



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 98 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**H M M.....ACCUSED**

**JUDGEMENT**

**Introduction**

This is a judgement in respect of a murder charge brought by the State through the Director of Public Prosecutions against HMM, alias Baba N., hereinafter “the accused”. He is charged under Section 203 as read with Section 204 of the Penal Code. Particulars of the charge as given are that on 14<sup>th</sup> December 2011 at about 6.00am at [particulars withheld] Estate in Kimbu District within Central Province murdered MKN , alias Mama N., “the deceased.”

To support the charge the prosecution, led by Ms Catherine Mwaniki Prosecution Counsel, called sixteen (16) witnesses: Michael Muna Ndung’u (PW1) who was guarding the gate at [particulars withheld] Estate where the deceased lived; Violet Baraza (PW2) the deceased’s house-help; CWN (PW3) and ANN (PW4), both sisters of the deceased; Police Constable Bethwel Kiprotich (PW5), one of the officers manning the Kiambu Police Station Report Office on the morning of 14<sup>th</sup> December 2011 when the accused surrendered to the police; Dr. Peter Muriuki Ndegwa (PW6), the pathologist who examined the body of the deceased; SN (PW7) husband to A PW4 and brother in law of the deceased; Dr. Zephania Kamau (PW8) who examined the accused; Inspector Johnson Mburu Kuria (PW9) the Scenes of Crime Officer who took photographs of the scenes; Inspector Anthony Kingori Wachira (PW10) the officer who escorted the body of the deceased to Kenyatta University Funeral Home for post mortem examination; Chief Inspector Felician Nafula (PW11) the Officer Commanding Kiambu Police Station; Henry Kiptoo Sang (PW12) a Government Analyst who produced a Report from the Government Chemist on behalf of Mr. Paul Waweru Kangethe who was not available having retired from the service. There is also A. N (PW13) R. W (PW14) and W. W. H (PW15) nephew and nieces of the deceased respectively and the Investigating Officer Chief Inspector Erastus Ogutu (PW16).

The accused denied committing this offence. His defence was led by Mr. F. N. Njanja, Advocate. The defence called four (4) witnesses to testify, namely: the accused person Harrison Mugo Moses (DW1); Dr. Ian Mukisi Kanyanya (DW2) and Dr. Mucheru Wang’omber (DW4) the two doctors who treated the accused and Ms RWK (DW3) the mother of the accused.

**Background**

It makes sense to put this matter into perspective before proceeding further. This is an old case that was

initiated in December 2011. I took over the proceedings in this case from my predecessor Honourable Lady Justice Florence Muchemi (Lady Justice Muchemi) on 10<sup>th</sup> November 2014 upon her transfer. One witness Michael Muna Ndung'u had testified before Lady Justice Muchemi.

From what can be discerned from the court file records, the accused was arraigned in court on 22<sup>nd</sup> December 2011 to take the plea. From that date to 29<sup>th</sup> May 2014, almost 2 ½ years later when the first witness testified, the matter had been adjourned on several occasions due to the absence of the defence counsel on record at the time and accused's requests for medical attention. At the same time, the matter had changed hands from one judge to another for reasons appearing on the file record. The trial proceeded in earnest upon my taking over the matter although not without adjournment challenges. The trial concluded in August 2016 upon filing of submissions almost 5 years later!

### **Prosecution Case**

From the evidence on record, the accused and the deceased were married and lived together in South C Nairobi prior to the deceased's moving out and finding residence at [particulars withheld] Estate in Kiambu. The prosecution dispute that there was a legal marriage between the accused and the deceased. However, this court takes the view that the two lived together as man and wife and besides what is before this court is a trial for murder. This Court was told that the relationship between the accused and the deceased was not a peaceful one because of the accused's violent and controlling nature. This necessitated the deceased to move out of their matrimonial home in South C Nairobi and seek residence in [particulars withheld] Kiambu away from the accused. The deceased took with her their little baby N. K. M aged 1 ½ years at the time and their house-help Violet Baraza and moved to house No. [particulars withheld] , Kiambu. It is not settled who used to pay rent for the [particulars withheld] residence. The accused claimed that he used to pay rent for both homes. The deceased was at the time working with Kenya Institute of Management (KIM) while the accused was working with Kenya Defence Forces as a Captain, flying and maintaining helicopters. Evidence shows that the accused used to visit the deceased and their child at [particulars withheld] and would sometimes pick and drop her back home.

On 14<sup>th</sup> December 2011, the deceased was hosting her nephew A. N aged 12 years (PW13) and nieces R. W aged six years (PW14); W. W H aged 11 years (PW15) and C. W. K aged 9 years (not a witness). The children were visiting during the December holidays. On the night of 13<sup>th</sup> December 2011, PW13, PW15 and C. W. K slept on a mattress in the sitting room. PW14 slept in the baby cot inside deceased's bedroom while Violet slept in the spare bedroom. In the morning of 14<sup>th</sup> December 2011, the deceased and the children were asleep at about 6.00am when the accused arrived at [particulars withheld] and parked his car [particulars withheld] outside the compound telling Michael the reason for parking outside that he was in a hurry to pick his wife and leave. Michael, who worked for [particulars withheld] Security Services and had been on night duty and who was waiting to be relieved from duty that morning, let the accused into the compound. It was not unusual for the accused to go to [particulars withheld] . He was known to Michael and Violet.

The accused walked to House B A2 and knocked at the door. Violet who was awake and at the kitchen preparing porridge for the baby let the accused into the house. His entry woke the children sleeping on the mattress in the sitting room. W. W. stood and hugged him. He exchanged pleasantries with them and went to the kitchen where Violet was. He asked her for tea but Violet informed him that there was no milk. He gave her money to go for the milk but Violet told him the shops were still closed at that hour.

The accused left the kitchen and went to the bedroom where the deceased was sleeping. Shortly thereafter, Violet heard screaming from the deceased who was also calling her. Violet rushed to deceased's bedroom and opened the door. She found the accused stabbing the deceased on the neck. Violet ran towards the accused and held him at the shoulders from behind in a bid to stop him but he turned towards her while still holding the knife. Violet let go of the accused, picked the baby and ran out of the house followed by the other children. She started screaming calling Michael the watchman (PW1) to help but Michael did not go into the house.

Shortly thereafter the accused came out of the house holding the bloodstained knife. Michael tried to close the gate in order to prevent him from escaping but he did not manage. The accused got into his car and drove off. Evidence shows that he drove to Kiambu Police Station and reported to Police Constable Bethwel Kiprotich (PW5) and Police Constable Pascal Okuyo (not a witness) that he had quarreled with his wife and that he had stabbed her several times. The accused was detained and the matter reported to CIP Felician Nafula (PW11) the Officer in Charge of the Station (OCS). The accused was detained at the Kiambu Police Station cells pending investigations.

Police visited the scene, confirmed the deceased was dead and took the body to the mortuary. Back at the Police Station, the accused's car which was parked at the Station was searched. A blood stained knife (Exhibit 10), suspected to be the murder weapon was recovered from the dashboard of the car by CIP Ogotu. The Officer also recovered from the same car a grey knapsack, (Exhibit 11). Inside the bag was a navy blue cap belonging to Kenya Army (Exhibit 12) and a short brand new panga (Exhibit 13). CIP Ogotu completed the investigations and decided to charge the accused with this offence.

### **Defence Case**

The accused denied committing this offence when the plea was taken. At his defence, he testified on oath and gave a very long defence. He told the court that he joined the military on 8<sup>th</sup> January 2008 as a Cadet and rose to the level of Captain. He admitted that the deceased was his wife and that they had one child. He said that their marriage had problems following complaints by the deceased that he was delusional and over suspicious of her and that she was not comfortable with this behaviour. He told the court that both went to see a marriage counselor at Amani Counselling Centre and were referred to a doctor; that they went to consult Dr. Kanyanya who told him that he was sick and gave him medication. The accused told the court that he went to see a Doctor Kigamwa at Aga Khan Hospital who told him he had a mental condition after taking down his family history and recommended that he undergoes more tests but this was not done.

He further confirmed the evidence of Michael and Violet that he went to [particulars withheld] on 14<sup>th</sup> December 2011 and found his nephew and nieces there; that he greeted them and then entered the deceased's bedroom. He however said that there was another man in the deceased's bedroom who hit him as he (the man) was escaping from the room and threatened to return. He said that the deceased taunted him that she had had sexual intercourse with another man who was better than him and had captured it on video which she would be sending to him. He said that the deceased had a knife and attempted to stab him with it; that during the struggle to avoid being stabbed he was injured on his right hand and that, things happened very fast after this. He said that he snatched the knife from her hand and stabbed her with it several times; that she was screaming calling Violet to seek help; that they struggled towards the corridor where the deceased fell. He said that he went out of the house and the compound to his car which he drove to Kiambu Police Station where he reported the matter. He also admitted leaving his phone inside the house as he could not remember where he had kept it. Violet had testified that the accused had left his phone in the house and that the phone had been used to call for help.

His mother RW told the court that the accused used to get unusually angry when he did not get what he wanted; that when he was in High School he threatened to burn their house and also burned his sister's clothes. She told the court that her late husband and accused's father used to suffer from a mental ailment but had refused to go for treatment. She further testified that her brother and brother in law (brother to accused's father) suffered from mental ailments as well.

The two doctors, Kanyanya and Wang'ombe testified to attending to the accused on different occasions. Dr. Kanyanya told the court that he diagnosed the accused with depressive disorder not otherwise specified and explained that this meant that the accused had not reached full criteria of depression. Dr. Mucheru Wang'ombe told the court that the accused was suffering from schizophrenia, a mental disorder characterized by false unshakable beliefs, abnormal behaviour and disorders of perception such as hallucinations.

### **Submissions**

At the conclusion of the trial, Ms Mwaniki submitted that the prosecution has proved that the accused with malice aforethought killed the deceased; that there is evidence that the death of the deceased occurred due to exsanguination due to multiple stab and cut wounds consistent with assault; that the accused was identified by all the witnesses present at the scene as the person who inflicted the injuries suffered by the deceased and that malice aforethought on the part of the deceased was established by evidence showing accused's behaviour before and after assaulting the deceased. The prosecution submitted that the accused arrived at the home of the deceased and parked his car outside which was unusual; that he entered the house, talked to the children and sent Violet to buy milk but Violet refused stating that the shops were still closed; that he entered the bedroom where the deceased was asleep and stabbed her several times; that the deceased tried to defend herself and got injured on her hand between the index finger and the thumb and that the accused had a panga inside his car.

The prosecution urged that the defence of the deceased that there was another man inside the deceased's house is not true and should be disregarded; that the accused was not provoked by anyone and that his defence of provocation should be disregarded by the court. Ms Mwaniki submitted that the defence of insanity is not available to the accused; that Dr. Mucheru Wang'ombe's evidence on the mental status of the deceased is contradictory and that Dr. Kanyanya found that the accused suffered from depressive disorder which does not meet the diagnosis of full depression. The prosecution further submitted that the accused had been examined by Dr. Kamau on 17<sup>th</sup> December 2011, three days after the murder and found to be mentally fit; that he was subjected to further psychiatric examination and he was found mentally stable. The prosecution cited Justice J. Anyara Emukule in **Republic v. Philemon Chemas, High Court at Nakuru No. 66 of 2009** on the issue of the defence of insanity and submitted that the prosecution has discharged the onus placed on it by the law in proving the accused guilty of murder. The prosecution urged this court to find the accused guilty of murder as charged and convict him.

On the other hand, the defence has submitted that the crime of murder has not been proved against the accused. The defence submitted that the accused does not contest that he killed his wife by his own act but in doing so he did not possess the correct frame of mind to have the necessary *mens rea* and because he had been laboring under the disease of the mind known as Schizophrenia.

The defence submitted that the accused was referred to hospital for treatment and doctors filed reports on his mental health directly to the court; that the prosecution failed to call these doctors as witnesses to testify as to the nature of treatment they had been giving the accused as the law requires and that as a result of that failure by the prosecution the defence brought in medical evidence on the mental health of the accused.

The defence further submitted that Dr. Kanyanya found that the accused had a mental problem and clarified that the symptoms he diagnosed from the accused were consistent with a person suffering from Schizophrenia and that he could not immediately diagnose Schizophrenia at the time he treated the accused because he needed to make a follow-up of the accused's treatment and family history. The defence submitted that the findings of Dr. Kanyanya and Dr. Wang'ombe were consistent.

The defence submitted that the accused was provoked by the utterances of his wife about her sexual exploits in an attempt to cover up the fact that there was a man in her bedroom and that the accused lost his self-control and a vicious fight ensued between them. The defence submitted that the act of killing the deceased by the accused together with the medical evidence tendered puts the accused within the meaning of Section 166(1) of the Criminal Procedure Code and urged the court to so find. Several authorities have been cited by the defence in support of their case including **PMI v. Republic, Criminal Appeal No. 91 of 1981 [1982] eKLR**; **Republic v. Stephen Mbogori [2009] eKLR** and **Criminal Appeal No. 112 of 2014 Leonard Mwangemi Munyasia v. Republic Criminal Case No. 35 of 2008 [2015] eKLR**.

The defence urged this court to find the accused not guilty and acquit him submitting that the prosecution did not call evidence in rebuttal of the medical evidence that the accused suffers from Schizophrenia as required by the law.

### **Analysis and Determination**

Section 203 of the Penal Code under which the accused is charged reads as follows:

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

From this simple statement of the law, the ingredients of murder are defined. The prosecutor must prove these ingredients beyond reasonable doubt before the accused person can be held responsible for the offence of murder. The burden of proof in a criminal case does not shift to the accused person to prove his innocence. Death of a human being must be proved; the person causing that death as a result of an unlawful act or omission must be identified and that person must be the accused person before the court. The intention to cause the death of the deceased, malice aforethought or *mens rea*, on the part of the accused person, must be proved.

Section 206 of the Penal Code defines malice aforethought as follows:

**“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.**

Available uncontroverted evidence shows that the deceased’s body was removed from her house, the scene of the crime. The body of the deceased was identified to the pathologist Dr. Peter Muriuku Ndegwa, PW6, by her sister CWN, PW3, and brother in law SN, PW7. Dr. Ndegwa examined the body of the deceased on 15<sup>th</sup> December 2011. His findings are captured in the post mortem report (Exhibit 2) and the summary of the injuries suffered by the deceased were noted as follows:

- (i) A defensive cut wound on the left hand between thumb and index finger;
  - (ii) A cut wound on the left shoulder measuring 2cm long;
  - (iii) A penetrating stab wound on the right ribs below the rib cage;
  - (iv) A penetrating wound below the xiphisternum (the lowermost segment of the sternum or breastbone);
  - (v) Two penetrating stab wounds between shoulder blades measuring 2cm long;
  - (vi) A deep cut wound on the nape of the neck measuring 9cm long and 3cm deep;
  - (vii) Deep cut wound on left shoulder measuring 8cm long and 3cm deep;
  - (viii) Eight penetrating stab wounds on left lateral neck measuring 2cm long and 3cm deep.
- i. (ix) Penetration of the cavity between the 6<sup>th</sup> and the 7<sup>th</sup> ribs in front;
  - ii. (x) A stab on the right lobe of the liver;

- iii. (xi) Several neck vessels had been severed both in front and at the back.
- iv. (xii) The body and its organs were pale.

The opinion of the doctor after the examination of the body was that the deceased died as a result of haemorrhage due to multiple stabs and cut wounds consistent with assault.

From this evidence, this court has no doubt that the deceased died as a result of the multiple injuries resulting from the assault. Consequently, I find and hold that the prosecution has proved beyond reasonable doubt that the unlawful death of the deceased occurred.

The second issue to determine is the identity of the person who caused the death of the deceased. I find overwhelming and corroborative evidence from the prosecution witnesses, Michael the watchman, Violet the house-help, the nephew of the deceased PW13 and the two nieces of the deceased, PW14 and PW15, as well as from accused person's own admission, that the accused is the one who assaulted the deceased inflicting fatal injuries on her. This evidence from both the prosecution and the defence proves the accused person's culpability in the act of causing the death of the deceased beyond reasonable doubt and I so find and hold.

The remaining issue for determination is whether, in causing the death of the deceased, the accused person possessed malice aforethought as defined under Section 206 of the Penal Code. The prosecution asserts that the accused possessed malice aforethought at the time he assaulted the deceased leading to her death. The defence argues to the contrary that due to a disease of the mind known as Schizophrenia, the accused was incapable of forming the intention to kill the deceased. The defence is also raising the issue of provocation. To my mind therefore the defence is relying on the two statutory defences of provocation and insanity.

Provocation is defined under Section 208 of the Penal Code thus:

**“(1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”**

### **Defence of Provocation**

Provocation has been discussed in many authorities including **Philemon Chemas** case (supra) cited by the prosecution. In that case the trial judge stated that:

**“For the defence of provocation to stand, the court must consider the evidence adduced on behalf of the accused, that he did the act which caused the death of the deceased in the heat of passion, caused by sudden provocation, that is to say, any wrongful act or insult done by an ordinary person to another ordinary person.....”**

What is the evidence on the issue of provocation in the present case?

The accused testified that the deceased provoked him by taunting him about her sexual exploits with another man who could perform better than the accused and that she had captured the act on video which she would send to him. He also said that the deceased taunted him about his condition which the accused termed as erectile dysfunction and called him a useless lunatic. He also testified that he found another man in the deceased's bedroom who threatened to return. He also said the deceased had a knife which she aimed at him.

Violet told the court that the bedroom of the deceased was about 7 metres from the kitchen and that she

heard the deceased screaming immediately the accused entered the bedroom. R. W (PW14) who was in the same bedroom with the deceased testified that she was woken up by screaming from the deceased and that on waking up she saw the accused stabbing the deceased. W. W. H (PW15) testified that a short while after the accused entered the bedroom of the deceased, she heard the deceased screaming. None of these witnesses, who were in the same house with the deceased when the accused entered, mentioned hearing any exchange, heated or otherwise, between the accused and the deceased. If such an exchange took place, it is unbelievable that none of the witnesses, Violet and the children, witnessed it. The evidence of these witnesses leaves doubts in my mind that such an exchange took place.

I am also doubtful that there was a man in that house. Violet and the visiting children testified that there was no other person besides the deceased, her baby, the nephew and nieces and Violet. Michael also said no other person came out of that house. In view of this evidence it is my finding, and I so hold, that the accused's evidence is untruthful in this respect. I therefore reject that part of his defence that he was provoked and that he acted the way he did due to that provocation. I also reject his defence that there was another man in the deceased's bedroom.

I have read **Republic v. Stephen Kimathi Mbogori, Criminal Case No. 35 of 2008** cited by the defence to support the defence of provocation. I wish to distinguish that case with this case. In the **Mbogori case**, there was evidence proving that the deceased in that case was entertaining a lover when the husband returned home unexpectedly. I have no evidence, other than the statement by the accused which I have discredited, that there was another man in the bedroom with the deceased. The defence of provocation is not available to the accused.

### **Defence of Insanity**

The law presumes every person to be of sound mind at any time which comes in question unless the contrary is proved. **Section 11 of the Penal Code** provides thus:

**“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.”**

The presumption of sanity under **Section 11 of the Penal Code** is rebuttable. This is so because insanity is a statutory defence available to any accused person who claims he/she was mentally sick at the time of committing an offence. While the burden of proof never shifts from the prosecution in a criminal trial, the onus of proving that the accused person was laboring under a disease of the mind at the time he/she committed the offence lies with the accused person. (See also **Section 107 of the Evidence Act** Cap. 80 Laws of Kenya). The standard of proof in the latter case is, however, not as high as the standard of proof in the former, this being prove beyond reasonable doubt. All an accused person, who relies on the defence of insanity, has to do is prove his defence on a balance of probabilities.

**Section 12 of the Penal Code** affords an accused person the defence of insanity. It is worded 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.”**

I have carefully read the **Philemon case** (supra) and **Leonard Mwangemi Munyasia v. Republic Criminal Appeal No. 112 of 2014 [2015] eKLR**. Both cases discuss the defence of insanity.

Under the **McNaughten Rules**, which were formulated in the Nineteenth Century and which refined the defence of insanity, and **Section 12 of the Kenya Penal Code**, insanity is a defence if it is proved that at the time of committing the offence charged, the accused person was laboring 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 what he was doing was wrong.

In the **Munyasia** case (supra), the Court stated as follows:

**“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 the 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.” (Emphasis added).**

The Court of Appeal in the case of **PMI v. Republic, Criminal Appeal No. 91 of 1981**, laid down the procedure to be followed where the defence of insanity is relied on. The Court stated as follows:

**“In *Muswi s/o Musela v Reg* [1956] EACA 622, the Court of Appeal for Eastern Africa held (in relation to a Kenya appeal) that as a general rule evidence of the state of mind of the accused should be called by the defence. The English procedure as set out in 33<sup>rd</sup> edition Archbold p 20 should be followed unless there are special reasons to the contrary (where for instance, the accused is not represented it might be in the interests of justice that evidence as to his state of mind should be called by the prosecution).**

**Archbold 33 edn at p 20 states**

**“The procedure that the defence should call any witness whose evidence is directed to the issue should be strictly followed, the duty of the prosecution being limited to supplying the defence with a copy of any report or statement of any prison medical officer who can give evidence on that issue and to making such person available as witness for the defence; R v Casey 32 Cr Appeal R 91: ICLC 2171. Where evidence to establish insanity has been called for the defence, the prosecution may call rebutting evidence, R v Smith, 8 Cr App R 72. And where it is clear from the cross-examination of witnesses for the prosecution that the defence of insanity will be raised and it is ascertained that no evidence will be called to establish the defence, the Crown may, before closing its own case, call evidence to negative insanity, R v Abramovitch, 7 Cr App R 145.”**

In the case before me, the defence has raised the defence of insanity. The record shows that way back before this trial began, this court was informed that the accused person was undergoing treatment at Kenyatta National Hospital for mental disorder. This court is on record as having referred the accused for examination by two doctors at Mathari Mental Hospital and called for a report of the same examination. One of the two doctors who examined him is Dr. Mucheru Wang’ombe, DW4. I will revisit her evidence later in this judgement.

In support of the defence of insanity, the accused testified that his workmates had commended that he had changed and become reserved. He told the court that his wife complained that he had become violent, over-protective and over-suspicious of her. In cross-examined on his evidence the accused told the court that “I was delusional at the time” in reference to the time of stabbing the deceased. The prosecution counsel took the accused over the various status reports prepared by the accused’s employer while assessing his performance over the years of service. The relevant parts of the reports show that the accused was cautioned against his temperament and advised to guard against it.

Dr. Kanyanya, DW2, testified that after examining the accused on 9<sup>th</sup> September 2011:

**“The main complaints noted down were excessive anger and irritability, over suspicious or paranoid and he also showed abnormal gestures. The symptoms manifested themselves more when he was under duress.....**

**He was angry and menacing. He was using hands to gesticulate in a threatening way.”**

Dr. Kanyanya diagnosis was that the accused suffered from depressive disorder not otherwise specified. He explained that this is a diagnosis in a standard manual used by doctors and it means that the patient has not reached full criteria of depression. The doctor told the court that he required more visits by the accused to make full diagnosis and get corroborative information from family and friends in order to get a better picture of what the patient was suffering from. He prescribed *zavesca*, anti-depressants, for the accused and booked an appointment to see the accused after two weeks. The appointment was not followed because the accused was and placed custody following the murder of the deceased.

Dr. Mucheru Wang’ombe, DW4, examined the accused in company of Dr Mburu following the court order. The doctor made follow-up interviews with family members and made an opinion that the accused exhibited abnormal behaviour since High School and could have been suffering from Schizophrenia. Dr. Wang’ombe explained the disease as follows:

**“Schizophrenia is a severe mental illness that runs in families. It has a genetic component. It can affect at ages 16 to 23 as early on-set or later in life. Before full-blown stage the symptoms can exhibit themselves then disappear. At prodromal (early) stage a patient can lead a normal life. Their behaviour may attract attention once in a while..... People suffering from Schizophrenia can live normal lives on medication. Without medication they cannot. A patient does not know he is suffering but people who live with him notice.”**

On re-examination Dr. Wang’ombe told the court that:

**“We normally have an objective assessment. Even without proof our diagnosis is based on history, especially in Schizophrenia. I found information corroborated. All information given to me matched. I did not get any information that was conflicting. From what Dr. Kanyanya found out and what I found out the two versions are consistent but each diagnosis is different.”**

I have read the reports filed in court and produced by the defence as Defence Exhibits 2, 3 and 4. They are all prepared by Dr. Wang’ombe in respect of the interview she conducted on the accused person, his mother DW3, one PNN brother to the deceased, CWN, PW3, ANN report dated 9<sup>th</sup> September 2013 (Ex.4) concludes that the accused could have been suffering from Schizophrenia. In Exhibit 3 the doctor’s opinion is that the accused was suffering from Schizophrenia. This has been challenged by the prosecution as being contradictory. My reading of the evidence of Dr. Mucheru Wang’ombe shows that the prosecution did not cross-examine her over the reports she made to the court.

My understanding of the evidence adduced by the prosecution and the defence, the law and the cited authorities, especially **Leonard Mwangemi Munyasia v Republic** (supra) and **Richard Kaitany Chemagong Cr. Appeal No 150 of 1983**, it is my finding that there is evidence pointing to the accused mental illness. There is dispute as to whether this disease is Schizophrenia given the prosecution’s challenge of Dr. Wang’ombe’s evidence that the prosecution termed contradictory although as stated above the doctor was not cross-examined on her reports. Evidence further shows that Dr. Kanyanya did not have the benefit of accused person’s family history or further follow-up visits to enable him make a full diagnosis. He told the court as much. Dr. Wang’ombe on the other hand had the benefit of interviewing the accused persons and his relatives.

The medical evidence on accused’s mental illness has not been rebutted by the prosecution as the law and procedure require. The prosecution was aware that the accused’s mental condition would come into

question as the record shows the court calling for medical evidence following claim by defence that the accused had a mental issue. The record shows that the prosecution counsel applied to reserve the right to call evidence in rebuttal of the defence case on the issue of the defence of insanity and this court granted that application. There was, however, no evidence called in rebuttal.

I have not lost sight of the evidence by Dr. Kamau that the accused was fit to plead. I am aware that this court did not have the benefit of the details of Dr. Kamau's examination of the accused before arriving at his opinion that the accused was fit to plead. Besides, this court has been told by Dr. Wang'ombe that the accused was fit to stand trial even after finding that he could be suffering from Schizophrenia because he was on medication.

I have considered at length the circumstances surrounding the deceased's stabbing by the accused. His actions that morning are strange and to a large extent unusual. The knife he used is not one of those found in the kitchen of the deceased. Violet denied she had ever seen that knife before. This court does not have evidence to show where that knife came from except what the accused told the court that he found the deceased holding that knife. It is either the accused had carried the knife with him hidden on his body or he found it in the bedroom. What is strange is that he stabbed the deceased 18 times going by the stab wounds found by Dr. Ndegwa. There were four visiting children and Violet in the two-bedroomed apartment. It is obvious to this court after what was described of the same, that the house was not big. Despite presence of witnesses, the accused delivered 18 fatal blows to the deceased. The injuries were concentrated around the chest and neck region. There must have been a struggle with the deceased attempting to ward off the attack. I believe it is due to that struggle that the accused too sustained the injuries he was later treated for.

The accused had a new panga stashed inside a knapsack. He told the court that it was in the car as a tool. In normal life, a tool is not hidden inside a bag. It is either kept in a tool box or left inside the boot of a car where it can quickly be of use. This again is, in my view, strange. It could be argued that by this action the accused was planning to kill the deceased. I have compared the circumstances of this case to those of the **Munyasia** case (supra) as well as **Chamagong** case (supra) where the facts were interpreted as proof of intention to murder but I have noted that the court of Appeal overturned the judgments in both cases with a finding that the appellants were insane at the time of committing those offences.

I think I have said enough to demonstrate that the defence has convinced this court, on a balance of probabilities, that the accused was suffering from a disease of the mind at the time he stabbed his wife to death. I have no evidence to rebut the probability that at the time the accused stabbed the deceased, he was laboring from a mental illness that affected his reasoning to an extent that he did not know that what he was doing was wrong. I so find and hold. For the avoidance of doubt the finding of this court on the issue of the defence of insanity is that the accused stabbed his wife. He is therefore "guilty" of the act of killing the deceased. However, at the time of committing the act of causing death, the accused was suffering from a disease of the mind identified as Schizophrenia that he was not legally responsible for what he did.

What does the law say in circumstances like the ones facing this court where the court finds that the accused person did the act of causing death but was at the time mentally challenged?

Section 166(1) of the Criminal Procedure Code (CPC) states as follows:

**"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."**

In **PMI case** (supra) the Court discussed the same issue as to whether a special finding as the one

envisaged under Section 166(1) CPC amounts to a conviction or acquittal. After considering the law and decided cases both locally and internationally, the Court had this to say:

**“We are of the opinion, however, that in the law of Kenya, as in the law of England, the verdict upon a criminal charge must be a conviction or an acquittal, and there is nothing in between. If the accused is found guilty of the offence charged, he is convicted. If the accused is found “guilty” only of the act charged, as on a special finding, or not guilty of the offence charged, the effect is the same, for the accused has not been convicted of the offence charged.”**

My issue with this finding is that it may mislead that where the court makes a special finding the accused is acquitted and is at liberty to go home. This is not the case and therefore it would be in order to clarify that the acquittal in a special finding is a “technical” one. The law is that for the offence of murder to be complete, death of a person must be proved, the identity of the person causing that death must be proved and malice aforethought, the *mens rea*, must be proved: all beyond reasonable doubt. However, if it is only the act charged (in this case the causing of the death) and the identity of the person who caused that death without proof of *mens rea*, then the offence is not complete and therefore the accused person cannot be found guilty of the offence of murder.

The procedure to be followed when a special finding is made is laid down in Section 166 (2) CPC as follows:

**“(2) When a special finding is so made, the court shall report the case for the order of President, and shall meanwhile order the accused to be kept in custody in such a place and in such a manner as the court shall direct.”**

What happens thereafter the court makes the special finding as stipulated under Section 166 (3), (4) and (5) CPC is outside the jurisdiction of the court and the court becomes *functus officio*.

### **Conclusion**

In conclusion therefore, after considering and analyzing all the evidence and the law, as well as the cited authorities by the prosecution and the defence, it is my conclusion that the accused person is “guilty” of the act of killing his wife, MKN, but due to the disease of the mind as testified and proved by the defence on a balance of probabilities, he is not guilty of the offence of murder. I therefore make a special finding under Section 166(1) CPC that the accused was legally insane at the time he committed that act. In accordance with the law, I order that the accused shall be held at Kamiti Maximum Prison to await the order of the President. This court shall proceed to make a report in that regard. It is so ordered.

**Dated, signed and delivered in open court this 10<sup>th</sup> day of November 2016 in the presence of both counsels and the accused person.**

**S. N. Mutuku**

**Judge**