

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAPSABET
CRIMINAL DIVISION
CRIMINAL CASE NO. E013 OF 2023

REPUBLIC.....
.....**PROSECUTOR**

VERSUS

ZACHARY
NG'AZURA.....**AC**
CUSED

JUDGMENT

1. The charge against the Accused, **Zachary Ng'azura** is that of murder, **Contrary** to **Section 203** as read with **Section 204** of the **Penal Code**. It was alleged that the Accused killed his wife **Rose Ng'azura** [deceased] on the 14th February 2023 at Chepkumia Kiprambu Village within Nandi County.
2. The case for the prosecution was anchored on facts to the effect that the Accused and his deceased wife lived together at their matrimonial home and on the Material 14th February 2023, they hosted their daughter, **Edah Jerop [PW4]** and her daughter, **Jasmine Jeptoo [PW5]** at their home in which their young son, **Brian Cheruiyot**

[PW6] also lived. Also hosted in the home was brother to the Accused, **Daniel Kiepkemboi Rugut [DW1]**.

3. The couple's daughter **[PW4]** had gone to her parents' home after experiencing marital problems with her husband at their matrimonial home in Kericho, she was in the company of the couple's grand daughter **[PW5]** both had been sleeping in an outside kitchen of the couple's home together with their mother, the deceased, who surrendered her usual sleeping area in their main house in order to accommodate her brother-in-law.

4. At about 3:00am on the material night the screams of the deceased rent the air in the kitchen awakening all those present therein. The deceased screamed that a person had hit her on the abdomen she sought for help. Her daughter **[PW4]** switched on her mobile phone torch light to illuminate the kitchen area which was in darkness at the time. It was then that the Accused was seen standing next to the deceased before deciding with his brother **[DW1]** to take her to hospital.

5. The deceased's daughter **[PW4]** and grand-daughter **[PW5]** saw the Accused, but he grand-daughter said that he was at the time standing at the kitchen door. Another daughter of the deceased, **Susan Chepchumba [PW1]** was at her home when she was firstly notified at 4:00am that the deceased was unwell and was being taken to hospital and later, that she had died.

6. The Accused's nephew, **John Kiprono Mutai [PW3]**, was awakened at 3:00am by a phone call from his other uncle **[DW1]** and notified that the deceased was unwell and ought to be taken to hospital. He waited for those taking the deceased to hospital and they eventually arrived in a vehicle which he boarded. They included the Accused, his brother **[DW1]**, his daughter **[PW4]** and his son **[PW6]**.

7. The Accused was driving the vehicle and on the way to Kapsabet District Hospital it stalled when its fuel tank ran dry. The fuel was obtained after some challenges and the vehicle driven to White Crescent Hospital where the deceased was pronounced dead from excessive bleeding occasioned by a stab wound on her abdomen. Prior to arriving at the hospital, the deceased allegedly told her daughter **[PW4]** saying that *"I am dying and the people responsible are my father and **Milly**."*

8. **Milly Cherop Kemboi [PW7]** was the person mentioned to **Edah [PW4]** by the Accused and was known within their family as the Accused's secret lover, a fact acknowledged by her **[Milly]**. She **[PW7]** however, said that the relationship was share lived and that on the material night she was at her business premises twenty kilometres away from the Accused's home stead.

9. The Accused's son **[PW6]** indicated that on the way to the hospital his mother [deceased] asked for water as she

could talk, but other than asking for and touching his father [Accused], she [deceased] did not mention anybody. The Accused's nephew **[PW3]** indicated that the deceased was wailing inside the vehicle and mentioning her children without saying that she was assaulted by the Accused or any other person even though her neighbour called **Arusei** or **Kiprotich** was suspected to be the culprit assailant after his bunch of keys, gumboots and a walking stick were found within the compound of the Accused's homestead.

10. The said suspect allegedly was away from the scene and remained at large prompting the local villagers to set his house on fire.

Dr. Evans Kibiwott [PW2], performed a post-mortem on the body of the deceased and concluded in his report **[P. Exhibit 1]** that the deceased died from excessive internal bleeding due to a penetrative stab wound caused by a sharp object leading to cardiopulmonary collapse.

11. CPL. Paul Ochieng Ogwalo [PW8], received a report to the effect that the deceased had been stabbed by an unknown person and died on the way to hospital. He **[PW8]** in the course of his investigations recorded statements from potential witnesses and took photographs of the scene of the offence **[P. Exhibit 2[a]** which were processed by the scene of crime section of the

DCI Nandi Central under cover of the necessary exhibit memo **[P. Exhibit 2[b].**

12. The Officer **[PW8]** indicated that the Accused was implicated by his eldest daughter **[PW4]**, but several theories emerged from other witnesses suggesting a family dispute, bad blood between Accused and daughter **[PW4]**, and an illicit love affair between the Accused and **Milly [PW7]** as possible motives for the death of the deceased. It was also indicated by the officer **[PW8]** that the murder weapon was never recovered, but some items belonging to a suspect whose house was razed down by villagers were recovered. The items included a bunch of keys, a pair of old gumboots and a walking stick.

13. After conclusion of his investigations the officer **[PW8]** made recommendations that a public inquest be conducted on the matter, but the Accused was arrested and charged with the present offence. The Accused denied the offence and continued to do so in his defence in which he stated that he was awakened from his sleep by his wife's [deceased] unusual loud screams and rushed to the outside kitchen where she was sleeping with their daughter. His brother **[DW1]** followed him.

14. On arrival at the kitchen he [Accused] found its door open and his daughter **[PW4]** asking the deceased what was wrong. At the time, the deceased was on the ground,

could not talk and appeared unconscious and unresponsive. They rushed her to hospital when they noticed blood stains on the left side of her chest. Their vehicle ran out of fuel and stalled on the way but despite the challenge they obtained fuel in a jerrycan and re-filled the fuel tank after which they proceeded to White Crescent Hospital in Kapsabet town where the deceased was pronounced dead after suffering severe bleeding from a fresh stab wound on the left side of the chest.

15. The Accused recorded his statement with the police on the following morning and on arrival back home found that a bunch of keys, a pair of gumboots and a walking stick all belonging to one **Daniel Kiprotich Arusei** had been recovered by one **Lily Chesang**, a neighbour, near the rear side of the kitchen where the deceased was sleeping. The said **Arusei** was suspected of having fatally attacked and assaulted the deceased. He fled from the area and escaped. He remains at large to date, but his house was set ablaze by the Villagers.

16. The Accused indicated that the fugitive suspect was prior to the death of the deceased involved in several criminal activities in the area and at one time his accomplice by the name of **Benard Maiyo** threatened him [Accused] after he [accomplice] was charged with a criminal offence in a case which is ongoing at the Magistrate's Court in Kapsabet.

The Accused did not understand why he was arrested and charged with the present offence which has caused him much suffering such that he lost his retirement benefits due to his seven month stay in custody. His own relatives turned against and threatened to kill him thereby prompting him to escape from his home and seek shelter in Elgeyo Marakwet.

17. The Accused's brother **[DW1]** confirmed more or less what the Accused stated with regard to the happenings at the scene of the offence on the material night and time. His evidence was in essence a corroboration of the Accused's defence that he did not commit the offence against his wife as alleged and that he was implicated without good or justifiable cause.

18. The totality of the evidence as expressed in both the prosecution and defence cases reveals that the death of the deceased was as a result of a criminal act of assault committed against her by an individual or individuals on that material date and time. This is a fact that was undisputed by both sides. The circumstances of the case and the degree of the injury inflicted upon the deceased was a demonstration that the assailant intended to cause grievous harm to the deceased and by extension cause her death.

19. The motive of the fatal attack as deciphered from the evidence remained uncertain and a matter of conjecture ranging from family squabbles and animosity arising from allegations of impropriety and criminal acts made against the Accused by some of his daughters.

A love triangle between the Accused, his departed wife and the lady called **Milly [PW7]** was also featured as a possible motive for the fatal attack on the deceased and so was the enmity between the Accused's family and that of the man known as **Daniel Kiprotich Arusei** who remains a fugitive after the offence was committed.

20. Notwithstanding the motive for the fatal attack against the deceased the act was criminal in nature and was the cause of the demise of the deceased. It was an act of murder, pure and simple.

The big question, indeed the main issue for determination in this matter, was the identity of the killer assailant or rather, whether the Accused was positively identified as the person who attacked the deceased while she was sleeping and fatally assaulted her using what appeared to be a sharp object which was never recovered.

21. The burden to establish the identification of the Accused as the Assailant lay with the prosecution and could only be discharged by availability of sufficient, cogent and credible evidence of identification from the

prosecution against the Accused who does not in law bear the burden of proving his innocence.

22. In this case, it is evidently clear that none of the prosecution witness saw the Accused in the act of fatally assaulting the deceased even though he appeared at the scene of the assault immediately after it had happened.

He explained that his immediate presence at the scene was reaction to the distressing screams of the deceased and a need to come to her rescue. This was confirmed by his brother **[DW1]** who likewise appeared at the scene almost together with the Accused.

23. The Accused's daughter **[PW4]** and grand-daughter **[PW5]** also confirmed as much.

In essence, there was no direct evidence of identification availed against the Accused by the prosecution which was therefore called upon to rely on indirect or circumstantial evidence in the attempt to prove the charge against the Accused.

24. In that regard, the circumstantial evidence was derived from the Accused's daughter [PW4] in the form of suspicion and the alleged dying declaration of the deceased. Indeed, **Edah [PW4]** was the key prosecution witness against the Accused in as much as she saw him at the scene immediately after the fatal assault and

suspected that he was the assailant. The Accused's grand-daughter [PW5] was also at the scene at the material time. She saw the Accused standing at the kitchen door no sooner had the fatal assault occurred. She implied that his presence at that juncture was to help the deceased and wondered aloud in court as to why the Accused was charged in court.

25. Contrary to the position taken by the Accused's daughter [PW4], the Accused grand-daughter [PW5] did not suspect that the Accused was responsible for the death of her grandmother [deceased].

As was stated in the case of **Republic Vs. Kipkering Arap Koske and Another 16 EACA 135** and the case of **Sawe Vs. Republic [2003] KLR 364**, circumstantial evidence must irresistibly point to an Accused Person as the offender to the exclusion of other persons.

26. Thus, in order to justify the inference of guilt, the exculpatory facts must be incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

In the case of **Simoni Musoke Vs. Republic [1958] EA 715**, it was stated that it is necessary before drawing the inference of the Accused's guilty from circumstantial evidence to be sure that there are no other co-existing

circumstances which would weaken or destroy the inference **[See also, Teper Vs. Republic [1952] AC 480].**

27. In this case, the circumstantial evidence availed against the Accused by the prosecution was incapable of aligning itself with the legal principles set out in the decisions cited hereinabove. The evidence of the key prosecution witness **[PW4]** in that regard only led to suspicion of the Accused because he appeared at the scene immediately after the deceased was fatally attacked and injured. There was no evidence circumstantially connecting the Accused to the murder of the deceased. Undoubtedly, the evidence strongly indicated that the Accused was arrested and charged purely on suspicion.

28. Or perhaps on account of his bad blood with his eldest daughter **[PW4]**. It is instructive to note that suspicion, however strong cannot be used as evidence in a criminal case of this nature. It is always upon the prosecution to prove its case against an Accused Person beyond any reasonable doubt. Its evidence herein was not credible and sufficient enough for this court to draw the inference of the Accused's guilt from the circumstances of the case considering that there were other co-existing circumstances which would weaken or destroy the inference as demonstrated by the fact that

other possible suspects were mentioned including the fugitive **Daniel Kiprotich Arusei** and his accomplice **Benard Maiyo**.

29. The discovery of items belonging to the fugitive at the scene of the offence confirmed his presence there and the fact that he escaped or disappeared from the area where the offence was committed confirmed that he may have been the killer assailant rather than the Accused who was actually charged on mere suspicion. **In Republic Vs. Nicholas Wanjohi Gakuya [2017] KETIC 51134 [KLR]**, it was held that suspicion, no matter how strong, does not obliterate the prosecution duty to prove the case against the Accused beyond reasonable doubt.

30. As regards the dying declaration alluded to by the key prosecution witness **[PW4]** it could not be relied upon to hold or infer the Accused's guilt for want of credibility and corroboration. The declaration was not heard by any of the other people in the vehicle used to take the deceased to the hospital. These included the Accused's nephew **[PW3]**, the Accused's son **[PW6]**, the Accused's brother **[DW1]** and the Accused himself. This was a clear demonstration that key witness **[PW4]** raised the issue of a dying declaration as an afterthought with a view to "*fixing*" her father whom she loathed.

31. In sum, the prosecution failed to prove the charge against the Accused beyond reasonable doubt by its

failure to lead water tight, cogent, credible and sufficient circumstantial evidence and indeed, direct evidence of identification against the Accused who must invariably be accorded the benefit of doubt by being declared herein **NOT GUILTY** as charged. He is accordingly acquitted of the charge and with be at liberty unless otherwise lawfully held.

Dated and Delivered this 2nd day of April, 2026

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