



**Republic v Natiom (Criminal Case 9 of 2018)  
[2024] KEHC 14232 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14232 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL CASE 9 OF 2018  
AK NDUNG’U, J  
NOVEMBER 14, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JAMES KAPUA NATIOM ..... ACCUSED**

**JUDGMENT**

1. The Accused person herein, James Kapua Natiom was charged with murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged in the information dated 12/06/2018 that on 8<sup>th</sup> November 2016 at Zebra Estate within Naromoru town, Kieni East Subcounty, within Nyeri county, murdered Amos Mwangi Mutuku.
2. On 02/07/2018, he pleaded not guilty to the charge and he was tried. A total of eight (8) witnesses testified for the prosecution. The Accused gave sworn evidence in his own defence; he called one witness, a doctor.
3. A summary of the evidence is as follows. PW1, John Kadibo testified that on the material time, he was a watchman guarding Muteeri Brewery and he was living there in room no. 2. The deceased herein was a manager and he occupied room no. 1. On 08/11/2016 at around 11:00pm, he was woken up by sound of two people entering the compound and they entered room no.1. There was a commotion as the two people were exchanging words. He fell asleep and after a while, someone entered his room. He lit the torch of his phone and he recognised the accused who was the maintenance man in the brewery. He asked him what was the matter and he answered that he wanted to kill him and he attacked him with an axe. He was hit on the head, left arm and left leg and he lost consciousness until morning when he was taken to hospital by the police. He stated that he saw a lot of blood outside room no. 1. He testified that the two people he heard exchanging words were the accused and the deceased.



4. On cross examination, he testified that he did not see the two people enter but he recognised their voices as they quarrelled in room no. 1. He fell asleep and could not know what happened to the deceased. That the accused entered his room when he was asleep and that he used to go to his room since they were friends. He stated that he did not know why the accused attacked him.
5. PW2 Francis Gatheru Wakahiu testified that the deceased was his nephew. On the material day, they met and they had beer until 7pm when the deceased left to his premises within the brewery to drop something. He was to go back but by 9:00pm, he had not returned so he decided to go check on him. He knocked on the gate and the accused opened the gate for him. He testified that he knew the accused as the deceased's workmate and that he did not live in the brewery premises but somewhere else. He asked him whether the deceased was there and the accused responded that he was angry and he will kill people. When he enquired why he wanted to kill people, he was hit on the knees and the left arm with a small axe. He ran to PW1 room for safety but the accused followed him there. PW1 was lying on his bed. PW2 was hit on the head but he was able to shove the accused who fell down so he was able to escape.
6. He went to Naromoru police station and reported the matter. He decided to look for the deceased to warn him that the accused had said he will kill PW2 and the deceased because his salary had been deducted but he did not find him. In the morning, he went to the brewery and upon opening the main gate, he saw the deceased lying down near his room with a lot of blood about and there was a small blood-stained axe and a large axe nearby. He screamed and PW1 called him out. He tried to lift him up from his bed but he could not. He ran to police station where he reported the matter. Accompanied by the police, they went to the accused's premises but they found the door locked. He later learnt that the deceased had died. He identified the two axes.
7. On cross examination, he testified that they were taking beer and therefore they were not drunk. The deceased lived alone. He testified that he heard PW1 say that they had been beaten by the accused. He stated that he did not know who injured the deceased and nobody told him that they saw anyone assault the deceased.
8. PW3 Stephen Kariuki Mutuku was the deceased brother. He only identified the deceased's body for the purpose of postmortem.
9. PW4 Charles Maina Mathenge testified that he had employed the deceased, the accused and PW1 and had deployed them to Muteeri breweries to perform various duties there. The deceased and PW1 were living within the premises of Muteeri breweries whereas the accused had rented out within the town. That in October, the deceased reported to him that the accused was reporting to work while drunk and had not reported to work for five days which was not the first time he was doing this. They decided to give him a final warning since he had been warned and 5 unworked days to be deducted from his October 2016 pay. This was reduced into writing and he produced the letter as Pexhibit3. On 08/11/2016, the October salary was paid less the five days he had not reported to work. On 09/11/2016, he was called by PW2 who informed him that they had been attacked by the accused and the deceased was in a bad state. He was later informed that the deceased succumbed to the injuries. He was also informed that the accused was arrested. He proceeded to the scene where he found PW1 who had injuries though he had been treated.
10. On cross examination, he testified that there was nothing strange about the accused. He was 9 months old in the job. The human resource department investigated the complaint by the deceased and believed him. That the employees had a cordial relationship but he would occasionally receive reports that the accused would visit the factory at night while drunk and would threaten the other employees. He stated that he never established that the accused was alcoholic and was never told that he had a mental



- problem. That he was normal and he would not know when he developed mental problem. He stated that he did not know whether the accused and the deceased had a good or bad relationship.
11. PW5 was the doctor who conducted postmortem on the deceased's body. He testified that the deceased died from a severe head injury to wit a massive intracerebral haemorrhage secondary to blunt and penetrating injury to the head meaning that the deceased died from massive bleeding in the brain caused by both blunt and sharp penetrating injury to the head. There were several fractures to the skull. He produced the post-mortem report as Pexhibit4.
  12. PW6 the government analyst produced the exhibit memo and the report as Pexhibit 5 and 6 respectively on behalf of Lawrence Kinyua Muthuri who was on study leave. She testified that she was familiar with his signature having worked with him for a period of eight years.
  13. PW7, Paul Ogoma was a scene of crime officer. He testified that a report was made by PW2 that his neighbour, the deceased, had been cut with a panga and had died. They found the deceased in his house but there was blood all over. He was alive but with severe injuries and he could not speak. He stated that the deceased was rushed to hospital but was pronounced dead on arrival. In the same compound, there was PW1 who was also injured. He testified that accompanied by PW1 and PW2, they went to the accused' house which was 10 meters away from the scene. The door was opened and they knocked on the door but there was no response. They entered and arrested the accused who was in deep sleep. PW1 identified the accused as the person who attacked them. He was wearing a grey jacket which he identified in court.
  14. He testified on cross examination that PW1 informed him that it was the accused who attacked the deceased and him. That while arresting the accused, he was asked what he had done and he said that he did not know. That it surprised him that the deceased was deep asleep even after what he was alleged to have done.
  15. He stated on re-examination that there was smell of alcohol in the deceased's house and he appeared drunk.
  16. PW8 the investigating officer testified that he was instructed to investigate this case and he proceeded to the scene where he found that the suspect had already been arrested and was at the scene. The accused was handed over to him. At the scene, there was a blood-stained big axe outside room no.1, Pexhibit2. PW1 led him to room no.2 where he found a small blood-stained axe (Pexhibit1) on the bed. He had an injury on the head which he said was inflicted upon him with the small axe. There was a blood-stained khaki jacket (Pexhibit8). The accused led him to his house where he recovered a grey pullover which was stained with blood (Pexhibit7). He also produced the photographs and the certificate on behalf of the scene of crime officer (now deceased) as Pexhibit 9A(i) to (vi) and 9B. That after completing the investigations, he charged the accused with murder.
  17. He testified on cross examination that he did not find the deceased body at the scene since it had been removed and he did not know how Pexhibit 2 came to be outside room no. 1. That the accused informed him that he had killed the deceased using the big axe however he was not authorised to take a confession and could not remember if any statement under inquiry was obtained from the accused. That a report dated 17/11/2016 addressed to the court stated that the doctor required input from a close relative about the accused to be able to give a report. Further a medical report dated 24/11/2016 said that the accused was not fit to plead and recommended that he be treated. That according to the said reports, the accused was of unsound mind and that the said reports were prepared 11 days and 17 days after the murder. That he did not get earlier medical report from the accused. He stated that it may appear that the accused was of unsound mind when he committed the murder.



18. On re-examination, he testified that he charged the accused with murder based on the investigations and not the confession he made. That the medical reports dated 30/03/2017 and 14/06/2018 diagnosed the accused with schizophrenia in remission which recommended that he continue with medication.
19. That was the totality of the prosecution's case.
20. The accused choose to give sworn testimony. He called one witness, a doctor. He denied committing the offence. He testified that he knew the deceased who was his manager and he had known him for five years and they had no differences. He testified that he had mental illness but he does not know when it started. That the psychiatrist reports dated 17/11/2016, 24/11/2016, 30/03/2017 and 14/07/2018 all said that he had mental illness. That since 2016, he had had the mental illness and that when it affects him, he does not understand things. He testified that he could not recall what happened.
21. On cross examination, he testified that he did not produce any document to show that he was sick prior 08/11/2016. That he was of good health bodily and mentally and the report dated 14/06/2018 stated that he was normal.
22. He testified on re-examination that he was put on medication between 2016 and 2018. That the report of 14/06/2018 was taken after he had taken the drugs. That he would be injected every month. He testified that the illness started long time ago but it is his parents who would know when. He testified that on 08/11/2016 he was at work but it does not mean that he killed the deceased.
23. DW2, Dr Ruth Gathuru testified that she is a psychiatrist by profession and working at Nanyuki Referral Hospital. She prepared four medical reports for the accused. She first examined the accused on 17/11/2016 and he alleged that he started a fight with the deceased but he did not know what transpired later. On examination, she stated that orientation was good, he was well kept, he had no abnormal mannerism, his mood was good, speech was coherent. He was composed and intelligent, his memory was good with no abnormal thoughts, he exhibited no abnormal perceptualities and he understood nature of his accusation. She testified that she did not make a conclusion since she needed collaborative history.
24. She again examined the accused on 24/11/2016. He was accompanied by a CID officer and his sister. The sister informed her that he has never been diagnosed with a mental illness but he had abnormal behaviour. She stated that his mannerism and glooming was okay and orientation was good. His mood was okay, speech was coherent, the affect was blunted though composed, he was not showing any emotion of happiness or sadness, intelligence was okay, he had no abnormal thoughts and the memory was good. On the level of perpetual abnormalities, he reported to have auditory hallucinations which is a sign of a psychotic illness. She stated that it is a situation whereby a patient reports hearing voices but the people one is communicating with cannot be seen. She further stated that judgment was good, insight was lacking and he did not seem as if he had a problem. She stated that she made a finding of schizophrenia (mwenda wazimu) which is a psychotic illness. She concluded that the mental status was abnormal and he was not fit to plead. She prescribed drugs.
25. She examined the accused again on 30/03/2017. The orientation was good, he was well kept, mood was good, speech was coherent, affect was appropriate, he was calm, composed and cooperative, intelligence was appropriate and no abnormal thoughts, memory was good, no auditory hallucinations and the temperament was good. She stated that the impression was that he had schizophrenia remission meaning that he was normal at that time but because he was under medication. He was fit to plead and to proceed with trial and recommended that he continue taking medication.



26. The other report was dated 14/06/2018. She stated that orientation and glooming was okay, mannerism was normal, mood was good, speech was coherent, affect was appropriate, no abnormal thoughts, memory was good, no perpetual abnormalities, no hallucination, judgment was good and he had good insight. That the diagnosis was schizophrenia in remission but he was to continue with medication. She produced the medical report as Dexhibit2, Dexhibit3, Dexhibit1 and Dexhibit4 respectively.
27. She testified on cross examination that the first time she attended to the accused, she did not receive any previous medical record and she did not reach a conclusion. That the diagnosis was made after the commission of the offence and not before.
28. On re-examination, she testified that on 17/11/2016, she did not reach a conclusion for the reasons that she required corroborative history. She stated that the accused's sister informed her that the accused had exhibited abnormal behaviour and that he was taking alcohol. The information was oral as she did not receive any medical record on history of the accused. She attributed the results in the subsequent reports to medicine meaning that the medication was working.
29. After the close of the defence case, the learned advocates for the accused and the prosecution filed written submissions. It was the accused's counsel submissions that the accused person was not of sound mind at the time of commission of the offence. It was their case that by the time the accused was charged, he was mentally sick as per the evidence of DW2 and according to Dexhibit 1, 2, 3 and 4. That the medical assessment that was done on 24/11/2016 established that the accused was suffering from schizophrenia, a serious mental disorder in which people interpret reality abnormally.
30. He submitted that Section 9(1) of the Penal Code states that 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. Further that Section 12 of the Penal Code states 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 incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission.
31. He submitted that under Section 12, a person cannot be held criminally responsible for his acts if it is established that he did not know what he was doing or that he was incapable of understanding that he ought not to do the act. That it is evident that the accused did not know what he was doing. The act may be committed but the accused may not have known that he ought not to have committed the act.
32. Reliance was placed on the defence of lunacy as provided under Section 166 of the Criminal Procedure Code whereby it states inter alia that if it appears to the court that the accused did the act or made the omissions but was insane when he did or made it, the court will make a special finding that the accused was guilty of the act or omission but was insane when he did the act or made the omission. Further reliance was placed on the case Leonard Mwangemi Munyasia v Republic (2015) eKLR where the court held that 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 disease of the mind, as to not 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.
33. He submitted that the mental assessment done on 30/03/2017 and 14/06/2018 confirms that the accused was suffering from schizophrenia and the condition was at remission and he was to continue with monthly injection. Reliance was placed on the case of Wakesho vs Republic (2021) KECA 223 (KLR) where the court ordered the accused to be taken to mental hospital for medical treatment until when he was to be certified as not a danger to himself or the society. He concluded by stating that



the accused was suffering from a mental illness at the time of the incident and he was incapable of formulating the necessary mens rea.

34. The prosecution counsel on the other hand submitted that the fact that the accused had malice aforethought was proved by the evidence of PW1 and PW2 who testified that the accused had told them that he was going to kill the deceased which shows that he had motive to kill. That the accused went at a great length in preparing to commit the offence and did not merely act on impulse in that at around 9:00pm, the accused had intimidated to PW2 that he was going to kill the deceased. He also had axes one of which he left at PW1's house which shows that he was prepared to cause grievous harm. Further, when the accused was hitting the deceased person on the head, he knew or ought to have known that the same could lead to the deceased's death or grievous harm and therefore, it proves that he had the mens rea to kill.
35. Counsel submitted that actus reus was proved by circumstantial evidence by the fact that the accused had earlier on told PW1 and PW2 that he would kill the deceased, PW1 heard the accused arguing with the deceased, two bloody axes were recovered from the scene one of which the accused left at PW1's house and there were only two houses in the compound, one for PW1 and the other for the deceased hence no other person was present at that night rather than the accused. Reliance was placed on the case of *Republic v Richard Itweka Wahiti (2020) eKLR* to emphasis that circumstantial evidence is often the best evidence. It was urged that the prosecution has proved beyond reasonable doubt that the accused harbored an intention to harm the deceased and indeed harmed him to his death.
36. On the accused defence, Counsel submitted that the defence consisted of mere denials and was inconsistent. Further that, the medical report produced by DW2 revealed that the accused's judgment was good, he had no abnormal mannerisms and thoughts. That DW2 stated that the accused's sister informed her that the accused had never been diagnosed by a doctor which shows that there was no history or evidence of mental illness prior to assessment by DW2. That DW2 confirmed that there were no medical records of the accused's mental illness prior to the material date and therefore, his defence of insanity cannot succeed if there were no material placed before the court to prove that he was insane during the commission of the offence.
37. She submitted that Section 11 of the Penal Code creates a presumption that a person is sane unless the contrary is proved and that in accordance with Section 111 of the *Evidence Act*, the accused person bears the burden to prove the facts he purports to exist. Reliance was placed on the case of *Republic v Lewis (Criminal Case E077 of 2021) [2021] KEHC 272 (KLR) (Crim)* where the court stated that all persons are presumed to be compos mentis and that if it is an accused defence that he was not of sound mind at the time of the commission of the offence, the onus is on him to prove.
38. Further, that the fact that the accused was a machine operator and had worked for nine months and there was no evidence that was led that he was away from work due to mental illness, the fact that the accused sister who was not called as a defence witness and who had informed the doctor that the accused had never been diagnosed with mental illness and that from the evidence of PW4 and the warning letter issued to the accused shows that he had a family and three children which means that he was living a normal life and the defence failed to call his wife to explain whether he ever exhibited any symptoms of mental illness. That all this shows that the accused was of sound mind and there was nothing to show that as of 08/11/2016, he was insane and therefore, the presumption of sanity under Section 11 of the Penal Code remains un rebutted.
39. On the inconsistency of the accused's defence, it is submitted that the accused testified that there was no grudge between him and the deceased and on the other hand, he purported to have been insane during the incidence which begs the question whether he committed the offence acting independent



of his own will or he did not kill the deceased at all. If then he was not the one who killed the deceased, it does not matter that he was mentally ill. She submitted that the accused's defence did not create doubt and therefore it must fail. It was submitted that the accused murdered the deceased and Counsel invited this court to so find.

40. Section 203 of the Penal Code defines murder in the following terms:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.” Thus, the central ingredients of the offence of murder are a) malice aforethought; b) an unlawful act or omission on the part of the accused.

41. Section 206 defines malice aforethought in the following terms:

“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.”

42. In other words, the prosecution must prove that the accused person herein had the intention to cause the death of or to do grievous harm to any person; that he had the knowledge that his act or omission causing death would probably cause death either to the person intended or to some other person; that he had the intent to commit a felony or that he had an intention by the act or omission to facilitate the escape from custody of any person who has committed or attempted to commit a felony.

43. The question that arises in the instant case is whether there is any evidence on record tending to prove the above ingredients of the offence of murder against the accused person.

### **The death of the deceased**

44. The death of the deceased has been proved by the PW2, 3, 5, & 7 who saw deceased's body and by the post-mortem form PEXH. 4 produced by PW5 that confirms that the Deceased died from a severe head injury to wit a massive intracerebral haemorrhage secondary to blunt and penetrating injury to the head meaning that the deceased died from massive bleeding in the brain caused by both blunt and sharp penetrating injury to the head.

### **Proof that accused committed the unlawful act which caused the death of the deceased**

45. Accused denied committing the offence. The evidence by the prosecution however reveals that the accused murdered the deceased. This is supported by the evidence of PW1. He testified that he heard



- a commotion between the deceased and the accused on the material night at the deceased's house. He recognised their voices since they were his workmates. He fell asleep so he did not know what transpired after the commotion. Later on, the accused entered his room and attacked him with a small axe. He was able to identify him with the aid of the light from his torch. The accused informed him that he wanted to kill him. The accused attacked him. He stated that he saw a lot of blood outside room no. 1.
46. PW2 testified that when he knocked on the gate, the accused opened the gate for him. He testified that he knew the accused as deceased's workmate. He asked him whether the deceased was there and the accused responded by stating that he was angry and he will kill people. When he enquired why he wanted to kill people, he was hit on the knees and the left arm with a small axe. He ran to PW1's room for safety but the accused followed him there. PW1 was lying on his bed. PW2 was hit on the head and he was able to shove the accused who fell down and PW2 was able to escape. He decided to look for deceased to warn him that the accused had said he will kill PW2 and the deceased because his salary had been deducted but he did not find him. In the morning, he went to the brewery and upon opening the main gate, he saw the deceased lying down near his room with a lot of blood about and there was a small blood-stained axe and a large axe nearby.
47. PW4 testified that the deceased reported that the accused was reporting to work while drunk and had not reported for five days. He was given a final warning and his October salary was paid less the five days he had not reported to work. This confirms what PW2 told the court that the accused had said he will kill PW2 and the deceased since his salary was deducted.
48. Further to this, the evidence of PW6, the government analyst who produced a report as Pexhibit6. In the said report it was indicated that blood sample generated from item B2, the accused jacket matched the DNA profile generated from samples item C1, C2 & D of the deceased, the suspect and PW1 respectively. B2 was the grey pullover that was produced by PW8 as Pexhibit7. PW7 also testified that at the time they were arresting the accused, he was wearing a grey jacket which he identified in court. Also, the fact that the axes that were recovered at the scene that is Pexhibit 1 and 2 were blood stained which the blood matched of the deceased and PW1 shows that the accused indeed committed the offence as charged. PW1 and PW2 confirmed that he was armed with a small axe which he attacked them with whereas at the scene near the deceased's body, there was a big blood-stained axe.
49. From the foregoing; I find that the Prosecution has proved beyond reasonable doubt that the Accused did the unlawful act which caused the death of the deceased which constitutes the 'actus reus' of the offence.

**(c) Proof that deceased had malice afterthought**

50. The court must determine whether accused, with malice aforethought inflicted the injuries that resulted in the death of the deceased. The circumstances which constitute malice aforethought are set out under Section 206 of the Penal Code as seen earlier.
51. Malice aforethought was defined in the case of NZUKI VS REPUBLIC [1993] KLR 171 where the Court of Appeal held that before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.

Intention to cause death

Intention to cause grievous bodily harm

Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and co commits them without lawful excuse.



52. The prosecution counsel submitted that malice can be inferred from the fact that at around 9:00pm, the accused had intimated to PW2 that he was going to kill the deceased. He also had axes, one of which he left at PW1's house, which shows that he was prepared to cause grievous harm. Further, when the accused was hitting the deceased person on the head, he knew or ought to have known that the same could lead to the deceased's death or grievous harm and therefore, it proves that he had the mens rea to kill.
53. In the case of DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR), the Court of Appeal while considering what constitutes malice aforethought, stated thus;
- “when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.”
54. See also Tubere S/O Ochen V Republic [1945] EACA quoted by Nyakundi J. in Republic Versus Mugereki [2017] ECLR thus:-
- “It is trite law that malice aforethought can be inferred from the circumstances in which the offence was committed as follows:-
- (a) The nature of the weapon used against the deceased to inflict injuries.
  - (b) The part of the body targeted by the attacker whether vulnerable or not.
  - (c) The manner in which the lethal weapon was used whether in furtherance to cause grievous harm the assailant used the weapon repeatedly.
  - (d) The conduct of the accused before, during and after the attack of the deceased.”
55. It therefore follows that the accused person must have been aware that his actions would lead to death or cause grievous bodily harm to the deceased person. The injuries the deceased sustained which were such severe to fracture his skull as described in the post-mortem report and the weapon he used shows that the accused person had the intention of killing the deceased and must have known the act of inflicting such injuries would have caused the death of the deceased. The fact that he intimated to PW2 that he was going to kill the deceased due to his salary cut shows that he had all the intentions to kill the deceased.
56. The accused in his defence however raised the defence of insanity. It was the accused's counsel submissions that the accused person was not of sound mind at the time of commission of the offence. It was their case that by the time he was charged, he was mentally sick as per the evidence of DW2 and according to D exhibit 1, 2, 3 and 4. That the medical assessment was done on 24/11/2016 and it was discovered that the accused was suffering from schizophrenia, a serious mental disorder in which people interpret reality abnormally.
57. DW2, Dr Ruth Gathuru testified that she is a psychiatrist by profession. She prepared four medical reports for the accused. She examined the accused on 17/11/2016 and he alleged that he started a fight with the deceased but he did not know what transpired later. Everything was normal but she did not make a conclusion since she needed collaborative history. She later examined the accused on 24/11/2016. He was accompanied by a CID officer and his sister. The sister informed her that



he has never been diagnosed with a mental illness but he had abnormal behaviour. On the level of perpetual abnormalities, he reported to have auditory hallucinations which is a sign of a psychotic illness. She stated that it is a situation whereby a patient reports hearing voices but the people one is communicating with cannot be seen. She further stated that judgment was good, insight was lacking and he did not seem as if he had a problem. She stated that she made a finding of schizophrenia (mwenda wazimu) which is a psychotic illness. She concluded that the mental status was abnormal.

58. The subsequent tests were carried on 30/03/2017 and 14/06/2018. She stated that at these times, the accused was under remission as everything appeared normal. She attributed this to medication that he was receiving.

59. There is a rebuttable presumption of sanity under section 11 of the Penal Code which states that;

“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.”

60. Section 12 of the Penal Code, on the other hand provides for the application of the defence of insanity as follows:

“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.”

61. Section 9 also provides that:-

“(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.”

62. This means that a person who cannot appreciate the consequences of his actions should not be punished if those actions happen to be criminal in nature.

63. The learned counsel for the accused relied on the case of Leonard Mwangemi Munyasia v Republic (2015) KECA 382 (KLR) where the court discussed the McNaughten Rules and stated that;

“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.”

64. The court further stated that;

“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... 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.”

65. In the instant case, there was no material evidence that was placed before the court to show that the accused was mentally ill prior to the commission of the offence. DW2 mentioned the accused’s sister who she said informed her that the accused has never been diagnosed with mental illness but had exhibited abnormal behaviors. She also informed her that the accused was taking alcohol. The said sister was not called to testify. PW4, the accused’s employer testified that the accused had worked for him for about 9 months. That apart from the report that he received that the accused was showing up at work while drunk, he stated that he has never been informed that the accused had exhibited signs of mental instability.
66. However, as the court in Leonard Mwangemi case (supra) stated that 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. What transpired after the commission of the offence could illuminate the issue further.
67. It was the evidence of PW7 that accompanied by PW1 and PW2, they went to the accused’s house which was 10 meters away from the scene of crime. The door was open. They knocked but there was no response. They entered and arrested the accused who was in deep sleep. The accused was wearing the grey jacket which was blood stained and which was produced as exhibit.
68. PW7 informed the court that while arresting the accused, the accused was asked what he had done and he said that he did not know. He stated that it surprised him that the accused was deep asleep even after what he was alleged to have done.
69. It is instructive that Dr. Gathuru (DW7) examined the accused at the initial stage to assess his mental state and his capability to plead to the charges herein. In her first examination of the accused on 17/11/2016, the accused alleged that he started a fight with the deceased but he did not know what transpired later. Everything was normal but she did not make a conclusion since she needed collaborative history. She later examined the accused on 24/11/2016. He was accompanied by a CID officer and his sister. The sister informed her that he has never been diagnosed with a mental illness but he had abnormal behaviour.
70. On the level of perpetual abnormalities, the patient reported to have auditory hallucinations which is a sign of a psychotic illness. She stated that it is a situation whereby a patient reports hearing voices but the people one is communicating with cannot be seen. She further stated that judgment was good, insight was lacking and he did not seem as if he had a problem. She stated that she made a finding of schizophrenia (mwenda wazimu) which is a psychotic illness. She concluded that the mental status was abnormal.



71. The subsequent tests were carried on 30/03/2017 and 14/06/2018. She stated that at these times, the accused was under remission as everything appeared normal. She attributed this to medication that he was receiving.
72. It follows therefore that the accused exhibited abnormal behaviour subsequent to the act. He made no efforts to conceal himself. Instead, he retreated to his house and slept, and strangely, making no attempt to discard the bloodied clothes that he was wearing. He did not even lock the door to his house thus PW7 and others got access unhindered. He slept soundly.
73. Additionally, there is cogent medical evidence from Dr. Gathuru soon after the act that the accused was mentally impaired and the assessment that found him fit to plead was only achieved since, in the words of the doctor, “at these times, the accused was under remission as everything appeared normal”. She attributed this to medication that he was receiving.
74. I have considered the evidence and submission on the accused’s state of mind before the incident. I take judicial notice that persons suffering from psychosis, schizophrenia or any other mental disorder can and do experience lucid intervals.
75. On the whole and on the evidence before court, am satisfied that evidence is overwhelming that the accused committed the offence herein, a despicable heinous act but 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.
76. Accordingly, I make a special finding that the Accused is guilty as charged but was insane when he did the act. Section 166(2) of CPC, provides that in such circumstances the Accused should be detained at the president’s pleasure.
77. I will not however commit this case to the order of the president as provided for under section 166(2) - (7) of CPC alive to the fact that this court has through several rulings found this provision as unconstitutional for it was depriving courts of the judicial function in sentencing and arrogating it to the executive. I am in agreement with Mativo, J (as he then was) in H.C. Constitutional Petition No. 570 of 2015- A.O.O& 6 Others v Attorney General & Another where he held that leaving a convicted person at the President’s pleasure is a violation of *the Constitution*. (See also Isaac Ndegwa Kimaru & 17 Others v The AG & DPP (2022) eKLR).
78. I should also add that, a person who has mental illness is a person with disability and in need of help and care and *the constitution* speaks loudly to the rights of such persons under Article 54(1). The Article provides;
- 1) A person with any disability is entitled-
    - a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
    - b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person
    - c) to reasonable access to all places, public transport and information;
    - d) to use Sign language, Braille or other appropriate means of communication; and
    - e) to access materials and devices to overcome constraints arising from the person’s disability.



79. Committal to the order of the president in accordance with section 166 of the CPC works against these rights.
80. In the same breadth, society deserves protection from any such incidents in moments of derangement and therefore the orders issued must balance the interest of society and the accused.
81. To achieve this the state must come up with special treatment and holding centres that will guarantee the health and well-being of offenders in this category while at the same time insulating the public from recurrence of crime in similar circumstances. It is unfortunate that despite the emerging jurisprudence and notice on the Attorney General and the Speaker of the National Assembly, no step whatsoever has been made towards a legislation to regulate the handling of persons found guilty but insane while guaranteeing their constitutional rights.
82. From the foregoing finding, I direct that the accused shall be detained at Mathare mental hospital for care and treatment for an initial period of 3 months and a report be filed with court for further orders. For purposes of future orders and possible re-integration of the accused into society the director of probation is to conduct necessary interviews and make a report on the accused which report shall factor in any medical report as may be received from Mathare Mental hospital

**DATED SIGNED AND DELIVERED THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024**

**A.K. NDUNG’U**

**JUDGE**

