



REPUBLIC OF KENYA



**Ndinwa v Republic (Criminal Appeal 34 of 2013)
[2025] KECA 2239 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2239 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 34 OF 2013
JW LESSIT, GV ODUNGA & A ALI-ARONI, JJA
DECEMBER 19, 2025**

BETWEEN

JOSEPH CHOMBA NDINWA APPELLANT

AND

REPUBLIC RESPONDENT

*((An appeal from the Sentence of the High Court of Kenya at Chuka
(Ong'undi, J.) dated 21st May 2013 in HCCR. No. 21 of 2010))*

JUDGMENT

1. A father's life, the very source of nurture and protection, was cut short. His son was accused of ending his life. What ought to have been a sanctuary of love became the scene of a crime. This Court is now called upon to confront on appeal the painful question of patricide; to examine a second time whether the appellant who stands convicted indeed took away the life of the very man who gave him life.
2. Joseph Chomba Ndinwa, the appellant, was charged before the High Court at Embu with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that, on 1st July 2010, at Kanyeri Village in Kirinyaga Central District within Central Province, he murdered Sammy Ndinua Kuthua.
3. The prosecution's case was that due to family squabbles, the appellant took away his father's life. Nine witnesses narrated the prosecution's evidence. Janet Wanjala Mwangi (PW1), testified that on 1st July 2010, at around 5:00 p.m., she went to buy napier grass from the deceased. She found him mending a shoe, and he showed her where the napier grass she had purchased was located, which was nearby. As PW1 began cutting the grass, she engaged in conversation with the deceased. Suddenly, she heard the appellant ask his father (the deceased) how long he was going to continue disturbing him. PW1 did not see where the appellant had come from. Moments later, she heard the deceased ask the appellant why he had stabbed him with a knife.



PW1 inquired into the matter, but the deceased did not respond. Instead, he collapsed, prompting PW1 to rush to his side. She found him bleeding from the left side of his chest. In a panic, PW1 started screaming, which attracted the attention of people nearby, who came to assist in getting the deceased to the hospital. By the time the vehicle arrived, the deceased had already succumbed to his injuries. The appellant fled the scene upon realising that the deceased was dead. The police were called, and upon arrival, they recorded statements and thereafter took the body away.

4. Fredrick Miano Thinwa (PW2) testified that on 1st July 2010, he left work for home around 3:00 pm. When he returned home, his father informed him that the appellant, his brother, had broken into his house and stolen beans and a radio. He confronted the appellant and demanded the return of the radio. The appellant retrieved it from the thickets and returned it to him. However, the appellant also pulled out a panga and attempted to stab PW2's other brother, but PW2 intervened and blocked him. The appellant then fled into the nearby maize plantation. PW2 and the other brother stopped by a shop to buy cigarettes. As they approached their house, they encountered PW1, who was screaming, and she told them that the appellant had stabbed the deceased. PW2 then went to where the deceased was lying. He tried to call out the deceased, but received no response. He then decided to get a vehicle to take the deceased to the hospital. The police were subsequently called. He recorded his statement.
5. James Kinyua Githungo (PW3) testified that on 1st July 2010 at about 5:30 p.m., he heard screams coming from the home of his younger brother, Samuel Ndinwa. He learnt that the appellant had killed their father. He did not go to the scene immediately due to shock, but later went upon police arrival. Meanwhile, the appellant had already fled the scene.
6. Mercy Muthoni Nthinwa (PW4), testified that on 1st July 2010, while at Kariini, she received a phone call from Stanley Gachoki late at night, informing her that her son (the appellant) had stabbed and killed his father with a knife. The following morning, she went to her home and discovered that the body had already been taken to the mortuary. She did not find the appellant. Subsequently, she went to the police station to record her statement.
7. IP. Pixely Nduko (PW5) testified that on 1st July 2010, at about 7:00 p.m., he received a call from CIP. Ngetich, who informed him of a murder that had occurred in the Kamuthambi area. He proceeded to the scene in the company of other police officers and a police driver. Upon arrival, they found a body lying in a pool of blood with a stab wound on the left side of the chest. The officers searched for the murder weapon but did not find it. He learned that the culprit was the deceased's son, and they had quarreled earlier that day over some stolen dry beans. The appellant became violent when questioned about the beans and stabbed his father. They did not locate the appellant at the scene and circulated the appellant's name and description to nearby districts. They took the deceased's body to the mortuary for a postmortem. The appellant was arrested nine days later in the Kagumo area of Murang'a, where he had gone in search of casual work. He was later charged with the offence.
8. Dr. Stephen Wangombe Nderitu (PW6) testified that on 8th July 2010, he conducted a postmortem examination on the deceased's body. His findings showed that the body was well preserved; the stab wound on the chest wall was 4 centimeters in length and had penetrated the chest cavity, affecting the lobe. He concluded that the cause of death was the deep cut wound on the chest.
9. Dr. Joseph Thuo (PW7), a psychiatrist, testified that on 19th July 2010, two officers from the Kerugoya Police Station brought the appellant to him to assess his mental status. He found that the appellant was cooperative, with normal speech and thought processes, and was oriented to time and place; his concentration and intelligence were within normal limits. He concluded that the appellant had no mental abnormalities and was fit to stand trial.



10. Cpl. Stanley Kabiru (PW8) testified that on 9th July 2010, while on duty, he was approached by members of the public accompanied by the Assistant Chief, who had apprehended the appellant. The crowd informed him that the appellant had murdered someone in Kerugoya. He re-arrested the appellant and booked him before taking him to Kangima Police Station.
11. Faith Muthoni Mwai (PW9) testified that on 9th July 2010 at approximately 5:00 p.m., while she was at the D.O.'s Camp in Kanyerene, her colleague, PW8, called her from the office and informed her about a suspect who the Assistant Chief and community members had arrested. She went to the office and, together with PW8, arrested the appellant and took him to Kangima Police Station.
12. At the close of the prosecution's case, the court found the appellant had a case to answer, and he was placed on his defence. He gave a sworn testimony. He testified that he left the Ndia Kiamuthambe area on 5th March 2009, and travelled to Kanyenyaine Village in Mathira, Murang'a, which is about 30 kilometers from his home, in search of a job. He got casual employment and was later to receive news of his father's death. The Assistant Chief asked him to stop by his office, and upon doing so, he was arrested and taken to Kanyenyaine Police Station, where he was later transferred to Kangima Police Station. He was known to the Assistant Chief, who was a good friend of his employer. He denied the allegations levelled against him.
13. In his judgment, the trial Judge found that the ingredients of the offence of murder had been established, and the case was proved beyond any reasonable doubt. He convicted the appellant and sentenced him to suffer death.
14. Aggrieved by the conviction and sentence, the appellant has lodged the instant appeal by filing undated grounds of appeal as follows: the learned Judge erred in both law and facts by failing to consider that crucial witnesses were not availed; by shifting the burden of proof to the appellant; the evidence adduced was contradictory and inconsistent; the prosecution tendered hearsay evidence; and the appellant's defence was dismissed contrary to section 169 of the Criminal Procedure Code.
15. Learned counsel Mr. Muchangi for the appellant filed submissions dated 24th January 2025, contending that the murder weapon was never recovered; and further, the court relied on the evidence of a single witness. In support, he referred to the case of *Maitanyi vs. Republic* [1986] KECA 39 (KLR), where this Court emphasised the importance of the lighting conditions at the time an incident occurs when evaluating witness identification, as the presence and quality of light influences proper identification, and which can significantly impact a witness's perception.
16. Further, counsel argued that the trial court failed to recognise the risks of relying solely on a single witness. He pointed out that the appellant was brought to court solely on suspicion, which should not form the basis for a conviction. He contended that there should be substantial, uncontested evidence establishing a connection between the deceased's death and the actions or omissions of the appellant. Additionally, counsel stated that the prosecution failed to prove the motive behind the alleged murder.
17. Regarding sentencing, the appellant's counsel referred to the Supreme Court's guidance on sentencing in murder cases, urging that there are several mitigating factors to consider. The appellant was described as a first-time offender who has shown remorse and has been in custody since 2010. At the time of his arrest, he was the family's primary breadwinner and has now spent approximately 15 years in custody/prison. Counsel argued that the appellant has endured enough, has undergone rehabilitation, and that the sentence is harsh and excessive. The appellant requested a non-custodial sentence or a short custodial term, commencing on the date of arrest, as he has already been in custody. In support, he relied on *Joseph Kimani Njau vs. Republic* [2014] KECA 229 (KLR).



18. Mr. Mwakio, holding brief for Mr. Naulikha, for the ODPP filed submissions dated 20th January 2025. He summarised the issues for determination as follows: whether the elements of the offence of murder were established to the required standard; whether crucial witnesses were called; and whether the sentence imposed was lawful.
19. Counsel identified the three key ingredients that must be proven in a murder trial, namely: that the death of the deceased occurred; that the unlawful act of the accused caused the death; and that the accused acted with malice aforethought.
20. Regarding the death of the deceased, counsel submitted that PW1 witnessed the deceased fall, was bleeding and his passing away before he could be taken to the hospital. PW2 testified that he found his father down, and he tried to call him, but the deceased did not respond. PW2 then went to search for a motor vehicle to take the deceased to the hospital, but on returning, his father had already died. He also referred to the evidence of PW5, a police officer who testified that by the time they arrived at the scene of the crime, they found the deceased dead and lying in a pool of blood. PW6 carried out the postmortem and concluded that the deceased died due to a deep cut in the chest.
21. On who caused the death of the deceased, counsel referred to the evidence of PW1, who, while talking to the deceased, noticed the appellant about 10 meters away and heard him tell the deceased, "How long will you continue disturbing me?" and thereafter heard the deceased ask the appellant why he had stabbed him with a knife. PW1 then stopped cutting grass to observe the situation, at which point the deceased fell, and she rushed to the scene and saw him lying there, bleeding from the left side of his upper stomach.
22. The counsel submitted that the evidence of PW1 is corroborated by PW2, who testified that on that day, his father informed them that the appellant had broken into the witnesses' house, taking beans and a radio. PW2 confronted the appellant, his brother, and requested that he return the radio. The appellant retrieved the radio from the thickets and surrendered it. However, he then pulled out a panga from the same spot and attempted to stab their brother Richard. Richard blocked the attack and ran across the road into a maize plantation. Feeling that the situation was dangerous and fearing that his brother would damage the iron sheets, Richard left for home. As they were nearing home, they heard PW1 screaming. Richard asked her what had happened, and she informed them that the appellant had stabbed their father.
23. On proof that the appellant had malice aforethought, counsel cited the case of *Roba Galma Wario vs. Republic* [2015] KECA 521 (KLR), and *Robert Onchiri Ogeto vs. R* [2004] (Criminal Appeal 1 of 2004) [2004] KECA 148 (KLR), on the need to prove malice for the charge of murder to be sustained. It was stated that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”
24. Counsel argued further that in section 206(a) of the Penal Code, malice aforethought is deemed to be established by evidence showing an intention to cause death or to do grievous harm. It can be reasonably inferred that when the appellant stabbed the deceased in the chest with a knife, he intended to cause either death or grievous harm. That malice aforethought can be inferred from the force of the attack and the weapon used. Counsel contended that the postmortem report indicated that the cause of death was a deep stab wound in the left side of the chest, resulting from the assault, which proved that the appellant possessed the necessary malice aforethought to cause the death of the deceased.



25. Regarding whether the appellant was the perpetrator of the offence, counsel asserted that the testimonies of witnesses PW1 and PW2 remained unshaken. The appellant's defense was deemed to be an afterthought - hollow and untruthful - and was therefore rejected and dismissed by the learned judge.

26. On whether the crucial witnesses were called, counsel refers to section 143 of the *Evidence Act*, which provides; -

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

The counsel contended that the prosecution is not obligated to call every person who may have been at the scene of the crime, and failure to do so is not necessarily detrimental to the case, unless the evidence presented is not sufficient to support the charge.

27. On whether the sentence was lawful, referring to *Bernard Kimani Gacheru vs. Republic* [2002] KECA, he submitted that the sentence is a matter of discretion and there is no basis for this Court to interfere with the sentence meted out to the appellant.

28. This is a first appeal against the appellant's conviction and sentence for the offence of murder. As such, it is the duty of this Court to reconsider, analyze and re-evaluate the evidence adduced before the trial court with a view to reaching its own independent determination on whether or not to uphold the conviction and sentence of the trial court. See *Okeno vs. Republic* [1972] EA 32.

29. We have subjected the evidence to fresh evaluation and are aware of the principle that must guide us. The Court will not usually interfere with findings of fact made by the trial court unless they are based on no evidence, or are based on a misapprehension of the evidence, or the judge is shown to have acted on wrong principles in reaching the findings. See *Chemagong vs. Republic* [1984] KLR 611.

30. We have carefully considered the record of appeal, submissions by counsel and the law and form the view that the issues for our consideration are: whether the prosecution proved the ingredients of the offence of murder beyond any reasonable doubt, and whether the sentence was lawful.

31. It is old hat that the prosecution in a charge of murder has a singular task of proving three ingredients to secure a conviction: that a death occurred; that the death was caused by the unlawful act of commission or omission by the appellant; and that the appellant had malice aforethought as he committed the said act.

32. It remains undisputed that the deceased was stabbed to death. PW1 witnessed the incident and heard the conversation between the deceased and the appellant. She saw the deceased dying as he was about to be taken to the hospital. The post-mortem report confirmed the injuries sustained and the death.

33. As to who caused his death, PW1 in her testimony was categorical that the appellant found her talking to the deceased when he stabbed him. She indeed heard the last conversation from the deceased, accusing the appellant of stabbing him. PW1 was a neighbour who had gone to harvest napier grass that she had bought from the deceased. She had no reason to pick the appellant from the other sons of the deceased and implicate him. The evidence by PW1, PW2, and PW3 regarding the reasons for the killing is a pointer. The deceased questioned the appellant as the appellant had broken into PW2's house, stolen beans, and a radio. PW2, upon being informed by the deceased, accosted the appellant and demanded the radio, which the appellant removed from a thicket and handed to him. The appellant was reportedly very upset. When he confronted the deceased, as testified by PW1, he questioned the father, accusing him of interfering with him. PW1 also heard the deceased ask the appellant why he



had stabbed him. The other pointer is the appellant's disappearance from home as soon as he stabbed the deceased and was located 30 km away several days after the incident. The circumstantial evidence corroborated the testimony of PW1, and we do not doubt in our mind that none other than the appellant brought an end to the deceased's life.

34. According to the evidence of PW6, Dr. Stephen Nderitu, when he performed the postmortem examination, he found a penetrating stab wound on the chest wall, 4 cm in length. He formed the opinion that the cause of death was the stab wound. The appellant must be found culpable, he ought to have known that his action of inflicting the penetrating stab wound could have caused grievous harm or killed the deceased. Section 206 states as follows:

Malice aforethought shall be deemed to be established by evidence proving any one of the following circumstance -

- a. ...
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

35. This Court in *Milton Kabulit & 4 others vs Republic* [2015] KECA 105 (KLR) had this to say of Malice aforethought; -

“In *Bonaya Tutut Ipu and another versus Republic* [2015] eKLR this Court stated that “Malice aforethought” is the mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on the peculiar facts of each case. (see *Moris Aluoch versus Republic Cr. App. No.47 of 1996*) where the court went further and drew inspiration from a persuasive authority in the case of *Chesakit versus Uganda CR App. No.95 of 2004* wherein the Court of Appeal of Uganda held thus: -

“In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

The court also drew inspiration from a decision of the predecessor of this Court in *Rex versus Tuper S/O Ocher* [1945] 12EACA63 wherein, it was ruled thus; -

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say of a spear or knife than from the use of a stick...”

36. There was evidence of an altercation between the deceased and the appellant. This happened much earlier. The action of the appellant was not spontaneous. He had an opportunity to cool down, even if his father had angered him. But alas, he went armed with a knife and accosted his father, who was busy mending his shoe and stabbed him in the chest. His action, the weapon he used, and the place he stabbed the deceased, including his utterances, are a clear manifestation of the appellant's intention. He was out to finish the deceased. We find that malice aforethought was well established.



- 37. On whether crucial witnesses were left out, section 143 of the *Evidence Act* is clear that there is no particular number of witnesses to be called to prove a fact. The number of witnesses to be called is at the discretion of a party who has the burden of proof. The prosecution submitted, and we agree, that they did not have to call all witnesses who were at the scene or had evidence, provided that the available witnesses were sufficient to prove their case.
- 38. As for the sentence, we are cognizant that the appellant was convicted on the 21st May 2013, by which time the courts meted out the death penalty as the only available punishment for the offence of murder, with the presupposition that the court’s hands were tied to the death sentence.
- 39. Since the decision of the Supreme Court in *Murutetu & another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated) [2017] KESC 2 (KLR) (14 December 2017) (Judgment), jurisprudence on the death penalty in relation to murder offences has shifted. The death penalty is no longer the only available punishment for the offence. The Supreme Court in the case stated:

“ 19. The mandatory nature of the death sentence provided for under section 204 of the Penal Code long predated any international agreements for the protection of human rights. It was a colonial relic that had no place in Kenya today. Whereas it was the duty of Parliament to make laws, it was the duty of the court to evaluate, without fear or favour, whether the laws passed by Parliament contravened *the Constitution*.

20. Human society was constantly evolving and therefore the law, which all civilized societies had to live under, had to evolve in tandem. A law that was caught up in a time warp would soon find itself irrelevant and would be swept into the dustbins of history. Section 204 of the Penal Code was inconsistent with *the Constitution* and invalid to the extent that it provided for the mandatory death sentence for murder. For avoidance of doubt, the decision had not outlawed the death penalty, which was still applicable as a discretionary maximum punishment.”

40. Noting that this case was heard and determined several years before the Muratetu case (supra), although the offence of murder remains barbaric and outrageous, deserving a severe punishment, we have considered the mitigation offered, and the remorse by the appellant over his action. We set aside the death sentence and, in its place, substitute the appellant’s sentence with 40 years’ imprisonment from the date of his arrest.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF DECEMBER, 2025.

J. LESIIT

JUDGE OF APPEAL ALI-ARONI

JUDGE OF APPEAL
G.V. ODUNGA

JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

