KLA v Republic (Criminal Appeal 39 of 2021)
[2024] KECA 1176 (KLR) (20 September 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 39 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

KLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (R. Nyakundi, J) delivered on 1st October 2013 in Criminal Case No 22 of 2008)

JUDGMENT

1. The appellant, KLA, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars being that, on 2nd October 2008 between 6.00 am and 9.00 am at Banda la Salama village within Kilifi District of the Coast Province, he murdered Nguyete Mwango.

2. The appellant pleaded not guilty to the charge and, in order to prove its case, the prosecution called 16 witnesses. PW1 - Kokola Mwango Nguyete, the mother of the deceased, testified that, on 2nd October 2008 at about 7:00 am, she was at home when the appellant, who was her neighbour, came accompanied by PW6, PW7, PW11, Chibungu Kadoli, Sande, Bidii, Makupe and Kahwui; that they knocked on the deceased's door and when the door was opened, they accused the deceased of practising witchcraft and demanded that he exorcises the spell inflicted on the appellant by the deceased; that, when the deceased denied and proposed that they go and take the oath, the group declined to do so, at which point the deceased proposed that they go to PW13's home who was alleged to be the deceased's accomplice; that they all left along with PW1; that, on arrival at PW13's home, they explained themselves, and were asked by PW12 to take the oath, but the appellant and his company declined; that the appellant then left and returned with a panga with which he struck the deceased; and that the deceased's attempt to flee was not successful after he got trapped and fell as the appellant

continued cutting him with the panga on the head inflicting injuries on the deceased from which he died.

3. PW2, Doris Mwambili, confirmed that she was with PW1, her mother in law, when the appellant in company of others went to the deceased's house and ordered him out on the allegation that he had bewitched the appellant, and that they wanted him to remove the spell he had cast on him; that, upon their insistence, the deceased, accompanied by PW1, left with the group and, shortly thereafter, she heard screams coming from PW13's home; and that, when she proceeded to the scene, she found the deceased already dead and bleeding from the head.

4. PW3, Mkambe Uyete, the deceased's wife, recalled that, on 2nd October 2010, she was at her farm at about 9.00 am when she received the information that the deceased had been attacked; and that she went to the scene and found the deceased with cuts on the head and the face with one eye gouged out.

5. The same day at 8.00 am, PW6, SJ, woke up to some noises and, on following the direction from which it was coming, he met his uncle, the appellant, with his blood stained clothes holding a panga in his hands and shouting "I have killed, I have killed"; that he proceeded to the scene and found that the deceased had been killed; and that, upon following the appellant, he found him having surrendered himself to the police. The same day, PW7, JA, a brother to the appellant and a palm wine seller, was returning from collecting palm wine from palm wine tappers when he found the deceased having been killed; that, on the day before, the appellant had informed him that he was being bewitched, but did not reveal who the culprit was; and that the appellant, who was perpetually anxious and restless, had been mentally sick for about one month during which period he used to attack people and had not been treated.

6. On the same day, 2nd October 2008 at about 6.00 am, PW8, KMY, the appellant's sister-in-law, was coming from the toilet when the appellant, who was mentally ill, emerged running towards PW13's home; that, alarmed, PW8 ran to her house; that, shortly thereafter, she heard noise from the said home and on her way there, she met the appellant going towards the District Officer's office; that, by then, the deceased had already been killed; and that, for about three weeks prior to the incident, the appellant had been aggressive, noisy and kept on shouting that there were people pursuing him in his sleep, and that he would die. PW9, PJ, a sister-in-law to the appellant, saw the appellant on 2nd October 2008 at 6.00 am standing outside before he left for the deceased's home; that, due to the appellant's mental illness that had affected him for about 2 months, they followed him upto the deceased's home before leaving for PW12's home where they discussed the issues of his concern whereupon the deceased was subjected to an oathing ceremony before they returned home; that, shortly thereafter, she heard that the appellant had cleared the witch; and that she was not aware of the circumstances under which the appellant slipped back to PW13's home where he killed the deceased.

7. According to PW10, RM, the appellant's brother, on 2nd October 2008 at 6.00 am, the appellant went to his house and informed him that he (the appellant) was not feeling well, and that his condition had worsened; that the appellant proceeded towards the deceased's home; that, on arrival at the deceased's home, they left for PW13's home in the company of the deceased where discussions took place and PW12 ordered that they go for oathing; that PW10 left, but before reaching home, he heard screams from the direction he had come; that, on returning, he met the appellant, who appeared wild and aggressive carrying a blood stained panga and shouting "I have killed him"; that, scared, PW10 gave way for the appellant and proceeded to the scene where he found that the deceased had been killed; that he did not know why he had been killed, but that, previously, the appellant had claimed that he had been bewitched by the deceased, PW13 and PW14; that the appellant claimed that the trio appeared to him in a dream and showed him two chicken one of which was to die; that the situation persisted for about one month during which he would wake up feeling weak and claiming that his eyes were not

focussing well; that the appellant sought the services of a witch doctor who treated him, but that his condition did not improve; and that, at times, his speech would be totally incomprehensible.

8. According to PW11, Thomas Kazungu Tunu, in July 2008, the appellant informed him that there was a witch doctor he wanted to call to come and cleanse their home because there were witches in the home; that the witch doctor came and removed the items he claimed were paraphernalia planted by a witch in the home to adversely affect the appellant and gave everyone some protective concoction; that the witch doctor was paid Kshs 15,000 by the appellant and a goat was slaughtered; that they believed that the appellant had been healed but that, on 2nd October 2008 at 6.00am, he woke up to find a large crowd gathered at the appellant's house; that on approaching the house, he found the appellant in a wild and agitated state shouting that "my Kshs 20 is going to cause my death"; that, shortly thereafter, the appellant left for PW13's home followed by the crowd, including PW13 and the deceased's family members; that the appellant claimed that the deceased and PW13 had bewitched him; that the ensuing discussions did not yield any agreement, after which the elder directed that the deceased and the appellant go for oathing to establish the truth; that people started dispersing, including PW11; that, shortly thereafter, there was a stampede, and that he was told: "you are working and your brother has killed and is on his way with a panga going to report to the police"; that he did not witness the killing of the deceased; and that, in his view, the appellant was normal, but claimed that the family of PW13 and the deceased had laced his drink with charms, and that this was what was distressing him.

9. At around 7.00am on 2nd October 2008, PW 12, Thomas Jira Tsuma, was at his home when two people, Lewa Mwadzoya and Jembe Mtawali, requested him to accompany them to PW13's home where the appellant was alleging that the deceased and PW13 had bewitched him; that, at PW13's home, the appellant alleged that he was drinking with the deceased and PW13 and that, from that day, his health deteriorated; that he believed that the two had bewitched him; that PW12 asked them to accompany him to the Chief's place, but the appellant declined, insisting that he wanted the two to cleanse him; that the deceased and PW13 refused to do so, insisting that they go for the oathing, but the appellant claimed that he had no money to pay for the administration of the oath; that PW12 persuaded them to go for the oathing but, after walking for about 20 metres, he heard shouts of "ana uwa, ana uwa"; that, on turning back, he saw the appellant having knocked the deceased down cutting him with a panga; that PW12 ran to call the chief and, on his way, he met police officers who had already received information about the incident, and that he accompanied them back to the scene; that, before the incident, the deceased and PW13 had reported to him in his capacity as the village elder that the appellant had alleged that they were witches, and that he had threatened them;

    that he had summoned the appellant for a meeting for 3rd October 2008; that, in his view, although the appellant was ailing, he appeared normal; and that the appellant had complained to him that he started experiencing stomach problems after sharing liquor with the deceased and PW13.

10. PW13, Sebastian Matano Mzungu, testified that on 8th July 2008 at about 7.00pm, he went to a cafeteria at the deceased's home with two bottles of liquor; that he found the appellant, the deceased and PW14, whom he invited for a drink; that the deceased then gave him Kshs 20 to buy an additional bottle of liquor which they shared and went home; that, three days later, the appellant went to his home and asked him why, he had developed constant headaches and was always dreaming of dead people since the day they shared the drink; that PW13 told him to seek medical help because it could be malaria, but that, if things did not improve, he should consult a witchdoctor; that, thereafter, the appellant started bringing witchdoctors to his home and later announced that the deceased, PW13 and PW14 were witches; that PW13 reported the matter to PW12 and informed him that the deceased

had made a similar report, and that he would summon a meeting for 3rd October 2008; that, on 2nd October 2008, a large group comprising the appellant went to his home and demanded that he must cleanse the appellant, but that he declined, saying that he had done nothing wrong, and that the matter was pending before the elders for the following day; that the appellant insisted that he could not wait for the case because he had been told that he would die that very day; that the group then left briefly, but returned and, that the appellant pulled out a panga which he had concealed around his waist and started slashing the deceased; that PW13 fled and stood at a distance while the appellant continued cutting the deceased until the deceased lay still; that he rushed to the chief's office to report and, on his way, he met the chief, police officers and the appellant under arrest; that the appellant was his neighbour with whom they had shared liquor several times before; that the community in Banda believed a lot in witchcraft which he confirmed exists and that, whenever issues of concern arose, they would consult witchdoctors; that, after he recommended to the appellant to consult the witchdoctor, he met the appellant, who informed him that his condition had improved; that the appellant alleged that the information that they were witches was disclosed to him in his sleep; and that PW12 went to his compound and tried to persuade them to wait for the decision of the elders, but that the appellant declined.

11. PW14, Steven Charo Konde, recalled that, on 8th July 2008 at 7.00pm, he went to the deceased's cafeteria where he found his drinking mates, the deceased, PW13 and the appellant drinking and joined them until 10.00 pm; that, a week later, he heard that the appellant was unwell and that, when he went to visit him, the appellant informed him that he intended to consult a witchdoctor; that, two weeks later, he received information from the deceased that it was being alleged that the deceased, himself and PW13 had bewitched the appellant and they decided to report the matter to the chief; that the deceased and PW13 proceeded to report the matter, and a date was set by the elders for the hearing on 3rd October 2008; that, on 2nd October 2008, he was woken up very early by noises and knocks on his door and, when he opened, he saw the deceased and the appellant, amongst others, who demanded that he accompanies them to PW13's home; that the group said that they had brought the appellant for cleansing from the spell they had cast on him because the appellant was to die that very day; that they declined, and the deceased proposed that they go for oathing; that the group left briefly and, when they returned, the appellant produced a panga with which he started cutting the deceased as the people fled; and that PW14 stood at a distance and witnessed the deceased being slashed by the appellant before running to the DO's office to make the report, but met the police on the way.

12. PW5, Cpl Paul Mwanza, an administrative police officer attached to Kilifi Chonyi Division, confirmed that while on patrol with Cpl Peter Kyalo on 2nd July 2008 at about 8.30am, they met the appellant with blood stained clothes holding a panga and claiming that he had killed without disclosing who he had killed; that, on being ordered to drop the panga, he obliged after which they arrested him, took the panga from him and handed him over to Kilifi Police Station; and that, from the scene, they found the body of the deceased with several cuts under the eye.

13. PW15, PC Daniel Nyamu, confirmed that on 2nd October 2008 at about 10.00am, the OCS informed him of a report of murder at Banda Salama village in Chonyi area; that, in the company of the OCS, they proceeded to the scene where they found the appellant under arrest by the Administration Police Officers and the deceased's body lying on the ground; that the deceased had severe injuries on the forehead; that he drew a sketch map of the position of the deceased after which they moved the body to Kilifi District Mortuary; that he later took the appellant's blood stained Tshirt, the panga and the exhibit memo to the Government Chemist for analysis; and that he also took the appellant to a psychiatrist for examination.

14. PW4, CIP John Maina, one of the investigating officers, testified that on 2nd October 2008 at about 10.00 am, he received a call from AP Senior Sergeant Baya informing him that he had arrested a murder suspect; that, in the company of PW15 and driver PC Kirori, they proceeded to Chonyi DO's Office where they found the appellant handcuffed; that they received information that the appellant was arrested during a patrol when the appellant, who was in possession of a panga, informed them that he had killed someone; that, on being ordered to stop, the appellant dropped the panga and fell to the ground, after which he was arrested and taken to the DO's office; that, when PW4 collected the appellant, he was screaming like a mad person; that they proceeded to where the deceased's body was where they found the body surrounded by members of the public; that they picked the body which they took to Kilifi District Hospital Mortuary while the appellant was placed in custody at Kilifi Police Station; that, while in police custody, the appellant's cell- mates complained that he was harassing, threatening and beating them, and was removed therefrom and placed in his own cell; that, while in his own cell, he continued being violent and smeared himself with faecal matter; that he was escorted to a psychiatrist for mental examination, and was confirmed to be mentally ill and in need of medication; that, after his relatives availed his medication, the appellant's condition improved; that, a week later, upon review of his condition, the doctor certified him as fit to plead, after which he was charged; and that the police officers who arrested the appellant recovered the panga used to cut the deceased and the vest worn by the deceased, which was taken to the Government chemist for analysis.

15. Though erroneously indicated in the proceedings as PW15, Dr. Malindi Tajbhai, was called to produce the post mortem examination report of the body of the deceased prepared by his colleague, Dr. Charles Ondiek, who was away on further studies. It was his evidence that the examination took place on 9th October 2008 at 11.00am; that there were multiple lacerations in the scalp and face, fractures in the frontal maxillary and mandibular bruises, amical injuries at C-5, amputation of the left ear, deep cut wound on the right ear, cut wounds on the left and right hands and forearm; and that the cause of death was haemorrhage, cervical and head injuries.

16. At the close of the prosecution case, the appellant was placed on his defence and, in his unsworn statement, the appellant stated that, on 8th July 2008, a market day in their area, he visited the deceased at his home between 7.30pm and 8.00 pm where they were later joined by PW13 and PW14 amongst other revellers and continued drinking till 11.00pm when they parted ways and went home; that, while asleep, he saw the deceased, PW13 and PW14 offering him a cigarette, alcohol and meat and making noises; that when awoken by his wife at 6.00am, he was trembling, anxious with heavy heartbeats; that, as he was going to relieve himself, he heard the voice of PW14 telling him that they laced his drink with concoction while the deceased appeared and directed him to go and report to his elder brother; that, as he was walking away, PW13 appeared and ordered him back to his house and he returned to his house; that, while asleep, he saw, in a dream that a lion was chasing him and that, every time he fell asleep, he saw dead acquaintances chasing him; that, when he sought to know from PW13 and PW14 how they were feeling since the drink, PW13 told him that he was alright while PW14 became very defensive, and was advised by PW13 to seek the services of a medicine-man, which he did after consulting his family; that, in the next dream, he saw a snake which threw him into the air after which he could no longer sleep; that he consulted one Bakari, a traditional healer and became fine; that, later, he was summoned by the DO and the said Bakari who was staying in his home after he failed to settle his charges, was told to leave within 24 hours and the nightmares returned; and that, on 2nd October 2008, he did not know where he was, but only found himself in police custody.

17. On 1st October 2013, the learned trial Judge (Meoli, J.), on the authority of the case of Republic v Rose Serenoi Kipukel in which this Court's decision in the case of Marii v R (1985) KLR 710 was considered, opined that the prosecution and the defence were entitled to seek a special finding under

section 166(1) of the Criminal Procedure Code. Upon evaluation of the evidence, the learned Judge was satisfied that the appellant was at the material time suffering from mental illness, and was incapable of forming the intention to kill the deceased, hence guilty of murder but insane. The learned Judge ordered in terms of section 166(1) of the Criminal Procedure Code that the finding to be reported to the President and that, in the meantime, the appellant be detained in prison custody.

18. Dissatisfied, the appellant has appealed to this Court. In the appeal, the appellant contends: that the learned Judge was wrong for sentencing him to an undetermined period of time at the pleasure of the President, thereby vesting in the executive judicial powers to determine the duration of such sentence, contrary to the doctrine of separation of powers; and that the learned Judge was wrong in sentencing him in accordance with the mandatory provisions of section 166(1), which violates Articles 25(a) and (c), 27(1), (2) and (4), 28, 29(d) and (f), 50,51(1) and (2), 159(2)(a), (b) and (d) and 160(1) of the *Constitution* thus occasioning a miscarriage of justice. He prayed that the appeal be allowed, that the sentence imposed by the learned Judge be set aside, and that he be released from prison. In the alternative, he prayed that an order be issued pursuant to rule 33(b) of the Rules of this Court setting strict timelines for the prison facility holding him to facilitate his arraignment before the High Court for appropriate orders and directions upon receiving his mental assessment status and in default of any adherence with the set timelines, that he be released from prison forthwith.

19. At the virtual hearing on 23rd April 2024, the appellant, who appeared from Manyani Maximum Prison, was represented by learned counsel, Ms. Julu, while learned prosecution counsel, Mr. Mulamula, appeared for the respondent. Both learned counsel relied on their written submissions.

20. Learned counsel for the appellant, Ms. Julu Winnie, filed submissions dated 19th April 2024 in which it was submitted that sentencing is a judicial function and an integral part of the administration of justice, and not subject to executive power, hence section 166 of the Criminal Procedure Code and section 25(c) of the Penal Code offend the principle of separation of power, and is thus unconstitutional; that the said provisions offend Articles 25(a) and (c), 27(1)(2) and (4), 28, 29(d) and (f), 50, 51(1) and (2), 159(2)(a), (b) and 160(1) of the *Constitution*; that the sentence passed was unlawful; that the imprisonment at the President's pleasure is a legal term of art referring to the indeterminate and indefinite sentence connoting detention in prison for an undefined length of time, which defeats the need for mitigation. In this regard, reliance was placed on the decision of Mativo J. (as he then was) in AOO & 6 Others v Attorney General & Another Petition *No. 570 of 2015* [2017] eKLR.

21. It was further submitted that an indeterminate sentence deprives detained persons of the freedom from torture and cruel, inhuman and degrading treatment or punishment and their indefeasible right to human dignity; and that the sentence of detention at the President's pleasure left the appellant at the discretion and mercy of the executive and exacerbates the cruel, inhuman and degrading nature of the punishment on the grounds that the maximum period of incarceration remains at all times unknown to the prisoner and amounts to life imprisonment, which is unconstitutional. In support of the submissions, the appellant relied on the case of Total Kenya Limited v Kenya Revenue Authority (2013) eKLR, highlighting the Court's inherent powers to protect a party from suffering injustice; and Republic v The Chief Magistrates Court Nairobi & Another Ex parte Hinesh K. Chudasama [2007] eKLR, submitting that the court has the power to fashion new remedies. It was further contended that rule 33(b) of the Court of Appeal Rules empowers this Court to, inter alia, remit the proceedings to the High Court with such directions as may be appropriate.

22. On behalf of the respondent, reliance was placed on the submissions dated 15th April 2024 by Edgar Mulamula, an Assistant Director Public Prosecutions, in which it was contended that section 166 of the Criminal Procedure Code is couched in mandatory terms, hence the trial court was rendered functus officio after making a finding under the section; that Mathare Mental Hospital takes care of

any lunacy related offenders, and that there are guidelines in place to ensure safe handling of persons with mental disability, hence the appellant will continue enjoying such services when diagnosed with any form of mental incapacity; that, given the circumstances under which the offence occurred and the public interest at large, and considering that the appellant will be under continued specialization care afforded by the government to inmates with mental disability, he can continue serving his sentence notwithstanding his condition; that the trial court properly evaluated the prosecution's evidence in the exercise of its jurisdiction and arrived at a correct conclusion; that the appellant's mitigation was considered by the trial court, and that he was sentenced as per the provisions of section 166 of the Criminal Procedure Code; and that the conviction and sentence should be upheld. In support of the submissions, the respondent cited the case of M'Riungu v R [1983] KLR 455 to highlight the obligations of this Court sitting as a second appellate court. We respectfully find the authority unhelpful in the matter since this is a first appeal.

23. We have considered the submissions made as well as the material on record. The general legal position concerning first appeals is that the Court is legally enjoined to subject the evidence adduced to a scrutiny, re-evaluate it afresh and come to our own findings, but always bearing in mind that we had no advantage of hearing or seeing the witnesses as they testified before the trial court, and must therefore give allowance for that handicap. See Pandya v Republic [1957] EA 336. However, in this case, there is no dispute regarding the factual findings by the learned Judge. The issues for our determination are: whether based on the evidentiary factual findings by the learned Judge, returning the verdict of guilty but insane was proper in the circumstances; and whether, in those circumstances, the sentence imposed was appropriate.

24. As stated above, the learned Judge rightly found that the appellant was at the time of the incident in question suffering from mental illness, and was incapable of forming the intention to kill the deceased. In legal parlance, the element of mens rea was missing. Section 9(1) of the Penal Code provides that:

> Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

25. However, section 9(2) creates a distinction where the offender is aware of his actions but did not intend the result of such actions by providing that:

> Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

26. Similarly, under section 9(3), the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial in so far as regards criminal responsibility.

27. According to Glanville Williams: Textbook of Criminal Law, Fourth Edition paragraph 4-001 pp 97 and 98, unless the provision establishing an offence expressly excludes the element of mens rea (i.e strict liability offences), the law is that:

> "The mere commission of a criminal act (or bringing about the state of affairs that the law provides against) is not enough to constitute a crime, at any rate in the case of the more serious crimes. These generally require, in addition, some element of wrongfully intent or other fault...If a penal statute does not include a mental element expressly, the courts will usually, sporadically and without much discernible principle, imply the requirement, on the

assumption that Parliament intended the offence to be read in light of the general mens rea requirement."

See also Sir William Holdsworth: History of the English Law Vol. III, page 374.

28. This Court restated the law in *Gombe & 2 others v Republic (Criminal Appeal 140 of 2017)* [2023] KECA 299 (KLR) that the prosecution must at all times prove the concurrence of mens rea and actus reus, and cited its decision in Joseph Kimani Njau v Republic [2014] eKLR where it was held that:

> "In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard."

29. We find the decision of Mativo, J (as he then was) in Philip Muiruri Ndarunga v Republic (2016) eKLR, persuasive in which he opined that:

> "It is a cardinal principle of criminal jurisprudence that mens rea of the accused persons is very much essential ingredient to prove the guilty against the accused. Hence from the evidence on record, it is clear that the criminal intention to steal by clerk was not established. Mens rea or criminal intent is the essential mental element considered in court proceedings to determine whether criminal guilt is present while actus reus functions as the essential physical element. These two elements, Latin terms for 'culpable mind' and 'culpable action' respectively, are required to establish the guilt of a defendant. The essence of criminal law has been said to lie in the maxim 'actus non facitreum nisi mens ait rea'. There can be no crime large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is every other, that the essence of an offence is the wrongful intent, without which the offence cannot exist."

30. In this case, the appellant was charged with the offence of murder. Section 203 of the Penal Code provides that:

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

31. In an offence of murder, therefore, the two elements constituting actus reus and mens rea are the unlawful causing of death of another person and malice aforethought respectively. Malice aforethought is defined in section 206 of the Penal Code which states that:

> 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. Running throughout the above provision are two crucial ingredients of 'intent' and 'knowledge' without which malice aforethought cannot be inferred. In his evidence, the appellant in the case before us stated that:

> "On 2nd October 2008 I do not know where I was and found myself in custody. I do not know what happened."

33. From the learned Judge's finding that the appellant was at the time of the incident in question suffering from mental illness, and was incapable of forming the intention to kill the deceased, one can deduce that the appellant neither had the intent nor the knowledge of killing the deceased due to his state of mind at the time of the incident. Section 12 of the Penal Code 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.

34. The section was considered by this Court in George Ngugi Mungai v Republic [2000] eKLR where it was held that:

> "We wish to observe that the defence of insanity as contained in our Penal Code was not taken from the holding in the M'Naghten case, but from rules which were made in England following the decision in that case and which came to be known as the M'Naghten's Rules. The defence of insanity having been incorporated in our Penal Code there is clearly no necessity of falling back on the M'Naghten Rules. Section 12 of the Penal Code, which we quoted earlier, sets out the whole gamut of the defence of insanity. As this Court stated in the Marandu M'Arimi case (Supra), the onus is on the appellant to show on a balance of probabilities that at the time of the act or omission giving rise to the charge or charges against him he was suffering from a disease which affected his mind to the extent that, at the time of the act or omission complained of, he was incapable of either understanding what he was doing or of knowing that he ought not to do the act or make the omission in issue."

35. In this case, it is clear that the appellant's mental illness incapacitated him from understanding what he was doing, or of knowing that he ought not to do the act. He was therefore not criminally responsible for the said act.

36. The learned Judge, in arriving at her decision, relied on section 166 of the Criminal Procedure Code, which provides that:

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.

37. The preamble to the Criminal Procedure Code provides that it is:

> An Act of Parliament to make provision for the procedure to be followed in criminal cases.

38. On the other hand, the preamble to the Penal Code states that it is:

> An Act of Parliament to establish a code of criminal law.

39. Clearly, as between the two statutes, it is the Penal Code that defines what constitutes an offence and the ingredients necessary to establish whether or not a crime has been committed. It is upon satisfactory proof of those ingredients that the commission of an offence may be said to have occurred. In the absence of such proof, a finding of guilt, strictly speaking, ought not in our respectful view to be returned.

40. We have set out the legal provisions guiding the finding of guilt and come to the conclusion that, under the Penal Code, the appellant was not criminally responsible for causing death to the deceased. He could not be held to have been guilty of such an act. We therefore associate ourselves with the opinion of this Court in *Wakesho v Republic (Criminal Appeal 8 of 2016)* [2021] KECA 223 (KLR) in which it expressed itself 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."

41. A holistic consideration of the legal provisions underpinning a finding of criminal culpability leads us to the conclusion that, in the circumstances of this case, the trial court ought to have returned a finding of not guilty by reason of insanity.

42. That leads us to the second issue as to whether, in those circumstances, the sentence was appropriate. Section 166 of the Criminal Procedure Code has been the subject of several judicial pronouncements in this country. In the case of Hassan Hussein Yusuf v Republic [2016] eKLR, the High Court of Kenya at Meru (Kiarie Waweru Kiarie, J.) held that the provisions of section 167(1) of the Criminal Procedure Code requiring an accused person to be detained during the President's pleasure was unconstitutional for being discriminative to people with mental illness; that the appellant should be accorded mental

treatment and be set at liberty if, in the opinion of a psychiatrist, he would not pose any danger to the public and to himself; and that, if the opinion of the psychiatrist is otherwise, he be admitted for treatment until such time as it would be safe to release him.

43. In Republic v SOM [2017] eKLR, the High Court at Kisumu (Majanja, J.) expressed "doubt as to the constitutionality" of the provisions of section 166(2) of the Criminal Procedure Code, which requires the court, on making a special finding, to report the case for the order of the President and to order the accused to be kept in custody in such place and in such manner as the court shall direct. The judge then adjourned the proceedings for counsel to address him on the matter following which he rendered a ruling on sentence on April 30, 2018 (See Republic v S O M [2018] eKLR) and thereafter held that:

> "Although, the Francis Muruatetu Case dealt with the mandatory death sentence, the principles it espouses are nonetheless applicable to this case. I would like to point out that the provisions of section 166 of the CPC dealing with conviction and sentence of an accused found guilty but insane are mandatory from the point of view of the accused and the court. They do not give the court any discretion irrespective of the nature of the mental illness or condition of the accused. The ultimate sentence imposed on an accused found guilty but insane is at the discretion of the President who determines under what conditions the accused serves either in a mental institution or a prison or is ultimately discharged."

44. According to the learned Judge, the vesting of discretion on the President on how an accused person is to be treated after conviction is inimical to the fundamental duty of the judiciary to determine the guilt of the accused and determine the terms upon which he or she serves the sentence; that the fact that the provision is made for periodic review by the President upon advise of executive functionaries goes further to buttress the point; and that, to the extent that the provisions of section 166 take away the judicial function to determine the nature of sentence or consequence of the special finding contrary to Article 160 of the *Constitution* by vesting the discretionary power on the executive, those provisions are unconstitutional.

45. Having found that a strict reading of the provisions of the Penal Code does not support a finding of guilty in the circumstances of this case, we believe that the correct conviction ought to be not guilty by reason of insanity as opposed to guilty but insane. That would distinguish it from the second scenario where the accused person was, at the time of the commission of the offence, under no mental disability but, by the time of his arraignment in court, was not able to apprehend the nature of the proceedings facing him.

46. As regards the sentence, we find that it would be a misnomer to "sentence" a person found not guilty. We agree with the opinion of Kiarie Waweru Kiarie, J. in the case of Hassan Hussein Yusuf v Republic (supra) and hereby direct that:

    a. the appellant shall, as soon as practicable and within 7 days from the date hereof, be subjected to mental examination by a psychiatrist at Malindi General Hospital or at any other recognised medical facility to determine whether he poses danger to the public or to himself, and that in the event of a finding that he no longer poses such danger, be set at liberty forthwith unless otherwise lawfully held.

    b. should the psychiatrist be of the view that the appellant requires further treatment, he shall be admitted for treatment at a mental health facility recommended by the psychiatrist until such time as it will be safe to release him.

    c. in the event that any further directions are required to implement this order, the parties shall be at liberty to seek further orders from the High Court.

47. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, C.Arb, FCIArb

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR