



**Republic v Likabo (Criminal Case 41 of 2014)  
[2026] KEHC 913 (KLR) (27 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 913 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 41 OF 2014  
AC BETT, J  
JANUARY 27, 2026**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**IGNATIUS LIKABO ..... ACCUSED**

**JUDGMENT**

1. The Accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The particulars of the said offence are that on the 30<sup>th</sup> day of July 2014 at Shirumba Location in Kakamega South District within Kakamega County, the Accused murdered Gracious Matakale.
3. The hearing of the case did not take off immediately despite the Accused having entered a plea of not guilty on 17<sup>th</sup> September 2014 because when the matter came up for hearing on 19<sup>th</sup> May 2015, the Prosecution informed the court that the Accused had not been taken for mental assessment whereby the court ordered that the Accused be taken for mental assessment and adjourned the case. Thereafter, the matter was adjourned twice. On 27<sup>th</sup> January 2016, the Prosecution informed the court that they had a non-conclusive Mental Assessment Report as the examining Doctor had recommended that the Accused do undergo a further assessment. The matter was mentioned severally and on 11<sup>th</sup> April 2016, the court was informed that the Accused was undergoing treatment as an inpatient at the Moi Teaching and Referral Hospital. After more adjournments, the court was once more informed that a second mental assessment done on 2<sup>nd</sup> December 2015 was also not conclusive. The Prosecution sought more time to conduct a further mental assessment.
4. On 16<sup>th</sup> October 2017, the Accused appeared before the court where he took plea. When the charges were read out to him, he responded in Kiswahili that he did not know whether he committed the



- offence. There is no record as to whether at the time the Accused was taking the second plea, a mental assessment report had been filed.
5. On 5<sup>th</sup> September 2019, the Accused's Counsel pointed out to the court that there were two contradictory mental assessment reports filed in court. The one by Dr. Amunga dated 25<sup>th</sup> July 2017 stated that the Accused was unfit to plead to the charges while the second report prepared by Dr. Mbiti on 1<sup>st</sup> August 2017 barely five days later stated that the Accused was fit to plead. In view of the conflicting reports, the court directed that the Accused be subjected to a mental assessment at the Jaramogi Oginga Odinga Referral Hospital for purposes of determining the suitability of the Accused to proceed or to plead afresh to the charges.
  6. On 11<sup>th</sup> December 2019, it emerged that the Accused had never been taken for mental assessment at Kisumu as ordered and the court revoked his order and issued a fresh order directing that the Accused be taken to the Kakamega County Referral Hospital for mental assessment.
  7. On 28<sup>th</sup> January 2020, the court was informed that the Accused had undergone mental assessment and declared fit to plead. The charges were then read afresh to the Accused who in response stated that the charges were not true.
  8. On 24<sup>th</sup> November 2021, when the matter was scheduled for hearing, the Accused's Counsel informed the court of the two previous conflicting mental assessment reports. The court then ordered that the Accused be taken to Kisumu for a full mental assessment and a report be filed.
  9. The record indicates that at one point, the Prosecution intimated to the court that they intended to file a Nolle Prosequi. Apparently, nothing came out of the Prosecution's review of the file because on 15<sup>th</sup> July 2022, the Prosecution informed the court that the Accused had taken plea on four separate occasions. The last one being on 28<sup>th</sup> January 2021 and then sought a hearing date. No reference was made of the conflicting mental assessment report or any other subsequent report.
  10. The Prosecution adduced evidence through five (5) witnesses. PW1 was Eric Bukhagala a brother to the Accused and gold miner who testified that on 30<sup>th</sup> July 2014 at about 4 p.m., he was from work. The following day, he woke up to do his domestic chores. At around noon, the Accused went to the house, picked an axe and hit the deceased who was his niece, on the head. They arrested the Accused as other neighbours took the deceased child to hospital but unfortunately, she died on the way. He recollected that the Accused had a problem of fainting since sitting Class 8 and was violent.
  11. On cross-examination, PW1 stated that he knew that the Accused was not mentally sound.
  12. PW2 was Edwin Litiama another brother to the Accused who recollected that on the material day, he was seated outside his house when the Accused emerged from the house with an axe and went and hit the deceased. They apprehended him and snatched the axe from him. The deceased succumbed to the injuries as she was being taken to hospital.
  13. When cross-examined, PW2 said that the deceased may have committed the offence due to mental illness as by the time he was committing the offence it was three months after treatment for mental illness. According to him, there were two children playing when the deceased was attacked.
  14. PW3 was Josephine Imbova Ishamba who testified that on 30<sup>th</sup> July 2014, she responded to distress calls from the home of PW1 and PW2 and as she walked there, she met a lady carrying the deceased. They took the child to hospital but the child died on the way.
  15. Caroline Kadogo testified as PW4 and recollected that on 30<sup>th</sup> July 2014, while she was at the river, someone went and informed her that Likavo had "finished" her child. She went home and found that



- the Accused had been arrested. She followed PW3 to the hospital but met her on the way going back home with the child who was dead. The witness identified the Accused as her brother-in-law and said that he had a mental illness.
16. In response to cross-examination, PW4 said that the Accused was friendly to her and whenever he was agitated, she would be called upon to pacify him. She said that he had a problem with seizures.
  17. The final Prosecution witness was Dr. Dickson Mchana, a Consultant Pathologist who conducted an autopsy on the body of the deceased and filled a post mortem report which he produced to the court. His testimony was that the body was of an African female infant with two fractures on the skull above both ears with extensive bleeding under the skin of the skull and oozing of brain matter through the fractures. Dr. Mchana told the court that as a result of his examination, he formed the opinion that the cause of death was severe head injury secondary to blunt force trauma following assault. On cross-examination, he said that the blunt side of the axe could have caused the fractures.
  18. After the close of the prosecution's case, the Accused was placed on his defence. However, the Accused's Counsel, while making reference to a report dated 1<sup>st</sup> March 2022, informed the court that the Accused was exhibiting tendency of mental unsoundness. He therefore prayed that the Accused be taken for further mental assessment.
  19. On 21<sup>st</sup> May 2024, the Prosecution informed the court that the Accused had been assessed and found to be unfit to face trial and requested that he be taken for treatment. The court made an order that the Accused be taken to Mathari Mental Hospital for purposes of treatment.
  20. By a certificate dated 19<sup>th</sup> November 2024, the Medical Superintendent at the Mathari National Teaching and Referral Hospital (as it was now known) confirmed to the DPP that the Accused had undergone treatment and was now capable of making his defence. The Superintendent asked the DPP for directions under Section 163 (2) of the Criminal Procedure Code.
  21. On 4<sup>th</sup> March 2025, the Prosecution indicated that there was a certificate of capability to make defence under Section 163 (1). The Accused's Counsel then sought a date for directions under Section 200 of the Criminal Procedure Code which directions were issued as prayed.
  22. In his defence, the Accused gave a sworn statement. He said that he did not know Gracious Mutakale the deceased but knew his neighbour Godfrey Makokha. He said that what happened on 30<sup>th</sup> July 2014 has to do with killing and that on the material day, someone came and took him from the shamba and informed him that they had found their child dead and that he was the one that had killed the child. He said that he was arrested by the police. He also testified that he knew Caroline Kadogo, PW2 and Derrick PW3 as his brothers. He said that he had never had a conflict with the deceased. On cross-examination, he said that he was digging his shamba when PW2 came and took him at around 2.00 p.m. According to him, Edwin told him that he found his child Celestine dead.
  23. On further cross-examination, the Accused said that he knew Gracious as the child of a neighbour by the name of Faith and that he had seen the child heading to her home alone on the material day. He denied doing anything to Gracious. He claimed that he could not recall assaulting anybody and said that he had never undergone treatment for mental illness before.
  24. In response to questions by the court, the Accused said that he did not hit anybody before his arrest. He said that before his arrest, he was suffering from epilepsy which began while he was in Primary School and for which he used to go for medication monthly.
  25. The parties were directed to file written submissions.



### **Submissions by the Accused**

26. The Accused submits that whereas the death of the Accused and the cause of death are not in doubt, the Prosecution failed to prove the ingredient of malice aforethought as there is sufficient evidence that the Accused has a history of mental illness and that on the fateful day, he was not in the right frame of mind. Relying on Sections 9, and 12 of the Penal Code, the Accused submitted that it is clear from the evidence that he did not have the requisite mental capacity for incrimination at the time he committed the offence.
27. Alternatively, the Accused submits that should he be found guilty, he should be declared guilty but insane in line with Section 166 of the Criminal Procedure Code and that he should be taken to a mental hospital for medical treatment where he is to remain until certified as no longer a danger to himself and to the society.
28. On its part, the prosecution submitted that the court should pass a verdict of guilty but insane pursuant to Section 166 of the Criminal Procedure Code.

### **Analysis and Determination**

29. There is a consensus between the Accused and the Prosecution that the deceased child was killed by the Accused who hit her with an axe. The body of the deceased was identified and a post-mortem conducted which established that the deceased succumbed to head injuries pursuant to assault. The deceased's mother gave evidence in court that her child died. The Accused's two brothers testified that they witnessed the Accused hit the deceased with an axe. There is therefore no need to belabor the point. The Accused assaulted the deceased, which was an unlawful act, without any justification and caused the deceased's death.
30. Having said that, the only issue outstanding is whether the prosecution were able to prove that the Accused harboured malice aforethought when he hit the deceased with the axe.
31. The elements required to establish malice aforethought are laid out under Section 206 of the Penal Code which states 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.”
32. Based on the aforesaid provisions of the law, the mental element (*mens rea*) is an imperative to prove murder as it is essential to establish the specific or conscious decision on intent to kill, cause grievous bodily harm, or commit a felony during which act, a person is killed.



33. In this case, the Accused person's two brothers witnessed him hitting the deceased minor with an axe therefore inflicting fatal injuries on him. This evidence was not dislodged by the defence and therefore the element of actus reus or the guilty act was established.
34. Although the Accused did not expressly raise the defence of insanity, the fact of the Accused's mental illness was a thread that ran visibly throughout the trial. At the commencement of the trial, the Accused's mental state could not be determined and the examining Doctor recommended further examination in the presence of a family member. Although the court is not an expert in medicine, the fact that the Doctor, who was not a Psychiatrist, needed to interrogate a family member of the Accused before making his decision regarding the mental state of the Accused is a pointer of a person who was not compos mentis. The concerns regarding the Accused's mental status also stem from the witnesses' testimony. PW1, PW2, and PW3, who are the Accused's family members all testified that the Accused was mentally unstable. PW3, who is a mother to the deceased, stated that the Accused had a problem with seizures and whenever he became agitated, she would be called upon to calm him down.
35. The medical reports dated 24<sup>th</sup> November 2015 by Dr. Mutai, and the one dated 25<sup>th</sup> July 2017 by Dr. Amunga, both of Kakamega County General Hospital indicate that the Accused was a known epileptic. Dr. Amunga went further to state that the Accused was unfit to plead.
36. Throughout the trial, the Accused was said to be mentally unfit the case could not take off until the Accused was committed to Mathari National Teaching and Referral Hospital where he was treated and a certificate declaring him fit to stand trial issued on 1<sup>st</sup> March 2022, that the matter was set to take off. After the matter was heard and the Accused placed on his defence, his Counsel sought an order to have him committed for treatment as he had relapsed.
37. At the defence stage, this court had the opportunity to question the Accused and observe his demeanour. He suffers from disjointed thoughts and jumbles up events to the extent that one cannot determine whether he is narrating a fact or regurgitating what he has heard.
38. Of significance to the trial are two medical reports made by Psychiatrists on 1<sup>st</sup> March 2022, Professor C. Othieno of Jaramogi Oginga Odinga Teaching and Referral Hospital examined the Accused and made a report in which he concluded that the Accused seems to suffer from an epileptic illness and has impaired cognitive function. He noted as follows:-
- “On examination: He is calm.  
His speech is slow, low volume.  
He has flat affect – expressionless.  
He has difficulty in understanding questions and gives inconsistent answers.  
It is not easy to establish whether he experiences hallucinations, delusions.  
He is oriented in time, person and place but lacks insight.  
He has healed ulcers both feet and swelling right leg and foot.”
39. On 5<sup>th</sup> March 2024, Dr. Akello Lina, a Consultant Psychiatrist at Kakamega County General Hospital also examined the Accused and found that he was not fit to plead to the charges facing him.



40. The defence of insanity is governed by Section 12 of the Penal Code which codifies the common law M’Naghten Rules and provides that:-

“ A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.”

41. In view of the foregoing, it is the duty of the court to examine the circumstances under which the Accused person committed the offence and determine whether at that time he was not of sound mind or whether the mental illness came after the offence had been committed.

42. Based on Section 12 of the Penal Code, for the defence of insanity to prevail, the Accused must demonstrate that he was suffering a disease affecting the mind at the time of the offence. The disease can stem from a permanent or temporary condition including schizophrenia, induced psychosis or epilepsy. Further, the disease must affect the Accused’s cognitive actions thereby rendering him incapable of understanding the nature or quality of the act, or knowing that the act was wrong. The Accused must, by reason of the disease, be unable to comprehend that his actions are wrong. See *Mwachia Wakesho v. Republic* [2021] KECA 223 (KLR).

43. It is the Accused’s submissions that he did not have the requisite mental capacity for incrimination at the time he committed the act as he was suffering from mental illness. In *Richard Kaitany Chemagong v Republic* [1984] KECA 64 (KLR), the Court of Appeal held that:-

“...the burden of proving an averment of insanity, once raised, lies upon the accused person to show on the balance of probabilities:

‘that at the time of the killing the deceased was=

(a) suffering from disease affecting his mind;

(b) through such disease incapable –

(i) of understanding what he was doing, or

(ii) of knowing that he ought not to kill the deceased.”

44. Whereas the burden of proving insanity at the time of the offence lies on the Accused, the standard of proof is on a balance of probability as held in *Marii v. R* [1985] KLR 70 when the Court of Appeal held:-

“...where an accused raises the defence of insanity, the burden of proving insanity rests with the accused, because a man is presumed to be sane and accountable for his actions until the contrary is shown. But while the burden rests with him, it is not such a heavy one as rests on the prosecution, and indeed after considering the evidence it is to be decided on the balance of probability, whether it seems more likely that due to mental disease the accused did not know what he was doing at the material time, or that what he was doing was wrong, and so could not have formed the intent to kill the deceased. Whether the defence has proved the case of insanity is a matter of fact.”



45. It was the evidence of the prosecution witnesses that the deceased was sick prior to the offence. PW1 said that the Accused had fainting spells since his Class 8 and had been violent. On cross-examination, he stated that the Accused was mentally unsound. PW2 said that at the time of killing the deceased, the Accused had undergone mental treatment 3 months prior. In his opinion, the Accused was mentally unsound. IN re-examination, the witness said that upon discharge from hospital, the Accused was alright but could just get excited suddenly. PW4, the victim's mother said that the deceased had "problem with seizures" and that when he would become agitated, she would be called to cool him down.
46. The witnesses' testimony is corroborated by the report by the report by the Consultant Pathologist from Kisumu who made a comprehensive report concerning the Accused person's mental status.
47. There is sufficient proof therefore that the Accused suffered from epilepsy and that as a result of this condition, his cognitive function had been compromised.
48. In the case of Leonard Mwangemi Munyasaa v. Republic [2015] KECA 382 (KLR), the Court of Appeal held that:-

"...Under the rule insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person will not be entitled to an acquittal but under section 167 (1) (b) of the Criminal Procedure Code he would be convicted and ordered to be detained during the President's pleasure because insanity is an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.

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 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..."

49. Section 166 of the Criminal Procedure Code provides:-

- (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 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.
- (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.”

50. It is impossible to prove that the Accused was suffering from insanity at the time he committed the offence, but having reviewed the evidence and the Doctor’s report, and having observed the Accused person in court, there is a possibility that at the time of committing the offence, the Accused person’s cognitive function had been so diminished that he was not in a position to know that he was committing the offence. The lack of full consciousness of his actions was reflected in his defence as he.....

51. The Prosecution urged this court to make a finding that the Accused is guilty but insane. This submission calls for a presupposition that the Accused was of sound mind at the time of the offence. However, the record shows that from the onset, the Accused was not mentally sound. This was conceded by the Prosecution. In *Wakesho v. Republic* (Supra) relied upon by the Prosecution, the court made a finding of guilty but insane. The facts in the said case are almost similar to the present case. The court rendered itself thus:-

“ 57... 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.”

52. Having said that, in view of the circumstances surrounding the offence, I make a special finding that the Accused did kill the deceased as charged but that he was insane at the time he did so. For that reason, I order that the Accused be committed to a mental hospital for treatment where he shall remain until he is certified as no longer a danger to himself or to the society.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 27<sup>TH</sup> DAY OF JANUARY 2026.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Chala for the State/Prosecution

Mr. Mbetera for the Accused

Court Assistant: Polycap

