



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

**Criminal Case 5 of 2003**

**REPUBLIC.....PROSECUTOR**

**VS**

**EDUSEI ASILA MALEMA.....ACCUSED**

**JUDGMENT**

Edusei asila Malema, the accused herein, is before this court duly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code. The particulars of the offence are that on the nights of 26<sup>th</sup> and 27<sup>th</sup> day of September 2003 at Emaseno village in Busia District within Western Province he murdered Eureka Abwavo.

A total of twelve witnesses were summoned to testify in support of the prosecution's case. Faith Abwavo Machoni (P.W1) told this court that she and her brothers namely: Eueka Abwavo (deceased) and Nelson Abwavo (P.W10) went to live with the accused as orphans having lost all their parents. She informed this court that at midnight of 26/27 September, 2003, the accused's house was raided by thugs who forced open the door leading to that home. She said she was assaulted when she screamed. She claimed she saw the deceased being dragged and beaten by the thugs as they demanded to be given money. She said that the deceased got seriously injured in the process and succumbed to his injuries the next day. Mr. Onderi, the learned principal state counsel pointed out that P.W1 had substantially departed from her statement she recorded at the police station. Another crucial witness in this case is Auma Nafula Oswaga (P.W2). P.W2 said at about midnight and being a neighbour to the accused she woke up when she heard a child scream. She visited the accused's home where she said she found the deceased lying down in the deceased's house while he was in great pain. P.W2 said she heard the deceased say that he was being killed. She said she made inquiries from the accused's wife as to why the deceased was being beaten and that she told her that her husband had disciplined the boy because he had stolen money. P.W2 further claimed that the accused visited her house that night whereby he warned her not to interfere with his family. She also alleged that the accused threatened her with dire consequences if she ever came to court to testify. Corporal David Amiani (P.W6) told this court at about 4.00 a.m. on 27.9.2003 the accused and two other people visited Korinda Police Patrol Base where they booked a report of robbery. P.W6 said that the accused claimed he had arrived home late and that is when he was attacked by thugs who were seven in number. He said the accused told him that the thugs kicked the deceased when he screamed thus critically injuring him. P.W6 said he told the reporters to take the deceased for treatment when he saw that he was critically ill. Thomas Somba (P.W9) said he investigated the case and found out that there was no robbery which took place in the accused's house. On the basis of his investigations the accused was arrested and charged with the current offence. P.W9 said that his investigations revealed that the accused came home late on 26<sup>th</sup> September 2003 and assaulted the deceased when he failed to account in full a sum of Ksh.200/= which he had left in his trousers. P.W9 said that Nelson Abwavo (P.W10) had revealed to the accused that the deceased had stolen his money and that is when the accused started beating up the deceased thus critically injuring him. P.W9 said his investigations revealed that the deceased managed to give the accused a balance of Ksh.150/= but was unable to account for Ksh.50/=. The accused then continued to beat the deceased until he lost consciousness. P.W9 claimed that the accused interfered with the witnesses by couching key witnesses. He said the accused gave false information to the police to cover-up the murder charge. Nelson Abwavo (P.W10) was declared a hostile. He completely deviated from the statement he recorded at the police station. Dr. Elifford Asava Amaganga (P.W11) produced the postmortem report prepared by Dr. Njau. In the post mortem report Dr.

Njau formed the opinion that the deceased died as a result of cardio respiratory arrest due to severe internal haemorrhage due to a ruptured spleen.

On his part, the accused, gave sworn testimony in his defence. He told this court that in the night of 26.9.2003 he came home late after attending Busia Teachers AGM at Hotel Villa and on the way he was accosted and robbed of Ksh..2,000/= by 4 people who posed as policemen. He said the quartet frog marched him to his house where they forced his door open when his wife refused to open. The accused claimed that he was beaten up when he refused to give the gang more money. He claimed that the robbers took him to some distance away from his house where he was ordered to lie down as the thugs fled with their loot. He said he went back to his house where he found his wife holding the deceased who was in critical condition having been assaulted by the thugs. He denied having committed the offence. Miriam Musindi (D.W2) said she escaped to hide in a near by cassava plantation when her home was raided by thugs in the night of 26.9.2003. She said the gang attacked the deceased. She said she came back from her hideout only to find the deceased writhing in great pain. She said she carried the deceased to Korinda Police Patrol Base where she was instructed to take him to a nearby clinic for treatment, where unfortunately he was pronounced dead.

At the end of the evidence, counsels were invited to submit. It is the submission of Mr. Ipapu advocate for the accused that the evidence of Thomas Somba was hearsay. It is further his submission that there was no evidence of proof that the accused indeed murdered the deceased because there was no proof of actus reus and malice aforethought. It is also the argument of the learned advocate that this case was not thoroughly investigated.

On his part, Mr. Onderi, the learned principal state counsel was of the view that the prosecution has discharged the burden of proof. He was of the view that there was a cover up by the defence when two of the witnesses turned hostile due to interference by the accused and his wife (D.W2).

At the end of the submissions, I summed up the case to the assessors after which I invited them to make their oral opinions. The assessors were unanimous that the accused was guilty as charged. They expressed the view that the defence put forward by the accused is make story to cover up the role played by the accused in killing the deceased.

I have considered the evidence, the submissions and the assessors' opinions. I have taken the following view of the matter. The evidence on record clearly shows that the deceased was fatally injured while in the house of the accused on the nights of 26<sup>th</sup> and 27<sup>th</sup> September 2003. The question is who did it? After a careful consideration of the evidence, it is crystal clear that there was a systematic scheme to suppress first hand information from the eye witness who happened to be orphaned children under the care of the accused and his wife. The cover up is manifested in the evidence of P.W1 who without any reason or excuse completely deviated from her statement she recorded at the police station. The cover-up and interference is further manifested in the evidence of Nelson Abwavo (P.W10) who was later declared a hostile witness. Despite the apparent interference of witnesses there were strong circumstantial evidence which were marshalled by the prosecution to establish its case. The evidence of Annah waffula Oswaga (P.W2) is very crucial. Being a neighbour to the accused, she said she visited the accused's house at the material night when she heard a child crying. She went to the accused's house and she was able to see the deceased who was in great pain. The deceased told her that he was being killed. P.W2 said that the Miriam Musindi (D.W2) told her that her husband, the accused, beat the deceased because he had stolen. P.W2 also claimed that later at night the accused went to her house to warn her not to interfere with the affairs of his home. She also claimed that the accused warned her not to come to court to testify. I observed P.W2 as she testified. She appeared to me to be a witness who told the truth. She had no grudge against the accused and his family. If indeed there was a robbery in the house of the accused, she could have been the first person to know. Why didn't the accused person and his wife (D.W2) tell her about the robbery. I agree with the assessors that the defence story in respect of a robbery was a theory created to cover up the heinous acts of the accused. The evidence of robbery was discounted and disapproved by the investigations of the police who recorded the evidence of P.W8. I am convinced from the evidence of P.W2 and P.W8 that the accused assaulted the deceased. However I find that he had no malice aforethought. He only applied excess force in disciplining the deceased. In the

end, I find the accused not guilty of murder. He is however guilty of the offence of manslaughter under section 205 of the Penal Code. I hereby convict him for that.

**Dated and delivered this 30<sup>th</sup> day of November, 2006.**

**J. K. SERGON**

**JUDGE**