

DEFENCES

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1. Introduction

- Criminal capacity is the ability of an accused person to form the necessary *actus reus* and *mens rea* of a given offence
- The proof of existence of certain conditions try to justify or excuse the commission of crimes. These justifications or excuses are referred to as defences and they seek to question the criminal capacity of an accused person.
- Defences are a denial of sufficient capacity to deserve the imposition of a criminal sanction
- Defences can entitle an accused person to an acquittal (absolute defence)
- A defence can also lower the charge from a most serious crime to a lesser serious crime (a partial defence)
- Partial defences do not lead to acquittals. In the case Of ***Republic v Andrew Mueche Omwenga [2009] eKLR***, upon the accused person proving the defense of provocation, the court proceeded to acquit the accused of the charge of murder but convicted him of the offence of manslaughter. The court cited with approval the case of ***Mancini Vs Director of Public Prosecutions***, [1941] All ER 272 where the English House of Lords held that not every kind of provocation, however, will reduce murder to manslaughter.
- A defence is specific when its application is limited to a particular offence. A defence is general when it can be applied to more than one crime. It is not general in the sense that it applies to all crimes, some general offences are not applicable to other crimes.

2 Insanity

- An accused person in a criminal trial can raise the aspect of insanity in two ways:
 1. An accused may raise insanity as a defence, claiming that at the time of committing the offence he lacked capacity to commit the alleged acts that constitute the offence
 2. An accused person may also raise insanity during plea taking. Here s/he may claim lack of mental capacity to stand trial because of insanity. Here, insanity does not operate as a defence but a procedural bar to the trial process.

2.1 Insanity as unfitness to stand trial

- In order to stand a criminal trial, the court must ascertain the mental fitness of an accused person
- According to section 162 of the Criminal Procedure Code of Kenya, whenever the court suspects the accused to be of unsound mind it must postpone the proceedings in the case and either
 - i. issue bail to the accused to be taken for medical attention or where bail is not applicable,
 - ii. order the detention of an accused person in safe custody, ordinarily a mental hospital until such time the accused person is found to be mentally fit to stand trial
- Similar principles of standard and burden of proof apply when one raises insanity as a defence and when one raises insanity as a procedural bar to a criminal trial.

2.2 Insanity as a defence

- Kenyan courts have recognized insanity as a defence. See *Leonard Mwangemi Munyasia v Rep* (2015) eKLR.
- For an accused person to successfully rely on this defence, they have to satisfy the conditions under section 12 of the Penal Code. They have to establish that at the time of committing the offence:
 - a) s/he suffered from a disease of mind
 - b) and because of this disease of mind s/he was unable to understand what they were doing or
 - c) because of the disease of mind, s/he was not able to know that he ought not to do the act or make the omission
- a) **S/he suffered from a disease of mind**
 - While Kenyan law lacks guidance on what amounts to disease of mind, judicial approach has broadly interpreted schizophrenia and drug induced psychosis (*Republic v IKI [2019] eKLR*); Post-Partum Psychosis (*Republic v CMW [2018] eKLR*); epilepsy (*Richard Kaitany Chemagong v Republic; Criminal Appeal No 150 of 1983*); temporary insanity (*Wakesho v Republic (Criminal Appeal 8 of 2016) [2021] KECA 223 (KLR) (3 December 2021)*) as constituting disease of mind.
 - Common law too has adopted a very inclusive approach as to what might constitute disease of mind.
- b) **Inability to understand what they were doing**
 - An accused person's inability to understand what they were doing corresponds to the nature and quality of an accused person's acts or omissions. It simply means that D did not know what he was doing.
 - For example, A kills B under an insane delusion that he is breaking a jar and where a mad man cuts a woman's head thinking he is cutting a loaf of bread.
- c) **Inability to know that he ought not to do the act or make the omission**
 - Here, the question the courts will be asking is: was the accused able to appreciate the wrongness of his acts?
 - Even if an accused did not know that his acts were contrary to law, he will still be liable if he knew that it was wrong 'according to the ordinary standards adopted by ordinary man'. See *Philip Muswi s/o Musele v Reginam (1956) 22 EACA 622*
 - Kenyan courts always acknowledge the common law origin of this principle; the *the M'Naghten Rule* in the case of *Republic v CMW [2018] eKLR* the court observed with approval that for the defense of insanity to stand, the accused must satisfy the grounds set out under the M'Naghten rule in *McNaughten Case (1843) 10 C1 & Fin 200*

A finding of "guilty but Insane"

- Once the accused person successfully proves the defence of insanity but the prosecution proves *actus reus*, then a finding of guilty but insane is entered in

accordance to section 166 of the Penal Code of Kenya. Following such finding, the accused is detained during the pleasure of the president.

- Kenyan courts do not have a uniform approach concerning a finding of “guilty but insane”.
- Some courts have struggled to make sense out of its constitutionality (*Wakesho v Republic (Criminal Appeal 8 of 2016) [2021] KECA 223 (KLR) (3 December 2021)*; *Hassan Hussein Yusuf v Republic* [2016] eKLR; *Republic v SOM* [2017] eKLR; *Francis Karioko Muruatetu and another v Republic*, SCK Petition No 15 and 16 of 2015)
- Other courts affirm the status quo (*Republic v ENW* [2019] eKLR)
- This necessitates reforms in order to align the Criminal Procedure to the relevant constitutional principles.

3 Intoxication

- As a general rule, intoxication is no defence (*DPP V Majewski (1977) AC 443*)
- The three instances under which intoxication can be said to be a defence
 - a) Where the state of intoxication was caused without an accused person’s consent (*Bakari Magangha Juma v Republic* [2016] eKLR; *R v Kingston* (1994) 99 Cr App R 286)
 - b) Where the state of intoxication led him to insanity (*Rex v Retief [1940-1943] EA 71*)
 - c) Where the state of intoxication negates any prior intention to commit the offence (*Said Karisa Kimunzu v. Republic, CR App No. 266 of 2006 (Msa)*; *Kupele Ole Kitaiga V R, [2009] eKLR, CR. NO. 26 of 2007*; *Republic v O M G* [2017] eKLR)

4 Infancy

- Prove of infancy at the time of committing an offence also operates as a defence and depending on the age of the child, this might as well be an absolute defence
- For children under the age of 8 years, the law creates an irrebuttable presumption that a child under 8 years can never be held responsible for any criminal offence (S 14(1)); See section 220 (1) of the Amendment to the Children’s Act: “A person under the age of 12 years shall not be criminally responsible for any act or omission”
- For children under 12 years, the law creates a rebuttable presumption that a child under 12 years is not criminally responsible unless it is proven that the child had the mental capacity to comprehend the criminal acts. (S 14 (2)) (*Republic v J.O & another* [2015] eKLR); *Republic v EM Embu HCCC Crim. Rev. No. 14* [2015] eKLR: See section section 220 (2) of the Amendment to the Children’s Act: “a child who commits an offence under the age of 14 years shall be presumed not to be capable of differentiating between right and wrong, unless the court is satisfied on evidence to the contrary”
- For boys under the age of 12 years, the law creates an irrebuttable presumption that a boy under the age of 12 years is incapable of having carnal knowledge. Thus, this age group enjoys total immunity from crime of rape or defilement. (S 14 (3)) (*Republic v E M* [2015] eKLR; *Rex v Opiri s/o Meope and another EALR 90*)

5 Duress/Compulsion

- The defence of duress, also known as compulsion, occurs when an accused person claims that he or she was compelled by another or others to commit the crime which they are being charged for.
- Section 16 above limits the application of the offence to the following circumstances:
 1. The offence is committed by two or more offenders
 2. The compulsion consists of threats to kill or cause grievous bodily harm to the person compelled if he refuses
 3. The threat is applied throughout the period of the commission of the offence- future threats not applicable
 4. The defense is not applicable to justify murder/ attempted murder
- See (*M'Kanyoro v R (1962) EA 110*; *Republic v Martha Auma Nyangol [2018] eKLR*): the threats need not be articulated, they can be inferred from conduct and surrounding circumstances
- *Republic v Martha Auma Nyangol [2018] eKLR*: taking into account the conduct of an accused person in determining duress.

6 Necessity

- Necessity as a defense applies where an accused is confronted by two unpleasant alternatives and he reasonably believes that his acts or omission would avert a greater harm
- This defence is not expressly provided for under Kenyan law. However, section 240 Penal Code makes provisions on justified surgical operations
- See (*R v Bourne (1938) 3 All ER 615*;
- The courts have however declined to apply the defence to cases of murder: *R v Dudley and Stephens (1884) 14 QBD273*)

7 Marital Coercion and related defences

- Section 19 of the Penal Code has legislated the common law principle on marital coercion.
- At common law a wife does not become an accessory after the fact if she were to shield the husband from punishment. However, given similar circumstances, a husband was treated as an accessory after the fact of a crime committed by the wife.
- Kenyan law, section 397(2) of the Penal code, treats spouses equally. None of them becomes an accessory to the fact if they were to assist each other escape from punishment after committing a crime. The law further extends the application of this rule to instances when the wife receives a third person in the presence of the husband and by his authority who is also part of the crime committed by the husband.
- Relatedly, under common law, husband and wife cannot be convicted of conspiracy with each other unless a third party is involved or that one spouse incited another to commit a crime even when the elements of incitement are proved. This common law position does not apply in Kenya. Although there is no express provision under the Penal Code on this aspect, Kenyan courts have pointed out the possibility of a spouse being held criminally liable for conspiracy. See *Celester Ajwang Juma v Republic [2010] eKLR*

- Concerning theft, both common law and section 274 of the Penal Code, a husband cannot steal from a wife and vice versa.
- Similarly, both common law and Kenyan law do not criminalise spousal rape.

8 Superior Orders

- There is no provision in the Penal Code on superior orders.
- The defence is provided for under the Kenya Defence Forces Act: (section 77-81) or (section 82 and 83).
- The defence is more practiced in the Court Martials.
- Ordinary criminal courts in Kenya have sparingly relied on this defense: *George Itiotia Karuku v Republic [1994] eKLR*
- Kenya to draw some lessons on the application of the defence from international criminal law; article 33 of the Rome Statute

9 Mistake of fact

- Section 10 of the Penal Code: an honest and reasonable, but mistaken, belief in the existence of any state of things
- *Republic v Michael Wachira Kinyua [2019] eKLR; DPP v Morgan [1975] All ER 347*

10 Alibi

- This is when an accused person claims that s/he was not at the scene of the crime at the time when the crime is said to have been committed.
- The defence applies to crimes that require the physical presence of an accused person at the scene of crime
- *Erick Otieno Meda v Republic [2019] eKLR; Karanja v R (1983) KLR 501 (1976-1985) EA*

11 Accident

- Under section 9 (1) of the Penal Code: “a person is not criminally responsible for an acts or omissions which occurs [...] by accident.”
- The accused engages in an innocent act without any element of *mens rea*
- Accident is an absolute defense: an accused person who successfully relies on this defense must be acquitted.
- Where an accused person unsuccessfully relies on the defense of accident in a murder charge, the court has been of the opinion that it has to consider manslaughter. In the case of *Rex –vs- Jehoshaphat Rugambi Mwaniki (1942) 9 EACA 40*

12 Bona fide Claim of Right

- Created by section 8 of the Penal Code: a person is not criminally responsible in respect of an offence relating to property if the act done or omitted by him was done in an honest claim of right and without intention to defraud.

- This is a common defence in property crimes: *Samwel Abuya Mbija v Republic [2014] eKLR*; *Josphat Mwinji Kamwara & Another v Republic [2020] eKLR*
- *Veronica Nyambura Wahome –vs- Republic [2019] eKLR* that the belief of the accused person should “neither based on a falsehood or intent to create a false impression.”
- *Kennedy Babu Gesora V Republic [2010] eKLR*

13. Self Defence – Defence of Self/Another/Property

- An accused person can invoke the defense of self defence with respect to defence of self or defence of another person or in the protection of property.
- Section 17 of the Penal Code:
- *Privy Council Palmer v. Republic 1971 1 ALL ER*; the need for self-defence justified
- The test for application of self defence: *Republic v Ismail Hussein Ibrahim [2018] eKLR*; *Ahmed Muhammad Omar & 5 Others v. Republic*; *Republic V Guzambizi S/o Wesonga 1948 15EACA 65*; *Shaw V Republic 1952 HCA CLR 356*; *DPP v Morgan [1975] 2 ALL ER 347*