



REPUBLIC OF KENYA



**Director of Public Prosecution v Milgo & another (Criminal Case
E026 of 2024) [2024] KEHC 13935 (KLR) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E026 OF 2024
S MBUNGI, J
NOVEMBER 5, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

BENARD KIPROTICH MILGO 1ST ACCUSED

SAMUEL MACHARIA 2ND ACCUSED

RULING

1. The accused persons were summoned to court to be charged with the offence of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offence was that on the 16.06.2023 at around 2200 hours at Mugunda Village in Butere sub-county within Kakamega County, the accused persons murdered Telvin Alex Okwaka Tobosa.
2. On the day of arraignment for plea taking, the accused persons could not take plea since the information could not be read out to them as they had not been subjected to a mental assessment. The prosecution through an oral application, sought that this court grants an order for the suspects to undergo mental exam before they take plea, the same was objected by the accused persons' counsel citing that a mental assessment is not a legal requirement and was not backed by any law.
3. The parties agreed that the matter be canvassed by way of written submissions. It was the concession of both parties that there is no legal provision directing that all murder suspects undergo mental assessment.

Applicant's submissions.

4. The applicant submitted that subjecting murder suspects to mental assessment has gained notoriety overtime in Kenyan courts although the same is not founded in statute or any other written law but the same is important pursuant to sections 11 and 12 of the Penal Code.



5. Secondly, the applicant submitted that section 12 of the penal code affords the accused persons with the defence of insanity and exonerates an accused person from criminal responsibility if at the time they committed the offence, they were suffering from any disease affecting their mind.
6. The applicant further submitted that the same cannot be taken away by the court or the accused person on the premise that they are fit to plead without consideration to the time the act or omission occurred.
7. The applicant also submitted that the accused persons have a right to fair hearing as per Article 50 of [*the Constitution*](#) of Kenya 2010 and that this included determination of whether the accused is fit to stand trial.
8. Lastly, the applicant submitted that that the respondents have not demonstrated to the court what prejudice they stand to suffer if they are subjected to a mental assessment, further submitting that it would be prejudicial to the applicant's case if the assessment is not undertaken.

Accused persons'/Respondents submissions.

9. The accused persons, through their counsel filed submissions stating that the requisite mental assessment for murder suspects is a matter of practice and not a mandatory legal requirement of law.
10. Further, they stated that the accused persons do not intend to rely on the defence of insanity and have notified the court of their stable mental positions and should not be subjected to the mental assessment citing the case of Republic vs Lewis – Criminal Case E077 of 2021(2021)KEHC 272 KLR.
11. They further submitted that the consent of the accused persons was necessary under the [*Mental Health Act*](#) Cap 248 Section 3(b) or in the alternative, by an order of the court in the course of proceedings where the court finds reason to believe that the accused person is of unsound mind.

Determination.

12. As submitted by the counsels, there is no legal requirement requiring a person charged with the offense of murder contrary to section 203 as read with section 204 of the penal code.
13. As submitted by the counsel for the DPP, the practice of subjecting the accused person to mental assessment before taking plea has gained notoriety in Kenyan courts overtime such that it is like a norm.
14. Courts have expressed different opinions when confronted with a scenario like this. In the case of Republic -vs- Musya Ngolo Lewis (2021) ECLR, The Honorable Judge Grace Nzioka stated that:

“...In my considered opinion, it serves the purpose of; inter alia, determining whether, the accused is mentally fit to understand, or appreciate the charges and/or information and then stand trial. Indeed, the insistence that an accused be fit to stand trial arose out of a concern in the common law that, criminal trials be fairly conducted...”

She further stated as follows: -

“Indeed, the insistence that an accused be fit to stand trial arose out of a concern in the common law that, criminal trials be fairly conducted. (See Blackstone, Commentaries on the Laws of England, Clarendon Press, Oxford, 1769, Vol IV, P 250. The justifications for the requirement that, the accused be fit to stand trial may be divided into four:

- a) A recognition that it is fundamentally unfair to try an unfit accused;
- b) A recognition that it is inhumane to subject an unfit accused to trial and punishment;



- c) A perception that, a trial of an unfit accused is comparable to trial of an accused in absentia, (Allen, Kesevarajah & Moses (1993) 66 A Crim R 376,397. 10 See Vernia),
- d) A procedure the legal system repudiates; and a concern to avoid diminution of the public's respect for the dignity of the criminal justice process if unfit accused are subjected to trial and punishment. 32.It follows that, there is need to establish the mental status of an accused person before plea is taken and therefore as much as it may be a matter of practice, it is morally right and in the interest of justice and the accused to do so".

She also further stated: -

"In the absence of express provisions of the law, the choice as to whether an accused person would be subjected to a compulsory mental assessment before plea lay with the accused. There was no legal bar to the accused who wished to undertake the examination."

15. In the case of *Republic -v-syuki (criminal Case E011 Of 2022)* [20231] Justice L.M Njuguna held that: -

“...The elements of the offence of murder under Section 203 of the Penal Code can only be proved when a mental assessment is carried out, in this case the prosecution has been diligent to secure this factor before the close of its case....”
16. Defence counsel referred the court to section 38 of the *Mental Health Act*. I have looked at that section. It talks of a person who has already been adjudged to be suffering from mental illness.
17. I am persuaded by the holding in Republic -vs- Musya Ngolo Lewis (2021) EKL.R. Since there is no legal requirement to subject an accused person charged with the offense of murder to mental examination, whether to subject or not should be left to the trial court and to the choice of the accused person.
18. To me, a trial court can at any time order an accused person to be subjected to mental assessment if there is a reason to doubt his/her mental fitness. The court can act on its own motion or can be moved by any party in the proceedings.
19. A murder trial cannot fail to kick start for failure/ for lack of mental assessment for accused person. The law presumes every person to be sane. Section 11 of the penal code provides: -

Presumption of insanity

“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”
20. In criminal cases, two elements ‘mens rea’ and ‘actus reus’ have to be established for an accused to be found culpable unless there is statutory provision stating otherwise. Where the accused person brings up defence of insanity the burden shifts to the accused. To me, by subjecting an accused person to a mental examination against his will is like taking away his/her possible defence of insanity.
21. I further note that this practice of subjecting only murder suspects to the mental assessment before taking of plea is unfair/discriminatory since accused persons charged with other offenses which also attract serious sentences upon conviction are not subjected to mental examination. Offenses like robbery with violence contrary to section 296(2) of the penal code, treason contrary to section 40(2) as read with section 40(3) of the penal code, attempted robbery with violence contrary to section 297(1)



as read with section 297(2) of the penal code attract death sentences just like murder charges, yet the accused persons are not subjected to mental assessment before taking of plea. Secondly, the process of mental assessment in most cases takes a long period of time owing to the scarcity of psychiatrists further infringing the accused's constitutional right to a speedy trial.

22. In conclusion, as stated elsewhere in this ruling since for now there is no good reason given to the court by the prosecution for the application is only anchored on a practice which has no legal backing, I decline to order the accused persons to undergo mental assessment before taking of plea.

DATED AND SIGNED AT KAKAMEGA THIS 5TH DAY OF NOVEMBER, 2024 AND DELIVERED IN OPEN COURT ON 8TH NOVEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Mr. Mbetera holding brief for Nyaberi for the accused persons present online

Court Prosecutor – Mbonzo

Court Assistant – Elizabeth Angong'a

