



REPUBLIC OF KENYA



KENYA LAW
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**Ngowa v Republic (Criminal Appeal E080 of 2023)
[2025] KECA 1100 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1100 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL E080 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JUNE 20, 2025**

BETWEEN

MAONJA CHARO NGOWA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the Judgment of the High Court of Kenya at Malindi
(R. Nyakundi, J.) delivered on 4th September, 2023 in CRA No. 10 of 2017)*

JUDGMENT

1. The Appellant, Maonja Charo Ngowa, was charged with the offence of murder contrary to Section 203 as read together with Section 204 of the *Penal Code*. The information was that, on the 15th June 2017 at Mulungu wa Mawe, with others not before Court, he murdered Mitchell Nafula (deceased).
2. The Appellant denied the charge and the matter proceeded to hearing where the prosecution called 4 witnesses.
3. According to Amina Jaroyea (PW1), the deceased was a daughter to the Appellant and her mother Rukia. On 15th June, 2017, she saw the Appellant assaulting the deceased who was his daughter aged 1 year 1 month old with a stick on her buttocks. She stated that, thereafter, the deceased was taken to hospital to undergo medical examination and treatment. However, she died while undergoing treatment three days after being beaten. During cross examination, she stated that the Appellant was teaching the deceased how to walk and, when the baby was unable to walk, he would beat the child with a stick on her buttocks and back.
4. AS PW2 aged 11 years testified after a voire dire examination, the Appellant was married to her mother, and was the father of the deceased, who was also her sister. According to her evidence, she heard the deceased crying and that, when she went to the scene, she found the Appellant beating the deceased



- with a cane and a small stick on her buttocks and pelvic region. She stated that the Appellant was beating her because he was teaching her to walk, and she had refused to walk. After the severe beating, the deceased became unconscious whereupon the Appellant took a basin of water, washed the deceased and applied ashes on her. Later, when her mother arrived and took the deceased to the house, she noticed the injuries suffered by the deceased, and which were more pronounced on her eye. The witness later learned of the deceased's demise following the beating by the Appellant.
5. After the conduct of a *voire dire* examination, CS PW3 aged 12 years, a cousin to the deceased, stated that he saw the Appellant beating the deceased, who is his cousin, on the head, buttocks and back with a stick. He also pulled her ears until she became unconscious. Thereafter, he took a basin and washed her. He saw that the deceased had injuries to her eyes, part of her head, ears and back. When the deceased regained consciousness, she was unable to walk, whereupon the Appellant took her to bed to sleep. Her mother later took her to the hospital, but he later learnt that the deceased passed on as a result of the injuries inflicted by the Appellant.
 6. Senior Sargent Martin Wanjala, (PW5), stated that, following a report made of the death of the deceased, the ensuing investigations revealed that the deceased was fatally assaulted by the Appellant. He visited the scene, the Appellant's house, from where he retrieved the murder weapon which was positively identified by the witnesses as a stick used by the Appellant to inflict harm on the deceased. PW5 tendered in evidence the murder weapon, a big stick and a small stick, a sketch plan and the postmortem report as exhibits in support of the preferred charge. He further stated that the postmortem report showed that the deceased sustained a fracture of the 1st vertebrae (neck) and intracranial bleeding which was the cause of her death.
 7. When placed on his defence, the Appellant stated that the evidence tendered by the prosecution witnesses were all lies because he only came to know of the deceased's inability to walk from his wife on the material day when he decided to teach her how to walk, but that the child cried as she tried to walk; that she later fell down and continued crying; that, when her mother came and noticed the deceased's injuries, she was taken into the house as they made arrangements to take her to hospital; and that, the next day, they applied "Kaluma" ointment on the injury, but that the deceased's condition worsened, and she later succumbed to the injuries in the house.
 8. The trial Judge upon considering the evidence convicted the Appellant of the offence of murder and sentenced him to serve 25 years' imprisonment.
 9. Aggrieved, the Appellant has filed an appeal to this Court on the grounds that: the learned Judge was wrong to convict him without proof of malice aforethought; that the judge failed to appreciate that his inherent right to dignity, respect and protection before sentencing him violated Article 28 of *the Constitution* since his mitigation was not considered; and that the learned Judge erred in failing to consider the circumstance of the case before passing sentence, thereby violating section 216 and 329 of the *Criminal Procedure Code*.
 10. Both the Appellant and the Respondent filed written submissions. When the appeal came up for hearing on a virtual platform, learned Counsel Mr. Wagoro appeared for the Appellant while learned Prosecution Counsel Ms. Anyumba appeared for the Respondent. Counsel for the Appellant submitted that it is not every circumstance surrounding the death of the deceased from injuries inflicted that would result in an automatic inference of malice aforethought as defined in Section 206 of the *Penal Code*; that malice aforethought in this case was not established as there was no evidence to suggest that the Appellant intended to kill his daughter or cause her grievous harm; and that the deceased death was as a result of unfortunate events. It was submitted that the prosecution witnesses testified that the Appellant was teaching the deceased how to walk, but notwithstanding his excessive desire to ensure



that she was able to walk, the circumstances did not point to the presence of malice aforethought. It was further submitted that the unfortunate death arose from very unique circumstances.

11. On the sentence, it was submitted that the Court did not consider his mitigation that the Appellant had lost his deceased daughter in a mysterious way; that he had been divorced by his wife; and that, for this reason, the sentence was harsh and excessive.
12. It was the submission of counsel for the Respondent that the principles upon which mens rea is founded are that it can be inferred from the conduct or actions of the perpetrator; that the evidence was that the deceased was severely beaten by the Appellant using sticks despite the child being of the tender age of about 1 year and 1 month; that, as a result of the assault, she suffered injuries to her pelvic region, eye, hands and legs, all of which demonstrated malice aforethought.
13. Counsel further submitted that the Appellant was well known to the prosecution witnesses and was identified by recognition; that the witnesses saw him assaulting the deceased; that, even in the absence of the medical doctor's evidence, the fact of the assault by the Appellant on the deceased was proved by the direct evidence of the prosecution witnesses and that, therefore, the lack of a medical opinion only deprived the court of the opportunity of judging the extent of the injuries suffered by the deceased.
14. On sentence, counsel submitted that the trial Judge considered the mitigation by the Appellant, and that the sentence hearing considered the nature of the offence, the time the appellant had spent in remand and custody and mitigation by the appellant and, thus, the same was proper.
15. This is a first appellate court whose duty is to re-evaluate and re-analyse the evidence adduced before the trial court. In so doing, the court is obligated to bear in mind that it neither saw nor heard the witnesses testify, for which we should give due allowance. This mandate was explained in *Okeno vs Republic* (1972) E.A. 32 where it was stated:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantital M Ruwala V R*, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness.”

16. The duty of this Court was also restated in the case of *David Njuguna Wairimu vs Republic* [2010] eKLR that:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions.

We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

17. Having considered the record of appeal, the respective rival submissions and the law, we find that the issues that are for determination are: i) whether malice aforethought on the Appellant's part was established; and ii) whether the sentence was excessive given the circumstances of the case.



18. For a conviction of the offence of murder to be sustained, it is paramount that the prosecution proves the following: the fact of the death of the deceased; the cause of the death of the deceased; that the death of the deceased was caused by the accused person; and that the death of the deceased was caused by an unlawful act of commission or omission of the accused, meaning that the accused had malice aforethought when he/she killed the deceased. See *Abdi Kinyua Ngeera vs. Republic* (2014) KECA 654 (KLR); and *Anthony Ndegwa Ngari vs. Republic* [2014] eKLR.
19. At the outset, it is observed that there is no dispute that the deceased died. There is also no dispute that she died from injuries sustained from a severe beating by the Appellant as he tried to teach her to walk. The direct evidence from the prosecution witnesses was that they saw the Appellant beating the deceased with a stick on her head, hands and buttocks, where upon she suffered injuries to her head, back and pelvic region. In his defence, the Appellant admitted that he was teaching the deceased how to walk. This admission and the fact that the prosecution witnesses saw the Appellant beating the deceased until she fell unconscious and eventually passed on from the injuries sustained from the assault, pointed to the Appellant as being responsible for her death.
20. The Appellant's main ground of appeal is that he did not intend to murder the deceased; that he was a loving father who was merely trying to assist his daughter to walk, and that the coconut twigs he used to beat the deceased could not have injured her, with the result that malice aforethought was not established; and that, therefore, malice aforethought ought not to have been inferred from his actions.
21. The trial court in reaching a finding that malice aforethought was established stated that:

“Surely the accused out of goodwill 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”
22. Section 206 of the *Penal Code* defines malice aforethought in the following terms:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;

 - a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
 - 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;
 - c. An intent to commit a felony;
 - d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”
23. In the case of *Hyam vs DPP* (1974) A.C. the Court held, inter alia, that:

“Malice aforethought in the crime of murder is established by proof beyond reasonable doubt when, during the act which led to the death of another, the accused knew that it was highly probable that that act would result in death or serious bodily harm.”



24. In the case of *Republic vs Tubere s/o Ochen* [1945] 12 EACA 63, the court identified those circumstances on which the existence of malice aforethought can be inferred:
- “The nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab wound or multiple injuries; the conduct of the accused before, during, and after the incident.”
25. Whilst in the case of *Rw^{abugande vs Uganda (Criminal Appeal 25 of 2014)}* [2017] UGSC 8, the court held that:
- “Circumstances from which an inference of malicious intent can be deduced are: (a) The weapon used, (b) the part of the body targeted i.e. whether it is a vulnerable part or not, (c) the manner in which the weapon was used i.e. whether repeatedly or not, or number of injuries inflicted and (d) the conduct of the accused before, during and after the incident i.e. whether there was impunity.”
26. In the instant case, the post mortem report PEX2 showed that the deceased had a protrusion on the skull, bleeding of the (occipital area) skull. According to the report, the cause of death was due to the fracture of the 1st vertebrae (neck) and intracranial bleeding. The prosecution witnesses’ evidence was that the Appellant beat the deceased who was only 1 year-old continuously with sticks until she lost consciousness. The manner in which the Appellant inflicted the injuries and location of the injuries on the deceased’s body, that is, her head, back and buttocks were sufficient to establish malice aforethought. Furthermore, the evidence disclosed that there was no attempt or urgency to take the child to hospital, which further pointed to malice aforethought. On this account this ground has no merit.
27. On the sentence, the Appellant was sentenced to serve 25 years’ imprisonment. He contended that the trial Judge did not consider his mitigation, and that the sentence imposed on him was excessive. In sentencing the Appellant, the trial Judge had this to say:
- “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 caregiver and protector of the survival rights of the victim. The mitigating factors though necessary consideration they do not go far enough to mitigate the seriousness of the offence and the blameworthiness of the convict in the light of the above approach I exercise discretion to sentence the convict to 25 years imprisonment with effect from 7 July 2017”.
28. As stated in the case of *Bernard Kimani Gacheru vs Republic* [2002] eKLR, ordinarily, sentencing is at the discretion of the trial court and an appellate court ought not to interfere with the sentence
- “...unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle.”
29. Although the Appellant has faulted the learned Judge for failing to consider his mitigation, the Judgment shows that his mitigation and other material factors were taken into account in arriving at the sentence. We are particularly cognisant of the circumstances that led to the life of a child of tender years being cut short for no apparent reason. The child’s only fault was that she could not walk when



the Appellant demanded that she begins to walk. It cannot be doubted that it was the violent and sustained assault by the Appellant on his daughter, a child of tender years, that led to her death.

30. We therefore do not find that the learned Judge failed to take into account relevant factors or took into account irrelevant factors, or that he acted on wrong principles in exercising his discretion to sentence the Appellant to 25 years' imprisonment, instead of the death sentence which is by law prescribed. Given the circumstances of the case, we find that the sentence was not harsh or excessive and, as a consequence, there is no basis upon which to interfere with the sentence.
31. In sum, the appeal against the conviction and sentence is lacking in merit and is accordingly dismissed.
32. It is so ordered.

DATED AND DELIVERED AT MALINDI THIS 20TH DAY OF JUNE, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

