



**Republic v Ngowa (Criminal Case 10 of 2017)  
[2023] KEHC 22000 (KLR) (4 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22000 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL CASE 10 OF 2017  
RN NYAKUNDI, J  
SEPTEMBER 4, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MAOJA CHARO NGOWA ..... ACCUSED**

**JUDGMENT**

1. The accused in this case was charged of the offence of murder contrary to section 203 as read together with Section 204 of the Penal Code against Mitchell Nafula unlawfully and with malice aforethought. He denied the charge and at his trial learned counsel Ms. Aoko appeared on his behalf pursuant to Article 50 (2) (h) of the Constitution.

**Background Evidence**

2. It is acknowledged from PW1 Amina Charo Yeri. That the deceased was the daughter to the accused. On record of her testimony in the evidence that on 15<sup>th</sup> June, 2017 she saw the accused assaulting the deceased in which the unlawful act targeted the buttocks using sticks. Thereafter the deceased was taken to the hospital so as to undergo medical examination and treatment. However, she died in the course of undergoing treatment. The evidence of PW2 Jefwa states that on 15<sup>th</sup> June, 2017 while on return journey from fetching water she confronted the accused who at the time was assaulting his own daughter now referenced as the deceased. Without interfering with the accused action, PW2 told the court that she went further to inform other relatives and members of the community of the incidence next was the testimony of PW3 – Agnes Samini, who gave evidence as the sister to the deceased. According to PW3 on 15<sup>th</sup> June, 2017 while at the homestead. She heard screams from the deceased. As a consequence, in company of other family members they moved to the scene only to witness the accused armed with sticks beating the deceased in a little while the accused took a basin of water which he used to clean up the deceased. Notwithstanding, that action, the deceased was in conscious out



- of the injuries inflicted upon her by the accused. Further (PW3) acknowledged noticing some of the injuries suffered more pronounced to the eye. On the same vein (PW4) Charo also testified informing the court on the event so of 15<sup>th</sup> June, 2017 which constituted the assault against the deceased by the accused in the testimony of (PW4) not only did the accused beat the deceased using sticks but he also pulled and dragged her along at the scene of crime. PW4 continued to state before the court that the deceased was to pass on as a result of the injuries inflicted by the accused.
3. Next, in line with the prosecution case was the testimony of PW5 (Senior Sargent Martin Wanjala, who also doubled up as the investigating officer of the complaint lodged with the police. It was PW5 assertion that from the investigations carried out, it became clear that the deceased was fatally assaulted by the accused on that account he visited the scene which happened to be his house. As part of the evidence PW5 told the court was a murder weapon positively identified by the witnesses as a stick used by the accused to inflict the harm.
  4. As a fact (PW5) also documented the scene by way of a sketch plan. All in all, PW5 tendered in evidence the murder weapon (stick) and a sketch plan, postmortem report as exhibits in support of the charge with the evidence of PW5, the prosecution closed their perspective on the charge against the accused. The second limb of the case was the defence trajectory. To start off was an account of the accused: sworn statement in respect of the events alluded to on 15<sup>th</sup> June, 2017, the accused testified that they were all lies because, he only came into contact with the deceased issues when he received information from the wife.
  5. According to the accused in the previous hours of the day she had assisted his child to practice on how to walk. In the course he was called by the wife to go back home to attend to the visitors. It was then at that juncture the issue about the deceased injuries emerged. For that reason, the accused testified that they made arrangement to escort her to the hospital. He denied ever being involved in the death of the deceased.
  6. At the close of the defence case, learned counsel Ms. Aoko filed the brief written submissions anchored on the principle that the legal burden vested with the state to prove all the elements of the offence beyond reasonable doubt failed to be discharged. In her submissions, learned counsel cited the following cases to agitate for an acquittal of the accused person. (*R v Albert Tirimba Ogala* (2014) eKLR *R v Cosmus Mwaniniki Mwaura* (Cr Case No 11 of 2005 *R v Bhati VR* (1957) EA 332 *Bukenya & Others v Uganda* (1972) EA 549. With that position taken by both parties to the prosecution of the accused, it now remains my singular duty to make a finding on the following issues namely:
    - a. The death of the deceased and the cause of that death
    - b. That besides the unlawful act the accused did so with malice aforethought.
    - c. That it was the accused who committed the unlawful acts
  7. In view of on-going unfolding events, I feel inclined to reiterate the doctrine on the burden of proof in criminal cases. It is trite that this burden of proof perpetually rests on the prosecution and does not shift to the accused person except on compelling specific statutory provision under section (i) of the *Evidence Act* (See the principle in *Woolmington v DPP* (1935) AC 462 *Okethi Okale v RC* (1965) EA 555. *R v Cosmas Mwaura* Cr. Case No. 11 of 2005 *Miller v Minister of Pension* (1947) 2 All ER 372.
  8. As provided for under section 203 of the *Penal Code*, a murder charge constitutes an unlawful killing of another human being with malice aforethought. The chain of events by the prosecution must fully establish all the elements beyond reasonable doubt.



9. For the sake of completeness on this issue the passage from *Kenny's Outlines of Criminal Law* 16<sup>th</sup> Edition at Page 416, the learned author observed that:

“A larger minimum of proof is necessary to support an accusation of crime that which suffice when the charge is only of a civil nature....In criminal cases the burden rests upon the prosecution to prove that the accused is guilty beyond reasonable doubt. When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence. The defence need to no more than show that there is reasonable doubt as to the of the accused.”

10. In the case of *Abdu Ngobi v Uganda* SCR ADP No 10 of 1991 the Supreme Court also recognized the balancing act of the trial court in exercising jurisdiction keeping in mind, the principle expressed as follows:

“Evidence of the prosecution should be examined and weighed against the evidence of the defence, so that a final decision is to be taken upon evaluation for the entire case. The proper approach is therefore to consider the strength and weakness of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted, but if the defence has not raised a doubt, that the prosecution case is true and accurate, then the witness can be found to have correctly identified the Appellant as the person who was at the scene of the incident as charged.”

11. In addition to the above guidance, proof of guilt is established by way of direct or circumstantial evidence. As regards direct evidence, it is the duty of the prosecution witness to demonstrate the events of the crime by way of the five senses, namely sight, touch, smell, taste and hearing.
12. Whereas on circumstantial evidence, as correctly founded in law, it is that best evidence to proof facts in issue with certainty of precision which count to an irresistible conclusion to proof beyond reasonable doubt the guilt of the accused person.
13. Pursuant to that position, after considering the evidence as a while and the applicable law. I think it makes sense to state that the case for the prosecution was majorly direct and seasoned with circumstantial evidence from (PW5).
14. On ingredient one as to the death of the deceased I find it plausible to rely on the evidence of the pathologist – Dr Aziza. In the postmortem report produced as exhibit 4 by PW5 the positive findings were that the deceased aged 1 years and 1 month suffered injuries to the buttocks and the skull. According to the pathologist opinion, the deceased cause of death remained to be the fracture of the 1<sup>st</sup> vertebra bone and intracranial bleeding. That medical events establishes the element as to the deceased death. See *Rex Sirasi Bachumira* (1963), *Kimweru v Republic* (1968). EA 452. The defence never disputed that the deceased is dead. As a consequence, the prosecution has discharged the burden of proof beyond reasonable doubt on this ingredient.
15. The second element is on unlawful cause of death. It is the law in Kenya that every citizen and those within our borders have a right to life under Article 26 of the *Constitution*. Therefore, any killing of another human being is considered unlawful unless it falls within sub section 3 of Article 26. The legal



issues surrounding causation of death are as defined in Section 213 of the [Penal Code](#) which provides as follows: “

“The accused would be held responsible for another person’s death although his act is not the immediate or sole cause under the following circumstances: (a) He inflicts bodily injury on another person and as a consequence of that injury the injured person undergoes a surgery or treatment which causes his death (b) He inflicts injury on another which would not have caused death if the injured person had submitted to proper medical or surgical treatment or had proper precautions as to his mode of living: (c) He by actual or threatened violence causes such other person to perform an act which causes the death of such person, such an act being a means of avoiding such violence which in the circumstances appear natural to the person whose death is so caused: (d) He by any act hastened the death of a person suffering under any disease or injury which apart from such an act or omission would have caused the death: and (e) His act or omission would not have caused death unless it had been accompanied by act or omission of the person killed or of other persons.”

16. On application of Section 213 of the [Penal Code](#) to the instant case the alleged causative acts or omission by the accused person are well illustrated by the testimonies of PW1-PW5
17. PW1, PW2, & PW3 evidence with certainty confirms tht they saw the accused assaulting the deceased using a stick and in addition pulled and dragged her along the scene. These witnesses brought into view the aspect of corroboration on how the accused committed the offence. Their respective pieces of evidence provide the requisite corroboration of the commission of the crime by the accused with the victim identified as the deceased. The device, herein, the stick tendered in evidence and the deliberate act of pull, drag and beat ensued maximum fatal impact upon the deceased. The unlawful acts of assault was for the purpose of causing death or serious bodily injury. That is supported by Kilifi-Hospital pathologist autopsy report. The body on examination had suffered serious injuries to the head and vertebra bone which ultimately occasioned her death. The evidence above attest to the fact tht the unlawful acts of assault were indiscriminately executed by the accused to cause the death of the deceased. It is my finding that the prosecution in consonant with Section 107 (1) 108 & 109 of the [Evidence Act](#) has discharged the burden of proof of beyond reasonable doubt that the homicide was unlawfully caused.
18. Equally important is the element of malice aforethought. This element of the offence of murder is defined in section 206 of the [Penal Code](#) as follows:
  - a. An intention to cause the death of or to do grievous harm to any person whether such person is the person actually killed or not that the act or omission of the accused which caused the death, of the deceased was intentional with knowledge than the death or grievous bodily harm was its probable consequence. An intent to commit a felony. An intention to facilitate the escape from custody of a person who has committed a felony in practical terms, the process of considering the materiality requirement of malice aforethought, the court in *Res v Tuberi s/o Ochieni* (1945) 15 EACA 63 it was observed interalia that:

“In determining existence or non-existence of malice aforethought one has to look at the facts proving the weapon used, the manner in which it was used and part of the body injured. Further the conduct of the accused before during and after the heinous crime.” (See also *Hyan v DPP* (1974) AC 62.



19. I take cognizance of the fact that malice aforethought being a mental element in difficult to prove by way of direct evidence. That is why it is more plausible for the court to review wholly the entire scheme of the surrounding circumstances of the offence as stipulated in Tubere case (supra).
20. In the instant case PW1, PW2, PW3 and PW4 testified to the fact of the accused armed with a stick on 15<sup>th</sup> June 2017 beating the deceased. According to PW4 besides the ferocity with which the accused used the weapon to inflict the wounds he also pulled and dragged the deceased at the scene. The Autopsy report produced as exhibit 4 by PW5 showed injuries suffered that caused the death of the deceased to be the fracture to the skull due to the blunt force trauma.
21. It is the law in Kenya under section 206 of the *Penal Code*, that criminal liability with malice aforethought is attached based on culpability element of intention to cause death, or to do grievous harm or knowing that the act or omission causing death will probably cause the death of some person, Giving effect to these guiding principles, it is clear from PW1, PW2, PW3 and PW4 that accused assaulted the deceased for over an hour hitting her body severally with sticks that were exhibited in court. The substantial injuries were unjustified to a toddler aged one year and one month. The deceased died as a consequence of violent acts of maim inflicted on her by the accused.
22. By virtue of section 206 of the *Penal Code* if death is caused by an unlawful act or mission, done in furtherance of an intention to commit any felony, malice aforethought is established. The murder in question was committed in the course of an assault. The defence testimony by the accused testimony that he did not participate in the commission of the crime is inconsistent with the prosecution evidence stated on oath by PW1, PW2, &PW4. There was no evidence to contradict this position by the four prosecution witnesses. The credibility of these witness weighed ultimately with the defence leads to one conclusion, that the charge of murder has been proved beyond reasonable doubt.
23. The admitted evidence in court by PW1, PW2, PW3 and PW4 establishes correctly to the positive identification of the accused through visual recognition evidence based wholly on what they saw on 15<sup>th</sup> June 2017 at Mulungu wa Mawe village. The witnesses assertion on identification of the accused was founded on the prior knowledge and material observation made at the time of the offence. See *Trudget v R* (2008) NSWCCA 62 *Turnbull v R* (1977) QB224 at 228.
24. In the present case I find that the accused was properly identified and squarely put at the scene. I therefore find no merit in the defense testimony of the accused on the issue of the culpability and non availability at the scene to participate in committing the offence. Each of the facts relied on by the prosecution are pointers to the accused guilt. There was ill motive demonstrating concrete evidence to support the fact of an assault upon the deceased as she was assisted to learn to walk on that early hours of 15<sup>th</sup> June 2017. The prosecution evidence on identification is consistent with the principles *R – vs- Turnbull and Others* (1976) 3 All ER 549:

“First wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or indemnifications, in addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation” At what distance” in what light” was the witness ever seen the accused before” “How often” if



only occasionally, had he any special reason remembering the accused” How long elapsed between original observation and the subsequent identification to the police” Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance”.

Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.”

25. Surely the accused out of good will offered to assist the deceased to learn how to walk but in the course of the training he turned his wrath against her with stick and trauma inflicting the fatal injuries. The inking facts of this case together produce nothing else except guilt of the accused for the offence of murder contrary to section 203 of the *Penal Code*. With this in mind, my task is clear, to find the accused guilty of the offence enter a verdict of conviction, dismiss the defence, primarily for failure to controvert the prosecution case. Accepting this position as I do, statutory violation of section 203 as read with section 204 of the *Penal Code* occurred and the accused as the principal perpetrator of the offence. The next stage of the proceedings is for the parties to file submissions on mitigation and aggravating factors.

### Sentence

26. The convict Maoja Charo Ngowa having been found guilty for the offence of murder contrary to Section 203 and 204 of the *Penal Code* it is now this court’s duty to impose an appropriate sentence. The maximum sentence for murder is the death penalty. From the facts this looks like one of those cases a trial court should consider passing such a sentence given the surrounding circumstances of this case. However, there are numerous competing principles which govern sentencing considerations. The primacy of deterrence was also propounded in *Radich* (1954 ) NZLR 86 in which the court stated that one of the main purposes of punishment ....is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them they will meet with sever punishment. In all civilized countries, in alleges, (Deterrence) has been the main purpose of punishment and still continues so.
27. In the same legal scheme the court in *Alister Anthony Pereira vs State of Maharashtra* the court held that:
- “Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and graving of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of just depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, mature of the offence and all other attendant’s circumstances.”
28. Given this background, and the precise factors which influence the sentencing discretion I am minded to look at nature and gravity of the crime, the manner in which it was committed by the convict, the age of the victim, and breach of trust by the convict as the care giver and protector of the survival rights of the victim. The mitigating factors though necessary considerations they do not go far enough to mitigate the seriousness of the offence and the blameworthiness of the convict. In light of the above approach I exercise discretion to sentence the convict 25 years imprisonment with effect from 7<sup>th</sup> July 2017. 14 days Right of Appeal explained.



DATED, SIGNED AND DELIVERED AT MALINDI THIS 4<sup>TH</sup> DAY OF SEPTEMBER 2023.

.....

**R. NYAKUNDI**

**JUDGE**

