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Republic v Lewis (Criminal Case E077 of 2021) [2021] KEHC 272 (KLR) (Crim) (1 November 2021) (Ruling)

Republic v Msuya Ngolo Lewis [2021] eKLR

Neutral citation: [2021] KEHC 272 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL CASE E077 OF 2021

GL NZIOKA, J

NOVEMBER 1, 2021

BETWEEN

REPUBLIC .... PROSECUTION

AND

MSUYA NGOLO LEWIS .... ACCUSED

Presumption of a normal mental state at the time the offence was committed where an accused declined mental assessment.

Reported by Ribia John

Criminal Procedure *– plea taking - mental state of an accused person to take a plea and stand trial - mental assessment test – justifications – impact of an accused person declining a mental assessment test - what were the justifications behind the requirement that an accused should be fit to stand trial - whether it was a mandatory legal requirement that an accused person should be subjected to a mental assessment - whether the requirement for mental assessment report should be given before, at or after plea - which party had the duty to establish the mental state of the accused person - whether an accused person who declined a mental assessment test would be presumed to be of a normal mental state at the time the offence was committed – Penal Code (cap 63) sections 9, 11 and 12.*

Criminal Procedure *- mental assessment - mental assessments of accused persons - justifications for the requirement to take mental assessments of accused persons - circumstances in which an accused declined to undergo a mental assessment test - whether an accused person who declined to undergo a mental assessment test would be presumed to be of a normal mental state at the time the offence was committed - Penal Code (cap 63) sections 9, 11 and 12.*

Brief facts

The accused was charged with the offence of murder contrary to section 203, as read together with section 204 of the Penal Code. The accused could not take plea because the information could not be read to him as the mental assessment report was not available. The prosecution sought time to obtain the mental assessment

report. The defence objected to the adjournment of the matter on the ground that the Criminal Procedure Code did not require that a mental assessment report be availed before the information was read to an accused person.

Issues

i. Whether a mental assessment test to determine an accused's state of mind when the alleged crime was committed violated the accused's constitutional rights.
ii. Whether it was a mandatory legal requirement that an accused person should be subjected to a mental assessment.
iii. Whether the requirement for a mental assessment report should (if required) be given before, at, or after the plea?
iv. Whether an accused person that declined a mental assessment test would be presumed to be of a normal mental state at the time the offence was committed.
v. What were the justifications behind the requirement that an accused should be fit to stand trial?
vi. Who had the duty to establish the mental state of an accused person in a criminal trial?

Relevant provisions of the Law

Relevant Provisions of the Law

Penal Code (cap 63)

Section 9 - Intention and motive

(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.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

Section 11 - Presumption of sanity

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.

Section 12 - Insanity

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.

Held

1. The requirement to subject a suspect to mental assessment before plea was a matter of practice than law. The rationale was founded on statutory law. Section 11 of the Penal Code provided that there was a presumption of sanity as regards all persons. The mental assessment of the accused person was important pursuant to the provisions of sections 11 and 12 of the Penal Code, save for the fact that it was required in evidence, where the need arose.
2. A mental assessment report served the purpose of, *inter alia*, determining whether, the accused was mentally fit to understand, or appreciate the charges and/or information and then stand trial. 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. The justifications for the requirement that the accused be fit to stand trial may be divided into four:
    1. a recognition that it was fundamentally unfair to try an unfit accused;

2. a recognition that it was inhumane to subject an unfit accused to trial and punishment;
3. a perception that a trial of an unfit accused was comparable to the trial of an accused in absentia
4. a procedure the legal system repudiated and a concern to avoid diminution of the public's respect for the dignity of the criminal justice process if unfit accused were subjected to trial and punishment.

3. There was a need to establish the mental status of an accused person before a plea was taken and therefore as much as it may be a matter of practice, it was morally right and in the interest of justice and the accused to do so. Insanity was a defence to any criminal charge. It was 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.
4. The mental status of the accused at the time of the commission of the offence was gathered by the psychiatrist at the time of mental assessment, as it was based on the history given by the accused including any previous treatment records and it only made legal sense that, the same was to be availed before the plea was taken. It was the duty of the prosecution to establish the mental state of the accused as it was of the defence. In order to prove that a suspect was guilty of a criminal offence, a prosecutor had to often also prove that, the suspect had a particular *mens rea* (criminal intent) when committing the offence.
5. There were a number of ways in which a suspect's particular and individual mental state could be relevant to whether a prosecutor could prove that they had the *mens rea* for the offence alleged. That could range from a diagnosed mental health condition or disorder to evidence that a suspect (without proof of a condition) did not, for instance, appreciate or turn their mind to a risk which was present in a case. It was not easy to gather tangible evidence and quite often, however, proof of *mens rea* will rest solely or heavily on inference, which was proof nonetheless.
6. The application to dispense with the mental assessment before plea indicated that, firstly, the applicant/accused did not wish to rely on the provisions of sections 9, 11 and 12 of the Penal Code; that he was not criminally liable due to his state of mind at the time of the alleged offence. Secondly, he was fit to stand trial and therefore if he declined to be subjected to the mental assessment, he would not at any time, raise a defence or averment to the effect, that he was not mentally capable of participating in the trial.
7. Failure to subject the accused to the mental assessment would not prejudice the prosecution's case. Once the prosecution requested the accused to go for the test and he declined, then it would be presumed that he was of normal mental state and was at the time the offence was allegedly committed. A case trial would not be deemed to be improper and/or a conviction quashed, due to want of a mental assessment report, where the accused did not allege that he was of an unstable mind, at any time and was not subjected to the mental examination.
8. There was no constitutional and/or express provision in the statutes that stipulated that, a person accused of committing an offence of murder and/or any other offence be subjected to mental assessment before plea. However, as already stated the subject requirement was a matter of universal practice in the interest of the accused.
9. Loss of life could not be equated to a loss of property. Life was sacrosanct. When a person was accused of committing the offence of murder, society presumed that the suspect was out of his mind to commit an otherwise heinous act, and would require scientific proof to the contrary. That was because the loss of life was permanent and irreplaceable. It could not be compensated by any amount of damages.
10. 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.

Application allowed.

Orders

The accused herein was not to be subjected to mandatory mental examination.

Citations

Cases

1. James Masomo Mbatha v Republic (Criminal Appeal 164 of 2013 [2015] eKLR) — Mentioned
2. Leonard Mwangemi Munyasia v Republic (Criminal Appeal 112 of 2014 [2015] eKLR) — Explained
3. Rosemadrine Njeri Kabuthi v Republic (Murder Case 13 of 2015 [2015] eKLR) — Mentioned
4. Titus Ngamau Musila Katitu v Republic (Criminal Appeal 124 of 2018 [2020] eKLR) — Explained
5. Greene vs Queen

Statutes

1. Constitution of Kenya 2010 — article 22, 23, 27, 27(1), 28, 47 ,48 ,50 ,50 (2) (b) ,157,165 — Interpreted
2. Criminal Procedure Code (Cap. 75) — section 166, 167, 206 — Cited
3. Penal Code (cap 63) — section 11, 12, 203, 204 — Interpreted

Texts

1. Blackstone, Commentaries on the Laws of England, (Clarendon Press, Oxford, 1769, Vol IV, P 250)

Advocates

Danstan Omari for Applicant
Ms Naulikha for Respondent

RULING

1. The accused was arraigned before the court on; October 25, 2021, charged with the offence of; murder contrary to; section 203, as read together with section 204 of the *Penal Code* of Kenya, (cap 63) of the Laws of Kenya.

2. On the subject date, the information could not be read to him as the mental assessment report was not available. As a result, the prosecution sought for ten (10) days to avail the same. However, the learned defence counsel Mr Danstan Omari objected to adjournment of the matter on the ground that; the *Criminal Procedure Code* (cap 75) of the Laws of Kenya, does not require that, a mental assessment report be availed, before the information is read to an accused person.

3. The defence further objected to the adjournment, on the ground that, the ten (10) days requested for, were rather too many and no basis had been laid for the same. That, in any event, the offence is alleged to have been committed in the year 2017, therefore, the prosecution should have secured the report by now, especially in view of the fact that, the accused is a Police officer, who has all along been on duty.

4. Upon hearing the parties, the court resolved the issue relating to the duration of adjournment, by fixing the matter for the next appearance on; 3rd November, 2021, taking into account the fact that, mental assessment appointments at the Mathari Mental Teaching and Referral Hospital, are only conducted on Tuesdays. In this case, the next falling Tuesday was the November 2, 2021.

5. The other issue that was raised but not contested, was where the accused would be remanded pending the plea taking and it was agreed by consent of the parties, he remains remanded at the Capitol Hill Police Station. An order to that effect was issued.

6. However, on the issue of whether, the mental assessment report, is required before plea taking, the defence was directed to file a formal application. Pursuant thereto, the applicant filed a notice of

motion application herein dated; October 26, 2021. The application is brought under the provisions of; articles; 22, 23, 27, 28, 47 ,48 ,50 and 165 of the *Constitution of Kenya 2010*; section 11 of the Penal Code (cap 63) Laws of Kenya and all other enabling provisions of the law.

7. The applicant is seeking for order that; the court dispense with requirement of his mental assessment prior to taking plea. The application is supported by the grounds thereto and the affidavit of even date sworn by the applicant. He has deposed to several matters, however, as regards the subject matter herein; he deposes *inter alia* that, the request by the prosecution for the accused to be subjected to mental assessment is not premised on any legal basis.

8. That, it is discriminatory in the sense that, suspects arraigned on all other criminal matters for plea taking are never required to have such an examination conducted on them. Furthermore, the subject practice is colonial and lacking in evolving with the changes in law, especially with the Supreme Court of Kenya's directions on the applicability of; *Muruatetu* matter, in which the mandatory nature of the death penalty in murder offences was declared unconstitutional.

9. The applicant further argues that, the request to extend the pre- plea detention by the prosecution, is a violation of the suspect's right to a fair hearing, which entails; speedy and expeditious disposal of cases. Moreover, the prosecution's request, is without any justification, thus extending the delay which is already inordinate, in that, since the alleged offence on; the 12th of November 2017, the applicant is just being arraigned now.

10. He further avers that, article 27(1) of the Constitution of Kenya, 2010, requires that, all person to be equal before the law and protects the right to equal protection and benefit of the law. Thus, the requirement of the mental assessment, is prejudicial to the applicant and flies against the express provisions of; section 11 of the Penal Code which provides 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.

11. Finally, that the law is clear that, all persons are presumed to be *compos mentis*. That the accused person has not raised any issue as not being of good mind so as not to stand trial. In any case, the respondent stands to suffer no prejudice, if the honourable court dispenses with the requirement of the applicant going through a mental assessment.

12. However, the application was opposed vide a replying affidavit dated; 28th October, 2021, sworn by Gakui Gichuhi, an Assistant Director of Public Prosecution, in the Office of the Director of Public Prosecution. She avers that, pursuant to section 206 of the Criminal Procedure Code, (cap 75) Laws of Kenya, the offence of murder, is the only offence that requires proof of; mens rea, and malice aforethought hence distinguishable from all the other offences.

13. Further, the requirement for mental assessment evolved out of practice directions and case law, therefore it is revolutionary and not archaic as alleged. That, it is imperative that, the court must be certain that, the person charged, is fit to stand and understand the trial process and in turn, accord him a fair trial as envisaged under; article 50 (2) (b) of the Constitution of Kenya, 2010. That, failure to conduct the mental assessment, will prejudice the Respondent's case and therefore the respondent is still desirous to have the mental examination carried out, on the applicant.

14. The respondent denied violating the applicant's constitutional rights as alleged and argued that, article 157 of the Constitution gives the Office of the Directorate of Public Prosecution, the power to prefer charges upon comprehensive investigation of the matter. The court was urged to find the application as frivolous, an abuse of the court process and dismiss it.

15. The application was disposed of by filing of submissions. The applicant filed submissions dated; October 29, 2021, and invited the court to consider two issues for determination namely: -

    a) Whether there is a legal provision to warrant the applicant to be mandatorily subjected to mental assessment prior to taking the plea for the offence of murder, and

    b) If the strict requirement of mental examination at a psychiatrist prior to plea taking violates the applicant's rights against discrimination, protection of dignity, access to justice, fair administrative action and within the national values and principles of governance.

16. The applicant reiterated that, there exists no legal provision whatsoever, that warrants the mandatory mental assessment of an accused person arraigned for any charge, let alone the charge of murder, and relied on the Court of Appeal's decision in; *Titus Ngamau Musila Katitu versus Republic (2020) e KLR*, where the court stated that: -

> " Before we embark on the determination of the single issue which we have identified earlier on in this judgement, the appellant has never complained he was never subjected to mental examination to prove that he was fit to stand trial Our answer is drawn from the decision of the Court in; *F U M vs Republic, Criminal Appeal No. 139 of 2010*, where it was explained that: "On whether or not the appellant should first have been taken for a psychiatric examination, we are unable to find a legal basis for that requirement. It little matters that some practice exists whereby murder suspects are first taken for such assessment. The law is quite clear that all persons are presumed to be compos mentis: Section 11 of the Penal Code states as much. If it is an accused person's defence that, he was not of good mind at the time of the commission of the offence, the onus is on him to raise and prove it on a balance of probability. See section 107, 109 and 111 of the Evidence Act. The appellant did not raise a defence of insanity and there were no doubts raised as to his mental capacity. As the court said in the above case mental examination of suspects accused of murder has been done as a matter of practice rather than law. No prejudice was occasioned to the appellant by the failure to subject him to a psychiatric evaluation.
>
> Therefore, nothing turns on this issue."

17. The respondents filed submissions dated; October 29, 2021 and argued that, the requirement of mental assessment though not founded on any law in the country, is embraced in practice through court pronouncements as held in the case of; *James Masomo Mbatha vs Republic (2015) e KLR*.

18. Further the rationale for mental assessment is that, if an accused person is tried and found guilty but insane then, as per the provisions of; sections 166 and 167 of the Criminal Procedure Code, he would be detained at the President's pleasure.

19. The respondent denied the allegations that, subjecting the accused to mental assessment, is discriminatory, as other persons charged with other offence(s) do not undergo such examination. It was reiterated that, the offence of murder is the only offence that requires proof of; malice aforethought otherwise known as; mens rea and therefore requires fitness to plead.

20. In addition, the requirement for mental assessment is not only procedurally, but evidential. Further, doing away with the requirement may invalidate proceedings and fail to balance the rights of the vulnerable accused and the public at large.

21. Finally, the respondent denied that, there has been inordinate delay in this matter and submitted that, the accused was arrested on Friday and arraigned in court on Monday. The case of; *Rosemadrine Njeri Kabuthi vs Republic* (2015) eKLR was cited and relied on.

22. At the conclusion of the arguments advanced by the respective parties and considering the materials placed before the court, I find that, first and foremost, although the applicant has invited the court to consider two issues for determination namely; the legal basis of mandatory mental assessment of a suspect before plea, and whether it violates his constitutional rights and/or it is discriminatory, this second issue is not supported by the prayers in the application.

23. I note that, the applicant seeks for three prayers in the subject application. Prayer (1) is spent, prayer (2), is seeking that, the court dispenses with the requirement of mental assessment of the applicant before plea and prayer (3) seeks for any order the court may grant. Thus, the only live prayer is prayer (2) that relates to the first issue for determination. In that case the court shall not pronounce itself on the constitutional issues raised and this ruling will be restricted to the live prayer only.

24. In that regard, I find that, the issue herein, basically revolves around, the determination as to whether, it is a mandatory legal requirement that, an accused person should be subjected to the subject mental assessment. In considering the same, I find that, indeed, first and foremost, both parties appear to be in agreement that, the requirement to subject a suspect to mental assessment before plea, is a matter of practice than law.

25. Be that as it may, the question to answer is; what is the rationale of that practice? In my considered opinion, the rationale is founded on statutory law and therefore the argument that, the requirement is purely based on practice per se, may not be fully correct. It is noteworthy that, indeed the provisions of; section 11 of the Penal Code, states that, there is presumption of sanity as regards all persons. It provides as follows: -

> " 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"' (emphasis added).

26. The question that arises is: how is the contrary to be proved? Can it be legally and conclusively proved in the absence of the mental assessment examination of the subject? Furthermore, who is to prove the contrary of presumed sanity; the prosecution or the accused? Finally, who is to benefit from such proof?

27. In the same vein, 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; 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".

28. Similar questions arise; how then, can it be established that, a person was or was not of sound mind, at the time he or she is alleged to have committed the criminal offence? Again, who has the burden of proving the same, and who is to benefit from the proof thereof?

29. It therefore follows that, the mental assessment of the accused person is important pursuant to the provisions of; section 11 and 12 of the Penal code, save for the fact that, it is required in evidence, where need arises.

30. The further, question that arises is, whether the requirement for mental assessment report should (if at all, it is required) be given before, at or after plea? To appreciate the answer to that question, regard should be held on; the purpose of requiring a mental assessment report. 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.

31. 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.

33. In the same vein, as rightfully submitted by the respondent, insanity is a defence to any criminal charge. It 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.

34. In the that regard, the Court of Appeal in the case of; *Leonard Mwangemi Munyasia -Vs- Republic* (2015) eKLR, stated that considering, both section 12 aforesaid and the McNaughten Rules, in the given circumstances, the accused person will not be acquitted but under section 167 (1) (b) of the Criminal Procedure Code, he will be convicted and ordered to be detained during the President's pleasure, because of the insanity, where he requires treatment rather than punishment, hence detained as patients and not prisoners.

35. The Court of Appeal further pronounced itself as follows:

> " 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.

What must be avoided and what this court has warned against in the two decisions relied on by the appellant's advocate in this appeal, is the likelihood of sentencing to death a person with a mental disorder. Therefore, it is the duty of trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question. Indeed, it would serve as a good practice, like it is in England, to call evidence based on the opinion of an expert in such cases in terms of; Section 48 of Evidence Act to explain the state of mind. It is the duty of both the investigating officer and the defence, to have the accused person subjected to a medical examination to establish whether he suffered from the disease of the mind that affected his mind and made him incapable of understanding his action. In addition, and in order to ascertain the accused person's state of mind at the time of the offence, the expert opinion of a forensic psychologist, may also be sought. The field of forensic psychology has become a popular field of psychology in Kenya, yet their expertise is hardly sought in criminal trials." (Emphasis mine).

36. Indeed, the mental status of the accused at the time of commission of the offence is gathered by the psychiatrist at the time of mental assessment, as it is based on the history given by the accused including any previous treatment records and it only makes legal sense that, the same be availed before plea is taken.

37. The Court of Appeal in the aforesaid case, cited 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",

38. As aforesaid, it is the duty of the Prosecution to establish the mental state of the accused as it is of the defence. In that regard, it suffices to note that, in order, to prove that, a suspect is guilty of a criminal offence, a prosecutor must often also prove that, the suspect had a particular mens rea when committing the offence: (for example, intention, or recklessness, as to a consequence of the suspect's action or omission; or knowledge, or belief, or suspicion, of circumstances in which those actions or omissions take place).

39. There are a number of ways in which a suspect's particular and individual mental state may be relevant to whether a prosecutor can prove that they had the mens rea for the offence alleged. This can range from a diagnosed mental health condition or disorder, to evidence that a suspect (without proof of a condition) did not, for instance, appreciate or turn their mind to a risk which was present in a case.

40. Be that as it were, is not easy to gather tangible evidence and quite often, however, proof of mens rea will rest solely or heavily on inference, which is proof nonetheless.

41. To revert back to the issues herein, I find that, the applicant prays that this court dispenses with his being subjected to a mental assessment before plea. He has categorically stated at ground (H) to the application that, he "has not raised any issue as not to be of good mind so as not to stand trial".

42. That, in my opinion, clearly indicates that, first and foremost, he does not wish to rely on the provisions of; section 9, 11 and 12 of the Penal Code, that, he is not criminally liable due to his state of mind at the time of the alleged offence. Secondly, that he is fit to stand trial and therefore, if he declines to be subjected to the mental assessment, he will not at any time, raise a defence or averment to the effect, that he was not mental capable of participating in the trial.

43. As regards, the Prosecution argument that, failure to subject the accused to the mental assessment will prejudice their case, I hold a different view that, once the prosecution requests the accused to go for the test and he declines, then it shall be presumed that, he is of normal mental state and was at the time the offence was allegedly committed. As such the absence of the examination will not prejudice the prosecution case.

44. As indicated by the authorities cited by the parties herein, a case trial will not be deemed to be improper and/or a conviction quashed, due to want of a mental assessment report, where the accused does not allege that he was of unstable mind, at any time and was not subjected to the mental examination.

45. In summation I find that, there is no constitutional and/or express provision in the statutes that stipulates that, a person accused of committing an offence of murder and/or any other offence be subjected to mental assessment before plea. However, as already stated the subject requirement is a matter of universal practice in the interest of the accused.

46. Finally, it suffices to note that, loss of life cannot be equated to loss of property. Life is sacrosanct. This is even evident from the biblical book of Job Chapter 1 verse 12 where, the Lord said to Satan,

> " Very well, then, everything he has is in your power, but on the man himself do not lay a finger."

47. It follows that, when a person is accused of committing the offence of murder, the society presumes that, the suspect was out of his mind to commit an otherwise heinous act, and would require scientific proof to the contrary. This is because loss of life is permanent and is irreplaceable. It cannot be compensated by any amount of damages.

48. Be that, as it were, I find that, in the absence of express provisions of the law, the choice as to whether an accused person will be subjected to a compulsory mental assessment before plea lies with the accused. It cannot therefore be held that, that violates one's constitutional rights when it is discretionary. There is no legal bar to the accused who wishes to undertake the examination.

49. That, then is the finding of the court and in that case, the accused herein shall not be subjected to mandatory mental examination.

It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 1ST DAY OF NOVEMBER, 2021.

GRACE L NZIOKA

JUDGE

In the presence of;

DANSTAN OMARI FOR THE APPLICANT

MS NAULIKHA FOR THE RESPONDENT

EDWIN - COURT ASSISTANT