

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. E006 OF 2023

REPUBLICPROSECUTOR

Versus

FRED O. MUTATIRO ACCUSED

JUDGEMENT

The Accused Fred Mutatiro is charged with the offence of murder contrary to Section 203 as read with 204 of the Penal Code

The particulars are that Fred Mutatiro on the 25th Day of January 2023at Nyamosense village, Ngochoni Sub-Location, Mabera Location Kuria West Sub-County in Migori County murdered Pauline Akumu.

The Prosecution called 9 witnesses to support the charge against the Accused.

The Accused person gave sworn statement and denied knowing what happened on 25th January but said that he was taken to hospital and given medicine and that is when he came back to his mind. He said he did not know the deceased.

PW1 MARY FRANCIS CHACHA testified that she knew the Accused who was her grandchild her daughter's son. That before arrest the Accused lived with her as the mother died when he was 6 months old and she had lived him for all his life. PW1 said that the Accused went to school till Form 3 and that he was hit with a stone in school and he was hospitalized. PW1 said further that after Form (IV) the Accused started complaining of headache and on the 3rd day when he went to harvest maize he became mad and started talking, laughing and

dancing to himself. His actions were not for a normal person. She said that the Accused was tied up and taken to hospital at Akidiva in 2022 where he was treated. She said that she was advised at the hospital to take the Accused for prayers. That she took him to 2 churches but he did not improve.

PW1 said that one day while she was resting at home a lady known as Nyamboha went and advised her to take the Accused to hospital but another one went and told her take the Accused to take him to pastor Kihingu who has a church - Yosari. That some boys carried the Accused and placed him on motor cycle and took him to Pastor Kihingu and placed him on a mattress on the alter and started praying for him and he fell asleep. That at 5:00p.m PW1 requested if she could go home with the Accused but the Pastor told her to go home and come for the Accused the next day. Pw1 said she gave the Accused the drugs to calm him and she went home and left the Accused with 2 people.

PW1 said that at 9:00p.m she saw a boy went to her running and told her Fred had killed somebody in church. She ran towards the church and called the Assistant Chief. That on arrival at the church she found Fred lying down and was shouting and he was alone and was injured on the head. PW1 said she did not go near the dead body which was covered and she was told it was a lady. She subsequently recorded her statement with police.

In cross examination by Ms Okota Advocate PW1 said the Accused was insane for about 6 days and she was with him at home during the 6 days. Accused did not injure anybody during the six days she said she did not see Fred kill but she was told that a woman had been killed. She said she did not see the deceased at the church but there 6 were other people.

PW1 said that those at Kihingu's church were both workers and those who came for treatment and when she left Accused with Pastor Kihingu at 5:00p.m he was chained on both hands and legs and there were two pad locks and Pastor had the keys for the padlocks to the chains. PW1 said she told Pastor Kihingu not to open the padlock as the Accused was making a lot of noise barking like a dog. She said that whenever she bought food the Accused would put it on the floor and eat like a dog, That when she found the Accused at the church he looked as if he had been beaten and he had injuries on the neck and head. She said that when the accused came to court he was shouting and he was not himself.

PW2 JOHN KIHINGU a Pastor at Maranatha Faith Assemblies at Giosahi Maberu Sub County testified that he has been a pastor at the said church since 1998. He said that he prays for people and he knew the Accused person who was taken to church on 25/1/2023 with chains on hands and feet. He said the Accused was taken to the church by the father, mother and riders for prayers. PW2 said the accused was in a bad state, and he was chanting and abusive. That he started to pray for him and at 7:00p.m he left the accused in church with other members and went home to rest. He said that when they prayed and noticed that his State had changed they unchained him in both hands and legs. That at 8:00p.m he was called and when he went back to the church he found the accused lying down in the Church compound. And was being chained by 3 people Samuel Muruga, Elisha Nyahiri and Francis Waitora. That he also found the deceased lying dead and had injury to the head. That he stopped people from beating the Accused and the Assistant Chief went to the scene and called police who visited the scene and the body of the deceased was taken to Akidiva. PW2 said the deceased was his church member but she was not there when

he left the church. He said the members normally went to church at night to pray.

When cross examined by Ms. Okota Advocate PW2 said he knew Pauline for long but on 25/1/2023 when going home at 7:00p.m she was not there at the church and he did not know when she went there. He said he found Accused with Samuel Murunga. PW2 said by the time he left church to go to his house nearby the accused was calm and sleeping.

PW3 SAMUEL MURUNGA' MAKURI a member at Maranatha Church at Giosai since 2001 said he knew the Accused. He said that on 25/1/2023 they were in church on a Wednesday and shortly after 3.00pm the Accused's father and mother took him to the church on a motor cycle with both hands tied and he was making noise and crying. That he put a mattress on the alter and Pastor John was informed of it and he came and started to pray and there was also a sick lady in the church whom he went to pray for while he left John praying for Accused he became calm. That the grandmother of Accused went to the church and they saw Accused was calm and well and they wanted to go with him but Pastor declined. That he asked for the key for padlock. That when the parents and grandmother left PW3 was left with Pastor and Accused who was well and could respond and Pastor told him to untie him on legs. When the accused was untied on the legs he danced well and after a short while he removed hand cuff on left hand. That Pastor told him to remove the hand cuff. When Pastor said he was tired and he went home to bath I PW3 was left with Accused. PW3 said that the Accused was going around and coming back to sleep.

That when Nyahiri entered and PW3 told him that he was rushing home to remove my cattle which he had put inside the house. While at home PW3 saw Nyahiri had called and when he called back and he was asked

me to go to church where he found Nyahiri had taken Wahiora. He told me Accused had become violent. That he tried to get hold of Accused who was shouting. When he opened the gate he found Accused was holding bricks going to break his windows. When he asked where the accused was going he was hit with a brick on the left side of the head and on the left hand. That When he looked back he was alone and there was somebody (lady) lying there he said he did not leave the lady at the church. PW3 said the accused had become wild and he needed to escape and he managed to reach the door but the accused came running and caught up with him. That he turned and got hold of him. PW3 said that they were now on the road and he shouted for help. That Wahiora and Nyabungu arrived and helped subdue Accused who was chained. We found a lady lying done in the compound. She was Pauline Akumu. I saw injuries to the head. She had been hit on the head.

In cross examination Ms. Okota PW3 said that the Pastor left him with the Accused 7:00p.m and he stayed with Accused for about one hour from when Pastor left to work. That later he left Accused alone with Nyahiri and on return he did not see if Nyahiri had any injuries. That on arrival at Church he was with Nyahiri and Nyaitora and he saw a body and did not know where it was. That Nyahiri did not tell him that she had another member in the church together with the with Accused. He said that deceased's injuries were to the head and he did not know who inflicted them.

PW4 ELISHA NYAHIRI a member of Marantha church testified that on 25/1/2023, he was at home at about 5:00p.m. That it was a day for prayer and he went to the church at 6:00p.m and found a sick person in church with Samuel Murunga and a member of the church. PW4 said he did not know the sick person. That the Pastor Kihingu called to tell

him that there was a person in church and he should go to help. That when he got to church Samuel Muruga told him to assist him because he was rushing home and he was left to sit with the sick person. While at the church there a lady called Pauline Akumu entered and he told them there was a sick person. That the Accused started abusing the lady and they decided not to pray. PW4 called Samuel Muruga and who said he was coming. That he decided to get a neighbour because it was getting late and the Accused had started hitting glass. I met a small school boy. That he left the accused and Pauline Akumu in different rooms within the church. That he I called Waihora and Nyahiri and told them That there was a patient who could not be left alone. When entering the church met Muruga and Waihora Samuel Muruga and Waihora entering and he went to call Pastor Kihugu. That on return he found the accused had been pinned down and we tied him up. That they found Pauline Akumu was dead and she he had injuries to the head. He said the accused was hitting the wall, using abusive language but was not addressing anybody in particular.

In cross examination by Ms. Okota PW4 said that Muruga left him with the Accused at about 7:00p.m He said the Accused never went towards him to beat him. Pauline went to church about 8:00p.m and when the Accused went near her the lady could not do anything. That he went to get Francis Waitora about 1 ½ Kms- from church and from Waitora's place he met Muruga. When he returned he did not enter the church instead he went to look for Pastor. He said he did not find Accused struggling with the deceased

PW4 said he found deceased's body in the church compound. He said he had left her in the church with the accused. I returned and left in the church and he did not know who caused deceased's death. PW4

said it took him 30 minutes from the time he left church to the time he returned.

PW5 FRANCIS WAITORA_testified that he was a resident of Giosahi and that on 25/1/2023 he was at home in the evening hours about 8:00p.m when somebody knocked and he found it was Nyahiri who told him to go and help him with a sick person who was violent. That he went with him Nyahiri and on the way they met Samuel Muruga going towards the church. They asked if Nyahiri told the Pastor happened. That he peeped into church and saw the sick person had bricks in both hands and when Samuel entered he hurled stones at him. That the sick person followed them and they asked Nyahiri to get the chain that had tied him up. That when Nyahiri returned he told them that the lady had been injured. The Pastor went in and confirmed the lady had died. After finishing tying the Accused, he found the lady was dead and had injuries to the head. PW5 said there was nobody else in the church.

In cross examination by Ms. Okota the witness said he went back to church with Nyahiri and Muruga but did not enter into the church but they found Accused in the church compound and the deceased's body was outside the compound. The chains were inside the church. That it is Nyahiri who went to tell them that somebody was lying with injuries. When he entered the church gate he did not see the deceased's body. That he saw the Accused who had bricks in his hands.

Nyahiri went into the compound to get the chains. PW5 said he did not see Accused hit deceased with a stone.

PW6 LAMECK MWITA WEGESA village elder testified that on 25/1/2023 at about 8:30p.m he was at Giosahiri Centre near the church when it was alleged by people that a person had hit somebody. That he met

Samuel and found he had arrested Accused and who was abusive and he seemed to be mad. That he was chained. IPW6 said he found the deceased lady in the church compound near the door of the church and he called Chief and also prevented the people from beating the accused. Police went to the scene and the accused was arrested and the body was taken to the mortuary.

PW7 WILLIAM OTIENO MWITA testified that the deceased was his mother. That on 1/2/2023 he identified the body of his mother for post mortem at Akidiva mortuary. He said he was with Rose Munanda and Pastor Kihigu.

PW8_Dr. Mark Oduor Otieno. Officer at Akidiva Hospital in Maberu testified that he is also employed by Migori County Hospital. He examined the body of the deceased upon request of P. C. John Njegu on 1.2.2023 at St. Akidiva Mindira Maberu Mortuary at 11:30 a.m. That the Post mortem was witnessed by William Mwita and Rasper Monanaka,

PW8 observed that there was obvious depression on bilateral side of head with black lacer eyes and dark eyes;_there was blood clotted stains from both ears - and there was also blood from mouth and nose.

He also established massive scalp hematoma on both sides of head bilaterally with an obvious skull fracture on parietal temporal region measuring 8 x 7 cm. There was also fracture of left mandible.

As a result of examination, he formed the opinion that the cause of death was severe head injury. PW8 filled the post mortem and signed and the same was stamped by hospital. He produced it as - EXP1. PW8 also said that the lacerations on the hand were signs of defense during assault.

PW9 NO. 78823 CPL PETER NGURI was stationed at DCI Isebania when on 25.1.2023 at around 22.00 hours he was called by I.P. Lovina Akinyi who informed him of murder incident which had happened at a church namely Maranatha that is located Giosari Village in Ngochoni Sub location. In company of other police officers drawn from DCI Isebania and police station and under command of IP Sigei they proceeded to the scene. That at the entrance of Marantha church they found a young man whose hands and legs had been chained. That the young man was rowdy / violent and was shouting. That as they were ushered into the church by the said elder they were shown a body of an elderly woman which was oozing blood from the head and around the body there were several bricks which were broken and scattered. They were also shown inside the church and they were able to interrogate the church elder who told them what transpired. They processed the scene, took photographs and the body removed to St. Akidiva mortuary in Maberera.

That on 26.1.2023 PW9 was mandated by I. P. Lovina to investigate the murder and they revisited the scene and were able to collect the stones that were stained with blood and which we believed were used to inflict injuries that led to death of the deceased. Thereafter he recorded statements of 5 witnesses and later the accused person was taken to a psychiatrist at Migori County Hospital for mental assessment. PW9 also arranged for Post mortem to be conducted at St. Akidiva Hospital Mortuary and suspect was later arraigned before the court. That at the court he was ordered to take the suspect to Kisii Level 5 Hospital where he was to undergo mental treatment while awaiting plea. While the suspect was still going for treatment I was transferred to Kisumu and left the file in custody of I.P. Lovina. The suspect had not taken plea by the time I went on transfer.

In cross examination by Mr. Ouma Advocate PW9 said that the accused person had been taken to church for prayers due to mental illness by the grandmother. PW9 said that from his observation and assessment the Accused person was not in proper state of mind as he was rowdy and violent when they found him at the church, That while in the cells he could defecate on himself and could not think rationally or recall what he had done. PW9 said that sometimes the accused could even beat them and at the scene he was chained on the legs and hands. That when he was arraigned in court the accused could not recall what had happened and he was making noise and proceedings could not go on as he was not in control of his faculties.

When the Accused was placed on defense he gave sworn statement and denied knowing what happened on 25th January but said that he was taken to hospital and given medicine and that is when he came back to his mind. He said he did not know the deceased.

ANALYSIS AND DETERMINATION.

Having considered the evidence on record for the Prosecution and the accused persons defense this court is to determine whether the charge of murder was proved beyond all reasonable doubt. Section 203 of the Penal Code provides:

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

In the case of Ndegwa Ngari versus Republic it was held that for the prosecution to sustain a conviction for the offence of murder the ingredients to be proved are:

“ the fact of death and its cause that the death resulted from an unlawful act or omission by the accused and that this act was committed with malice aforethought”

In the circumstances the issues for Determination in the instant case are:

1. Whether the death of the deceased occurred and what caused it;
2. Whether the Accused caused the death of the deceased;
3. Whether the Accused acted with malice aforethought; and
4. Whether the Accused’s mental condition substantially impaired his responsibility for the act.

On Whether the death of the deceased occurred and its cause

The evidence of **PW8 Dr. Mark Oduor Otieno** who conducted the post-mortem, confirmed that the deceased died from **severe head injury secondary to assault by blunt object**. This evidence was unchallenged. The prosecution proved beyond reasonable doubt that the deceased’s death occurred and was unlawfully caused.

Whether the Accused caused the death

The evidence of PW4 was that the accused was taken to the church for prayers as he was behaving abnormally. PW2 said that after prayers the accused calmed down and he left him in custody of PW3 and PW4. According to PW4 when he remained alone with the accused person, the deceased came to church and accused person on seeing her started abusing her. That when he noticed the accused becoming unruly and hitting glasses he decided to go and call PW3. He said that he left the accused and the deceased in different rooms in the church. However, on return he found the deceased lying dead in the church

compound and the accused had been pinned down and was being tied up. The pastor PW2 and Francis Wahitora PW5 were called to the church and they found the deceased had been killed. PW1 said that she was also called and informed that her grandson had killed someone in the church. The village elder PW6 also said that he got information that the accused had killed a lady within the church compound and he reported to the chief. PW9 Corporal Peter Nguri visited the scene and established that the accused who had mental incapacity used bricks to stone the deceased. From the evidence above, it is clear that the unlawful act that caused the death of the deceased was committed by the accused person. No other plausible perpetrator was identified.

On **Whether the Accused acted with malice aforethought**

Under **section 206 of the Penal Code**, malice aforethought may be inferred from the nature of the weapon used, the part of the body targeted and the conduct of the accused before, during, and after the act.

The deceased sustained obvious depression on bilateral side of head with black lacer eyes and dark eyes;_there was blood clotted stains from both ears - and there was also blood from mouth and nose.

He also established massive scalp hematoma on both sides of head bilaterally with an obvious skull fracture on parietal temporal region measuring 8 x 7 cm. There was also fracture of left mandible.

The above injuries ordinarily point to an intention to cause death or grievous harm. However, the Accused's **mental state** was questionable and must have negated malice aforethought.

On Whether the Accused's mental condition diminished his responsibility

Section **207 of the Penal Code** provides:

“Where a person kills another in circumstances which, but for this section, would constitute murder, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from arrested or retarded development, or any inherent cause, or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions.”

In this case:

When the accused was arraigned in court, the mental assessment report indicated that he was suffering from hallucination and agitation and it was recommended that he could benefit for admission at a mental facility for treatment. A report dated 22nd September 2023 from Kisii County Government Hospital confirmed that he was mentally fit and could understand and follow proceedings in court. His trial proceeded on the basis of the above report. However, at the time of commission of the offence, the witnesses described the accused person's behavior as abnormal, delusional with incoherent speech. The Accused himself stated that he **could not recall** the incident and he was **hearing voices**

The Court of Appeal in ***Republic v Ochieng [2009] eKLR*** emphasized that diminished responsibility lies between full insanity and complete sanity. The test is whether the abnormality of mind was such as to substantially impair the accused's mental responsibility.

Similarly, in ***Republic v Leonard Mwangemi Munyasia [2015] eKLR***, the court held that where medical evidence shows the accused suffered from a mental disorder that affected his capacity to form intent, a conviction for **manslaughter** rather than **murder** is proper.

Applying these principles, I find that the Accused's mental condition significantly impaired his capacity to understand the nature and consequences of his act or to form malice aforethought. This court therefore finds that the accused persons mental capacity was impaired and he could not make informed judgment or informed decision.

Arising from the above analysis the prosecution proved that the Accused caused the unlawful death of the deceased. However, the defense and the Prosecution witnesses demonstrated that at the material time the Accused suffered from a mental abnormality that substantially impaired his responsibility.

Accordingly, the charge of murder cannot be sustained in the circumstances of diminished mental capacity. The charge of murder is therefore **reduced to manslaughter** under **section 202 as read with 205 of the Penal Code**.

The Accused is **found not guilty of murder** but **guilty of manslaughter by reason of diminished responsibility**.

The court orders that the Accused shall undergo **psychiatric evaluation** at **Migori County Referral Hospital** prior to sentencing. Upon receipt of the report, the court will determine whether to make a **hospital order** for treatment under **section 166 of the Criminal Procedure Code**, or to impose a **custodial term** in a facility capable of providing psychiatric care, or to make a **supervised non-custodial order** if the Accused is now stable and poses no risk.

Mention on 13th November 2025 for psychiatric report, victim impact report and pre-sentencing report.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 16TH DAY OF OCTOBER, 2025.

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ANNE ADWERA ONG'INJO

JUDGE