on shoulder and cut wound on upper eyelid. From the examination he formed opinion that cause of death was due to cardio-pulmonary arrest due to strangulation and severe head injury. He issued Certificate No. 1647070. He therefore confirmed the fact of death and the unlawful act that caused death as strangulation by a person.

15 Did the accused strangle the deceased? PW1 Jane Kisa who is a neighbour to the accused and deceased testified that the accused was with the deceased in their house on the night of 20/9/2020. At 11 pm she heard the deceased screaming. She informed Eliud (PW6) the brother of the accused who went to investigate. Eliud told her that he had gone outside and that the accused and deceased appeared to be praying. The next day the deceased was found having been killed and her body thrown into a river.

16 Police visited the scene and house of accused found a blood-stained sheet which blood was confirmed by Government Analyst to be that of deceased. The confirmed that the deceased was killed or injured while in the house.

17 The accused who was only person with the deceased before she died. In his evidence in court he stated:

“ Remember on 20/9/2020 which was on a Sunday at 12 pm I was with my wife when something appeared which was a demon which wanted to finish me and my wife. I told God I had left it to him. She wanted to kill me. I managed to kill her and kept her somewhere. I found she had disappeared. Where she was found is not where I left her. She was found at the Police Station. We had quarreled in 2013 and we reconciled. I was involved in an accident at the Police station. Police took me but instead of taking me to hospital they treated me as a mad person. I am not using any drugs in prison.”

18 In his defence the accused readily admits that he is the one who killed the deceased. From the evidence of the Prosecution witnesses and defence of accused I am satisfied that accused is the person who inflicted injuries and strangled the deceased, leading to her death.

19 M/S Lunani for the accused submitted that the accused strangled his wife under the influence of evil spirits and that although in his evidence he appeared mentally well, he does not understand the nature and impact of his actions. Counsel referred to the evidence of Oscar Mannase a Clinical Officer who



had earlier examined the accused and found him fit to plead who now says he actually meant to record that he was not fit to plead.

- 20 On the evidence of Oscar Manase that the accused has a mental problem this Court notes that the report made on 7/10/2020 indicated that he was suffering from a mental illness for which he was being treated. The plea was deferred and the accused was ordered to be taken for treatment. The accused was after treatment found to be fit to plead. There is also evidence that the accused was behaving in an irrational manner and was walking in the market from shop to shop talking politics. At the time of trial and from his evidence he appeared to have recovered.
- 21 This can be deduced from his evidence in defence which was detailed. In cross examination he was able to state his children, - ages, and schools they are attending. He appeared oriented in place, time and people and was aware of his surrounding and could express himself logically and eloquently. M/S Lunani for the accused however submits that the test of insanity is strictly at the time the offence was committed. She submitted that there is evidence that on the material date he was calling himself president was walking from shop to shop and on that night he was said to be praying and making reference to evil spirits.
- 22 Handling a similar issue the Court of Appeal in Mwangeni Munyasi –versus- Republic [2015] eKLR stated:

“To begin with and as a matter of general rule, the law presumes that every person is sane and responsible for his actions at all times including when he is alleged to have committed an offence because sanity is the normal and usual condition of mankind. Section 11 of the Penal Code provides thus;

“ 11. 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 provided.”

The presumption of sanity is, from the above provision, rebuttable, hence the recognition in criminal law, of the defence of insanity. Section 12 of the Penal Code, on the other hand provides for the application of the defence of insanity as follows:

“ 12. 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 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.”

Finally on the applicable law, Section 9 to which we have also made reference provides that:

“ 9.

- (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which



occurs independently of the exercise of his will, or for an event which occurs by accident.”

23. We reiterate that this is the basis of the generally accepted notion that persons who cannot appreciate the consequences of their actions should not be punished if those actions happen to be criminal acts.
24. The law on the defence of insanity was refined in 1843 following the trial of Daniel McNaughten, who, operating under the delusion that Sir Robert Peel, Prime Minister, wanted to kill him, set on a mission to kill the Prime Minister first. Executing this intention, McNaughten in an attempt to assassinate the Prime Minister shot his secretary, Edward Drummond and killed him instead. McNaughten’s trial at the old Bailey was high profile attracting two solicitors, four barristers and nine medical experts. Medical evidence in the trial indicated that McNaughten was psychotic, suffering from what would today be described as paranoia and delusion. Consequently, the court acquitted him by reason of insanity. This provoked considerable public furor followed by a debate in the House of Lords culminating with a direction to a panel of Justices of the Queen’s Bench Division presided by Chief Justice of the Common Pleas, Sir Nicholas Tindal to craft new rules on the defence of insanity based on a series of hypothetical questions framed by the House. The principles developed by the panel have come to be known as the McNaughten Rules. That marked the beginning of forensic psychology. Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a 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, that he did not know he 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.
25. Both Section 12 aforesaid and the McNaughten Rules recognize 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 law. The test is strictly on the time when the offence was committed and no other. Yet it would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the time of the commission of the crime. Borrowing from a medieval English Judge, Brian CJ in a 1468 case of *Greene vs Queen*, and who in turn reiterated Cicero who famously remarked that:-

“The thought of man is not triable, for the devil himself knoweth not the intendment of man”,

26. From the evidence of both the prosecution witnesses and the defence I am satisfied that accused at time of committing the offence was suffering from a disease of the mind and hereby make a special finding that the accused is guilty of the offence of murder but insane.
27. Where a Court makes a special finding of guilty but insane, Section 166 of the *Criminal Procedure Code* provides a mechanism of how to deal with the accused. The Court of Appeal in *Mwangeni Munyasia –versus- Republic (Supra)* in addressing itself to the procedure under Section 166 *Criminal Procedure Code* stated:

“In *Grace Nyoroka (Supra)* the High Court upon satisfying itself as to the accused person’s state of mind straight away committed her without the order of the President to a mental hospital, a procedure, which this Court on appeal described as short-circuit, and justified on account of saving time. For our part, and granted the provisions of the law, we think the



court without an order of the President would have no powers to commit an accused to a mental hospital directly.

The second scenario under which the appellant falls was provided for under Section 166 which states:-

“ 166.

- (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.”

Once again, where the trial court finds that the accused person was legally insane when he committed the crime it has to report the case for the direction of the President, who may then order that the accused person be detained in a mental hospital, prison or other suitable place of safe custody. The rest of what should follow thereafter is provided for in the subsequent sections.

28 I therefore find accused guilty but insane and direct that the finding be reported to the President under Section 166 of the [Criminal Procedure Code](#). The accused to be detained in custody in the processing of these orders.

DATED AT BUNGOMA THIS 20TH DAY OF JUNE 2023.

S. N. RIECHI

JUDGE

