



**Republic v Kenga (Criminal Case E019 of 2022)
[2024] KEHC 16192 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE E019 OF 2022
SM GITHINJI, J
DECEMBER 19, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

HAMISI CHENGO KENGA ACCUSED

JUDGMENT

- 1 HAMISI CHENGO KENGA is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Chapter 63 of the Law of Kenya.
- 2 The particulars of this offence are that on the 11th day of August, 2022 at Kamkomani village in Kaloleni Sub-county within Kilifi County, the accused jointly with others not before the court murdered Joyce Kadzo Kadenge.
- 3 The prosecution case is that the deceased herein who by the time of her demise was aged about 22 years, was a daughter of PW-3, the village elder of Dzhosohe village. The deceased was married to the accused herein and were living at Kadzongo village. They had one child aged 3 years then, called Liz. According to PW-3, the marriage between the two was not entirely blissful. The deceased is alleged to have taken a loan from a women group for use by the family, and its repayment raised issues which made the couple quarrel. Such quarrels had made the deceased on several occasions seek refuge in her parents' home but would later get back to her matrimonial home.
- 4 On 11/8/2022 at about 9.00am PW-2 who is their neighbour at Kadzongo village, saw the deceased and the accused along a path walking towards Mariakani. They were not quarreling. They had left their child Liz alone outside the house and some clothes in a basin which was to be cleaned. The home door though shut back was not bolted.
- 5 On the said very morning, PW-1 who was aged then 15 years and who is their neighbour and a relative was at home playing with her other siblings. The mother was at work and she was left in charge of



her other seven siblings. At about 9.00am Liz joined them while crying, PW-1 knew her as a cousin, neighbour and regular visitor. PW-1 held her. She took her back to her home and noted the parents were absent. She noted of the unbolted door, dirty clothes in a basin and others on the ground. She returned back home with Liz. She stayed with Liz and other siblings the whole day. She cleaned her, fed her and carried her on her back in the evening. She slept and at about 8.00pm hoping her parents were back took her back home. The parents were not yet back. She returned home with Liz. PW-1's mother did not also get back home and PW-1 ended up sleeping with the rest of the children till morning. Even at this time, the parents had not returned. PW-2 was advised by a cousin called Marian that they should report to the chief. When the mother to PW-1, by the name of Asha Kahindi got back home, she reported to the chief. The chief told her that Liz should be taken to her grandmother. At 9.00am PW-1 took Liz to the grandmother and she refused to be left with her. PW-1 returned with her home.

- 6 Later at about 8.00am PW-3 was called by the area chief and informed of a body of a lady that was found near Pembe za Kulo area, in Kamkomani. The photo of the deceased was sent to him and he recognized it to be of his daughter, one Joyce Kadzo Kadenge. The matter was reported at Mariakani police station. PW-5 the Investigating Officer, in company of the area chief and I.P Chai, visited the scene. The body was in a seasonal stream which had water at the time. It was facing downwards. They collected the body and took it to Coast General Hospital Mortuary. Witness statements were recorded. The accused is alleged to had gone underground.
- 7 Postmortem was conducted on 17/8/2023 and the postmortem form filled. Significant findings are that the fingers had signs of deficiency of blood; Anterior neck had bruises; There were lacerations extending to the right temporal region; She had scratch marks; The left upper limb had abrasion; The hymen was absent and semens presence was noted.
- 8 On internal examination, it was noted that there was hemorrhage on the trachea muscles, vaginal canal had semen and on the head there was tempo parietal hematoma extending to the back of the head (occipital region). C1 and C2 in the spinal cord were dislocated. An opinion was made that the cause of death was due to Asphyxiation, secondary to mechanical strangulation. Semens and nails were taken for further examination.
- 9 On 19/8/2022 at about 2.00am the accused went to Mariakani police station where he was arrested. After investigation were through he was charged with the offence.
- 10 The accused in his defence said he was married to the deceased for 4 years and they had one child. On 10/8/2022 he went home at 8.00pm. He was operating a Bodaboda and on 11/8/2022 he left for Ndaragwa at 7.00am. He went looking for charcoal to do business. At about 5.00pm on his way home he met the sub-chief at the stage and he was informed about the murder of his wife. He was advised to go to Mariakani police station and did so. He was arrested and later taken to Mombasa for DNA. He was later charged.
- 11 To prove the offence of murder under Section 203 of the Penal Code (Cap. 63), the prosecution must establish the following ingredients beyond reasonable doubt:
 1. The death of the victim. There must be proof that the alleged victim is dead. This can be established through medical evidence such as a post-mortem report, death certificate or reliable direct or circumstantial evidence confirming the death.
 2. The act or omission causing the death. It must be shown that the accused's actions or omissions directly caused the death of the victim. This is the actus reus or rather the physical act of the crime.



3. Malice aforethought The accused must have had the intention to kill or cause grievous harm. Under Section 206 of the Penal Code its established in the following circumstances: An intention to cause the death of, or grievous harm to, another person Knowledge that the act or omission will probably cause death or grievous harm, even if there is no intent to kill. An intention to commit a felony. An intention to resist or prevent lawful arrest or detention.
 4. Unlawfulness of the act. The act or omission causing the death must be unlawful for instance, killing in self-defense where excessive force given the circumstances is not used, may not constitute murder.
 5. Participation of the accused. It must be shown that the accused participated in committing the act or omission that caused the death. This ties the accused directly to the crime.
- 12 The issue for determination in this case is whether the prosecution case meets the disclosed threshold, not forgetting that the standard of proof is beyond reasonable doubt.
- 13 In this case there's no direct evidence as to who murdered the deceased. Prosecution case is therefore rooted in purely circumstantial evidence. The circumstances are that the accused who was married to the deceased, had an unhappy marriage. He was the last person seen with the deceased alive on 11/8/2022 at about 9.00am; And that he went underground after the wife was found dead, only to emerge later and present himself at Mariakani police station on 19/8/2022.
- 14 Circumstantial evidence can sufficiently support a conviction if it meets specific criteria; The evidence must form a complete and unbroken chain that leads to the conclusion of the accused's guilt, excluding any other reasonable exculpatory hypothesis. This principle was articulated in the case of Sawe –vs- Republic [2003]KLR 364, where the Court of Appeal stated:
- “In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.”
- 15 This standard ensures that circumstantial evidence is scrutinized carefully to prevent wrongful convictions. The evidence must be compelling enough to form a cohesive narrative pointing directly to the accused's guilt, without any reasonable alternative exculpatory explanation.
- 16 Noticeable in this case is that the particulars of the offence in the charge sheet discloses that the accused committed the offence together with others not before court. No witnesses saw the alleged others. In my view, the only evidence that would lead to such finding would have been forensic evidence on DNA. In the deceased vagina there were semens which were collected for examination. The accused also disclosed that he was taken for DNA examination. The findings of such examination if was conducted, was not availed in court. It's most probable given the circumstances, that the semen did not match the accused's DNA, hence indications that he was with others not before the court. The evidence does not exclude possibility where the said others would have committed rape and murder of the victim, in exclusion of the accused herein. There's no credible evidence that the accused was present during the probable rape and murder of the deceased.
- 17 There is no marriage that is entirely blissful because it is a union of two imperfect individuals, each with their own strengths, weaknesses and perspectives. Its therefore correct that not every quarrel in a marriage would constitute evidence of motive for murder. There's no evidence that accused had ever assaulted his wife before or threatened to kill her. Motive which would lead to murder is therefore not sufficiently established.



- 18 Given the foregoing, it's my finding that the available circumstantial evidence is weak and does not point irresistibly to the guilt of the accused person.
- 19 It simply raises suspicion, and in law, suspicion however strong, cannot form the sole basis for a conviction.
- 20 The accused in this case deserves the benefit of doubt as the offence against him is not proved by the prosecution beyond reasonable doubt. He is therefore acquitted of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 19TH DAY OF DECEMBER, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of: -

Ms Mwanja for the accused

Ms Ochola for the ODP

