Wakesho v Republic (Criminal Appeal 8 of 2016)
[2021] KECA 223 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 223 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 8 OF 2016

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

DECEMBER 3, 2021

BETWEEN

MWACHIA WAKESHO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Muya, J.) delivered on 18th September, 2015 in High Court Criminal Case No. 27 of 2012)

The distinction between not guilty for reason of insanity and guilty but insane.

Reported by Ribia John

Statutes *– interpretation of statutes– constitutionality of a statutory provision -constitutionality of section 166 of the Criminal Procedure Code which provided that in cases of a finding of guilty but insane, the sentence would be indeterminate and at the President's discretion - whether for purposes of a finding that an accused person was guilty but insane, the imposition of an indeterminate sentence at the discretion of the President was unconstitutional - whether a finding of not guilty for reason of insanity was more legally sound than a finding of guilty but insane in light of the requirements of criminal responsibility and culpability which required that for a person to be criminally liable - whether submitting an accused person that was insane to a trial whose nature and effect the accused person did not from the outset understand, or appreciate, and be convicted as guilty but insane was unfair - Constitution of Kenya, 2010, articles 50(2) and 160; Criminal Procedure Code (cap 75) section 166.*

Law of Evidence *– circumstantial evidence – circumstances in which an accused could be convicted based on circumstantial evidence - what were the circumstances in which an accused person could be convicted based on circumstantial evidence.*

Criminal Law *– defences – temporary insanity – elements of the defence of temporary insanity - what factors did the court consider in determining the defence of temporary insanity - Criminal Procedure Code section 166(1); Penal Code (cap 63) section 11.*

Criminal Law *– defences – provocation – elements of the defence of provocation - what factors did the court consider in determining the defence of temporary insanity - Penal Code (cap 63) sections 208 and 209.*

Brief facts

The appellant, Mwachia Wakesho, was charged and convicted of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Aggrieved by the conviction, the appellant filed the instant appeal on grounds that the trial court had erred in failing to properly consider the appellant's mental state and that the accused was provoked. The accused also challenged his conviction on grounds that the conviction was based solely on circumstantial evidence. It was the appellant's position that the evidentiary burden had not been proved to sustain a guilty conviction

Issues

i. What was the threshold that the prosecution had to meet to sustain a conviction based on circumstantial evidence?
ii. Whether under the circumstances, the offence of murder was proved to the required standard.
iii. What were the factors the court needed to consider when determining the defense of provocation?
iv. What were the factors that the court needed to consider when determining the defense of temporary insanity?
v. Whether for purposes of a finding that an accused person was guilty but insane, the imposition of an indeterminate sentence at the discretion of the President was unconstitutional.
vi. Whether a finding of not guilty for reason of insanity was legally sound than a finding of guilty but insane in light of the requirements of criminal responsibility and culpability.
vii. Whether to submit an accused person that was insane to a trial whose nature and effect an accused person did not understand or appreciate, and be convicted as guilty but insane was unfair.

Relevant provisions of the Law

Criminal Procedure Code (Cap 75)

Section 166 - Defence of lunacy adduced at trial

(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.

(4) The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President under subsection (3) shall make a report in writing to the Minister for the consideration of the President in respect of the condition, history and circumstances of the person so detained, at the expiration of a period of three years from the date of the President's order and thereafter at the expiration of each period of two years from the date of the last report.

(5) On consideration of the report, the President may order that the person so detained be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.

(6) Notwithstanding the subsections (4) and (5), a person or persons thereunto empowered by the President may, at any time after a person has been detained by order of the President under subsection (3), make a special report to the Minister for transmission to the President, on the condition, history and circumstances of the person so detained, and the President, on consideration of the report, may order that the person be discharged or otherwise dealt with, subject to such conditions as to his remaining under supervision in any place or by any person, and to

such other conditions for ensuring the safety and welfare of the person in respect of whom the order is made and of the public, as the President thinks fit.

(7) The President may at any time order that a person detained by order of the President under subsection (3) be transferred from a mental hospital to a prison or from a mental hospital, or from any place in which he is detained or remains under supervision to either a prison or a mental hospital.

Held

1. Section 203 of the Penal Code under which the appellant was charged provided that, any person who with malice aforethought caused death of another person by unlawful act or omission was guilty of murder. To sustain a charge under that provision, the prosecution had to prove, beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was a result of an unlawful act or omission on the part of the accused person; that such unlawful act or omission was committed with malice aforethought.
2. To sustain a conviction against an accused person based on circumstantial evidence, such evidence had to exclude co-existing circumstances which would weaken or destroy the inference of guilt. The evidence had to point to the accused as having committed the offence he stood convicted of and to no other person. In order to justify circumstantial evidence, the inference of guilt, the inculpatory facts had to be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. The burden of proving facts which justified the drawing of that inference from the facts to the exclusion of any other reasonable hypothesis of innocence was on the prosecution. That burden always remained with the prosecution and never shifted to the accused.
3. Under section 208(1) of the Penal Code, provocation meant and included, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who was under his immediate care, or to whom he stood in a conjugal, parental, filial or fraternal relation, or in the relation of master-servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult was done or offered. Provocation was some act, or series of acts done (or words spoken) which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not the master of his or her mind.
4. For the defence of provocation to be maintained, it had to be demonstrated that the accused person was actually provoked so as to lose self-control and that a reasonable person in similar circumstances would have been so provoked. It was a question of fact that the trial court had to determine based on the evidence before it whether an accused person was provoked to lose self-control.
5. The appellant in his defence stated that he was staying in the same house with the deceased; that he got dizzy; and that he beat her. He did not at all suggest or assert that he may have been provoked. Therefore, there was no evidence at all based on which the trial court would have concluded that there was provocation.
6. Throughout the trial, the appellant's mental state was a recurring theme. When the appellant physically appeared before the instant court for the hearing of the appeal, the court, having seen the appellant, noted that it was evident that the appellant was of an unstable mind and ordered that he be escorted to Port Reitz Mental Hospital Mombasa for mental examination and for a report to be filed in court. During the virtual hearing of the appeal on September 27, 2021, the appellant appeared virtually before the court from prison, and it was manifest, that the appellant did not have the presence of mind.
7. The critical point at which the mental state of the accused person was relevant for purposes of the defence of insanity was at the time of the 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 not responsible for his actions.

8. Insanity was 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 would 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 was an illness (mental illness) requiring treatment rather than punishment.

9. Insanity would only be a defence if it was 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 was charged with or was incapable of knowing that it was wrong or contrary to law. The test was 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.

10. When the evidence at the trial court was considered alongside the testimony of the other witnesses as to the appellant's state of mind as well as the trial courts own observation of the appellant during the trial, the presumption, under section 11 of the Penal Code, that the appellant was of sound mind at the time in question was rebutted.

11. Although the defence of insanity did not appear to have been expressly raised, it was, as already mentioned, a recurring theme throughout the trial and the trial court ought, to have specifically inquired into it before convicting the appellant. Had it done so, and as borne out by the probation report that came late in the day, the appellant's mental history would have been established. To inquire specifically into the question of insanity, not only in situations where such defence was raised but also where it became apparent to the court from the accused person's history or antecedent that insanity could be an issue.

12. The court would not normally interfere with a finding of fact by the trial court unless it was based on no evidence, or was based on a misapprehension of the evidence, or the court was shown demonstrably to have acted on wrong principles in reaching the findings that it did. The preponderance of evidence showed that the appellant suffered from a mental disorder. Where it emerged from the evidence that the defence of insanity was in issue, (and the standard in that regard was on a balance of probabilities) the prosecution was required to disprove it. The trial court ought to have made a special finding of guilty but insane.

13. Judicial opinion was divided on the constitutionality of some of the provisions of section 166 of the Criminal Procedure Code. It was a matter on which the state of the law was unsatisfactory and in dire need of reform and the Attorney General should have taken immediate steps to initiate reforms.

14. Reforms were needed to the provisions of section 166 of the Criminal Procedure Code in two respects:
    1. it was a legal paradox to find a person guilty but insane, in light of the requirements of criminal responsibility and culpability, which required that for a person to be criminally liable, it had to 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 was suffering from a defect of reason caused by a disease of the mind at the time of the commission of an offence. The court should have been granted discretion to impose appropriate measures to suit the circumstances of each case, upon a finding of not guilty for reason of insanity.
    2. The subs-stratum of the provisions as regards the right to a fair trial in criminal cases in article 50(2) of the Constitution was that an accused person should have been fully informed, understood and thereby effectively participated in a criminal trial. To go through the motions of a trial whose nature and effect an accused person did not from the outset understand or

appreciate, and be convicted on the basis of such a trial as was provided for in section 166 of the Criminal Procedure Act, was manifestly unfair in light of Kenya's current constitutional dispensation.

Appeal allowed.

Orders

i. *The Court of Appeal quashed the conviction and set aside the sentence of death and substituted therefore, a special finding that the appellant did the act charged but he was insane at the time he did it.*

ii. *The appellant, who has been in custody since his arrest on May 18, 2012, was to immediately be taken to a mental hospital for medical treatment where he was to remain until such time as a psychiatrist in charge of the hospital certified that he was no longer a danger to society or to himself.*

iii. *The Registrar of the Court to send a copy of the instant judgment for the attention of the Attorney General.*

Citations

Cases

1. Adama Juno vs. Uganda (Cr. Appeal No. 50 of 2006 [2010] UGCA 27) — Explained
2. Bernard Kimani Gacheru V Republic ([2002] eKLR) — Explained
3. Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) ([2021] eKLR) — Explained
4. Hassan Hussein Yusuf v Republic ([2016] eKLR) — Explained
5. Leonard Mwangemi Munyasia v Republic ([2015] eKLR) — Explained
6. Muruatetu, Francis Kariokor & another v Republic ([2017] eKLR) — Explained
7. Okeno v Republic ([1972] EA 32) — Explained
8. Peter Kingori Mwangi vs. Republic ([2014] eKLR) — Explained
9. Republic v Milton Kabulit & 6 others [2011] eKLR ([2011] eKLR) — Explained
10. Republic vs. ENW ([2019] eKLR) — Explained
11. Republic vs. SOM ([2018] eKLR) — Explained
12. Republic vs. SOM ([2017] eKLR) — Explained
13. Rex v Kipkering Arap Koske & anor ([1949] 16 EACA, 135) — Explained
14. Richard Kaitany Chemagong v Republic ([1984] eKLR) — Explained
15. Simon Musoke v Republic ([1958] EA 715) — Explained
16. S vs. Makwanyane ([1995] (3) SA (391)) — Explained
17. VMK vs. Republic ([2015] eKLR) — Explained
18. Tadeo Oyee s/o Duru vs. R ([1959] EA 407) — Explained
19. Bachan Singh vs. State of Punjab ([1980] 2 SCC 478) — Explained
20. R vs. Duffy ([1949] 1 All ER 932) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 50 (2) — Interpreted
2. Criminal Procedure Code (Cap. 75) — section 166 (1), 167 — Interpreted
3. Penal Code (Cap. 63) — section 204, 203, 207, 208 (1), 12, 209 (1), 11 — Interpreted

Advocates

Miss. Aoko Otieno for for the Appellant
Mr. Jami Yamina for for the Respondent

JUDGMENT

1. The appellant, Mwachia Wakesho, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on May 17, 2012 at

Magale village, Kishushe location within Taita-Taveta County, he murdered Wakesho Ndigilah (the appellant's mother). On arraignment on May 23, 2012, the High Court ordered a psychiatric report in respect of the appellant to be availed.

2. In a medical report titled "Mental Status Examination for Mwachia Wakesho" and dated May 29, 2012, Dr. E. Macharia, a Medical Officer, Wesu District Hospital reported that the appellant's behaviour was calm; his speech coherent and relevant; his mood normal; his orientation, well oriented in time place and person; concentration, good; perceptional disorders, no hallucinations, no illusions; judgment, good; insight, present. Conclusion, "no psychotic features, able to follow the court proceedings".

3. Subsequently on June 6, 2012, the plea was taken whereupon the appellant pleaded not guilty. On July 19, 2012, counsel then on record for the appellant, Mr. Okello, indicated that he had been unable to get instructions from the appellant and requested for a second psychiatric report. The court (M. Odero, J.) having observed and noted that the appellant

> " appears scared and timid. He speaks in low tones" ordered the Officer in Charge, Shimo La Tewa to facilitate the appellant to be taken to Provincial General Hospital for evaluation by a psychiatrist and for the report to be filed in court.

4. By a letter dated August 1, 2012, Dr. C.M. Mwangome, Consultant Psychiatrist, Coast General Hospital, Mombasa reported to the Deputy Registrar, High Court Mombasa that he interviewed the accused on the same date in the presence of Sergeant Bochola and Warders Nixon Bwire and Carlos Munyoki "who said the accused was calm and not mentally disturbed while in remand"; that "the accused denied any history of mental illness"; and that "on examination, his behaviour, mood, speech and cognition were normal."

5. After several mentions before the court, Muya, J. took over the conduct of trial proceedings before whom the hearing commenced on June 13, 2013. The daughter of the deceased, and a sister to the appellant, Eliza Nakaisaka Wakesho Ndingile (PW1) was the first to testify. PW1 stated that on the material day, she was at their shamba, about 50 meters from her mother's house, when she heard cries from her mother's house. She heard her mother say that she was being killed. She went to the house and found her mother lying on the ground outside the house with blood oozing from her mouth and nose. Her brother, the appellant who was staying with the deceased was sitting outside the house and on inquiring from him what had happened, he did not respond. She screamed and members of the public arrived at the scene. On cross examination, PW1 stated that the appellant "is mentally okay" and that she "did not know what happened before the attack" and that the "two had no disagreements."

6. The deceased's neighbour, David Mkala Simon (PW2), was next to testify. He stated that on May 17, 2012 at about 6.00 p.m. he heard screams from some distance and decided to go and check; he saw people gathered at the deceased's house and on going there, he saw the deceased lying on the ground with blood oozing from her ears and nose and nearby was a piece of wood. The appellant, who was living with the deceased had been tied up with ropes. In his view, it is not true that the appellant "is mentally unstable."

7. PW3, Police constable Simon Ndoloi accompanied by the officer in charge crime, went to the scene on May 18, 2012 following a murder report made at the police station on the night of May 17, 2012. At the scene, they found the body of the deceased outside her house. The body was oozing blood from the ears and the nose. Next to the body of the deceased was a partly burnt piece of wood. The appellant was also at the scene having been tied up with ropes by members of the public. The body of the deceased was taken to Wasu Hospital. PW3 described the partly burnt piece of wood as the "weapon of murder." According to PW3, on interrogation, the appellant stated that he used the piece of wood on his mother.

The appellant was arrested. PW3 stated further that "at times the accused acts abnormally" and that there were allegations that he was of unsound mind.

8. Ferdinand Mwabite (PW4), a village elder also went the scene on May 17, 2012at about 6.00 p.m and found the deceased lying dead. The appellant had been restrained with ropes by members of the public. He called the chief and the police and thereafter the body was taken to the mortuary.

9. Nephews to the deceased, Ronald Ndigila Fawilo (PW5) and John Mwabingu (PW6) identified the body of the deceased at the mortuary for purposes of post mortem which was conducted by Dr Macharia Emmanuel (PW7). According to PW7, the deceased was about 70 years old. On examination, the deceased had a depressed fracture of occipital area, had blood from her ears, right shoulder was fractured and both knees had fractures. The main injury was on the head. He concluded that cause of death was cardiorespiratory arrest, brain injury due to blunt head trauma.

10. Sargent David Chege (PW8) of CID Voi attached to scenes of crime section produced photographs taken at the scene showing images of the deceased lying beside her mud house and a piece of wood, said to have been the murder weapon.

11. The last prosecution witness Police officer Anthony Waigwa (PW9) was at the time the officer in charge, Crime, at Kishushe police station. He stated that on May 18, 2011(12?) at 7.00 a.m he was called by the Officer Commanding Station who informed him that a report had been made at night in relation to the death of the deceased. He proceeded to the scene of crime with his colleague. At the scene, they found the body of the deceased. The appellant had been tied up with ropes by members of the public. There was a piece of wood, which he stated was used to beat the deceased. The appellant "appeared mentally disturbed."

12. In his sworn statement in defence, the appellant stated: "It is alleged that I killed my mother. I beat my mother after taking drugs.

    I got dizzy. We were staying in the same house." On cross examination, he simply stated, "I beat my mother."

13. After reviewing the evidence, the learned trial judge observed that nobody saw the appellant commit the offence and what was before the court was circumstantial evidence; that the appellant had ample opportunity to attack his mother; that in his defence he admitted having beaten his mother after consuming drugs that made him dizzy; and that the circumstantial evidence before the court irresistibly pointed to the appellant as the person who inflicted the fatal blows on the deceased.

14. Regarding the appellant's mental status, the judge observed that based on the line of cross examination of witnesses, there was suggestion that at the time of incident, the accused was insane and that during the hearing the court "also did observe that the accused did not appear very normal". The judge noted that according to the medical report dated May 29, 2012 by Dr Macharia, no psychotic features were noted and that the appellant was able to follow proceedings. The judge also referred to the second medical report by Dr Mwangombe, based on which the appellant had denied having had a history of mental illness and noting that his behaviour, mood, speech, and cognition were normal. The judge then posed the question whether "these observations afford him the defence of insanity". In answering that question, the judge stated:

    > " In view of the findings on the two medical reports it would not be available for the accused to bring himself under the ambit of the defence of insanity. At the time of doing the act he was not suffering from a disease affecting his mind to be incapable of understanding what

he was doing and that it was wrong. I am satisfied that the accused knew what he was doing and that it was wrong."

15. Satisfied that the prosecution had proved its case beyond reasonable doubt, the judge found the appellant guilty as charged of the offence of murder and convicted him accordingly.

16. During the sentence hearing, the issue of the appellant's mental state recurred. Mutisya Kioko, the Probation Officer Mombasa, observed in a report dated 6th november 2015 that the appellant "seemed withdrawn and mute. He was not interested with the interview and did not say a single word for the time I engaged him. He was only nodding his head in response to questions". Under the subject of "history of mental illness", the probation officer stated in his report that most of those interviewed confirmed there was a history of mental illness in the family; that the appellant's mother and a sister as well as the appellant are said to have been having occasional mental illnesses and that the appellant "is also said to have been admitted and discharged at Port Reitz Hospital several years back."

17. In mitigation, counsel for the appellant submitted that the appellant was remorseful, that the circumstances surrounding the case were regrettable; that the accused killed his mother without good reason and that "the accused is mentally challenged." In sentencing the appellant to suffer death, the learned judge observed, "I have had the opportunity of observing the demeanour of the accused person and he does not appear mentally stable. This is an issue for the Board of Prerogative of mercy as there is no evidence to find the accused guilty but insane."

18. Aggrieved, the appellant lodged this appeal against the conviction and the sentence. In his supplementary grounds of appeal through learned counsel Miss Aoko Otieno, the appellant has faulted the learned judge for: failing to find that the offence of murder was not proved beyond a reasonable doubt; disregarding evidence of provocation; and failing to consider the evidence of temporary insanity. It is also the appellant's case that the sentence meted out is manifestly excessive and harsh sentence

19. It was submitted for the appellant that the learned trial judge disregarded the evidence of provocation and temporary insanity; that beyond the scanty evidence that there was a fight between the appellant and the deceased, malice aforethought, a necessary ingredient to establish the offence of murder, was not proved; that although PW2 and PW9 alluded to a disagreement and a struggle between the appellant and the deceased, the nature of disagreement and struggle was not established and neither was it established who between the appellant and the deceased provoked the other. In those circumstances, counsel urged, the appellant ought to have been given the benefit of doubt. In that regard, counsel referred us to sections 207 and 208(1) of the *Penal Code.*

20. It was submitted further that based on the evidence of PW3 and PW9 who arrived at the scene the morning after the incident and arrested the appellant, there may have been tampering with the evidence so as to implicate the appellant; that it is not clear why, despite report having been made at the police station on May 17, 2012, the police waited until the following morning to go to the scene; that it is puzzling that despite the testimony of PW1 and PW2 that blood was oozing out of the ears and nose of the deceased, the partly burnt wood that was said to be the murder weapon had no blood. It was urged that the circumstantial evidence was weak, and insufficient to convict the appellant.

21. Counsel submitted further that the defence of temporary insanity ought to have been availed to the appellant. In that regard it was pointed out that independent persons had observed that the appellant was mentally unstable; that in addition to the trial judge who observed at the onset of proceedings that the appellant did "not appear mentally stable", there was also the testimony of PW3 and PW9 who stated that the appellant "acts abnormally" and that he "appeared mentally disturbed"; that the

probation officer's report also indicated that the appellant's family occasionally suffer mental illness; that at the prison where the appellant is presently held, he is in a dormitory where mentally challenged convicts are kept; that the medical reports on which the trial court relied to discount the defence of insanity did not show any scientific findings or analysis how the conclusion reached that the appellant was medically fit to plead was arrived at; and that curiously, the appellant's family members, PW1 and PW2, denied that the appellant was suffering from mental illness.

22. On the sentence, counsel urged that the same is manifestly excessive and harsh. On the strength of the decision of this Court in *Bernard Kimani Gacheru v Republic* [2002] eKLR, it was submitted that sentence is a matter of discretion by the trial court; that the death sentence should be reserved for the "rarest of rare cases" and this is not one of those. The Supreme Court of India decision in *Bachan Singh v State of Punjab* (1980) 2 SCC 478; the decision of the Constitutional Court of South Africa in the case of *S v Makwanyane* (1995) (3) SA (391); the Court of Appeal of Uganda decision in *Adama Juno v Uganda*, Cr Appeal No 50 of 2006 [2010] UGCA 27; the Supreme Court of Kenya decision in *Francis Kariokor Muruatetu and another v Republic* SCK Petition No 15 and 16 of 2015 [2017] eKLR among others were cited. Furthermore, counsel urged, the death penalty should only be imposed in circumstances which establish the gravest case of extreme culpability and where the court determines that individual reform and rehabilitation consequent to a custodial sentence would be impossible.

23. Counsel also referred to the Sentencing Policy Guidelines and submitted that the factors that aggravate a sentence of death do not apply in this case where there were strong mitigating factors including lack of premeditation, the appellant being a first offender, the incident was single and isolated, the circumstantial evidence does not irresistibly point to the appellant, and where the appellant suffers from temporary insanity and ought to have been given medical attention and not imprisonment; that the pre-sentence report was disregarded by the court. It was urged that should the courtuphold the conviction; the death sentence should be substituted with a custodial sentence limited to the time served.

24. In opposition, learned counsel Mr Jami Yamina submitted that for the defence of provocation to hold, two conditions must be satisfied. The first, a subjective condition, is that it must be demonstrated that the accused person was indeed provoked to lose self-control. The second condition, an objective condition, is that a reasonable man would have, in similar circumstances, been so provoked. In that regard, reference was made to the section 209 of the *Penal Code*; the case of *VMK v Republic* [2015] eKLR; and the decision of this Court in *Peter Kingori Mwangi v Republic* [2014] eKLR. It was submitted that no evidence was tendered to show that the appellant was sick at the time or that there was a disagreement thereby provoking him into acting in the heat of passion.

25. Moreover, counsel submitted, having regard to sections 12, 208 and 209(1) of the *Penal Code*, the defence of provocation can only be available to an ordinary person who can be criminally liable but is not available to a person who may be suffering from mental infirmity and who is not criminally responsible; that if the appellant fell in the category of a person incapable of understanding what he was doing, then that defence cannot be available to him.

26. Counsel further submitted that there was no evidence on which the trial court could have relied to support the defence of temporary insanity and the Judge could not therefore make a finding under section 166(1) of the *Criminal Procedure Code*; that considering the presumption of sanity under section 11 of the Penal Code, it was incumbent upon the appellant to provide evidence to support the defence of insanity.

27. As regards sentence, counsel submitted that the same is commensurate with the nature and gravity of the crime as the appellant killed his own mother and a deterrent sentence is called for. Reference was made to the High Court judgment in the case of *Republic v Milton Kabulit & 6 others* [2011] eKLR.

28. We have considered the appeal and submissions in keeping with our duty on a first appeal, which requires us to subject the evidence before the trial court to fresh and exhaustive examination, weigh it and draw our own conclusions bearing in mind that the trial court had the advantage, which we do not have, of hearing and seeing the witnesses. See case of *Okeno v R* [1972] EA 32. Having that in mind, the issues fordetermination in this appeal are whether the offence of murder was proved to the required standard; whether the defence of provocation was available and established by the defence; whether the judge erred in rejecting the defence of temporary insanity and whether the sentence meted out is manifestly harsh and excessive.

29. Section 203 of the *Penal Code* under which the appellant was charged provides that, "any person who of malice aforethought causes death of another person by unlawful act or omission is guilty of murder." To sustain a charge under that provision, the prosecution must prove, beyond reasonable doubt, the fact and cause of death of the deceased person; that the death of the deceased was as a result of an unlawful act or omission on the part of the accused person; that such unlawful act or omission was committed with malice aforethought.

30. The fact of the death of Wakesho Ndigilah, the deceased, is not in contention. All the prosecution witnesses who went to the scene on the evening of May 17, 2012and the following morning stated that the body of the deceased was lying on the ground outside her house with blood oozing from her mouth and nose. The nephews to the deceased, Ronald Ndigila Fawilo (PW5) and John Mwabingu (PW6) identified the body of the deceased at the mortuary where Dr Macharia Emmanuel (PW7) performed a post-mortem.

31. As to whether the death of the deceased resulted from an unlawful act or omission on the part of the appellant, nobody saw him commit the offence. The prosecution relied on circumstantial evidence. The question is whether the evidence presented met the requisite legal threshold. As held by the Court in *Rex v Kipkering Arap Koske* [1949] 16 EACA 135, to sustain a conviction against an accused person based on circumstantial evidence, such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. The evidence should point to the accused as having committed the offence he stood convicted of and to no other person. See also *Simoni Musoke v R* [1958] EA 715. In *Sawe v Rep* [2003] KLR 364, this court expressed that:

> "1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.
>
> 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.
>
> 3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

32. Having regard to those principles, did the prosecution evidence in the present meet the threshold? As already noted, PW1, the daughter of the deceased, stated that she responded to her mother's cry, that

she heard her mother say that she was being killed. On getting to the house, she found her mother lying on the ground outside the house with blood oozing from her mouth and nose. Her brother, the appellant, who resided with the deceased, was sitting outside the house. On inquiring from him what had happened, the appellant did not respond. PW1 screamed. Neighbours, including PW2 and PW4 arrived at the scene. On his part, the appellant in his testimony stated that he beat his mother. Based on the foregoing, we are satisfied, as the trial Judge was, that the evidence formed a complete chain pointing irresistibly to the appellant as the person who attacked the deceased and inflicted the injuries from which she died.

33. As regards the element of malice aforethought, section 206 of the *Penal Code* provides 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;..."

34. In that regard counsel for the appellant argued, as already noted, that the learned trial judge failed to consider that the appellant was provoked; and that the appellant was insane and incapable of forming the intent. Under section 208(1) of the Penal Code, provocation "means and includes, except hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered".

35. In the words of Devlin, J in *R v Duffy* [1949] 1 All ER 932

> " Provocation is some act, or series of acts done (or words spoken)... which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind."

36. As submitted by counsel, for the defence of provocation to be maintained, it must be demonstrated that the accused person was actually provoked so as to lose self-control, and that a reasonable person in similar circumstances would have been so provoked. See the decision of this Court in *Peter King'ori Mwangi & 2 others v Republic* [2014] eKLR. It is a question of fact which the trial court must determine based on the evidence before it whether an accused person was provoked to lose self-control.

37. As already stated, PW1 testified that the appellant kept silent when she inquired from him what had happened; that she did not know what happened before the attack and that the "two had no disagreements." The appellant in his defence stated that he was staying in the same house with the deceased; that he got dizzy; and that he beat her. He did not at all suggest or assert that he may have been provoked. There was therefore no evidence at all based on which the learned Judge would have concluded that there was provocation. We have found no such evidence ourselves.

38. There is then the question whether the Judge erred in rejecting the defence of temporary insanity. Was there evidence that the appellant was prevented, by reason of insanity, from appreciating what he was doing or from knowing that it was wrong. To that end, the judge expressed:

> " In view of the findings on the two medical reports it would not be available for the accused to bring himself under the ambit of the defence of insanity. At the time of doing the act he was not suffering from a disease affecting his mind to be incapable of understanding what he was doing and that it was wrong. I am satisfied that they accused knew what he was doing in that it was wrong"

39. The matter of the appellant's mental state, as already indicated, arose from the very onset of the proceedings before the trial court. When, on July 19, 2012counsel for the appellant, Mr. Okello, expressed his frustration in obtaining instructions from the appellant and requested the court to obtain a second psychiatric report, the Judge seized of the matter at the time (M. Odero, J.) observed that the appellant appeared "scared and timid" and that "he speaks in low tones". After several mentions before the court, Muya, J. took over the conduct of trial proceedings before whom the hearing commenced on June 13, 2013with Eliza Nakaisaka Wakesho Ndingile (PW1), the daughter of the deceased and sister to the appellant, being the first to testify.

40. Throughout the trial, the appellant's mental state was a recurring theme. When the issue was raised with PW1 during her cross examination, she simply stated that the appellant "is mentally okay". The matter of the appellant's mental health was also taken up with PW2, a neighbour of the deceased, who during cross examination asserted that it is not true that the appellant "is mentally unstable.". The arresting officer, Police constable Simon Ndoloi PW3, stated that "at times the accused acts abnormally" and that there were allegations that he was of unsound mind. Police officer Anthony Waigwa (PW9), who also at the scene the morning of May 18, 2012also observed that the appellant "appeared mentally disturbed." Before us, counsel for the appellant stated that at the prison where the appellant is presently held, he is in a dormitory where mentally challenged convicts are kept.

41. There was also the report of the probation officer Mutisya Kioko dated November 6, 2015 supplied to the trial court prior to sentencing. In that report, the probation officer observed that the appellant seemed withdrawn and mute; showed no interest in the interview and did not say a single word for the time the officer engaged him but merely nodded his head in response to questions. The probation officer reported further that most of the people he interviewed concerning the appellant confirmed "there was a history of mental illness in the family'; that the appellant's mother and a sister as well as the appellant were said to have been having occasional mental illnesses and that the appellant "is also said to have been admitted and discharged at Port Reitz Hospital several years back."

42. On October 24, 2019 when the appellant physically appeared before this Court for the hearing of this appeal, the Court,

> " having seen the appellant" noted that "it is evident that the appellant is of unstable mind" and ordered that he be escorted to Port Reitz Mental Hospital Mombasa for mental examination and for a report to be filed in court. The hearing was subsequently adjourned but no report was filed in this court and ultimately counsel for the appellant urged the court to proceed with the hearing of the appeal to avoid further delay in its disposal. During the virtual hearing of this appeal on September 27, 2021, the appellant appeared virtually before the court from prison, and it was again manifest, that the appellant did not have the presence of mind.

43. Despite the intimation in the two medical reports produced in the lower court that the appellant was fit to plead and follow proceedings, the testimony of the police officers who visited the scene immediately after the incident, considered alongside the conduct of the appellant immediately after the incident as well as the observations by the trial court during the trial indicate mental sickness on the part of the appellant. The learned trial judge acknowledged this while sentencing the appellant when he stated that he, "had the opportunity of observing the demeanour of the accused person and he does not appear mentally stable" but expressed that that is a matter for the Board of Prerogative of mercy "as there is no evidence to find the accused guilty but insane."

44. Section 166 of the *Criminal Procedure Code* provides that:

> " 166.
>
> (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 aspecial 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."

45. Provisions that follow require the officer in charge of the place where such person is detained to make a report with respect to the condition and circumstances of the person detained to the minister for consideration by the President after three years and thereafter periodically every two years, and on consideration of such report the President may order the person detained to be discharged or otherwise dealt with subject to such conditions as to his remaining under supervision in any place or by any person, and to such other conditions for ensuring the safety and welfare of the person and of the public.

46. 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.

47. As stated by this Court in *Leonard Mwangemi Munyasia v Republic* [2015] eKLR:

> " 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." [Emphasis]

48. As acknowledged by the trial court, there was evidence pointing to the appellant's mental state at the time of the incident. Although his sister denied that the appellant was mentally sick, she went on to say that there had been no disagreement between the appellant and the mother that would have explained his assault on her; and that he kept silent when she inquired from him what had happened but simply sat, seemingly oblivious of what had happened. Conduct that would hardly qualify as normal, given the circumstances. The police officer (PW9) observed the following morning that the appellant appeared mentally unstable. When that evidence is considered alongside the testimony of the other witnesses as to the appellant's state of mind as well as the trial courts own observation of the appellant during the trial, the presumption, under section 11 of the *Penal Code*, that the appellant was of sound mind at the time in question was rebutted.

49. Although the defence of insanity does not appear to have been expressly raised, it was, as already mentioned, a recurring theme throughout the trial and the trial court ought, in our view, to have specifically inquired into it before convicting the appellant. Had it done so, and as borne out by the probation report that came late in the day, the appellant's mental history would have been established. As held by the Court in *Leonard Mwangemi Munyasia v Republic* (above) it is the duty oftrial courts, to inquire specifically into the question of insanity, not only in situations where such defence is raised but also where, as here, it becomes apparent to the court from the accused person's history or antecedent that insanity may be an issue.

50. The circumstances in this case are not very different from those in case of *Richard Kaitany Chemagong vs. R* [1984] eKLR where the accused person slashed the deceased todeath. On examination by a doctor the day after the incident, the doctor concluded that he was normal, had coordinated ideas and had no history of mental disorder. During his trial he made no mention of his mental illness, but upon application by the defence he was examined by a psychiatrist who found that although he was, at the time of examination normal, he had a history of mental illness for which he had been admitted in a mental hospital. The court found that the appellant was legally insane.

51. Whereas this court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or is based on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings that he did, in this case, we think, the preponderance of evidence showed that the appellant suffered mental disorder. Where, as here, it emerges from the evidence that the defence of insanity is in issue, (and the standard in that regard is on balance of probabilities) the prosecution is required to disprove it. (See *Tadeo Oyee s/o Duru vs. R* [1959] EA 407). We hold that the learned Judge ought to have made a special finding of guilty but insane.

52. What then? Although we were not addressed on the constitutionality of section 166 of the *Criminal Procedure Code* which sets out the procedure that should follow upon such a special finding being made, there are several High Court decisions on the matter. We will mention a few. There is, for instance, the case of *Hassan Hussein Yusuf v Republic* [2016] eKLR where the High Court at Meru (Kiarie Waweru Kiarie, J.) found the provisions in section 167(1) of the Criminal Procedure Code requiring an accused person to be detained during the President's pleasure to be unconstitutional for being discriminative to people with mental illness. The court in that cased directed 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. If however the opinion of the psychiatrist is otherwise, he shall be admitted for treatment until such time it will be safe to release him.

53. 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). Invoking 'the principle' in the Supreme Court of Kenya decision in *Francis Karioko Muruatetu and another v Republic*, SCK Petition No 15 and 16 of 2015 [2017] eKLR the learned Judge stated:

> "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."

54. The learned judge went on to say that 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 and 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. The court held 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. The Supreme Court has since directed that its decision in Francis Muruatetu Case does not espouse a principle of general application and is specific to section 203 of the Penal Code. See Directions of the Court in *Francis Karioko Muruatetu & another v Republic: Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR.

55. In *Republic v ENW* [2019] eKLR, Lesiit, J. (as she then was), distinguished, for purposes of section 166, the judicial function to pass sentence, a reserve of the judicial process, and the executive responsibility of the President regarding power of mercy. The learned judge had this to say:

> "20. It is clear that passing sentence is an integral part of the judicial function. Equally important is the exercise of power of mercy, a responsibility that has been donated under the *Constitution (2010)* to the President acting on recommendations by the Power of Mercy Committee. This is an important

role which has both constitutional and statutory underpinning. It is for that reason that I would hesitate to take the route suggested by my learned brother in the *SOM* case, *supra* where he declared that the name of the President be replaced with that of the court in section 166 of the *CPC* untenable.

21. In addition, once a trial court passes sentence after conviction, it becomes *functus officio*, and can no longer handle the matter again. Unless of course for purposes of review where that is applicable. The case file will have come to an end and will be marked concluded. I would hesitate to keep the matter open for further periodic action after concluding it as, in my view, it would render the doctrine of *functus officio* nugatory.

22. I can understand the frustrations we face as a court when you find children you detained at the President's pleasure still incarcerated several years later, and worse still without any word from the POMAC or Ministry concerned. That is a matter that the ministry concerned needs to look into to ensure that the cases of persons sentenced under section 166 of the CPC, or those of underage children are attended to as provided under section 25(2) and (3) of the Penal Code. The delay cannot be cured by having the matter mentioned in court.

23. In conclusion, I do find that it is expedient and judicious to give a determinant sentence in cases concluded under section 166(1) of the CPC. After so doing, the court becomes *functus officio*, and should let the Executive carry out its responsibility under section 166 (2) to (7) of the CPC."

56. It is clear from the few decisions of the High Court we have sampled that judicial opinion is divided on the constitutionality of some of the provisions of section 166 of the Criminal Procedure Code. As we have mentioned, beyond passing reference, counsel did not address us on this issue which certainly requires to be fully canvassed. It is a matter on which the state of the law is clearly unsatisfactory and in dire need of reform and the Attorney General should take immediate steps to initiate reform.

57. 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.

58. Second, the subs-stratum of the provisions as regards the right to fair trial in criminal cases in article 50(2) of the Constitution is that an accused person should be fully informed, understands, and thereby effectively participates in a criminal trial. To go through the motions of a trial whose nature and effect an accused person does not from the outset understand or appreciate, and further still to be convicted on the basis of such a trial as is provided for in section 166 of the Criminal Procedure Act, is in our view manifestly unfair in light of our current constitutional dispensation. We therefore direct the Registrar of the Court send a copy of this judgment for the attention of the Attorney General. Enough said on that.

59. For purposes of the present appeal, however, we are satisfied that the learned judge ought to have made a special finding of guilty but insane. We therefore allow the appeal. We quash the conviction and set aside the sentence of death. We substitute therefor, a special finding that the appellant did the act charged but he was insane at the time he did it. We order that the appellant, who has been in custody since his arrest on May 18, 2012, shall immediately be taken to a mental hospital for medical treatment where he shall remain until such time as a psychiatrist in charge of the hospital certifies that he is no longer a danger to society or to himself.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF DECEMBER 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR