



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA**

**Criminal Case 23 of 2003**

**REPUBLIC.....PROSECUTOR**

**VS**

**ELPHAS FWAMBA TOILI.....ACCUSED**

**JUDGMENT**

Elphas Fwamba Toili is before this court on information of the Attorney General facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on night of 18<sup>th</sup> and 19<sup>th</sup> august 2003 at Busia (K) Village in Kisawayi sub-Location, Mukwa Location within Bungoma District of Western Province murdered Linet (Judith) Nabwire.

It is the evidence of the prosecution that Elphas Fwamba Toili (accused), Linet Judith Nabwire (deceased) and Kevin Kibuyi (P.W1) spent the night of 18<sup>th</sup> August 2003 in the same house. It is the evidence of P.W1 that towards the morning of 19<sup>th</sup> August 2003, he heard the accused and the deceased talk in low tones after which he saw the accused assault the deceased, (who was P.W1's mother) using a panga. P.W1 said the accused slit the deceased's throat using a panga after which the accused sent him to inform David Masibo (P.W5). P.W1 said he saw the accused commit the heinous with the assistance of the emerging day light. P.W1 said he went to inform P.w5 of what happened and when they came back they found the accused had fled. P.W5 confirmed having been informed of the incident by P.W1. P.W5 also confirmed that he visited the scene upon which he observed the deceased's body and found that her throat had been slit and that her legs also had injuries. P.W5 further confirmed that the accused had fled the scene of crime. Collins Kibuyi (P.W2) a brother to P.W1 said that he was woken up by P.W1 in the morning of 19.8.2003 while he was asleep in the house of P.W5. He said he was told by P.W1 that their mother (deceased) had been slaughtered by the accused. DANIEL WASWA (P.W3) also told this court that he visited the scene where P.W1 told him that the accused told him to cover his face before he butchered P.W1's mother using a panga.

Robert Maina Simiyu (P.W6) told this court that at about 5.00 a.m on 19.8.2003, the accused visited his house whereby he requested him to lent him his bicycle to enable him reach Chwele. P.W6 said he acceded to his request but left his house almost immediately. On his way P.W.6 said he met people who informed him that the deceased had butchered the deceased after which he fled. P.W6 said he was prompted to report to the area Chief about this encounter with the accused. P.W6 identified his bicycle which he had lent to the accused on that fateful morning. P.W6 said that he knew that the accused and the deceased were people who used to occasionally quarrel over matters he did not know.

Corporal Vincent Juma (P.W8) said he booked the report of the deceased's murder on 19.8.2003 at Malakisi Police Station after which he visited the scene of crime where the deceased's body was taken to

the hospital mortuary. P.W8 said on 21.8.2003 he received a report that the accused had been arrested and locked up at Kimaeti Police Post. It is the evidence of P.W8 that they went and re-arrested the accused for interrogation and the outcome of the interrogation is that the accused took the police and showed them where he hid the panga, the murder weapon. At the scene of murder, P.W8 said they took possession of the accused's trouser and shirt which had blood stains. P.W8 said that he prepared an exhibit memo of the items he sent to the Government Chemist for analysis. That exhibit memo was produced as an exhibit in evidence. P.W8 said he sent to the Government Chemist for analysis the following items:

- Grey Trouser
- White shirt
- Panga
- Deceased's blood
- Sponge mattress.

P.W8 also produced the Government analysis report which report showed that the blood stains on the accused's long trouser and shirt and on the panga were of the same blood group B just like that the deceased.

Doctor John Ouma Juma (P.W7) produced the post mortem report prepared by Dr. Wanjala. The report indicated that the deceased's left ring finger had been severed and that she suffered extensive multiple scalp wounds. Facial injuries were also noted. The doctor formed the opinion that the cause of death was cardio pulmonary arrest due to excessive external haemorrhage.

When placed on his defence, the accused admitted having killed the deceased on the basis that he was so enraged that the deceased had lent money to one of her boyfriends called Anthony Nyongesa. The accused said that he had given the money to the deceased for safe keeping but she ended up lending to her boyfriend. The accused claimed that he acted at the spur of the moment hence he had no malice aforethought. The accused said in his unsworn testimony in defence that he knew the deceased had a love relationship with one Anthony Nyongesa but that the deceased had promised to abandon the illicit affair.

At the conclusion of the evidence, Mrs Mumalasi advocate for the accused was the only one entitled to submit in view of the fact that the accused person gave an unsworn testimony.

It is the submissions of Mrs Mumalasi that the prosecution tendered hearsay evidence and that none of the witnesses saw the accused commit the offence save for P.W 1. It is the argument of Mrs Mumalasi that the evidence of P.W1 needed corroboration pursuant top section 124 of the evidence Act. It is further submitted by the learned advocate that there was no proof of mensrea on the accused's part.

Mrs Mumalasi further urged this court to find that there was cumulative provocation on the accused by the deceased. The learned defence counsel urged this court to hold that the accused acted at the spun of the moment hence he is not guilty of murder.

At the end of the submissions, I summed up the evidence to the assessors and directed them on the applicable legal principles. I then asked for the assessor's opinion. The assessors were unanimous that the accused person is guilty as charged.

Having taken into account the evidence, the submissions and the assessors' opinion, I have formed the following view of the matter. The star witness in this case is Kevin Kibuyi (P.W1) a child of tender age. At the time of giving his testimony, P.W1 was aged 11 years. He gave unsworn evidence in view of the fact that he did not understand the meaning of giving evidence under oath. It is a legal requirement that P.W1's evidence must be corroborated. The accused does not deny that he killed the deceased. His

defence is that he killed the deceased because she gave out his money which he had given her for safe keeping to her long time lover called Anthony Nyongesa. The accused said that he had promised to end the illicit love affair with Anthony Nyongesa prior to the date of the incident. The accused's evidence therefore corroborate the evidence of P.W.1. The evidence of P.W.1 is further corroborated by the evidence of P.W8 in several respects. First, is that the murder weapon was recovered from a location shown by the accused. Secondly, that the murder weapon, a panga was found to contain the deceased's blood. Thirdly, that the accused's shirt and trouser were found to have blood stains of group B which is similar to that of the deceased. The evidence of the Government Analyst squarely corroborated P.W1's evidence. The question as to who killed the deceased therefore is settled by the evidence of P.W1, P.W8 and of course by the admission by the accused.

The remaining question is whether or not the accused had malice aforethought when he killed the deceased. P.W1 said he heard the deceased and the accused talk in low tones before the accused slaughtered the deceased. There was no evidence that the duo had quarreled before going to bed. After a careful consideration, I am satisfied that the accused was actuated by malice to kill the deceased. A close look at the post mortem report prepared by Dr. Wanjala and produced by Doctor John Ouma Juma (P.W7) will reveal that the deceased had multiple cut wounds. Such injuries cannot be said to have been inflicted by a person who acted at the spur of the moment. The accused must have planned and intended to phase out the deceased out of this planet. Consequently, I find him guilty of murder. In this regard, I agree with the assessors that the accused is guilty as charged. I sentence him to suffer death as authorized by law. Pursuant to section 271 of the Criminal Procedure Code the assessors are hereby discharged and that they should not be summoned to serve as assessors until twelve months have lapsed.

Dated and delivered this 14<sup>th</sup> day of September, 2006.

J. K. SERGON

JUDGE

In open court in the presence of Mr Onchiri holding brief for Mrs Mumalasi for the accused and in the presence of the L.P.S.C.