



**Republic v Owino (Criminal Case E012 of 2023)
[2025] KEHC 15134 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E012 OF 2023**

DK KEMEL, J

OCTOBER 28, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

FELIX CHARLES OWINO ACCUSED

JUDGMENT

1. The accused herein, Felix Charles Owino is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 17/4/2022 at Simur sub-location in Ugunja Sub County within Siaya County, he murdered Rayden Ooko.
2. The prosecution called six witnesses in support of its case which was as follows.
3. Benjamin Ogutu Ooko (PW1) was the father of the deceased who testified that on that fateful day, they had a party organized by his clients which involved his family members including his wife and their two children. That the children included Rayden Ooko. That after refreshment, the deceased got tired and was taken to sleep in one of the rooms. That after sometime, at around 6.00 pm, his wife informed him that she had heard some commotion from direction where his son was then sleeping. That his wife asked him to go and bring the son. That upon rushing to the room and before opening the door, he heard someone shout ‘ghost’, ‘ghost’ as something hit the wall. That upon opening the door, he found the accused holding their son who was then one year nine months old by neck and throwing and hitting his head on the wall and on the ground. That the boy was bleeding from both nose, ears and mouth. That they first rushed the boy to Rang’ala hospital where first aid was administered and then they were referred to Siaya Referral Hospital but that they did not find a doctor since it was a Sunday. That they were referred to Bama Hospital where the boy was admitted and put on oxygen awaiting for ambulance for onward transfer to Kisumu. That the boy was pronounced dead after some time while enroute to Kisumu.



On cross examination, he stated that he is the one who organized the party and that he invited the accused who was a brother to his client was an attendee. That before he opened the room someone shouted “ghost” four times and that something hit the ground. That the room had three beds where the boy had been taken but had rested on his bed. That he learnt later that the accused had gotten tired and had gone into the same room to rest. That he had known accused for several years as a priest and that they had no differences prior to the incident and that he was shocked about the incident.

4. Oliver Tambo (PW2) testified that he was a parish priest stationed at Ukwala Catholic church. That on a Sunday of 16/4/2022 and on Easter Sunday he together with Father Felix celebrated mass before going to his brother’s construction site. That he later joined the accused at the site. That they had lunch together and that he left for another mass in the evening. That at the site, he found the accused with others roasting meat. That later on, he was called by the investigating officer Musa who inquired about what had happened and that he was not aware as he had already arrived at his home and in bed. That the officer informed him of the incident and that after some days the officer requested that him to hand over the phones of the accused whereupon he complied.

On cross examination, he stated that he knew the accused since 2020 upon reporting to the parish. That he and accused had slept at the parish. That while sleeping in his room, he heard him shout that “you cannot have power over me,” which was not normal. That he did not ask him about it. That on that day, he left him at the party despite urging him to accompany him for lunch. That he as well pleaded that they go to the parish but that the accused declined. That he was shocked when he heard of what he had done. That he realized something was wrong.

On cross examination, he stated that he was his senior in priesthood and that he has not had any disciplinary issue about him. That he had driven from Nairobi to attend the mass and that by the time he was through with the mass, he found the accused already asleep. That it was his first time to experience about ghosts. That the accused did three morning masses and that when he woke up, accused had already left. That he was to have lunch with him during which he was to ask him about the experience of the previous night. That the accused had never complained of ghosts. That the Catholic church regards murder as a sin and that he was not aware if the church had investigated the case or punished the accused.

5. Stephen Ochieng (PW3) testified that he is a mason and that on 4/4/2022, he went to Siranga for work. That he worked for two weeks without any problem. That on 17/4/2022 they had a party where Benjamin attended the party with his wife and children. That later on, the accused joined the party. That Benjamin rushed to the house then he appeared while carrying a child who was bleeding and shouting to his brother “doctor, doctor” and that they left for hospital in Siaya. That he saw the child bleeding from the mouth. That the doctor informed him that Benjamin informed him that he found the accused (Father Felix) hitting the child. That they later called and informed him that the child had died. That Benjamin informed him to report to the police station. That he reported to Ukwala Police Station and upon which the police visited the home. That later he wrote his statement.

On cross examination, he stated that he had not shown his employment letter. That he did not see the accused hitting the child and that he only saw Benjamin carrying the child out of the house. That he did not accompany them to hospital and that he reported the matter following what he had seen and heard at the scene.

6. Bethin Ovuru (PW4) stated that he is a student at Strathmore University and University of Nairobi. That on 17/4/2022, he was at Ugunja market and at home having a party for workers when an incident involving a child who was aged 1-2 years old happened. That he was not at the scene. That he only saw Benjamin leaving with his brother for the hospital and that he later followed them to Matibabu



Hospital in Ukwala where first aid was administered then moved to Bama Hospital in Siaya but they used different cars. That he had no chance to examine the child. That they waited and were referred to Kisumu, and that on the way the ambulance turned back and returned to Bama whereupon the child was pronounced dead.

On cross examination, he stated that both the host and the accused are his relatives and that there was no family dispute. That people were in a happy mood. That it was true that he showed the accused where to rest and that he wrote a statement which states that the accused found him at the party and that he showed him where to sleep. That he was not aware that there was a child in the room. That the home belonged the brother to the accused. That he did not witness what happened inside the house. That he saw the accused looking confused and sweating. That the accused was saying “ghost, ghost, blood of Jesus”. That he had seen the accused in that state before as he had been having bad dreams and shouting. That he has been seeking medical attention and that the accused was on treatment.

On re-examination, he stated that he only found the accused in the room and did not see any ghost.

7. Musa Galgithale (PW5) testified that he is a DCI officer attached at Ugenya and that he was the investigating officer in this case. That on 17/4/2022 and at around 21.00 hours he received a call from Sgt Joel who informed him of a murder incident which had been reported by Stephen and Maurice Okoth. That he proceeded to the scene and secured it. That he was informed that a minor had been knocked on the ground severally at the scene and had been rushed to hospital. That he neither found the child at the scene nor the accused who allegedly committed the offence as he had escaped. That he found witnesses at the scene whom he summoned to record statements. That upon investigating the deceased’s father, he informed that he had organized a party in which his wife and two children aged three years and one and nine months old attended. That the younger one fell asleep and was taken to one of the rooms on one of the beds. That he later heard a commotion in the room and that on rushing to find out, he found accused knocking the child to the ground and that he took the child to Matibabu Hospital for first aid. That he was referred to Siaya Referral Hospital and was later taken to Bama Hospital. That he was referred to Kisumu Agha Khan and that while on the way, the child died. That the deceased was brought to Bama Hospital mortuary for post mortem purposes. That a post mortem was performed by Dr. Mchana on 21/4/2022 and that he attended the same and that he was given a copy. That the accused was brought to the station by his advocate after being at large for almost a year. That the accused was booked and taken for mental assessment and that he was found fit to plead as per the mental assessment report produced as exhibit 1.

On cross examination, he stated that the reportees indicated that accused knocked the child on the ground severally. That the report indicates that the accused pushed the child over the wall, that the minor woke up and upon touching the accused, the accused knocked the child severally on the wall. That the child had shared the room with the accused. That he interrogated the family members and that he did not establish any disagreement between the family members and the accused. That Father Oliver had reported that accused was drunk and had made noise the previous night.

On cross examination, he stated that efforts to trace the accused bore no fruits as he had left the phone at the parish switched off.

On re-examination, he stated that upon visiting the scene, they did not find the accused and that they were informed that he had escaped. That they wrote to the Apostle of Jesus who indicated that he was not there.

8. Dr. Dickson Mchana (PW6) testified that he is a consultant pathologist from Kakamega County and that he covers western region. That he had an autopsy report in respect to Rayden Nick Ooko conducted on 21/4/2022 at Bama Hospital Mortuary, Siaya. That the body was of a male aged one



year and that four days had lapsed since time of death. That nails, hips and tongue appeared bluish in colour. That there were bruises to the forehead and cheek extending to the back of the head. That there was a fracture of the neck and a closed fracture on right thigh bone (femur). That there were bruises on lower back and left lung. That there was extensive bleeding under the skull and that there was a depressed fracture from the front. That he formed the opinion that the cause of death was multiple injuries secondary to blunt force trauma. He produced the autopsy report dated 21/4/2022 as exhibit 1.

9. At the close of the prosecution's case, this court found that a prima facie case had been made out against the accused to warrant him to make a defence. He opted to tender sworn evidence and call three witnesses.
10. Felix Charles Owino (DW1) the accused herein stated that he has been experiencing mental illnesses for many years starting in 1999 when he began to experience psychotic episodes in the form of violent dreams, fighting and kicking walls as well as anxiety and panic attacks. That he sustained several injuries as a result of psychotic seizures and was taken to several hospitals both in Kenya and USA. That he has been undergoing medication all along. He identified several medical documents issued from the various hospitals that he visited. That on the material date, he woke up at 5.00 AM and took his medication as usual and proceeded to Siranga where he was to conduct a church mass. That he later attended a party at a relative's house in Simur area and that he blessed the relative's new building which had been constructed by his brother who is a contractor. That he was introduced to the guests. That later in the day, he felt weak and requested for a place to rest and that the father of the deceased took him to one of the rooms to rest. That he was later woken up and that he saw many people running up and about. That he together with others left the area and that he did not know what had happened. That he found himself in hospital in Kisumu and that it took him up to two weeks to figure out on what had happened. That he was later taken to Karen Nairobi where he continued with medication. That he was referred to USA for medication and after several months, he became stable. That as far as this case is concerned, he maintains that he had a strange dream in which he was hitting the walls with his fists. That he had no reason at all to hurt the deceased who was a son of his cousin. That the minor did not offend him at all and thus he had no reason at all to hurt him. That the elders met and asked him and family members to cater for the funeral expenses and afterwards, a reconciliation ceremony was held where he paid about Kshs300,000/= to the family and also bought animals for the funeral. That he is sorry about the tragic incident. That this is the first incident he has been engaged in and that he has never hurt other people and that he loves children and that he works with children in the parish and that he would not wish to do anything against his Christian faith. That he is deeply sorry for what happened and that he has asked the deceased whose spirit is innocent to forgive him.
11. Elizabeth Achieng Owino (DW2) stated that she is a sister to the accused. That she recalls on 17/4/2022 she attended mass and was later invited by the father of the deceased to attend a party and as she arrived the venue, she saw the father of the deceased rushing out with his child to hospital. That she heard noise from the bedroom and when she rushed there, she found the accused herein hitting and kicking the walls and that he could not even recognize her. That she escorted the accused to a hospital in Kisumu while the deceased was rushed to Bama Hospital from where he was referred to Kisumu. That the deceased died before reaching Kisumu. That there was no hostility prior to the incident. That the accused had been experiencing episodes in 2002 when he woke up at night and drove his car and ended up being involved in an accident. That the accused had been undergoing medication upto date. That the accused is not an alcoholic and loves children a lot. That the families reconciled after the incident.
12. Okoth Lily Innocent (DW3) testified that she is a caretaker at the home of accused's mother and that she has worked for five years. That on the material date, she was invited to attend a party at the home



of the deceased's father's family. That while they were taking lunch, she heard some noise and that she walked outside to find out and that she entered into the room from where the noise emanated and found the accused herein lying on a bed and was shouting and throwing himself. That she went outside and saw the father of the deceased driving outside the compound and that she followed him to the hospital where the child passed on.

13. Dr. Amunga Jairus (DW4) testified that he is a medical doctor based at Kakamega County Referral Hospital. That he handles the psychiatric department as well as medical/causality. That the accused had been their client since 2016 and that he has been attending to him as a psychologist. That the accused was admitted at their hospital in 2016 as a psychiatric patient and that he managed him. That the accused had shown symptoms of violence and that at the time they were dealing with schizophrenia condition. That the accused had complications about certain drugs that he had prescribed such as haloperidol and that he changed it to newer drugs such as olanzapine. That the medical condition can interfere with the judgment, concentration and attention of a person suffering such conditions. That the patients are being controlled by something beyond their control and that they can harm themselves or even they can destroy property or harm other people. That such people are to be controlled. That there is a possibility that the accused was a victim of the foregoing behavioral changes. That side effects of medication can lead to such condition or failing to take the medication. He produced his medical report dated 24/4/2025.
14. Upon the close of the defence case, parties were directed to file and exchange written submissions. However, it is only the defence that complied while the prosecution opted to rely on the evidence on record.
15. Vide submissions dated 10/7/2025, Mr. Nyaberi,, learned counsel for the defence, submitted that the accused was a known psychiatric patient and that during the incident he was still on drugs for his mental illness as evidenced by medical documents produced in evidence and backed by the testimonies of the witnesses called by the defence. That at the time of committing the offence, the accused's mental ability was acutely vitiated and was not in a proper state of mind to conceive the consequences of his actions and to appreciate what he was doing and therefore no malice aforethought could be attributed to him over the incident. Learned counsel relied on the provision of Section 9 and 12 of the Penal Code which provides as follows:

9. Intention and motive

- (1) Subject to the express provisions of this Code relating to negligent act 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, is immaterial so far as regards criminal responsibility.

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.



Premised on this, counsel submitted that it is clear that the accused person did not have the requisite mental capacity for incrimination and therefore the prosecution fell short of proving this mandatory ingredient. It was submitted that from the totality of circumstances of this case, the accused has not been proven guilty beyond reasonable doubt to warrant his conviction.

Learned counsel submitted that in the alternative, the accused person should be found guilty but insane in line with Section 166 of the Criminal Procedure Code which provides as follows:

Section 166 – Defence of lunacy adduced at trial

1. Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he has 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.
2. When a special finding is so made, the court shall report the case for the order of the President and shall meanwhile order the accused to be kept in custody in such place and in such manner as the court shall direct.
3. The President may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.
4. The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the president under subsection (3) shall make a report in writing to the Ministry for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the president's order and thereafter at the expiration of each period of two years from the date of the last report.
5. On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.
6. Notwithstanding the subsections (4) and (5) , a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under sub section (3) make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions ensuring the safety and welfare of the person in respect o whom the order is made and of the public, as the President thinks fit.
7. The President may at any time order that a person detained by order of the President under sub section (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.

In addition, learned counsel drew the attention of the court to the fact that the provisions of section 166 of the Criminal Procedure Code has been declared unconstitutional in a number



of decisions by superior courts making its provisions unavailable in the instant suit. Reliance was placed in the case of *Kimaru & 17 Others vs Attorney General & Another*, Kenya National Human Rights and Equality Commission (Interested Party) (Petition 226 of 2020) [2022] KEHC 114 (KLR) (Constitutional and Human Rights) where the Honourable court declared Section 166 of the Criminal Procedure Code unconstitutional as follows:

- i. A declaration was issued that detaining of persons with mental challenges who were facing criminal trials or who had been tried and special findings made that such persons were ‘guilty but insane’ in prisons at the president’s pleasure pursuant to Section 162 (4) and (5), 166(2), (3), (4), (5), (6), and (7) and 167 (1) (a), (b), (2), (3), and (4) of the Criminal Procedure Code or under any other law constituted a threat to the doctrine of separation of powers and the independence of the Judiciary.
- ii. A declaration was issued that Section 162(4) and (5), 166 (2), (3), (4), (5), (6) and (7) providing for detaining of any person with mental challenges who faced a criminal trial or had been tried and a special finding made that such a person was ‘guilty but insane at he the President’s pleasure contravened article 25(a), 27(1), (2), (4), 28, 29(d) and (f), 50, 51(1), and (2), 159(a), (b) and (d) and 160(1) of *the Constitution*. Such provisions were declared unconstitutional null and void.
- iii. A declaration was issued that an accused who was found to be unfit to stand trial or to continue participating in a criminal trial due to mental challenges or an accused person who was tried for a criminal offence, and was found to have been insane at the time of committing the crime was a person with disability and ought to be accorded the necessary protection and assistance required under *the Constitution* and the law.
- iv. A declaration was issued that no court of law should commit any person facing criminal trial found to suffer from mental challenges to any prison facility in Kenya to be detained under the President’s pleasure pursuant to any law.
- v. A declaration was issued that that no prison facility in Kenya should accept and detain any person found to suffer from mental challenge under the President’s pleasure. For clarity, person found to suffer from mental challenges under the president’s pleasure. For clarity, a prison facility should only accept such persons with mental challenges committed to the facility under the orders of the court which orders should not include any order to hold such persons under the President’s pleasure.
- vi. A declaration was issued that any continued detention of persons with mental challenges who were facing criminal trials or who had been tried and special findings made that such persons were ‘guilty but insane’ and that they were to be detained at the mercy of the President’.
- vii. A declaration was issued that the Advisory Committee on the Power of Mercy established under Article 133 of *the Constitution* had no jurisdiction to deal with persons with mental challenges who were facing criminal trials or who had been tried and special findings made that they were ‘guilty but insane’ until such a time when such persons were sentenced by courts of law.
- viii. An order was issued that any prison facility in Kenya holding any person with mental challenges facing a criminal trial or who had been tried and a special finding made that such a person was ‘guilty but insane’ and be detained at the President’s pleasure should



make arrangements and arraign such a person before the court that committed the person to the prison facility for appropriate orders.

The counsel further persuaded the court that from the foregoing, the accused person should be found not guilty as he has demonstrated that he has stabilized and gone back to work and has never had any other episode since the fateful incident and is under constant medication and support from the church and that he should be released to the church parish under its care and supervision.

16. I have considered the evidence presented by both prosecution and defence as well as submissions tendered. I find the issue for determination is whether the prosecution proved its case against the accused beyond reasonable doubt.
17. In all criminal cases, the burden of proof is upon the prosecution to discharge and that the standard is one of beyond any reasonable doubt. (See *Woolmington Vs DPP* [1935] AC 462). As the charge is that of murder, the same is provided for under Section 203 of the Penal Code which provides as follows:

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

The prosecution in order to prove the charge is under obligation to establish the essential ingredients of the offence which are inter alia; the fact of the death of the deceased; that the death was unlawfully caused; that there was malice aforethought; that the accused is the person who caused the death.

18. As regards the aspect of death, the pathologist Dr. Dickson Mchana (PW6) established several on the forehead and chic as well as the back of the head, the fracture of the neck, closed fracture on right thigh bone (femur), extensive bleeding under the skull, (depressed skull fracture) from the front. He formed the opinion that the cause of death was multiple injuries secondary to blunt force trauma following assault. He produced the autopsy report dated 21/4/2022. I find that this ingredient was proved by the prosecution beyond reasonable doubt.
19. As regards the unlawfulness of the death, it is trite law that homicide is unlawful unless authorized by law. The deceased was a young child aged about two years who was in good health. There was no evidence that the said victim had any problems with his health or life and was the only son of his parents. The deceased had a long life ahead to live to the fullest. Hence, the death for all intents and purposes was unlawful as the same was neither authorized by law nor as a result of an accident. It is instructive that the minor was peacefully sleeping in one of the beds after taking his lunch before his life was cut short. I find that the prosecution proved this ingredient beyond reasonable doubt.
20. As regards the identity of the accused as the perpetrator, it is noted that the incident took place during the day. The accused was found having held the deceased and hitting him on the walls. The witnesses who testified herein did not have any problem identifying or recognizing him since he was well-known to them and was a cousin to the father of the victim and also he was a resident of the area. Therefore, there was no issue of a mistaken identity. Indeed, the accused in his defence evidence admitted to have injured the deceased and added that this was his first incident as he had never hurt other people before. He also stated that he was deeply sorry for what had happened and that he had asked the deceased whose spirit is innocent to forgive him. He also stated that he had approached the family of the victim for reconciliation and had already paid Ksh 300,000/= and also contributed animals which were slaughtered for the funeral and further took the deceased's parents for counselling. The accused was thus placed at the scene of crime as the father of the deceased (PW1) entered the room and found him holding the deceased and pounding him on the wall and ground. The incident took place during the day. I find that this ingredient was proved by the prosecution beyond any reasonable doubt.



21. As regards the aspect of malice aforethought, the same is provided for under section 206 of the Penal Code which provides as follows:

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 intention 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.

22. The evidence tendered by the prosecution is that the deceased minor had been taken to the house to sleep after having lunch and that the accused herein later entered the said room to rest as he had informed his hosts that he needed to take some rest. It was after a short while when those who were outside heard some commotion coming from the room and on rushing there, they found the accused person hitting the deceased against the wall while shouting and casting demons while claiming that the said demons could never defeat him. It was the evidence of the father of the victim that he found the accused in a state of confusion, shouting loudly trying to chase imaginary ghosts and was sweating all over and breathing heavily and that he appeared not to realize what was going on. Further, it came out from the testimonies that the accused had been suffering from mental illness and had been undergoing treatment. The accused in his defence evidence claimed that he had been struggling with mental illness from the year 2012 and had sought medical treatment from various institutions in the country and abroad. He named the hospitals he had been attended to as Mater Hospital, Kakamega County Referral Hospital, Pakwacha Mental Hospital in Uganda. He further added that he used to experience extreme anxiety, paranoia, general delusion, nightmares, sleepwalking and acting out dreams physically. He added that throughout his medical journey and challenges he had never hurt anybody and that the present incident was unfortunate and isolated. The accused called his doctor by the name Jairus Amunga (DW4) based at Kakamega County Referral Hospital who testified that he had been attending to the accused in the psychiatric department in 2017 to-date and that he confirmed that the accused was diagnosed with psychotic symptoms for which he was admitted. The said doctor produced the medical reports and added that the accused was a known psychiatric patient who had been under treatment by several doctors and that the general description of his illness included anxiety disorder with parasomnia (sleeping disorder characterized by unusual behavior during sleep such as sleep walking, nightmares, sleep talking and acting out dreams physically). The doctor added that the accused had fractured his right ulna during one of the episodes. The doctor further added that patients of the accused's nature could commit several acts unconsciously including hurting themselves and other people. Learned counsel for the defence has submitted that the accused did not have a mental ability to understand what he was doing at the time and therefore did not have the requisite malice aforethought. Reliance was placed on provisions of Section 9 and 12 of the Penal Code.

9. Intention and motive



- (1) Subject to the express provisions of this code relating to negligent act 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, is immaterial so far as regards criminal responsibility.

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.

23. Learned counsel urged this court that despite existence of the position established by the said precedents, its decision should be inclined towards the provision of Section 9 and 12 of the Penal Code that makes it mandatory for the accused person to possess the requisite sanity. Reliance was placed in the Court of Appeal's decision in the case of *Wakesho V Republic* (Criminal Appeal 8 of 2016 [2021] KECA 223 (KLR) where the Honourable Court stated as follows:

“We can only add our voice to the many on the reforms that are needed to the provisions of section 166 of the Criminal Procedure Code in two respects. First, in our view, it is a legal paradox to find a person guilty but insane, in light of the requirements of criminal responsibility and culpability, which require that for a person to be criminally liable, it must be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy mind. A finding of not guilty for reason of insanity would be more legally sound in circumstances where an accused person is suffering from a defect of reason caused by disease of the mind at the time of commission of an offence. In addition, it is our view that the Court should be granted discretion to impose appropriate measures to suit the circumstances of each case, upon a finding of not guilty for reason of insanity.

Second, the sub-stratum of the provisions as regards the right to fair trial in criminal cases in Article 50(2) of *the Constitution* is that an accused person should be fully informed, understands, and thereby effectively participates in a criminal trial. To go through the motions of a trial whose nature and effect an accused person does not from the outset understand or appreciate, and further still to be convicted on the basis of such a trial as is provided for in section 166 of the Criminal Procedure Act, is in our view manifestly unfair in light of our current constitutional dispensation. We therefore direct the Registrar of the Court send a copy of this judgment for the attention of the Attorney General. Enough said on that.

14.

- a) It was a legal paradox to find a person guilty but insane, in light of the requirement of criminal responsibility and culpability, which required that for a person to be criminally liable, it had to be established beyond reasonable doubt that he or she committed the offence or omitted to act voluntarily and with a blameworthy



mind. A finding of not guilty for accused person was suffering from a defect of reason caused by a disease of the mind at the time of the commission of an offence. The court should have been granted discretion to impose appropriate measures to suit the circumstances of each case, upon a finding of not guilty for reason of insanity.

- b) The sub stratum of the provision as regards the right to a fair trial in criminal cases in article 50(2) of *the Constitution* was that an accused person should have been fully informed, understood and thereby effectively participated in a criminal trial. To go through the motions of a trial whose nature and effect an accused person did not from the outset understand or appreciate, and be convicted on the basis of such a trial as was provided for in Section 166 of the Criminal Procedure Act, was manifestly unfair in light of Kenya's current constitutional dispensation.

24. Even though the defence have urged this court to find that the accused person did not have the requisite mental capacity for incrimination and that the prosecution fell short of proving this mandatory ingredient, I find that the conduct of the accused immediately the incident took place gives him away and thus he does not fit as a candidate to seek reliance on his mental condition at the time of the incident. It is instructive that as soon as the incident took place, the accused took off from the scene went through Kisumu to Nairobi and later switched off his mobile phone and could therefore not be reached. The investigating officer (PW5) stated that he made frantic efforts to trace him in vain and later learnt that the accused had fled the country and through Uganda. I find this kind of conduct on the part of the accused left no doubt that by fleeing the country he placed himself in the position of fugitive from justice. It is also instructive that the accused remained at large for a period of one year before he showed up and presented himself to the police after which he was charged with the present offence. In his defence evidence, the accused stated that he is sorry about the tragic incident and that he has asked the spirit of the deceased to forgive him. Further, his defence claim that it took him two weeks to realize what had happened is not convincing in view of the fact that he went underground immediately after the incident. Even though the accused doctor (DW4) indicated that the accused must have had bouts of psychotic conditions which he indicated to be an on and off condition and which can even lead to the patient harming himself or even killing someone, it is instructive that through out the accused's medical history no evidence whatsoever was shown to the effect that he had injured/killed somebody. Whereas he had been under medication, it is obvious that the accused mental condition was sound going by the fact that he had been conducting church services all these periods. Indeed, on the material date, the accused conducted two church mass services before joining the party. It is therefore quite clear that on the material date he must have been in good mental condition and with lucid moments. This is backed by the fact that as soon as the incident took place, he sneaked out of the scene and disappeared and later switched off his mobile phone and then finally fled the country. I find that these are not actions of a person with mental illness. In fact, a person with such mental illness would have depended on the assistance of well wishers to attend to his situation but this was not the case. I find that the fact that the accused has been under medication for mental illness, that has not prevented him from carrying out his church duties and obligations all this time in addition to attending his court case as from 2023 to date. It is instructive that upon his return to the country, the accused was promptly taken for mental assessment and was found to be fit and fiddle and that he could stand trial. He duly took his plea and has been attending court all through and that he has presented his defence without any hitch. Throughout the court case, nothing was presented to the court to the effect



that the accused had any mental challenges. I am therefore satisfied that the accused's mental condition was not impaired at the time of the incident and that even if he was under medication, he committed the offence while he was in lucid moments. It transpired that the parents of the deceased were close relatives of the accused and further it transpired that the accused is fond of children and therefore the circumstances rules out any malice aforethought on the part of the accused. This then supports the view that the evidence presented points to a charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. I am not persuaded by the accused's attempt to seek reliance on a defence of insanity at the time of the commission of the offence. I am satisfied that the accused knew where he was and what he was doing at the time of the incident and that he was in a lucid moment when he committed the offence. The claim by the accused that he was seeing ghosts is a subterfuge or a cover to run away from criminal responsibility for the offence. This is informed by the fact that the accused in his defence stated that he later approached the family of the deceased and sought for pardon and engaged them in some reconciliation where he claimed that he paid Kshs300,000/= to the family as well as donating cows for use in the funeral. These are actions of a person who was mentally sound and knew what he was doing and has been of sound mind all along in these proceedings to-date.

25. The totality of the evidence aforesaid and the observations lead me to come to the finding that prosecution has not proved its case against the accused on the charge of murder but that it has proved a charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code against the accused herein beyond reasonable doubt. Consequently, I find the accused herein Felix Charles Owino guilty of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and he is convicted accordingly.

DATED AND DELIVERED AT SIAYA THIS 28TH DAY OF OCTOBER 2025.

D. KEMEI

JUDGE

In the presence of:

Felix Charles Owino Accused

Nyaberi for Accused

Soita for Prosecution

Kimaiyo/Maureen ... Court Assistant

