



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 11 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY OKONGO ALIAS TABULEE.....ACCUSED

JUDGMENT

1. Anthony Okongo alias Tabulee is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 16th day of June 2020, at Bunyamoit, Luanda Sub location, Nambomboto location in Samia sub County of Busia County, murdered Benard Wafula Juma.
3. At about 8 p.m., the deceased was waylaid and stabbed. He managed to seek assistance and was taken to hospital. He informed the people that he interacted with, that he was stabbed by the accused.
4. The accused denied any involvement in the offence and pleaded an alibi.
5. The issues for determination are:
 - a. Whether what is attributed to the deceased amount to a dying declaration;
 - b. Whether the circumstances obtaining at the time of the offence were favourable for a positive recognition; and
 - c. Whether the alibi defence of the accused was displaced by the evidence on record.

6. A dying declaration is defined in the Black's Law Dictionary ,10th Edition as follows:

A statement by a person who believes that death is imminent, relating to the circumstances of the person's impending death. The statement is admissible in evidence as an exception to the hearsay rule.

Though no much evidence was adduced as to the state of the deceased, we can safely conclude that this was a dying declaration. The only issue is what weight to attach to it taking heed of caution as advised in the case of **Chogo vs. Republic [1985] KLR**. The Court of Appeal stated as follows:

The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.

7. When John Ouma (PW2) was taking the deceased to the hospital, he said that the deceased told him that he was stabbed by Anthony Tabulee, the accused, on allegations that he (the deceased) had made the former's wife leave him. Though Bonface Barasa Juma (PW3) accompanied the deceased to the hospital, he said he did not know why the accused stabbed the deceased. The evidence on the cause of the stabbing is doubtful for he (PW2) claimed that the deceased informed him in the presence of Boniface Barasa Juma (PW3) but the latter testified that he did not know the cause.

8. The second reason why it would be unsafe to base a conviction solely on the dying declaration is the circumstances obtaining at the time of the purported recognition. According to the evidence of Bonface Barasa Juma (PW3) the deceased told him that his assailant whom he recognized as the accused emerged from some maize plantation. This raises an issue of the suddenness of the attack and whether the deceased was in a position to recognize his assailant.

9. There was no evidence that was adduced on the state of lighting considering that it was at night. Without such evidence, the court is left with nothing to make a finding whether there was ample light. On identification when circumstances are not favourable, Lord Widgery in the case of **R. vs. Turnbull and Others [1976] 3 All ER 549** stated as follows:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people?

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Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

10. The accused raised an alibi defence. He said on the material day he was in Uganda where he had gone to visit a relative. In the case of **Kiarie vs. Republic [1984] KLR** where the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

11. It was only John Ouma (PW2) who said during cross examination that he had seen the accused on the evening of the incident. He however did not say where he had seen him and in what circumstances. This did not amount to displacing the alibi defence.

12. It would appear that the accused was arrested and charged on suspicion. The Court of appeal in the case of **Sawe vs. Republic [2003] KLR 354** said:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

13. In the instant case, I find that the prosecution case has not proved that the accused was involved in the murder of the deceased herein. I accordingly acquit him of the charge of murder and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 30th day of July, 2020

KIARIE WAWERU KIARIE

JUDGE