



**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL CASE NO.37 OF 2003**

REPUBLIC **PROSECUTOR**

~VRS~

TITUS JUMA WAFULA **1ST ACCUSED**
JAFRED WEFWAFWA WANYONYI
Alias MATUMBEBEYI **2ND ACCUSED**
DAVID SIFUNA
Alias CHUKUNI **3RD ACCUSED**
MARTIN WANYONYI WAUYILE **4TH ACCUSED**

JUDGMENT

The four accused persons Titus Juma wafula, Jafred Wefwafwa Wanyonyi *alias* Matumbeyi, David Sifuna *alias* Chukuni and Martin Wanyonyi Wauyile are jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code.

It is alleged that on the 13th and 14th March 2003 at k Village, Mukwa Location of Bungoma District, they murdered the deceased GN. They all pleaded not guilty to the offence.

The facts of the case are that the deceased stayed in her home on the land of her brother PW1 where she reared goats, chicken and turkeys. On the 14th March 2003, around 2.00 p.m her brother PW1 went to her house to take milk to her. The deceased used to collect milk from PW1’s house daily. On that day, she had failed to go for her milk and PW1 decided to go and check on her. PW1 found that the goats and hens were still in the house at that hour. He entered the house and found the deceased’s naked body on the bed with rope marks on her neck. He alerted neighbours including the village elder and the assistant chief. The matter was reported to Malakisi Police Station. Two turkeys were missing from the house. Information was received that the 1st accused had been selling two turkeys fitting the description of those of deceased. The Assistant Chief (PW6) traced one Douglas Nyongesa (PW5) who had bought the turkeys from the first accused. The first accused was arrested and he gave the names of the 2nd, 3rd and 4th accused as his accomplices in the murder of the deceased and the stealing of the turkeys. The suspects were all arrested and handed over to police. With the help of the 1st accused, police recovered the rope which was used to strangle the deceased in the evening of 13/03/2003. Investigations led to the four (4) accused being charged with the offence.

It is PW1 who discovered the body of the deceased in her house around 2.00 p.m on 14/03/2003. He testified that the door of the house was not broken or damaged. He said the 1st accused went with police to the home of the deceased and showed them the rope he had used to strangle the deceased. It was tied to the leg of a he-goat outside the house. PW1 said the house of deceased was a bit far from those of neighbours and it was not likely that a neighbour could hear a person scream from the deceased’s house.

PW2 the village elder on learning of the deceased's demise from PW1, informed the assistant chief. PW3 is a neighbour to the deceased who escorted PW1 to Malakisi Police Station to report the matter.

PW4 the Area Councillor of Siboti Ward went to the house of the deceased at 4.00 p.m. He saw the half naked body of the deceased on the bed. He helped the Assistant Chief, Martin Wasike to trace PW5 who had bought the turkeys from the 1st accused. When the 1st accused was arrested, he gave the names of his accomplices 2nd, 3rd and 4th accused whom he said were with him in the house of deceased on 13/03/2003 at around 9.00 p.m. The 1st accused explained in detail how they raped and killed the deceased although no confession was recorded.

PW5 testified that on the 14/03/2003 he went to Malakisi Market and met a friend one Wanyonyi Stokario. The two men were poultry traders. The 1st accused who knew PW5 approached him and offered to sell two turkeys to him. The first accused had a black and white turkey. He sold PW5 both turkeys at Ksh.350/=. PW5 and his friend immediately sold the white turkey to a customer leaving the black one with his friend Wanyonyi. PW5 was to be arrested and questioned by the Assistant Chief on how he bought the turkeys, he explained and helped to arrest the first accused. The Assistant Chief then released him.

PW6 was the Area Assistant Chief. He gave an account of how he traced PW5, arrested the 1st accused, recovered the black turkey and arrested the other three accused persons with the help of the 1st accused. The first accused told PW6 how he and his accomplices murdered the deceased and stole the turkeys. He also said that he had sold the turkeys to PW5 that morning (14/03/2003).

The 4th accused resisted two attempts by PW6 to arrest him. At first he armed himself with a panga and ran out of his house. Later he went into hiding at his sister's home. PW6 handed over the suspects to police at Malakisi Police Station.

PW7 was the brother to the deceased. He identified her body to the doctor who performed the post mortem.

Dr. Isaac Obore, PW8 produced the post mortem report in evidence done by Dr. Wanjala. The doctor formed the opinion that the cause of death was cardio-pulmonary arrest due to asphyxia/strangulation. The same doctor produced the mental assessment reports of the four (4) accused persons. All of them were found to be adults of sound mind and mentally fit to plead.

The investigating officer PW9 visited the scene of crime at k Village on 14/03/2003. The body had rope marks on the neck and semen fluid in the private parts which he thought could have been evidence of rape before the murder. He took blood samples, pubic hair and semen fluid from the suspect's body and clothing and from the deceased. He sent them to the Government Chemist for analysis. He recovered the rope which was used in the crime from the home of deceased. Later he charged the accused persons with the offence.

PW10 was the Government Chemist who received the blood, pubic hair, semen fluid and saliva samples. The DNA results generated from the 1st accused showed a mixture of his semen and the vaginal fluid of the deceased.

It was the evidence of PW1, PW2, PW4, PW6 and PW9 that the body of the deceased was found naked or half naked on the bed. PW9 found semen fluid in the deceased's private parts. The doctor PW8 found evidence of penetration which led him to take samples of a high vaginal swab (HVS) for further analysis. PW10 the government chemist confirmed that the deceased had been raped before death. It was found to have mixed with the vaginal fluid of female through DNA. PW10 said that if she had received a fresh blood sample of the blood of the deceased, she would have found out the name of the female. This was not possible because the deceased was dead and buried. It was confirmed by PW8 and PW9 that the HVS was removed from the dead body of the deceased. It therefore follows that the deceased is that female who was unnamed by PW10. The defence of the first accused that he was a man friend to the deceased and had visited her that day around 3.00 p.m on the material day and had sex with her did not strike me as the truth. This defence was given after the first accused knew of the DNA results. The defence was stage-managed to dislodge the DNA results. The first accused sold the turkeys of the deceased to PW5 at Malakisi Market the following morning after the deceased was murdered. PW1, PW3 and PW4 confirmed that the deceased owned turkeys which were found missing after her death. PW1 the brother of the deceased owned the land where the deceased stayed. The deceased was supplied with milk from PW1's house on daily basis. PW1 was therefore the best placed person to know how the birds looked like. He said one was black in colour and the other white. PW5 who bought them from 1st accused

described them in the same way. The defence of the accused is that he was given the turkeys by the deceased to sell for her when he allegedly visited her on 13/03/2003. The home of the accused according to him and to other witnesses was about one kilometer from the home of the deceased. It did not make sense to carry the bulky birds to his home one kilometer away and have them spend the night in his house to go and sell the following morning. It was indeed more logical to go to his home, sleep and come the following morning, pick the birds and go straight to Malakisi Market to sell them. It is doubtful that the accused went to his home on the material night. When he was arrested the following day, he had not taken a shower. PW9 said the accused had the semen fluid in his pants when he was handed over to him by PW6. On cross-examination, the accused said that after selling the birds, he did not take the cash to the deceased as instructed. He stayed with the money and gave no reason for that conduct. The inference that may be drawn is that the accused sold the turkeys which he and others stole from the deceased to benefit himself and his accomplices with the proceeds. On being asked whether the deceased had ever sent home for any such errand before, the accused answered in the negative. He told PW4 in presence of other witnesses that when they went to the house of the deceased in the material night, it was the 4th accused who called the deceased and convinced her to open the door. The 4th accused gave the reason for the visit that they had been sent to do some farm casual work for PW1, the owner of the land. If it was true that the 1st accused was a lover to the deceased, he is the one who would have led the others to go to the deceased's house. The most probable thing is that the accused and others did not know the deceased intimately or at all and therefore went to her house to execute their evil plan to rape and steal which later resulted to the death of the deceased.

The first accused led PW9 to recover the rope which he and his accomplices used to strangle the deceased. It was recovered in the compound of the deceased. The accused did not raise any defence in regard to this recovery. If the accused was not involved in the murder of the deceased, how would he have known where such an exhibit would be found. PW9 the investigating officer did not know the 1st accused before the incident and had no reason to frame up the recovery against the accused.

PW6 testified that the 4th accused escaped arrest on 14/03/2003. He went to hide in his sister's house and was arrested several days after the 1st, 2nd and 3rd accused. The conduct of the 4th accused implies a guilty mind. Why did he escape arrest if he was innocent as he said in his defence. His co-accuseds had already been arrested at the time PW6 went for him. That information must have reached him. Apart from these two attempts to escape arrest, there is no direct evidence to connect the 4th accused person with the offence. The other evidence was from PW4, PW6 and PW9 who were told by the first accused that he committed the offence together with the others.

The evidence against the 2nd and 3rd accused is also that of an accomplice given by the first accused through PW4, PW6 and PW9. The Government Chemist's report was negative as regards the 2nd, 3rd and 4th accused. Each of the accused persons denied the offence in their sworn statements of defence.

The evidence against the first accused is mostly circumstantial. There is no witness who saw him inflict the injuries which killed the deceased or strangle her for that matter. However, the fact that he was found with the birds of the deceased, sold them to PW5 and retained the money, told PW4, PW6 and PW9 what he did to deceased with his accomplices and the part he played in the recovery of the murder tool, the rope and the results of the DNA test as regards him and the deceased point guilty at the first accused. The circumstances lead to an inference that it is the first accused and others before or not before the court who killed the deceased. I find no other co-existing circumstances pointing guilt at anyone else but the first accused.

I find that the prosecution have proved to the standards required that the accused alone or with others did the act which led to the death of the deceased.

As for the 2nd, 3rd and 4th accused, I find that the evidence on record is not sufficient to prove the *actus reus* of the offence against them. I find them not guilty and acquit them of the offence.

The deceased was strangled with a rope which led to her death. The doctor confirmed that the cause of death was a strangulation related cause. The act of strangling the deceased with a rope around her neck was not intended to achieve any other results but to bring her life to an end. This was meant to silence her forever not to divulge any information of the theft and rape. The first accused in his act applied force which led to the death of the deceased well aware of the consequences of his act.

I find that the prosecution have proved that the accused had the intention to kill the deceased. He is accordingly guilty of the offence as charged and is hereby sentenced to death.

**F. N. MUCHEMI
JUDGE**

Dated, Delivered and Signed at Bungoma this 27th day of October, 2010 in the presence of Mr. Ocharo for the Appellants, the Appellants and the State Counsel Mrs. Leting.

**F. N. MUCHEMI
JUDGE**