

# Mens Rea

## 1. Introduction

- *Mens rea* is the wrongful intent or fault element of a crime. It refers to the guilty mind that one requires together with *actus reus* to fulfil the requirements of criminal liability.
- It is the mental element required by the definition of a particular crime – the state of mind required for a particular crime.
- It concerns legal and not moral guilt
- Different forms in which general *mens rea* is manifest:
  - i) Intention
  - ii) Recklessness
  - iii) Negligence
  - iv) Knowledge
- Each of these forms of *mens rea* imply different degrees of fault
- *Mens rea*, manifests itself as either subjective or objective.
- **Subjective *mens rea*** - holds that “the mental element should require proof that D has personal awareness of his actions and of the relevant circumstances and consequences comprising the *actus reus* of the offence.”<sup>1</sup>
- **Objective *mens rea*** - uses the reasonable person test. That “the reasonable person would have been aware of the relevant circumstances/consequences comprising the *actus reus*, irrespective of whether D himself was aware of them.”<sup>2</sup>

### Intention

- Section 9 (2) of the Penal Code on the relevance of intention as a form of *mens rea* necessary in establishing criminal liability only when it is expressly provided for under the law to be one of the elements constituting the offence
- Intention can be direct or indirect/ oblique
- **Direct intention** – the prohibited consequence was the accused person’s aim/purpose
- **Indirect/oblique intention** – the consequence was not the accused person’s aim but it could be foreseen
- The current English position is that intention will only be inferred where the accused person foresaw the results as a virtually certain consequence of his/her actions-*Moloney [1985] A.C. 905HL, Hancock and Shankland [1986] A.C. 455 HL, Nedrick (1986) 83 Cr. App. R. 267, Woollin (1999) 1 A.C. 82 HL*
- Preference by most Kenyan courts is to give a narrow interpretation restricting intention to instances where the consequences were the direct purpose of the accused.
- It can be inferred nonetheless, from several decisions that intention also includes the consequences which although not the aim/purpose of the defendant were an inevitable result of the defendant’s conduct-Indirect/Oblique Intent.

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<sup>1</sup> D. Ormerod and K. Laird, Smith, Hogan, and Ormerod’s Criminal Law, 16<sup>th</sup> edn (Oxford: OUP 2021) p. 89.

<sup>2</sup> D. Ormerod and K. Laird, Smith, Hogan, and Ormerod’s Criminal Law, 16<sup>th</sup> edn (Oxford: OUP 2021) p. 89.

- Not clear from the Kenyan case law if intention will be inferred where the accused person foresaw the consequences as merely probable, highly probable or virtually certain.
- Consider the facts of *Republic v Ismail Hussein Ibrahim [2018]eKLR, criminal case 4 of 2016*; *Republic v TWG [2021]eKLR, Criminal case no. 42 of 2017*; *Jennifer Wanjiru Ng'ang'a v Republic [2018]eKLR, Criminal Appeal No. 196 of 2016*-an inference can be drawn that the courts were not prepared to find the defendants had intended the consequences, unless the defendants had been virtually certain the prohibited consequences were inevitable.
- The foresight the court is concerned with here is that of the accused person and not that of a reasonable person.

### Intention and motive

- Intention is not motive.
- Motive- the reason that drives the accused person to act as he did. Often involves emotions such as jealousy, greed, compassion, sympathy.
- Prove of motive is irrelevant in establishing criminal liability. It is however relevant in sentencing, where it is an element of the offence, as evidence in proving *mens rea* and to the defence of necessity.

### Recklessness

- Involves an accused consciously taking an unjustified risk either to the possibility that certain undesirable circumstances exist or the possibility that certain consequences will occur.
- Where the activity undertaken involves low social utility but a high risk of harm such conduct would be considered unreasonable. The standard for determining whether the risk taken was unjustified is an objective test.
- Recklessness has been defined using two approaches the objective and subjective approach.
- **Objective recklessness** – Accused person does an act which creates an obvious risk but when doing the act fails to give thought to the possibility of the risk or wrongly concludes there is no risk. The focus is on whether a reasonable person would have recognised the risk
- **Subjective recklessness** - An accused person took an unjustified risk, and was aware of the existence of the unreasonable risk. The focus is on accused person's own cognition of the existence of a risk
- English courts have settled for the subjective *Cunningham* test on recklessness- *R. v G [2004] A.C. 1034*. Objective test of recklessness considered too harsh in its implication- Considers those who fail to give thought to the possibility of existence any risk to be equally blameworthy as those who foresee the risk. Adopting the subjective test for recklessness also creates a clear distinction between recklessness and negligence.
- Kenyan courts seem to have adopted the objective *Caldwell* test.
- Most cases that have specifically addressed recklessness in Kenyan courts concern traffic offences. For purposes of establishing liability the courts adopt objective recklessness, but at the moment of sentencing recognition is also given to subjective recklessness, with the latter considered to be deserving of a harsher penalty- *Timothy Orwenyo Missiani v R [1979] KLR 285*; *Bernard Wambua Kuu v Republic [2021] eKLR*; *R v Dilesh Sonchand Bid [2014]eKLR Criminal Revision no.521 of 2013*.

- Subjective recklessness involves the accused consciously/deliberately acting in a manner that disregards the danger his conduct creates. The accused person is aware of the substantial risk and takes an unjustified risk. It is a more culpable state of recklessness that deserves harsher punishment.
- In some cases although the courts recognise the objective test for purposes of recklessness, they still seem to require proof of subjective recklessness to establish criminal responsibility- *Peter Nguu v Republic [2021]eKLR, Criminal Appeal 56 of 2019*.
- Since recklessness applies to other serious offences the most prudent test that should be adopted is the subjective *Cuningham* test-class to consider and discuss *Jennifer Wanjiru Ng'ang'a v Republic [2018]eKLR, Criminal Appeal No. 196 of 2016*

### Negligence

- Inadvertently taking an unjustified risk.
- Legal fault that arises for failing to comply with the standards of the reasonable (prudent) man.
- Accused person is negligent if he fails to recognise a risk that a reasonable person would have recognised, or he does consider the possibility of such a risk but wrongly concludes that there is no risk or that the risk is so small that it is worth taking.
- Where the defendant fails to realise a risk when he ought to have, he is inadvertently negligent
- Section 243, Kenyan Penal Code provides a list of acts it collectively calls negligent and reckless acts that endanger human life or can cause harm.
- The standard adopted to establish negligence is that of a prudent man-Objective test-*Joseph Waruinge Njenga v Republic [1980] eKLR; R v Collins Otieno Obako [2017]eKLR*
- Any small departure from the standard of the reasonable person should be sufficient to establish the fault element of negligence.
- Objective test adopted for purposes of establishing recklessness obscures the distinction between recklessness and negligence. Kenyan courts have in effect extended the concept of recklessness to include negligence.
- Practice however shows that Kenyan courts at the point of sentencing recognise that an accused person who was merely negligent deserves less severe punishment than in the instant where advertent fault is proved.
- Need to clearly define the parameters of recklessness so as to distinguish it from negligence -Consider and discuss the facts of *R v Veronica Gitahi and Anor [2016]eKLR criminal case no. 41 of 2014*.

### Knowledge

- Accused considered to know something where he or she is virtually certain the fact exists.
- English Law, knowledge is equated to true belief-*Saik [2006] UKHL*.
- Often considered alongside intention.
- Three degrees of knowledge identified- *Hemedi Ameri and 9 Others v R [2000]eKLR* citing with approval *Roper v Taylor's Central Garages [1951]2 TLR*
  - a) Actual Knowledge
  - b) Wilful blindness; involves shutting his eyes to the obvious means of knowledge, deliberately refraining from making inquiries
  - c) Ought to have known; constructive knowledge, equated to negligence

### Strict liability

- Do not require *mens rea* as part of their element
- Only requires the prosecution to prove the prohibited act
- Often found in respect to regulatory offences concerning public health and safety, environment, and regulations in respect to licencing.
- Where an offence does not expressly have a requirement of *mens rea*, courts need to determine if it means the offence is one of strict liability.
- Generally there is a strong presumption that an offence should be interpreted as one requiring *mens rea* unless it is clear or implicit from the wording of the statute that the offence is one of strict liability.

### Transferred malice

- Defendant with the *mens rea* of a particular crime causes the *actus reus* of the crime but the end result is unintended, for example a different victim is harmed or different property damaged.
- Accused person's *mens rea* is transferred from the intended target of his crime to the unintended target.
- Most important is that the initial intended act was unlawful and it was accompanied by the guilty mind-***Latimer (1886) 17 Q.B.D. 359.***
- Only operates where the *mens rea* and the *actus reus* which the defendant has caused relate to the same offence-***Pembliton (1874) L.R. 2 C.C.R.119.***
- The Kenyan case law reflects the this position, -***Peter Kiambi Kariuki v Republic [2013]eKLR; Peter Shirau Amakobe V R [2017]eKLR***