



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Bante (Criminal Case 11 of 2018)  
[2024] KEHC 8172 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8172 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL CASE 11 OF 2018**

**JN ONYIEGO, J  
JUNE 28, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**ISMAEL BIDU BANTE ..... ACCUSED**

**JUDGMENT**

1. The accused person herein is charged with 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 05.10.2018 at Kibilay location in Habaswein Sub County within Wajir County murdered Rahma Dekow Gabow. Having pleaded not guilty to the charge, a plea of not guilty was entered and thereafter the case proceeded to full hearing.
2. PW1, Gini Hodad Abdikalim testified that on 05.10.2018 at 6.00 a.m., together with the deceased, they were on their way to school when they met the accused person who at that time was holding a Somali sword and a panga. Upon approaching him, he hit the deceased on the right shoulder thus causing her to fall on the ground. On seeing that the accused person had also fallen down, she ran back home to inform the mother of the deceased of what had happened. The deceased was rushed to the hospital but unfortunately succumbed to her injuries. It was her evidence that the accused was a person well known to her.
3. PW2, Sahara Yusuf Hassan, the deceased's mother testified that on the fateful morning, her daughter left home for school. At about 6.30 a.m. or thereabouts, her friend, PW1 rushed to her home informing her that someone known as Bidu Bante had attacked her daughter using a panga. She further stated that she proceeded to the scene where she found her daughter lying down on the ground and that she had an injury on the neck and a cut on the right-hand side of the forehead. That the injured daughter was rushed to the hospital but upon arrival, she was declared dead. She identified the body of the deceased to the doctor who carried out the post mortem.



4. PW3, Mohamed Bare Samor, chief Kibilai location stated that on the material day, he received a call from one Mr. Charles, the Assistant County Commissioner who informed him that a girl had been killed within his area and so he proceeded to the scene of crime. He recalled that he saw a girl lying dead on the ground but at the same time bleeding from the neck and forehead.
5. He told the court that the alleged perpetrator was also lying down some few metres away from where the girl's body was. He stated that people claimed that he had consumed poison as he passed foam from the mouth. He testified that members of the public who had gathered attempted to kill the accused person but he intervened and thereafter took the deceased to the hospital. On cross examination, he stated that the accused person was well known to him and that he was not aware that he had any mental illness.
6. PW 4, Hassan Mohamed Farah recalled that while at the water point drawing water, he saw the deceased and PW1 heading to school. He recalled that the accused approached the girls and hit the deceased on the head prompting the girl to fall down. That he hit her the second time on the neck and thereafter continued to slaughter the victim as the other girl ran away. While there, the accused person also fell down and pretended to have fainted and started eating sand. He further stated that it was his screams that drew peoples' attention and after some time, the police arrived and took the victim and the accused person away. According to him, the accused person had no known mental illness.
7. PW5, Mahat Ali, a borehole attendant stated that while at his place of work, he was called by PW4 requesting him to hurry up as the accused person had killed a girl. Upon reaching the scene, he found the accused person lying on the ground as well as the girl in school uniform whose body was covered with blood. He called Aden, a neighbour as well as the mother of the girl as she was someone known to him and informed them of what had ensued.
8. PW6, Mohamed Aden Mohamed, a teacher at Kibirai Primary School stated that on the material day, he was at the school compound when he heard screams emanating from the direction of the borehole. That together with Mr. Gabriel, they headed to the said direction and upon reaching there, they found a girl and a man, both lying on the ground. He called a taxi but police came and took both the girl and the man away.
9. PW7, Dr. Feisal Ibrahim, a medical officer testified that he conducted postmortem on the body of the deceased. According to him, the cause of death was due to excessive bleeding secondary to penetrating stab wound at the right side of the neck.
10. PW8, No. 107554, Paul Wanjala Mucha, stated that on 05.10.2018 at 7.30 a.m., a teacher and a person well known to him went to the station and informed him of the incident. That together with PC Kirui, PC Kemboi and Mushi, they rushed to the scene where they found a lady and a man lying down on the ground. That the lady had injuries on the head and neck while the man did not have any injuries. The following morning, he was informed that the lady had passed on leading to the commencement of investigations which later led to the charge herein.
11. PW9, No. 110358 PC Felix Kemboi, the investigation officer stated that on the material day, while in company of his colleague, they heard some noise coming from the eastern side of the borehole nearby. That IP Taru directed them to find out what the problem was and so, they rushed to the scene and upon reaching there, they found students and members of the public. They saw a man surrounded by members of the public and a lifeless body of a pupil lying on the ground. Upon uncovering the pupil, they saw a deep cut on the scalp and therefore organized for a taxi and rushed the victim to Habaswein Hospital. After interrogation, the borehole attendant informed them of all that ensued and in the process, recovered a panga and a small unicef bag.



12. He went further to state that the girl died upon arrival at the hospital and so, he organized for post mortem examination to be conducted. On the other hand, the accused person started vomiting and so he rushed him to the hospital for treatment. Upon completion of investigation, he recommended for the accused to be charged.
13. On his defence, the accused gave unsworn testimony stating that he has been suffering from mental illness and that he lived alone as his wife had left him owing to his condition. That the problem is temporary as at times, he feels alright. He stated that he did not remember killing the deceased and could not possibly remember what had ensued. It was his evidence that he has been to Mathare Hospital on three occasions and has been receiving medication for mental illness.
14. After close of the defence case, parties proceeded to file final submissions. The prosecution in their submissions dated 19.04.2024 submitted that the evidence tendered was sufficient to sustain a charge of murder and that they had established the elements of the said offence. Prosecution placed reliance inter alia on the case of *Republic v Tubere* 1945 EACA 63 where it was held that malice aforethought in murder may be established by ascertaining the nature of the weapon used and the part of the body targeted. The court was therefore urged to convict the accused person.
15. The defence on its part via submissions dated 26.03.2024 submitted that the death of the deceased was not in question and further, that there was evidence placing the accused at the scene of murder but no evidence was led to the effect that there was malice aforethought.
16. It was contended that the evidence before the court pointed to the fact that the accused person suffered a mental illness and therefore could not be said to have acted with malice aforethought. Reliance to that end was placed on the case of *Republic v Mulwa Mulemba* [2006] eKLR where the accused was found to have been suffering from a mental illness and therefore a special finding was entered that the accused was insane at the time he committed the offence. This court was therefore urged to find that the accused person was suffering from mental infirmity at the time of commission of the offence herein.
17. I have considered the evidence tendered before this court both by the prosecution and the defence. I have equally considered rival submissions filed by both parties. The accused herein was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The offence of murder is defined under section 203 of the *Penal Code* in the following terms;

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”
18. It is trite that for the prosecution to secure a conviction on a charge of murder, it has to prove, beyond reasonable doubt, the following ingredients;
  - a. the death of the deceased and the cause of death;
  - b. that the accused committed the unlawful act which caused the death of the deceased; and
  - c. that the accused had malice aforethought.
19. There is no doubt that the prosecution bears the burden of proving every element of the offence an accused person is charged with, and in this case, prove that the accused herein murdered the deceased [ See *Woolmington v DPP* (1935) AC 462). The standard of proof which is required of the prosecution is that of “beyond any reasonable doubt” [ See *Miller v Ministry of Pensions*, [1947] 2All ER 372). The question therefore is whether the above ingredients were proven to the required standards.



20. As for the proof of the death of the deceased and the cause of the death, all the prosecution witnesses testified as to having seen the body of the deceased with stab wounds. PW7 further testified as to having conducted post-mortem on the said body upon which he formed the opinion that the deceased had died as a result of excessive bleeding due to a penetrating stab wound at the right side of the neck. Owing to the foregoing, death of the deceased was thus proved.
21. On whether the accused person committed the unlawful act, guidance can be drawn from the Constitution under article 26 which underscores the right to life which can only be taken away under the circumstances provided therein. It therefore means that every homicide is unlawful unless authorized by law or excusable under the law. [See *Daniel Nzioka Mbuti & another v Republic* [2021] eKLR and *Roba Galma Wario v Republic* [2015] eKLR]. From the facts herein, it is clear therefore that the cause of death of the deceased was not excusable or authorized by law thus the same was unlawful.
22. As to whether the accused person committed the unlawful act which caused the death of the deceased, the evidence of PW1 and PW4 is clear. They testified as having seen the accused person kill the deceased while PW9 stated that from his investigations, he determined that the accused was responsible for the death of the deceased herein. Accused did not controvert the fact that he was responsible for the deceased's death. He only pleaded mental infirmity at the time when he attacked and killed the deceased.
23. Having held that the accused was responsible in causing the death of the deceased, the court is left with the question whether there was malice afore thought. Malice aforethought was defined by the court of appeal in the case of *Nzuki v Republic* [1993] KLR 171 where it held that; before an act can be referred to as murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused.- Intention to cause death- Intention to cause grievous bodily harm- Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse.
- [Also see *Peter Kiambi Muriuki v Republic* (2013) eKLR].
24. The accused mounted a defence from the onset to the effect that he was suffering from a mental illness in that he was not even aware of the alleged incident hence the charges preferred against him. In his written submissions, it was contended that the prosecution did not prove the mens rea for the reasons that the mental assessment report indicated that the accused person was undoubtedly unfit to stand trial in court as he had a mental illness.
25. Section 11 of the *Penal Code* (Cap 63 Laws of Kenya) provides that: –
- “ Every person is presumed to be of sound mind and to have been of sound mind at any time which comes into question until the contrary is proved.”
26. However, under Section 11, the presumption of insanity is rebuttable. Where an accused person raises the defence of insanity, the burden of proving insanity rests with him. (See *Marri v Republic* [1985] KLR 710 and *Muswi s/o Musele v Republic* [1956] EAC 622).
27. Under Section 12 of the *penal code*, it is further provided 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 effect above mentioned in reference to that Act or omission.”

28. It is thus clear that insanity is a defence if proved that at the time the accused committed the offence he was labouring under the disease of the mind. However, for the said defence to be available, it must be shown that the accused at the time of doing the act or making the omission he was incapable of understanding what he was doing or of knowing that he ought not to do the act or make the omission as a result of the disease of the mind.
29. The Court of Appeal in the case of *Leonard Mwangemi Munyasia v Republic* (2015) eKLR held that; -
- “if it is shown that the appellant suffered from this condition then under Section 9 & 12 of the *Penal Code* he could not be held criminally responsible for the murder of the deceased.
- Both Section 12 aforesaid and the M/c Naughten Rules recognise 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 the law. The test is strictly on the time when the offence was committed and no other.”
30. According to the prosecution witnesses, they all knew the accused person as a normal person who prior to the incident herein had not suffered any mental illness. The defence on the other hand urged that even the court had noted on 19.11.2019 that the accused person’s behaviour was unusual. Additionally, that the accused person has been receiving treatment for mental illness. Further, the mental assessment report showed that the accused herein suffered mental infirmity and therefore was unfit to stand trial in a court of law.
31. From the medical information stated above, would it be therefore safe to conclude that indeed the accused herein was at the time of the commission of the offence labouring from a mental illness?
32. In the case of *Leonard Mwangemi Munyasia v Republic* (*supra*), the court observed that: -
- “We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop.”
33. In reference to the above case, the witnesses who allegedly saw the accused person kill the deceased, also noted that after the attack, the accused person fell down and started eating sand as he passed out foam from the mouth. From his conduct, it was not a normal behavior that the accused could attack somebody, fall down there and then start eating sand while passing out foam.
34. The accused person also confirmed that owing to his condition, his wife had left him. That his problem is an on and off condition. The same was corroborated by the report that the accused was suffering from a mental illness thus was unfit to stand trial. From this kind of evidence, I have no doubt that it was the accused who killed the deceased but he was not in his right frame of mind hence malice aforethought cannot be apportioned on him.



35. Having come to the above conclusion, the finding that commends itself to the court is to proceed as provided under Section 166 (1) of the *Criminal Procedure Code*. Accordingly, I make a special finding under Section 166 (1) of the *Criminal Procedure Code* to the effect that the accused is guilty of murder contrary to Section 203 of the *Penal Code*, but was insane at the time he committed the offence. Accordingly, I am inclined to enter a special finding of Guilty but Insane.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF JUNE 2024.**

**J.N. ONYIEGO**

**JUDGE**

