



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 68 OF 2017

FORMERY MACHAKOS HCCR NO. 4 OF 2012

REPUBLIC PROSECUTION

VERSUS

AMSTRONG MUSYOKA KIVUVA

ACCUSED

JUDGMENT ON Plea Bargain

1. This matter comes up for Sentence Ruling. It brings to a close the oldest murder case before me. It also makes a case for cases to retain the year of filing in whatever form even when they are transferred to another court.
It is never about the case number or the series, but about the person represented by that case file number.
2. By the time Armstrong Musyoka's file was transferred to Makueni he had already been in custody for 5 years.
3. Armstrong Musyoka Kivuva was charged with murder Contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 31/12/2011

at Ngawani Village, Kithangathini Sub location, Kikoko Location, Kilungu District within Makueni County he murdered Jacob Kivuva his father.

4. From the record the accused was examined by Dr. Kokonya on 13/7/2012 and was found to be mentally stable, able to follow proceedings, understand charges facing him, advice counsel and plead to the charges.
5. There was a re-examination in 2015 by Dr. Munga Edgar where it was found that he would have difficulty following proceedings/advising counsel.
6. On 2/3/2017, the matter was transferred to High Court at Makueni.
7. When the matter was before Hon C. Kariuki J on 22/5/2018 he noted that the accused could "*neither recognise his mother nor know why he was arrested or in custody*". It was ordered that he be escorted to Mathari Hospital for treatment.
8. On 8/3/2021 - he was found not competent to plead by Dr. Joseph Masila. On 14/6/2021 the doctor noted that it was difficult to ascertain competence and started him on treatment. On 20/9/2021 - he concluded that the accused was not competent to stand trial and

take plea. He now had a nodule on its right orbit margin. On 6/12/2021 - he was on review and further review for 2 months. On 14/2/2022 - he was found not fit to take plea /stand trial. On 1/8/2022, he was found to be competent to stand trial/ take plea. The doctor however noted that “he has been giving approximate answers and estimates in what is called prison psychosis (Gander syndrome)

9. Doctor Masila noted that time the first interview he had with the accused in 2021, he had a history of giving approximate answers.

10. At the time I took over the matter on 30/5/2023 the accused had been found competent to plead and there was a plea bargain agreement in process. However, by then the members of the Law Society of Kenya who had signed up to take up pro bono cases of murder suspects were on court boycott pursuant to a disagreement between them and the Office of the Chief Registrar with regard to their payments . They had downed their tools and these matters ground to a sad halt, leaving these persons without legal representation.

11. The accused relapsed and was sent to Mathari Hospital in May 2024 , and discharged on 7th November 2024 , the matter went before the DR on 7th February 2025 awaiting the report from the hospital. The matter came before me on the 7th May 2025. I noted that the report had been brought but had been inadvertently filed away by the Prison Authorities upon the accused's discharge.
12. The Plea Bargain Agreement resumed ; the accused represented by Mr. Kithuka.
13. On 6th November 2025 having satisfied myself that at that time he understood the process of Plea bargaining and its implications , he pleaded guilty to the lesser charge of manslaughter c/s 202 as read with s. 205 of the Penal Code.
14. The prosecution gave the facts that on the 31st December 2011 at 1900 hours the deceased who was the father of the accused and his mother were at home. The accused unprovoked picked a stool hit the deceased who bled profusely and died soon thereafter; the accused was arrested by members of the public and taken to Kilome police station. The body of his

father was later taken to Nunguni Hospital Mortuary. On the 6th of January 2012 a post-mortem was conducted and the cause of death was intracerebral hematoma secondary to trauma on the skull, skull fracture .The accused had been suffering from mental illness , was treated at Machakos Hospital where he had been admitted in September 2010 and discharged in October 2010. He stayed for a while and on the 29th of October 2010 was readmitted and discharged on 2nd of November on treatment and medication. He was later charged with murder which was now reduced to manslaughter as per the plea bargain agreement. The prosecution produced the post-mortem report and the treatment documents as part of their evidence.

15. The accused pleaded guilty to the facts was convicted on his own plea of guilt

16. I sought a presentence report from probation and aftercare Services. From reading the report I noted that the probation officer was saying that the community and the family were not ready to receive the accused back in the community . I expressed the view that it was not enough for the social worker to say that the

family was not ready that it was important for the officer to explain and demonstrate in the report that the officer had made an effort to explain to the family the circumstances of the offender his needs and how they could support him .I directed that the matter be referred to the county probation officer for re assessment further report.

17. On the 17th of December 2025 Mr Muthoka appeared and informed the court that he had reviewed the report , had spoken to the family members on the status of the offender and they had filed a fresh report and the family members were now ready to receive the offender and take responsibility for his treatment.

18. His advocate Mr Kithuka submitted in mitigation that he agreed with the probation officer's report as filed and confirmed that the accused had been suffering from a mental illness; that at the time of the offence he had failed to take his drugs and that took a wrong turn. He submitted that the offender was remorseful and pleaded with court to consider that his mental illness was a normal health issue that could be treated and that he deserved a second chance within the

society and that the family was now willing to take him back and he requested for a non-custodial sentence and a supervision by probation and after care services and NGAO

19. In the report it was noted that upon the offender being diagnosed with a mental illness and placed on treatment he failed to take his drugs as prescribed which resulted into his erratic and unpredictable moods and violent behavior and that it was the improper use of drugs that instigated his violent behaviour during which he attacked his father with a stool resulting in the death. That the officers at the Makueni prison hospital confirmed that the offender had been receiving continuous medical treatment since his admission and while in custody had been treated at Mathari Hospital whenever he needed intensive management and his mental status had stabilized.

20. The report painted a person who had been well living in the community until he suffered the mental illness, His family members told the PACs officer that before the incident he spoke about seeing a hyena which he intended to kill It was then he proceeded to take the

stool on which the deceased was seated and struck him with it.

21. It was also reported that through his mother was elderly and ailing she had forgiven him and she and his siblings had accepted to be involved in the offender's rehabilitation on non-custodial sentence and they expressed willingness to ensure that the offender took his medication and abided with court orders .They committed county probation office and the Kithangathini local administration (chief) .
22. It was reported that the offender was admitted to the Kenya police at Embakasi Administration training college in 2004 completed his course and later developed mental in 2007 while at work .
23. He regretted the incidence noting that he was not aware of what he was doing or what he had done until he was treated .
24. Noting that the offender had been in custody since 2011 it was recommended that he be placed on a non-custodial sentence and a request be made to the inspector general of police to consider reinstating or paying him his dues .

25. It was stated that the probation together with other relevant stakeholders would monitor him closely offer him guidance and counselling assist therapeutically to address his mental health status, monitor and supervise his conduct and ensure that he attended his follow up medical appointments

1. I gather from the report that the Accused was an administrative police officer(AP) from 2004 to the time in 2011 when he is alleged to have committed the offence. According to the report he developed some mental health issues while at work, was admitted to Mathare, and was later escorted home by his colleagues. That his family tried to get him treatment including, traditional treatment, all in vain.

2. His mother confirmed that the main problem was when the accused failed to take his medication, he would suffer erratic behaviour and bouts of violence and stated that it was during one of those episodes that he hit his father with a stool.

3. The family 's concerns are genuine , that they may not be able to manage the cost of his medication they fear

he may turn against his mother in the event that he fails to take his medicine and becomes violent towards her. Their views that he would only be welcome home when healed were clearly misplaced and founded on the colonial laws where a person with a mental illness would be held in custody at the pleasure of the President.

4. It is important to add what I stated in the Ruling on bond that that society must accept that Prison and Remand are not mental hospitals for the detention of persons with mental illness. Even when they commit offences the presumption of innocent until proven guilty still applies to them. Persons with mental illness ought to be accorded treatment just like persons with other ailments , in hospital.
5. In the Criminal Justice System, the probation and after care services more often than not have first-hand information on the family and societal attitudes long before the court does. It is part of reintegration and for them to start at the earliest to work with the family and the relevant professionals to bring home this message.

6. The court cannot totally blame the family or the community because mental illness issues have been shrouded in fear, mystery and magic in our communities and it is time that NGAO, PACs and the relevant medical branch took it upon themselves to create awareness on these and what families and societies can do to support such persons to prevent relapses. This mandate can be seen in the Mental Health Act.
7. In light of the Mental Health Act, perhaps this is the time to move away from the ***'fit/unfit to plead or stand trial'*** to disclosure of the mental illness at the earliest to the ODPP and the court by the psychiatrist/mental health experts to enable appropriate interventions pre, during and post-trial, to enable better informed directions on treatment if the offender in custody and ODPP can also make better informed decisions charging and prosecution. All this in the spirit of Article 159 (2) (a) of the Constitution where it states that *"justice shall be done to all, irrespective of status"* and 27 on non-discrimination.

8. The issue then what is the proper disposition of this matter.

9. Section 12 of the Penal Code states:

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.

10. Courts were required to order that a person found guilty but insane be committed to be held in custody at the pleasure of the President.

11. The Courts, guided by the Constitution on the right to fair trial right to dignity and the fact mental illness itself is not a crime, and such a person requires treatment not incarceration, declared those provisions of the law unconstitutional

12. The Court of Appeal in [Wakesho vs Republic \[2021\] KECA 223 \(KLR\)](#) gave directions 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.

13. It is not in doubt that the offender was suffering a mental illness at the time of the offence. And while he has entered into a plea bargain agreement, and at the time of the plea he was aware of the offence and the facts , it emerges from every information placed before me that he was not in control of his faculties at the time the offence was committed .

14. The final order here would have been to find the offender guilty but insane. However, taking guidance from the aforesaid decision of the Court of Appeal I make the finding of *not guilty for reason of insanity*, and order that the offender be placed on Probation Supervision for three years.

15. During this period, the offender will abide by the Probation Order, will co-operate with the Probation Officer, the family on account of his treatment. Considering the period, he has been in Custody PACs will be required to offer more intense supervision and psychosocial support in the first quarter to enable

reintegration. PACS to work closely with the nearest hospital to the offender for purposes of follow up

16. The matter will have a mention before the Deputy Registrar in 3 months hereof for follow up

17. Orders accordingly

Dated, signed and delivered virtually this 22nd

December 2025

**Mumbua T. Matheka
Judge**

CA Chrispol

Mr. Kazungu for State

Offender present virtually

Mr. Kithuka

PACs Officer Ms Mwalekwa