Republic v Kamotho (Criminal Case E001 of 2025)
[2025] KEHC 577 (KLR) (29 January 2025) (Ruling)

Neutral citation: [2025] KEHC 577 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL CASE E001 OF 2025

DR KAVEDZA, J

JANUARY 29, 2025

BETWEEN

REPUBLIC ..... PROSECUTION

AND

SARAH WAIRIMU KAMOTHO ..... ACCUSED

RULING

1. The accused person Sarah Wairimu Kamotho was arraigned before court for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on 20th July, 2019 at Lower Kabete area within Nairobi County, in the Republic of Kenya, jointly with others not before the court, murdered Tob Chichou Cohen. On the day of first arraignment the prosecution made an application to defer the reading of the information and asked the court to have the accused subjected to mental assessment before the information was read.

2. The application was opposed by the defence, who raised the following arguments: The accused had already undergone a mental assessment upon her initial arraignment at the Milimani High Court in HCCR No 60 of 2019, and a report to that effect is available, and therefore, subjecting her to a similar process, they argued, constitutes double jeopardy. It was further submitted that undergoing a mental assessment is not a mandatory requirement before an accused person takes plea. The defence further contended that subjecting individuals charged with murder to mental assessment is discriminatory and lacks any demonstrated or established legal basis. The court was informed that no evidence had been presented to show that the accused is unfit to stand trial. Lastly, the defence argued that since the prosecution had entered a nolle prosequi in HCCR No 60 of 2019, it would have been more appropriate to reopen the previous case rather than instituting a fresh case against the accused person.

3. I have considered the application, the opposition thereto and the applicable law. The issues for determination are as follows:

a. Whether the accused person should undergo a mental assessment prior to taking plea.

b. Whether subjecting the accused to mental assessment amounts to discrimination.

c. Whether the prosecution should have reopened HCCRC No 60/2019 instead of charging the accused person in a different case.

4. Both parties agreed that there is no explicit legal provision requiring accused persons, regardless of the offence, to undergo mental assessment prior to taking plea. They further concurred that the requirement for mental assessment before plea-taking is a matter of practice rather than law.

5. Upon reviewing the relevant provisions of the applicable law, I find no express legal requirement mandating an accused person to undergo mental assessment before taking plea. This practice, adopted from common law, has been applied in Kenya over time. When faced with a similar argument, Lady Justice Nzioka in *Republic v Lewis* (Cr. Case E077 of 2021) KEHC 272KLR) held as follows: -

> Be that as it may, the question to answer is; what is the rationale of that practice? In my considered opinion, the rationale is founded on statutory law and therefore the argument that, the requirement is purely based on practice per se, may not be fully correct. It is noteworthy that, indeed the provisions of; section 11 of the Penal Code, states that, there is presumption of sanity as regards all persons. It provides as follows: -
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> " Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved"'.

6. The emphasis lies on how the contrary can be proven: Can the absence of a mental assessment conclusively and legally establish the accused's mental state? Furthermore, the questions arise: who bears the burden of disproving the presumption of sanity—the prosecution or the accused? And who stands to benefit from such proof? In this context, Section 11 and 12 of the *Penal Code* provides that:

11. Presumption of sanity

Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

12. Insanity

A person is not criminally responsible for an act or omission if at all at the time of doing the act or making the omission, he is through any disease affecting his mind incapable of understanding what is 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 or reference to that act or omission.

7. Similar questions arise: How can it be established whether a person was or was not of sound mind at the time the alleged offence was committed? Additionally, who bears the burden of proving this, and who stands to benefit from such proof?

8. Reference is also made to the decision of Nyakundi J. in *Kiprop v Kiptanui,Director of Public Prosecutions (Interested Party)*, Miscellaneous Criminal Application E094 of 2023 [KEHC 10380 KLR], wherein his Lordship concurred with the position advanced by Nzioka J in Lewis (*supra*). I likewise align with their Lordships' reasoning. A mental assessment serves as a crucial tool in criminal proceedings, providing answers to the questions raised in Sections 11 and 12 of the *Penal Code*. It is

only through such an examination that the presumption of sanity can be rebutted, and, it remains the sole method of establishing whether a suspect is of sound mind.

9. However, and more broadly, the practice of subjecting suspects to mental assessment is centred on the welfare approach in our societies. The welfare model focuses on core protection, treatment and rehabilitation. Put it differently societies have adopted a paternalistic approach to ensure that those suffering from disease of the mind are not subjected to criminal trials without protective safeguards.

10. The doctrines of paternalistic and welfare models are also cantered on morality. For instances A. Birgden and D. Thomson, '*The Assessment of Fitness to Stand Trial for Defendants with Intellectual Disability: A Proposed Assessment Procedure Involving Mental Health Professionals and Lawyers*' (1990) 6(2) Psychiatry, Psychology and Law 2017–2214 postulated that in the criminal justice process, a defendant must be fit to stand trial so that the criminal procedure is dignified, the results are reliable and the punishment is morally justifying i.e. a fair trial.

11. M. R. Schoffer, '*Fitness to Stand Trial*' (1977) 35(1) University of Toronto Faculty of Law Review 1–25 too observed that the idea that persons of unsound mind should not be made to stand trial is noted in old age concepts of fair play and fundamental justice. The fitness requirement is both the product of the traditional right of an accused to make further answer and defence and a logical extension of the rule which evolved at common law prohibiting trial in absentia.

12. In my view, the language of our section 12 of the *Penal Code* embodies the welfare and paternalistic models. These models are fashioned to be protective.

13. From the foregoing reasoning, is the accused person justified in objecting to mental assessment? I am alive to the holding in *Lewis* (*supra*) and *Kiprop* (*supra*) where the Lordships held that an accused person has a choice to make and if he/she opts not to undergo a mental assessment, the court will presume that he/she is of good mental health and has therefore waived the right to the defence of insanity.

14. However, as outlined above, I liken our laws to the paternalistic and welfare models, which, in my view, advocate for a more caring and protective approach. Accordingly, while the requirement for a mental assessment is not mandatory under the law, it is a beneficial and necessary practice for addressing the questions raised in Sections 11 and 12 of the Penal Code. A positive mental assessment report serves as a valuable tool that empowers the court to protect and safeguard the inherent dignity and right of the accused person as guaranteed under Article 28 of the *constitution*.

15. Moreover, Article 159 of the *constitution* calls for the effective administration of justice. Courts are mandated to facilitate the expeditious and efficient administration of justice. To this end, what prejudice would an accused person suffer by undergoing a mental assessment before trial? In my view, none. It would be an inefficient use of judicial time and resources if a trial were to be interrupted midway, or if a decision were overturned, upon discovering that the accused person was, in fact, suffering from mental impairment hence was unfit to stand trial.

16. It is therefore my belief that the fair administration of justice supports the position that individuals charged with murder should undergo a mental assessment. I am further of the view that this requirement is both necessary and good practice, and it should be embraced. There is nothing demeaning or undignifying in undergoing such assessment since in the long run, an accused person found to be suffering from mental impairment stands to benefit. Any accused person who wishes to be examined by a doctor of their choice should be free to do so, in order to challenge the report of a government psychiatrist.

17. Let us now return to the case at hand. The issue to be determined is whether it is necessary for the accused, Sarah Wairimu Kamotho, to undergo another mental assessment, having already been subjected to one in 2019. While the report for the 2019 assessment was not produced before this court, both parties agreed that such a report does exist and the conclusion by the psychiatrist that the accused was mentally fit to plead to the charge. Based on this information, I do not find it necessary to subject the accused to another mental assessment at this stage. The prosecution has not demonstrated any reasonable grounds to this court to believe that the accused has developed mental impairment after the assessment in 2019, thus, rendering her unfit to stand trial. For these reasons, the request to have the accused undergo another mental assessment is hereby declined.

18. Notwithstanding the foregoing, I caution that this order is not cast in stone. Should circumstances change or should the court be presented with reasonable grounds to believe that a further mental assessment is necessary, the court retains the discretion to issue such an order.

19. The second issue for determination is whether subjecting the accused to mental assessment amounts to discrimination. The defence counsel failed to provide sufficient material to enable this court to assess the constitutionality or otherwise of the practice. The court requires a proper application to be filed in order to address this issue. Until such an application is properly before the court, I decline to engage in an in-depth analysis of speculative matters and hereby reject the invitation to make any determination on this issue.

20. The third issue is whether the prosecution should have reopened Nairobi HCCRC No 60/2019. It is an accepted position that the prosecution entered a nolle prosequi under section 82(1) of the Criminal procedure code, and the accused person was discharged. The defence counsel contended that the prosecution erred by instituting fresh charges against the accused person in the current file whereas Nairobi HCCRC 60/2019 is in existence.

21. Article 157(6) of the *constitution* grants the DPP prosecutorial powers as follows:

> (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may--
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> (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
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> (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
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> (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph *(b)*.

22. Further Section 82(1) of the *Criminal Procedure Code* on the other hand provides that:

> 82. Power of Director of Public Prosecutions to enter nolle prosequi
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> (1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Republic intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged;

but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.

23. My understanding of these provisions is that a nolle prosequi may be entered either as an acquittal or as a discharge, depending on the stage of the trial. Section 82(1) of the Criminal Procedure Code explicitly provides that a discharge does not bar subsequent proceedings against an accused person on the same facts, as the provision permits subsequent proceedings for good cause. This implies that the prosecution may institute fresh charges, and there is no requirement for the prosecution to reopen the same case file. Once a nolle prosequi is accepted by a court, for whatever reason, the file stands closed.

24. Furthermore, the power to enter a nolle prosequi is intended to allow the prosecution an opportunity to correct errors, conduct further investigations, apprehend additional or more appropriate suspects, turn certain suspects into witnesses, or, more generally, to give the Director of Public Prosecutions a chance to put their house in order, or should new evidence emerge, the prosecution may institute fresh proceedings.

25. I am therefore not persuaded that there currently exist any jurisprudence mandating the prosecution to reopen a file previously closed following a successful nolle prosequi application under Section 82(1).

26. Notwithstanding the foregoing, it is important to note that the alleged offence was committed in Kabete, Nairobi County which is within the territorial jurisdiction of this court. It should however be noted that in 2019, when the alleged offence was committed, Kibera High Court had not been established, and this explains why the matter was initially filed at Milimani High Court.I therefore hold that Kibera High Court is the court that is properly vested with jurisdiction to hear and determine this case.

27. Disposition:

    i. The application by the prosecution to subject the accused person to a mental assessment prior to taking plea is hereby declined.

    ii. The application to have this case dismissed and Nairobi HCCRC No 60/2019 reopened for hearing is hereby dismissed.

    iii. A copy of the mental assessment report filed in Nairobi HCCRC No 60/2019 shall be submitted to this court and shall form part of the court record.

    iv. The accused person shall forthwith take plea.

    Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY 2025.

D. KAVEDZA

JUDGE

In the presence of:

Ms. Ogweno h/b for Gichuhi & Mr. Monda, Ms. Maina, Ms. Timoi, Ms. Wandera and Ms. Gachanja for the State

Mr. Wakima and Mr. Tumu for the Victims

Mr. Maloba, Mr. Ndeda, Mr. Mingo, Mr. Amalemba, Mr. Muriithi and Ms. Obuya for the Accused.

Accused present

Achode Court Assistant