



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Kagendo & another (Criminal Case 124 of 2018)  
[2022] KEHC 13237 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13237 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL CASE 124 OF 2018  
TW CHERERE, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JOHN MAINA KAGENDO ..... 1<sup>ST</sup> ACCUSED**

**ISAAC SIFUNA KIPONDO ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. John Maina Kagendo and Isaac Sifuna Kipondo (accused) are charged with murder contrary to section 203 as read with section 204 of the [Penal Code](#).

The particulars of the charge are that on the night of 23<sup>rd</sup> and November 24, 2018 at Christway Foundation Building, Gakoromone area in Imenti North sub-county within Meru County jointly with others not before the court murdered Lucy Makena Nduru.

2. Both accused persons denied committing the offence and the prosecution called a total of nine (9) witnesses in support of their case.
3. PW1 Pamills Inoti Mbaya, brother to Lucy Makena Nduru (Lucy) was on November 25, 2018 informed that Lucy could not be reached on phone went to her house to check on he decided to go to her house and from a distance saw a crowd gathered outside where she lived. That he proceeded to her apartment and found her blood soaked naked body on the bed with a deep cut on the throat. He reported the matter to police who visited the scene and removed the body to the mortuary. PW2 Doreen Kathambi Chebere tried to reach Lucy on her phone on November 25, 2018 without success. She proceeded to Lucy's house to find her lying dead on her bed. PW3 Evalyne Nkatha Ndereva, a colleague of Lucy last saw her on November 23, 2018. When Lucy's daughter Vivian Kendi called her on November 25, 2018 inquiring about Lucy's whereabouts, she proceeded to Lucy's house to find her lying dead. Police later showed him CCTV footage but she did not identify a



man that was in company of Lucy. PW4 Sammy Ikiao Mboroki, a guard at Christway apartments where Lucy lived stated that Lucy arrived home on November 23, 2018 at about 06.00 pm. That immediately thereafter, a young man that she introduced as her friend arrived and together they walked up the stairs towards Lucy's house on 1<sup>st</sup> floor. That about 04.00 am that light, the man exited the building only for Lucy to be found dead later in the day. PW6 PC Peter Mbatha received 2 mobile phones IMEI 355663008344xxxx and 35563008344xxxx paired with sim card numbers ICCID 8925402105419408xxxx and 8925402106411309xxxx for the purpose of extracting outgoing and incoming text and WhatsApp messages and he prepared a report and a certificate thereof both dated December 20, 2018 which he tendered as PEXH 2 (a) and (b) respectively. He established that the retrieved messages were between Mwangi and Eric. PW7 CPL Gabriel Kosgey, a scenes of crime officer visited the scene of Lucy's murder and took 8 photographs which he tendered together with the certificate thereof as PEXH 5 (b) and (a) respectively. PW7 CPL Joseph Mungai the investigating officer visited the Lucy's house on November 25, 2018 and caused her body that was soaked in blood to be removed to the mortuary. During investigations, he gathered from PW4 that Lucy had a male visitor on the night of November 24, 2018 who had left on the wee hours of the morning of November 25, 2018 before Lucy's body was discovered. Using deceased's phone number 0722xxxxxx

, he traced the last caller to phone number 0740xxxxxx belonging to one Charles Mwangi who had been in constant communication with Accused 1 who was his colleague at SK Bar in Nyeri was subsequently arrested. accused 2 whose phone 0706xxxxxx was used by Mwangi to call accused 1 0704xxxxxx was subsequently arrested and he was jointly charged with accused 1. The witness further informed court that he gathered information that Mwangi had exited Kenya for Uganda on November 26, 2018 and has to date not been arrested.

4. Upon the prosecution closing its case this court has to determine whether or not the prosecution has established a prima facie case against the accused as defined in the case *Ramanlal Trambaklal Bhatt v Rex* [1957] EA 332, 335.
5. That Lucy died the most painful death is borne by the postmortem report PEXH. 1 tendered by Dr Dennis Mutuma which reveals that she suffered a 12 cm long and 8 cm wide deep gaping cut wound on the anterior aspect of the neck revealing the cervical vertebra, severed trachea, severed jugular veins left carotid, severed proximal esophagus, mild per vaginal and vulval bruising and oedema, severed neurovascular bundle in the neck, communitied fracture of third cervical vertebrae anteriorly and had died of exsanguination secondary to single deep cut wound to the neck with a sharp object.
6. From the evidence on record, it is apparent that the main suspect to the murder was one Charles Mwangi who has to date not been arrested. PW4 Sammy Ikiao Mboroki, a guard at Christway apartments where Lucy lived confirmed that none of the accused persons visited the Lucy on the night of the murder. Indeed, the investigating officer confirmed that they were nowhere near Meru.
7. What came out clearly from the evidence by the investigating officer is that the only reason accused 1 was arrested was because he was in communication with Mwangi immediately after the offence was committed. Concerning accused 2, he was arrested only because Mwangi had used his phone to call accused 1.
8. From the foregoing, there is no doubt that accused persons were charged on the basis of suspicion. The issue in question is whether the evidence, though based on suspicion, is sufficient enough for this court to call accused persons to make a defence.



9. In *Sawe v Rep* [2003] KLR 364 the Court of Appeal held:

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

10. In *R v Kipkering Arap Koske & Another* [1949] 16 EACA 135, the Court of Appeal for Eastern Africa had this to say:

“In order to justify 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 his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

11. Whereas it is evident that the investigating officer put in a lot of effort to nab the suspect, one Mwangi, evidence discloses that he evaded arrest and escaped from the jurisdiction of the court, I find that it has not been demonstrated that accused persons either severally or jointly with others not before court murdered the deceased and it would therefore be futile to ask them to defend themselves for even if they choose to remain silent, the evidence on record is insufficient to sustain a conviction.

12. Accordingly, both accused persons are found not guilty of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and it is ordered that they be set at liberty unless otherwise lawfully held.

**DATED THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

Court Assistant - Kinoti

Accused 1 - Present

Accused 1 - Present

For 1<sup>st</sup> Accused - Mr. Gichunge Advocate

For 2<sup>nd</sup> Accused - Ms. Munga Advocate

For the State - Ms. Mwaniki (PPC)

