Eleman v Republic (Criminal Appeal 9 of 2018)
[2025] KECA 828 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 828 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 9 OF 2018

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MAY 9, 2025

BETWEEN

STEPHEN ELEMAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgement of the High Court of Kenya at Naivaha (C. Meoli, J.) dated 20th December 2017 in CRA No. 38 of 2015)

JUDGMENT

1. This is an appeal against the judgment of Meoli J. delivered on 20th December 2017 in Naivasha High Court Criminal Case No. 38 of 2015 in which she convicted the appellant for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and sentenced him to death. The indictment against the appellant was that on 20th May 2015 at Kikopey Trading Centre in Gilgil Sub-County, he murdered Naomi Wangui Eleman.

2. The appellant was first presented in court on 2nd June 2015, but he could not take a plea because a report from a psychiatrist at Gilgil Sub- County Hospital indicated that he was not mentally fit to plead, therefore, he was admitted at Mathari Mental Hospital for treatment. On 10th February 2016, the trial court recorded that Mathari Mental Hospital had confirmed that the appellant had recovered and he was fit to stand trial. This information was contained in a report from the said hospital dated 22nd December 2015.

3. In the ensuing trial, the prosecution called a total of 7 witnesses. PW1, then aged 9 years was in class four at the time he testified. The appellant and the deceased are his parents. He gave unsworn evidence. At the time of testifying, together with his other siblings they were living in a children's home. His evidence was that his parents quarreled quite often, and his father often beat their mother, (the deceased). In 2015, the deceased relocated with her children to Kikopey to live with his grandmother,

PW4. It was his evidence that one day, the appellant came to where they were staying at Kikopey and asked them to go back home, but his mother refused. He testified that on the fateful day he went to School and left his mother preparing to go to work but that was the last day he saw her alive. On cross examination, he stated that the appellant often threatened to kill the deceased, and commit suicide.

4. PW2, (the deceased's grandmother) saw the deceased's body at the mortuary on 21st May 2015 and noted that her neck was slit and the body had knife cuts. It was also her evidence that the deceased went to live with her at Kikopey in 2015 after the appellant beat her and evicted her from their home.

5. PW3 was aged 17 years at the time of giving evidence. He recalled that on 20th May 2015 on their way from school, they heard a lady screaming from a valley. They went nearer and saw a man holding a lady about 15 meters away from where they were. Ibrahim Maina, the oldest boy among them went nearer to intervene, but the man produced a knife prompting him to ran away shouting the man is armed. The next day on their way to school they saw a crowd at the same place and at the scene they saw the body of a lady lying at the same spot they had seen a man and a lady the previous day. He identified a kiondo he saw the previous day. It contained potatoes and a small bag. They were accompanied to the police station by their teacher. In court, he identified the kiondo, 8 caps, wallets, driving license cover, a black wallet, red and black sports bag, marvin and safari boots and a red bag.

6. PW4, the deceased's mother testified that the appellant was cohabiting with the deceased, although they had not wedded formally, that the deceased relocated to Kikopey in March 2015 after the appellant threatened to kill her. Subsequently, they had a meeting with the appellant and the deceased and owing to the beatings meted on her by the appellant and threats to kill, the deceased opted to live at kikopey and the appellant agreed to her decision. It was her evidence that on 20th May 2015, the appellant came to Kikopey and left with the deceased in the morning but unlike previous similar instances, this time the deceased never returned. On 21st May 2015, she was informed that a body had been found nearby. She went to the mortuary where she saw her body which had stab wounds and the neck was slit. She identified the items which were collected at the scene, among them the deceased's kiondo, the items the appellant was hawking which included hats and purses and the appellant's red bag, safari boots and his woolen marvin.

7. PW5 testified that on 21st May 2015 on his way to school, he found a crowd of children viewing the body of a lady. In court he identified the items found at the scene and recalled that the previous day at around 6pm on their way from school, they heard a lady screaming and he went close, but the appellant produced a knife menacingly and himself and the other boys including PW1 ran away. It was his evidence that he knew the deceased.

8. PW6, PC Joseph Thuo was at the material time attached to the Gilgil Police Station. On 20th May 2015 at around 11.45pm, officers at the Crime Office called him and asked him to attend to a person who was barefoot, he wore a jacket without a shirt and he appeared confused. The person said he had fought with his wife, whom he only referred to as Mama Willie and feared she had been injured but he could not divulge where the fight took place. They put him in custody, but the next day, at 8.00am, the Officer Commanding Station (OCS) said he had learnt that pupils from Gilgil Garrison Secondary School had reported seeing a body of a female on their way to school. In the company of IP Kirui, the OCS and pupils, they proceeded to the scene where they found the body lying against a trunk, seemingly, having rolled down hill. They also saw a knife at the scene. The body had a deep wound on the neck, and there was a blood trail going downhill which led them to a disturbed area. They found a pair of safari boots, and about 8 caps, piece of white cloth with blood, one marvin, a black pack and 5 wallets, a licence cover and a kiondo containing rice and potatoes. There was also a yellow leso on the deceased's neck. The jacket, knife and yellow leso were forwarded to the government chemist. Upon

questioning the appellant led them to the scene of the fight and to the deceased's mother's home. A post mortem was conducted on the body on 26th May 2015.

9. PW7 CIP Simon Kirui, previously attached at Gilgil police Station testified that on 20th May 2015 at mid night, he received information that a man had presented himself at the police station and reported having fought with his wife but he could not recall the scene. He was detained in custody and the next day they received a report from Garrison Secondary School that a female body had been seen in a valley. At the scene, they saw a woman's body and the items listed earlier scattered all over. Her mouth was tied with a leso and her throat was cut. They took the body to the mortuary and collected the items found at the scene. The appellant led them to the scene and the deceased's mother's home. The appellant's counsel did not object to the witness producing the post mortem report.

10. On 27th July 2017, the appellant's counsel informed the court that the appellant was not disputing the deceased's death, but his sole defence was insanity.

11. In his defence, the appellant said that he found himself at Mathare Mental Hospital after the alleged incident where he learnt that he killed his wife. He stated that he was treated at the said Hospital in 2015 and he was discharged in 2016. He admitted that he murdered the deceased but he could not tell what provoked him. He stated that he loved his wife but he could not tell how he came to kill her. He produced in evidence treatment cards showing he was treated at Gilgil Hospital.

12. In the impugned judgment dated 20th December 2017, after analyzing the evidence, the provisions of the law relating to the defence of insanity and authorities, the trial judge rejected the appellant's defence of insanity and returned as verdict of guilty. After considering the appellant's mitigation, the circumstances under which the murder was executed, and the Supreme Court decision in Muruatetu & another vs Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR) (the Muruatetu case) which held that the death penalty is not mandatory in murder cases, the learned judge sentenced the appellant to suffer death.

13. In his quest for justice, the appellant appealed to this Court citing 5 grounds of appeal. However, before the trial as mentioned earlier, the appellant's advocate informed the court that the deceased's death is not disputed and that the appellant was only raising one ground, namely, the defence of insanity. In fact, his defence as recorded by the trial court revolved around this one ground. Accordingly, we will only address this one ground in this judgment, which was the only issue before the trial court.

14. The appellant's counsel, Miss Wangari, in her written submissions dated 13th February 2025 cited the High Court decision in Kenya National Commission on Human Rights & 2 Others vs. Attorney General; Director of Public Prosecutions & 3 Others (Interested Parties); Law Society of Kenya (Amicus Curiae) (Constitutional Petition E045 of 2022) [2025] KEHC 6 (KLR) (9 January 2025) which held that attempted suicide is unconstitutional and maintained that the appellant exhibited signs of mental health (sic) before committing the offence. Citing the provisions of section 167 (1) (a), (b), and (c) of the *Criminal Procedure Code*, counsel submitted that the trial court should have considered appellant's underlying mental condition. Lastly, counsel described the sentence imposed on the appellant as harsh.

15. Learned counsel for the respondent Mr. Omutelema in his written submissions dated 30th January 2025 which he adopted submitted that sections 9 (1), 11 and 12 of the *Penal Code* provide for (a) acts which occur independent of a person's will, (b) presumption of sanity, and, (c) sanity. He cited C.N.M. vs. Republic [1985] eKLR which underscored that once an accused person invokes the defence of insanity, the burden of prove lies on him to prove insanity. He maintained that the trial court correctly applied the applicable principles in determining the case.

16. As to whether the appellant proved that he was suffering from insanity, Mr. Omutelema cited Ellis vs. Republic [1965] EA 744 at 791 which held that whether a defence of insanity is proved is a question of fact and maintained that by a report dated 22nd December 2015, the appellant was found to be fit to stand trial. Counsel underscored that the credible testimony tendered by PW1, PW2 and PW4 confirmed that the appellant was sane and he knew what he was doing. He also referred to the many instances the appellant assaulted the deceased and argued that his conduct suggests he was in control of his faculties. He maintained that the prosecution proved malice aforethought.

17. Mr. Omutelema further submitted that the appellant appreciated the consequences of his actions and cited section 12 of the *Penal Code* and the MacNaughten's case [1843] UKHLK J16 in support of the holding that "to establish a defence of insanity, it must be clearly proved that at the time of committing the act, the accused was laboring under such a defect from decease of the mind as not to know the nature and quality of the act he was doing, or, if he did not know, that he did not know what he was doing was wrong." To further buttress his submissions, Mr. Omutelema cited Lord Goddard in Regina vs. Windle [1952] QBD 826 statement that the word "wrong in the rule means contrary to law, and not wrong according to the opinion which the person accused or other people might hold on the question whether the act might be morally justified."

18. Counsel recalled that the appellant went to the deceased's home, in the morning, he followed her to her place of work and waited for her in the evening as she went home. Further, the appellant was armed with a knife which he used to slit her throat. He chased away students who tried to intervene to stop the attack. He reported the incident to the police the same evening, and although looking confused, he knew what he had done was wrong. Counsel argued that the trial judge correctly held that the accused person exasperated by the deceased's adamant refusal to return to her matrimonial home decided to deal with her violently, that he armed himself with a sharp knife and waylaid her on her way from work, attacked her and slit her throat and inflicted the severed injuries on her manifesting a clear intention to cause her death.

19. Regarding sentence, Mr. Omutelema submitted that the appellant was afforded an opportunity to mitigate and the trial court considered his mitigation and the aggravating circumstances surrounding the commission of the offence and ultimately imposed what it correctly considered to be an appropriate sentence on the appellant, which is death and urged this court to uphold the said sentence.

20. As stated earlier, the appellant does not dispute that he caused the deceased's death. However, he raised the defence of insanity. Therefore, this appeal will turn on this one germane issue, which is, whether the trial judge erred in failing to uphold the appellant's defence of insanity. In an insanity defense, the accused admits the action, but asserts a lack of culpability based on mental illness. The insanity defense is classified as an affirmative defense, which means that an accused introduces evidence, which, if found to be credible, will negate criminal liability, even if it is proven that the accused committed the alleged acts. The party raising the affirmative defense has the burden of proof on establishing that it applies. Raising an affirmative defense does not prevent a party from also raising other defenses. (See Insanity defense, Legal Information Institute, Retrieved on 17th April 2025).

21. Confronted with the defense of insanity, the learned judge at paragraphs 17 and 18 of the impugned judgement cited this Court's decision in Leonard Mwangemi Munyasia vs. Republic [2015] eKLR, in which this Court set out the historical background to the formulation of the principles commonly known as the McNaugthen Rules in the United Kingdom and stated:

> " 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...

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. Borrowing from a medieval English Judge, Brian CJ in a 1468 case of Greene vs Queen, and who in turn reiterated Cicero who famously remarked that: -

"The thought of man is not triable, for the devil himself knoweth not the intendment of man",

We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus, it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.

What must be avoided and what this court has warned against in the two decisions relied on by the appellant's advocate in this appeal, is the likelihood of sentencing to death a person with a mental disorder. Therefore, it is the duty of trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question. Indeed, it would serve as a good practice, like it is in England, to call evidence based on the opinion of an expert in such cases in terms of Section 48 of *Evidence Act* to explain the state of mind. It is the duty of both the investigating officer and the defence, to have the accused person subjected to a medical examination to establish whether he suffered from the disease of the mind that affected his mind and made him incapable of understanding his action. In addition, and in order to ascertain the accused person's state of mind at the time of the offence, the expert opinion of a forensic psychologist, may also be sought. The field of forensic psychology has become a popular field of psychology in Kenya, yet their expertise is hardly sought in criminal trials." (emphasis added)

22. In general terms, the above decision sums up the law and guiding principles in cases where a defence of insanity is raised. However, it is important for us to underscore that Section 11 of the *Penal Code* establishes the presumption of sanity. It states that "every person is presumed to be of sound mind, and to have been of sound mind at any time which comes into question, until the contrary is proved." This means that every person is assumed to be legally responsible for his/her actions unless there's evidence to the contrary. The phrase "until the contrary is proved" in section 11 means that the presumption may be rebutted by proof on a balance of probabilities.

23. Equally important is the fact that Section 11 is not a stand-alone provision. It must be read in conjunction with other sections, such as Section 12 of the *Penal Code*, which outlines the criteria for proving a legal defense based on insanity as follows:

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> "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."

24. The settled position of law is that every person is presumed to be sane and to possess sufficient degree of reason to be responsible for his acts unless the contrary is proved. The burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by section 12, lies on the accused who claims the benefit of this exemption. The accused must prove, on a balance or probabilities, that unsoundness of mind was present to such an extent that at the time of commission of the offence, he could not know the nature of the act he was committing.

25. The defence under section 12 is based on the principle that in order to constitute a crime, the act should have been committed with 'guilty' intention, and if the doer of the act did not know the nature of the act; the wrongfulness of the act; or the illegality of the act committed, he cannot be held responsible for it. However, the unsoundness must exist at the time of the commission of the offence. Therefore, whenever a defence of insanity is raised, the court has to consider whether at the time of the commission of the offence, the accused was suffering from unsoundness of mind or not. Unless the court comes to the conclusion that the accused was insane at the point of time he committed the offence, he cannot be absolved of the responsibility of the offence even if it is found by the Court that he was insane either earlier or in the later point of time of the commission of offence.

26. If the accused is at that crucial moment found to be laboring under such a defect of reason as not to know the nature of the act he was doing, or that even if he knew it, he did not know it was either wrong or contrary to law, then section 12 applies. In the impugned judgment, the learned judge first addressed her mind to the appellant's mental condition as at the time of taking the plea. She stated:

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> "19. In the present case, the Accused was found to be unfit to take plea on the first arraignment. The psychiatrist's report dated 29th May, 2015, the presumed date of examination states that:
> "He was accompanied to hospital by a police officer for mental assessment. He is wearing torn and dirty civilian clothes. He is able to respond to most question asked, though some responses are inappropriate. His mood is low. He has been having auditory hallucinations. He lacks insight. He is not fit to stand trial. He will benefit from treatment (antipsychotics) as he is mentally unstable."

27. The learned judge then proceeded to address her mind to the report dated 22nd December 2015 from Mathari Mental Hospital as follows:

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> "20. Unfortunately, the subsequent report filed into court by Mathari Mental Hospital and dated 22nd December 2015 merely stated that the Accused had become capable of making a
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> defence...."

28. The use of the word "unfortunately" in the above excerpt in worth noting. The report dated 22nd December 2015 from Mathari Mental Hospital simply stated that the appellant was fit to stand trial. It never provided the history of the patient, findings on examination at the time he was admitted, the treatment given, prognosis and opinion or the professional assessment which could guide the court in understanding the appellant's mental state as at the time of committing the offence. We also note that despite its importance, this report was casually mentioned in court, basically to confirm the appellant's fitness to stand trial, not to prove his state of mind as at the time he committed the offence. Therefore, the relevancy of this report is strictly limited to its finding that the appellant was fit to stand trial, and not, to address his mental condition as at the time of the offence. In fact, from his wording, this report was never meant to assist in ascertaining the appellant's mental condition as at the time he killed the deceased. To this extent, this report is of little probative value to the appellant's plea of insanity.

29. In support of his plea of insanity, the appellant relied of the fact that he was treated at Mathari Mental Hospital. As mentioned above, there is nothing to show his exact ailment, if any, and whether it affected his capability to make a sound decision at the material time. Luckily, the scanty evidence relied upon by the appellant in support of his plea of insanity is not to be considered in isolation. It must be weighed against the prosecution evidence and the law. In this regard, the trial judge had the following to say:

> "23. Regarding this background and the accused's own defence, no evidence was tendered regarding his previous treatment as a mental patient despite the order made on 12th May 2016 at the defence request. It was then said that the accused had misplaced his previous medical documents which presumably contained his medical history. This history however was not given orally at the defence hearing.
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> 24. Thus concerning the said history as gleaned from both sides, the court has to ask itself whether the fact that a person is repeatedly violent against a spouse and threatens suicide is conclusive evidence of mental illness. This is not an easy question to answer because it is not uncommon in our society for spouses, particularly males, to resort to physical violence, intimidationn or even manipulation by threatening a spouse with suicide, as a means of dealing with relational difficulties between spouses. The fact that the accused went as far as bringing poison and displaying it in the house, may not mean that he was suicidal due to mental illness necessarily. Evidence of past mental illness would have brought clarity on this issue.
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> 25. But moving closer to the material period, evidence by PW4 was that after the deceased left the matrimonial home and commenced her stay at Kikopey, the Accused tried on several occasions to convince her to go back to the matrimonial home. In one instance, he came accompanied by his alleged

brother and held discussions with the deceased and PW4. It would seem that in that period the Accused did not attack the deceased or in any way act violently towards her or PW4.

26. Indeed, it appears that he had moved to Gilgil and visited the deceased often at PW4's home. He continued to hawk his merchandise as evidenced by the goods found at the scene of murder. In May, he had called the deceased to go back and threatened suicide, but the deceased did not yield. It was after this event that he started coming early to PW4's house and leaving with the deceased as she left for work, and escorting her back home in the evening.

27. According to PW4, the Accused continued to press the deceased to return to his home, which the deceased flatly refused, as she had already enrolled the children in school. Pausing here, the Accused's conduct thus far is consistent with that of a sane, reasonable man whose wife has left the matrimonial home making efforts to persuade her to return to him by all means. His persistence, without more cannot be evidence of mental illness. Rather, it is the conduct of a sane estranged spouse who desires to mend the marital breach.

28. On the actual date of the murder, the Accused was observed by two students PW3 and PW5 while engaged in a scuffle with the deceased.

30. The state of mind which entitles an accused to avail the benefit of Section 12 of the *Penal Code* is to be established from the circumstances which preceded, attended and followed the crime. There is a duty on the defence to prove the unsound state of mind of the accused at the time of commission of the offence. One who is subject to recurring fits of insanity will be entitled to exemption from criminal liability only if he was subjected to such a fit at the time of the commission of the crime. If he was capable of understanding the nature and consequences of his actions at the time when he committed the offence, he would not be entitled to the protection of Section 12 and would be liable to punishment. (See V. Deswal, Insanity as a Defense to Criminal Charge – An Analysis; Delhi Journal of Contemporary Law (Vol. II)).

31. The words 'incapable of knowing' in section 12 clarifies that an accused has to prove that he was rendered incapable of understanding his actions owing to unsoundness of mind. What is protected under Section 12 is an inherent or organic incapacity and not a wrong or erroneous belief which might be the result of perverted potentiality. This incapability may be due to arrested development of the mind, sudden fit of insanity or delusion or some other medically accepted ground. As was held by the Supreme Court of India in the case of Lakshmi & Ors vs. State of U.P AIR 2002:

> "A person might believe so many things. His beliefs can never protect him once it is found that he possessed the capacity to distinguish between right and wrong. If his potentialities lead him to a wrong conclusion, he takes the risk and law will hold him responsible for the deed which emanated from him. What the law protects is the case of a man in whom the guiding light that enables a man to distinguish between right and wrong and between legality and illegality is completely extinguished. Where such light is found to be still flickering, a man cannot be heard to plead that he should be protected because he was misled by his own misguided intuition or by any fancied delusion which had been haunting him and which he mistook to be a reality. Our beliefs are primarily the off springs of the faculty of intuition. On the other hand, the content of our knowledge and our realization of its nature is born out of the faculties of cognition and reason. If cognition and reason are found to be still alive and gleaming, it will not avail a man to say that at the crucial moment he had been

befogged by an overhanging cloud of intuition which had been casting its deep and dark shadows over them."

32. In determining the question whether the appellant had the mental capacity to understand what he was doing, the learned judge had this to say:

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"28. On the actual date of the murder, the accused was observed by two students PW3 and PW5 while engaged in a scuffle with the deceased. The accused in his charge and cautionary statement recorded by PW7 on 26th May, 2015 and produced an Exhibit 9 gave an account of the events of 20th May, 2015:

"The suspect having understood the charge and caution wishes to state as follows: -

I do recall very well that on 20th day of May, 2015 I came to Gilgil from Nakuru. I was communicating with my wife N W E by borrowing phones and we had agreed that I come wait for her and escort her home after work as she does manual work at Army Camp. I came and waited for her at about 6.00pm and while she headed home, she found me on the road. As I escorted her, I do not remember what happened but I do remember we disagreed and fought somewhere on the way. I left her while I had critically injured her and I found my way to police station where I reported that I fought with my wife and the police arrested me, telling me to wait until morning so that I take them to where I had fought with my wife. I then slept at station until the following day when I was picked by police and I took them to where I had fought with my wife, Mama W (W I) who is my first-born son's name. I took police to the scene but I did not find Mama W, I took them to cucu's place where I found my children but their mother was not there. That is the much I can remember, since I have had problem of forgetting things.

That is all I state."

33. The learned judge at paragraph 29 of the judgment noted that PW3 and PW5, testified that when they attempted to intervene, the appellant chased them with a knife. The learned judge had this to say about these two witnesses:

"30. I observed them testify. I do believe PW3 and PW5 were credible witnesses. They maintained a good demeanour and answered with apparent candour the questions put to them during cross- examination. They have no axe to grind with the accused and their involvement in this family tragedy was purely coincidental because of their use of the path close to the scene of murder, to and from school. What they described is consistent with the accused's narration in the charge and cautionary statement."

34. Unlike this Court, the trial court had the benefit of seeing and hearing these witnesses first hand. We have no reason to doubt this lucid observation. The learned judge proceeded to state:

"31. That the Accused had the presence of mind to chase away these two boys when they interrupted him, and later presenting himself to the police at 11.45pm, to my mind negates the suggestion that at the material moment, he did not know what he was doing or that it was wrong. The Accused's cautionary statement is detailed enough concerning his meeting the deceased on 20th May 2015 and surrounding circumstances, and it narrates how a disagreement arose as he escorted the deceased home.

32.He states that he recalled a disagreement and a "fight" between them along the way as he escorted her. He also recalled that she was critically injured after the fight and thus his report to the police station. This part of his statement gives credibility to the evidence of the two police officers PW6 and PW7 who interviewed the Accused when he arrived at the station at 11.45pm."

35. Section 12 applies where a person, as a result of mental disease or defect, lacks substantial capacity to know or appreciate either that the conduct was against the law or that it was against commonly accepted moral principles, or both. This Court in Wakeshovs.Republic (Criminal Appeal 8 of 2016) [2021]KECA 223 (KLR) (3 December 2021) (Judgment) observed as follows:

> 43. The critical point at which the mental state of the accused person is relevant for purposes of the defence of insanity is at the time of commission of the act complained of. If the appellant was suffering from a disease which affected his mind and made him incapable of understanding what he was doing or knowing that what he was doing was wrong at the time of the commission of the offence of murder, then he was no responsible for his act.
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> 44. As stated by this Court in Leonard Mwangemi Munyasia v Republic [2015] eKLR:
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> "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.
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> 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."

36. In cases where a plea of insanity is raised, there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by section 12 of the *Penal Code*. The accused may rebut it by placing before the court all the relevant evidence - oral, documentary or circumstantial, but the burden of proof upon him is not higher than that rests upon party in civil proceedings i.e. on a preponderance of probabilities. Though the burden lies on the accused to prove his insanity at the time of occurrence of the offence, it will be sufficient if the materials on record lead to an inference that the requirements of section 12 may be reasonably probable. Such an inference can be drawn from materials on record, past history of the accused, conduct of the accused during the occurrence and thereafter. Absence of motive though not a sine qua non, is a relevant factor for consideration.

37. We note that the learned judge correctly addressed her mind to the events prior to the murder to demonstrate that the appellant was aware of all the happenings. Without repeating the relevant events in detail, the deceased was married to the appellant, the marriage was rocky and characterized by brutal violence meted on the deceased by the appellant including threats to kill her. The deceased fled with her children to Kikopey and the appellant is said to have visited her several times pleading with her to return home with the children but she declined her request. On the fateful day, he visited her at her mother's place at Kikopey, left with her in the morning as she was going to work, but that was the last day she was to be seen alive. He does not dispute killing her. With this detailed history and with no prior evidence of insanity or treatment for mental health, we agree with the learned judge that the appellant never tabled evidence to rebut the presumption of sanity on a balance of preponderance of evidence. Therefore, his plea of insanity was properly rejected.

38. Regarding sentence, we note that the trial court after considering the circumstances and the manner in which the offence was executed, noted that the Supreme Court decision in Muruatetu & Ano. vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2017] KESC 2 (KLR) did not take away the court's discretion to impose an appropriate sentence in murder cases, rather it made the death penalty discretionary rather than mandatory.

39. The import of the above Supreme Court decision is that judges have discretion while sentencing persons convicted of the offence of murder, and in exercising their discretion, they are required to take into account both mitigating factors (e.g. provocation, self defence, accidental, youth, lack of prior criminal record, cooperation with authorities, remorsefulness), and aggravating circumstances (e.g., brutality (i.e. extreme violence), multiple victims, use of weapons, victim vulnerability, premeditation, public impact). We agree with the trial judge that the death penalty is lawful and can be imposed in appropriate cases. What the Supreme Court outlawed in the Muruatetu case is the mandatory nature of the death penalty. We note that the trial court considered the appellant's mitigation and the manner in which the offence was committed and the gravity of the offence. Accordingly, we find no reason to interfere with the death sentence imposed on the appellant. The upshot of the foregoing is that the appellant's appeal against both conviction and sentence fail and is hereby dismissed.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY, 2025

M. WARSAME

JUDGE OF APPEAL

J. MATIVO

JUDGE OF APPEAL

M. GACHOKA CIARB, FCIARB.

JUDGE OF APPEAL