

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPSABET

CRIMINAL DIVISION

CRIMINAL CASE NO. E078 OF 2021

REPUBLIC.....

.....PROSECUTOR

VERSUS

JACOB SANG ALIAS

KIPLAGAT.....**ACCUSED**

JUDGMENT

- 1.** The Accused, **Jacob Sang** alias **Kiplagat** faces a charge of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. He is alleged to have murdered, **Colleta Kitur** [deceased] on the 26th September 2016 at Kapchemoiywo Nandi County.
- 2.** The prosecution case was that a neighbour to both the Accused and the deceased who was a motorcycle taxi operator [boda-boda] by the name of **Geoffrey Kipkoech Magut [PW1]**, had on the material date at about 7:35pm dropped a customer at Kaplamai ACK when he arrived at the home or house of the deceased and found a person standing

next to the fence. He beamed his motorcycle's full lights on the person and recognized him as the Accused who was his neighbour across a ridge.

3. The motor cycle rider continued with his journey and arrived at his home. Shortly thereafter he heard screams, left behind his motorcycle and proceeded to the scene of the screams at the place where he had left the Accused. He then saw the deceased lying down with cuts on her head. A crowd of villagers had gathered at the scene. It was then that he informed the crowd that he had earlier five minutes ago left the Accused at the scene standing at the fence. Later he recorded a statement with the police.

4. Nicholas Kiptoo Rugut [PW2], lived twenty [20] metres away from the home of the deceased who was his neighbour and shared a fence with the Accused. He was at his house on the material date and time when he heard screams of a person remarking "why are you killing me." He recognized the voice as that of the deceased and shortly thereafter, he spotted a person jump over the fence to the accused's home. He then reported the incident to a local leader and proceeded to the scene thereafter.

5. At the scene, **Nicholas [PW2]** found a crowd of people having gathered. The deceased was on the ground having

been assaulted. Her dead body was collected from the scene by the police and on the following day village elders convened a meeting to discuss the incident while the Accused and his wife were away practicing athletics. He **[PW2]** later recorded his statement and learnt that it was the Accused who killed the deceased.

6. Raymond Kipkoech Biwott [PW3], was also a neighbour of both the Accused and the deceased. He heard screams on the material date and time and enquired. He then saw a group of people heading towards the home of the Accused which neighbours that of the deceased. He also proceeded there and noticed the body of the deceased on the ground. He did not move close to the body upto the time the police arrived at the scene with the Assistant Chief and collected the body.

7. The witness [PW3] alluded to several cases involving the deceased and the Accused's family and implied that the Accused was arrested on the following day with the suspected murder weapon, a machete **[panga] [P. Exhibit 1]**. A son to the deceased, **Limo Kipyego [PW4]**, referred to a court case involving her late mother and the Accused and said that on the twenty fifth [25] of September 2016 he left his mother at home and proceeded to Eldoret from where he received calls from several persons telling him that there

was something urgent. He was further told that his mother had been injured after being attacked.

- 8.** The witness [PW4] returned home on the 27th September 2016 and found many people including the Area Chief. He joined the group in moving around a maize plantation next to the Accused's homestead when the machete [panga] **[P. Exhibit 1]** was found. He indicated that he was familiar with the panga as the Accused, his neighbour, normally used it. He **[PW4]** alluded to a boundary dispute between his family and that of the Accused.
- 9.** The Area Assistant Chief **Silvano Kiprotich [PW5]**, was on the material date at his home when he received a phone call on the death of the deceased. We proceeded to the scene and confirmed the information. Many people had gathered at the scene. He noted head injuries on the deceased head and reported to the police. Later, the Accused was arrested as the suspect.
- 10.** **Richard Kimutai Langat [PW6]**, a Government Chemist/ Analyst based in Kisumu with thirty [30] years work experience carried out DNA tests on the blood stained panga **[P. Exhibit 1]**, blood samples from the deceased and pieces of hair from the deceased head. Thereafter, he compiled and signed his report. **[P. Exhibit 2]** indicating that the

DNA profiles generated by the blood stains on the panga matched the DNA profile of the deceased.

11. Dr. Wekesa Nalinya [PW7] carried out the post mortem on the body of the deceased after which he compiled and signed the necessary post-mortem report [**P. Exhibit 4**] indicating that the deceased died from severe head injury due to blunt trauma to the head.

The necessary report was made to the police on the material date and **CPL. Fredrick Odemba [PW8]** was assigned the role of investigating the matter.

12. He [PW8] visited the scene accompanied by fellow police officer and found a crowd gathered there. The body of the deceased was lying down on its back with blood oozing from the mouth and nose.

The witness [PW8] noticed that the body was ten [10] metres away from the house of the Accused, and thirty [30] metres from the house of the deceased. It was eventually removed from the scene to the Kapsabet District Hospital Mortuary.

13. CPL. Odemba [PW8] interrogated potential witnesses in the course of his investigations and gathered that the deceased and the Accused had been seen together by a boda-boda operator shortly before the deceased was found murdered.

After completion of the investigations, the Accused was charged with the present offence, but not before the recovery of the blood stained panga [machete] by the police hidden at a fence which was sixty [60] metres from the Accused's house.

14. It was also gathered by the investigations officer **[PW8]** that there existed bad blood between the Accused and the deceased occasioned by a land dispute which at one point occasioned the Accused's arraignment in a criminal court for allegedly threatening the deceased with a panga [machete], but for which he was duly acquitted.

15. In his defence, the Accused denied the offence and contended that he did not know how the deceased died or he was not at the scene of the offence when it occurred. He said that he was a businessman dealing in tea and timber and that on the material date at about 7:00pm he was within Baraton area where he had gone to split timber from the morning hours while in the company of his witness, **Henry Kipkemboi Maiyo [DW1]**. Thereafter, he spent the night at the Baraton home of the witness before returning to his Kapchemoiywo home on the following day at 10:00am after being called by his Assistant Chief one **Sylvestus Magut** who sought to know his where about.

16. On returning to his home at Kapchemoiywo he found nobody there. He then noticed many people gathered at the neighbouring home of the deceased. He went there and learnt from a colleague called **Sammy Kiplimo** that the deceased had been found dead along a path. He denied having seen the deceased on the previous day as he was not in that area. He explained to the Assistant Chief his whereabouts on the previous day and was asked to step-aside and wait. Later, the police arrived at the scene and asked him whether he had previously quarreled with the deceased. His answer was in the affirmative. He was then told to accompany the police officers to the Kapsabet Police Station.

17. At the police station, he [Accused] was interrogated about the previous incident between the deceased and himself and was then arrested on suspicion of having murdered the deceased. He was later charged with the present offence. His witness **[PW1]** indicated that they were together on the material date at about 7:00pm onwards splitting timber at a construction site. They did not complete the job due to heavy rain and therefore left for the witnesses home at Baraton where they spent the night.

18. The witness **[DW1]** further indicated that on the following morning they returned to the construction site, but

at about 10:00am the Accused, who was his boss, received a phone call from his area chief and said that he had to return to his home to attend to an emergency. He then left and went away leaving the witness **[DW1]** behind.

The Accused's daughter, **Goldlyn Chepkazi Lagat [PW2]**, indicated that she lived with her father and siblings at Kapchemoiwo and that on the material date the father [Accused] was in Namgoi where he spent the night. She further indicated that she did not see the Accused at home on the material night of the 26th/ 27th September 2016.

19. Due consideration of the foregoing evidential facts as against the final submissions presented by both the prosecution and the defence revealed to this court that the fact that the deceased was murdered was not at all or substantially disputed. Indeed, the prosecution evidence was credible and steadfast in establishing that the deceased met her untimely death as a result of an unlawful act of assault committed against her by individual or individuals.

20. The post mortem report **[P. Exhibit 4]** pointed to a brutal attack on the person of the deceased such that she suffered severe head injury which proved fatal. The severity of the injury was a clear pointer to a willful intention on the part of the assailant to cause the death of the deceased.

21. Under **Section 203** of the **Penal Code**, a person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Malice aforethought, under **Section 206** of the **Penal Code** includes 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.

22. There can be no doubt that the assailant was all out to kill the deceased as clearly demonstrated herein by the severity of the head injury inflicted on her. The force used by the assailant to inflict the injury with a sharp weapon said to be a machete [panga] left no doubt that it was intended to cause death if not grievous harm [**See, Karube Vs. Republic [2024 KECA [KLR].**

23. What therefore emerged as the basic issue for determination was whether the prosecution provided sufficient and credible evidence to positively identify the Accused as having been the person who brutally attacked the deceased with a panga and occasioned her fatal grievous injury. It was the Accused's defence that he did not commit the offence and knew nothing about it because he was not at or close to the material scene of the offence when it occurred.

24. There was no obligation on the part of the Accused to prove his innocence **[See, Kioko Vs. Republic [1983]KLR 289].** Instead, it was the duty of the prosecution to prove the offence against the Accused beyond reasonable doubt **[See, Woolmington Vs. Director of Public Prosecutions [1935] AC 462].**

In that regard, the prosecution provided indirect or circumstantial evidence of identification against the Accused through the testimony of **Geoffrey Magut [PW1]**, a close neighbour of both the Accused and the deceased who stated that on the material date and time he saw the Accused standing next to the fence of the deceased and shortly thereafter after reaching his home he heard screams and proceeded to the scene of the screams on foot.

25. The witness **[PW1]** said that on arrival at the scene which was the spot where he had seen and left the Accused, he found a crowd of people and saw the deceased lying down with cut injuries, on her head. He said that he was able to see and recognize the Accused when he saw him at the same scene with the aid of his motor cycle's headlights which were bright enough for him to clearly identify the Accused by recognition.

26. The witness **[PW1]** in Cross-Examination said that the Accused was at the time wearing the sports gear or clothes

normally used by athletes. He indicated that the Accused was indeed an athlete and was alone when he saw him.

In addition to the testimony of **Magut [PW1]**, the prosecution also provided peripheral circumstantial evidence of identification against the Accused. This included the evidence of **Nicholas Rugut [PW2]**, also a neighbour of both the Accused and the deceased.

27. Rugut [PW2] stated that he was in his house on the material date and time when he heard the screaming noise of the deceased who was at the time asking why she was being killed using the words “*why are you killing me*”??. the two lived twenty [20] metres apart. He **[PW2]** indicated that immediately after hearing the deceased screaming he saw a person jump into the Accused’s nearby home. He implied that he did not identify the person, but later suspected that the Accused was that person because there was suspicion in the village that the deceased was attacked and fatally injured by the Accused.

28. This witness [PW2] merely relied on the suspicion cast upon the Accused by the local community to say that he was the person who jumped over the fence. In true sense, the witness was not able to identify in any manner the person he saw jumping over the fence. However, he significantly said that that person wore dark clothes normally used by

athletes. This was clearly in tandem with what **Geoffrey [PW1]** stated with regard to having seen the Accused wearing sports clothes used by athletes on the material date and time.

29. Rugut [PW2] also indicated that the suspected murder weapon, a panga [**P. Exhibit 1**], was recovered by members of the community on the Accused's parcel of land near a river. This fact was somehow confirmed by **Raymond Biwott [PW3]** when he stated that they searched for the murder weapon which was recovered having blood stains and traces of hair. These were analysed by the Government Analyst. [**PW6**] and confirmed to be those of the deceased.

30. The Government Analyst report [**P. Exhibit 2**] effectively confirmed and proved that the murder weapon was indeed the panga produced herein [**P. Exhibit 1**]. The post mortem report [**P. Exhibit 4**] by **Dr. Nalianya [PW7]** alluded to the deceased sustaining severe head injury due to blunt trauma. The investigations officer [PW8] indicated that the scene was revisited by his team and the murder weapon recovered at a fence where it was hidden. He said that the fence was 60 metres away from the Accused's house.

31. The son of the deceased [**PW4**] indicated that he was among those people who went in search of the murder

weapon which they found in a maize field near the Accused's homestead. He **[PW4]** alluded to an existing land boundary dispute between the Accused and his late mother [deceased]. There was no denial of this fact by the Accused in his defence which was essentially an alibi.

32. All the factors foregoing clearly indicate that there was no direct evidence of identification against the Accused. Nobody saw him in the act of assaulting the deceased. However, prior to the act he was seen and recognized by **Geoffrey [PW1]** while he was standing in the dark near the fence of the deceased's homestead. His identification by the witness **[PW1]** was by recognition and watertight. He was no stranger to the witness **[PW1]**. In fact, he [Accused], the witness **[PW1]** and the deceased were all close neighbours.

33. Although it was during the hours of darkness, the motorcycle in control of the witness **[PW1]** at the material time provided favourable conditions through its powerful headlights for a positive identification of the Accused by the witness **[PW1]**. Further, although the identification was by a single witness in the hours of darkness its was nonetheless, consistent, credible and reliable thereby ruling out the possibility of mistaken identification **[See, Abdulla Bin**

Wendo Vs. Republic [1953] 20 EACA 166 and Roria Vs. Republic [1967]EA 583].

34. The recovery of the murder weapon near the Accused's homestead or on his land as stated by **Rugut [PW2]** and **Limo [PW4]** and the fact that the person seen by **Rugut [PW2]** jumping over the fence into the Accused's homestead was wearing sports clothes provided sufficient corroboration to the circumstantial evidence provided by **Geoffrey [PW1]** on the identification of the Accused as the assailant of the deceased to the exclusion of any other person.

35. The inculpatory facts foregoing were not only consistent with the guilt of the Accused, but also wholly incompatible with his alleged innocence [**See, Teper Vs. Republic [1952]2 ALL ER 447**]. It would therefore follow that the Accused was placed at the scene of the offence at the time it happened or immediately before and after it happened. His alibi defence was therefore adequately discredited and displaced.

36. In any event, the alibi was raised rather belatedly during defence hearing thereby denying investigative advantage afforded to the law enforcement agencies when an alibi is disclosed promptly. This was a clear

demonstration that the alibi was an afterthought by the Accused as supported by his witnesses **[DW1 and DW2]**.

The Court of Appeal in the case of **Ganzi and others Vs. Republic [2005] 1 KLR 52**, stated that: -

“Where the defence of alibi is raised for the first time in the Appellant’s defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi, against the prosecution evidence.

In the circumstances of this appeal we are satisfied that when weighed against the evidence of his identification at the scene which we now turn to consider, the Appellant’s alibi defence was completely displaced.”

37. Indeed, the Accused’s defence of alibi was herein displaced by the prosecution evidence and rendered an afterthought. It could not have been a coincidence that the deceased was attacked and fatally injured within few minutes after the Accused was seen near her fence and there was nobody else at the scene or near the scene. It could not also have been a coincidence that the actual murder weapon **[P. Exhibit 1]** was recovered near the accused’s homestead or on his parcel of land.

38. Ultimately, it is the finding of this court that the Accused was positively identified as the person who brutally attacked and occasioned fatal injuries to the deceased. The prosecution case was thus proved beyond reasonable doubt against the Accused who is now found guilty as charged and convicted accordingly.

Dated and Delivered this 18th day of February 2026

**HON. J. R. KARANJAH,
JUDGE**