

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA

Criminal Case 14 of 2003

REPUBLIC.....PROSECUTOR

VS

CLEMENT ODUORI MUDALA.....ACCUSED

JUDGMENT

Clement Oduori Mudalla, the accused herein 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 the 21st day of March 2003 at Budama Village Mukhweso sub location in Busia District within Western Province, he murdered Angeline anyango.

A total of ten (10) witnesses testified in support of the prosecution's case. John Peter Okoth wanjiru (P.W1) told this court that at about 6.30.a.m on 1.3.2003, members of a village group called Jogoo came to till and plough his farm. Amongst the members who came included the accused and the deceased. At 9.30 a.m the group completed its work and were paid their dues before leaving P.W'1's farm. P.W1 said he left to attend a funeral in the neighborhood and when he came back at around 3.30 p.m he was told that the deceased had been cut. Patrick Onyango (P.W2) told this court that he visited the scene where the deceased was injured at 4.30 p.m whereby the deceased told HIM that she was cut by the accused when she went to borrow cassava seedlings for planting. At about 7.00 p.m on the same date, Charles Bilimo Ondalo (P.W6) claimed that he heard the deceased tell the police that she had been assaulted by Clement Oduori. Ernest Ochieng Opondo (P.W7) in his testimony told this court that he was the one who translated what the deceased told the police in Kiluhya language to Kiswahili. Inspector of police, Meshack Cherutich (P.W10) informed this court that he visited the scene at 9.00 p.m where he recorded a dying declaration from the deceased. He told this court that the deceased narrated her story in Kiswahili as he recorded the same in English language. On being cross-examined P.W10 denied the assertion of P.W7 that he assisted to translate what the deceased said from Kiluhya to Kiswahili language. Doctor Njau (P.W8) produced on behalf of Dr. Onyango the postmortem report which indicated that the deceased died as a result of severe hemorrhage due to head and neck injury. Alfred Ouma (P.W5) told this court that the accused attempted to escape when he inquired from him about the deceased's death when he visited his home. He gave a chase and managed to catch him with the assistance of school children. P.W5 claimed that the accused had told him that he cut the deceased and he fled home for fear of his life and that is why he requested him to take him to the police station.

The accused gave sworn testimony in his defence. He told this court that upon being paid his dues after ploughing the farm of P.W1, he left for his home whereby he received a report that his uncle's child had passed away. He said he took off for Samia where he stayed until 9.3.2003 when he left for Ebudama village. On 10.3.2003, the accused said he visited the house of Charles Alfred Wandera (P.W4) to say hi. He said upon reaching his compound P.W4 became hostile when he suspected that the deceased may have committed murder. The accused said he was saved by children who restrained P.W4 from cutting. In a nutshell the accused raised the alibi.

At the close of the evidence counsels on both the prosecution and defence made detailed submissions. Mr. Wanyama was of the view that the dying declaration given by the deceased is very weak to sustain a conviction. He discredited the same by stating that there was contradictory evidence as to how the same

was recorded. It is pointed out that the evidence of P.W7 and P.W10 are at variance. It is further the argument of Mr. Wanyama that the alibi defence given by the accused has not been displaced. Mr. Onderi on his part is of the view that the accused admitted to P.W7 that he cut the deceased. It is also the argument of the learned principal state counsel that there was malice aforethought as manifested in the kind of injuries the deceased sustained.

At the conclusion of the submissions, I summed up the evidence to the assessors and then requested them to give the oral opinions. They were unanimous that the accused is guilty as charged. They formed the opinion that the deceased gave a dying declaration which implicated the accused as the culprit.

Having considered the evidence, the submissions and the assessors' opinion, I am of the following conclusion in this case. I have carefully considered the evidence of P.W5 and I am satisfied that this witness told the truth. On being cross-examined he revealed that the accused had told him that he had assaulted the deceased and that is why people were baying for his blood. The evidence of P.W7 and P.W10 seemed to be in conflict. According to P.W7, he translated the what the deceased said in Kiluhya language to Kiswahili to the police whereas P.W10 said he spoke directly with the deceased in Kiswahili and that he recorded what the deceased said in English. It is clear in my mind that the contents of the dying declaration is not disputed. It is not alleged that the dying declaration is a fabrication by the police. The fact is whatever the deceased said was recorded. There is no dispute that she thumb printed the same before P.W10 countersigned. It has been argued by Mr. Wanyama advocate for the accused that the deceased did not anticipate death when making the statement. A careful perusal of the evidence shows that the same was recorded at 10.00 p.m and the deceased died at midnight. That is about two hours from the time of recording. It is obvious that the deceased must have anticipated death. In any case there is no denial that the deceased had told P.W2 that the accused had assaulted her. In the end, I find that the accused alibi defence is displaced. He is squarely placed at the scene of crime by the deceased's dying declaration made to P.W2, P.W7 and P.W10. It is also obvious that the accused fled his home after committing the heinous act. His conduct of escape is consistent with his guilt conscience. The kind of injuries inflicted on the deceased shows that whoever inflicted the same knew that he would cause death or do grievous harm. Pursuant to section 206 of the Penal code, this court is entitled to presume that the assailant had malice aforethought. In the end, I agree with the assessors that the accused is guilty of murder. Consequently, the accused is hereby convicted of murder. He is hereby sentenced to suffer death in the manner authorized by law. Pursuant to S.271 of the criminal Procedure Code the assessors are hereby discharged. They should not be summoned to serve as such until twelve (12) months have lapsed from the date hereof.

Dated and delivered this 30th day of November, 2006.

J. K. SERGON

JUDGE