



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA

Criminal Case 12 of 2006

REPUBLIC.....PROSECUTOR

-VERSUS-

PATRICK BULUMA ODILO.....ACCUSED

J U D G E M E N T

The accused Patrick Ouma Odilo is charged with murder contrary to S. 203 as read with 204 of the Penal Code. It is alleged that on the 12th July 2006 at S Village, Busia District, Western Province murdered FA. He pleaded not guilty to the offence.

This case was heard by three judges before it was concluded. Justice Wanjiru Karanja heard eight (8) witnesses and was transferred to another station. Her successor Justice Mbogholi Msagha took over the case under S. 200 (3) and 201 (2) of the Criminal Procedure Code in full compliance of the said provisions. The honourable judge took the submissions of the defence and the State Counsel after prosecution closed their case. Thereafter, he gave a ruling to the effect that the accused has a case to answer. When I took over the case, I complied with Section 200 (3) and heard the defence case.

The evidence of the prosecution begins with that of the doctor (PW1) who performed the post-mortem. He formed the opinion that the cause of death was intracranial hemorrhage due to severe head injury. The body had a penetrating injury which was leaking on the right side of the head. The accused was examined and found to be an adult and mentally stable.

PW2 said the deceased F A, was his in-law. On 26/10/06 PW2 was at home with the deceased who was sick. She told PW2 that the accused person had raped her and that when she attempted to run away, he hit her with an object on the head and on the left knee. The deceased died two days after the injuries were inflicted. The accused had bought the deceased drugs before her death. When PW2 informed accused that deceased had died, the accused wrote a note undertaking to meet all the burial expenses (EX.1). He went to PW2's home and saw the body of the deceased.

PW3 is the sister to the deceased and wife to PW2. She testified that on 26/07/07 she was working in her shamba during the day. When she went home in the evening, she found deceased in bed with injuries on the head and leg. The deceased told PW3 that she had visited the accused who was her friend the previous day and she spent the night there. When the two disagreed, the accused attacked her inflicting severe injuries. When the accused was informed of the death of the deceased, he came to PW3's home and begged for forgiveness and volunteered to meet all the burial expenses.

PW4 saw his deceased auntie when she was very sick on the 26/07/07. He went to call her close relative from Mumias. When the relatives arrived at the home; they found deceased dead. The accused was called to the home and he said he had beaten the deceased after the two disagreed. He saw the accused writing a note at the home of PW2 whose contents PW5 did not know.

PW6 the brother to deceased identified the body of deceased to the doctor who performed the post-mortem.

PW7 P.C. Mathew Mugambi of Nambale Police Station visited the home of PW2 at S village accompanied by P.C. Kiprop. It was on 31/07/08 and they found the body of deceased placed on a mat. It had injuries on the head and leg. They removed the body and took it to Busia District Hospital Mortuary.

PW8 IP Moses Waliaula investigated the case after visiting the home where the body was kept. He saw the injuries on the body which were visible on the head and the left knee. He found out that the deceased had been assaulted by the accused who was her man-

friend. PW8 visited the home of the accused which was a house under construction. His wife and children were not in the home having deserted him earlier on. PW8 took the note the accused had written in the house of PW2 which he produced in evidence. He later charged the accused with the offence.

In defence the accused denied the offence. He said he was a Councillor of Nambale County Council. He was on duty on 26/07/07 and did not give any casual work to any person. He denies meeting the deceased on the material day. On 31/07/07, PW2 came to house of accused and asked him to help transport a body of a visitor who had died in his house to Matungu in Mumias for burial. He went there and found PW3, PW4 and two other people. The cause of death was not known and the accused advised PW2 to have a post-mortem done before burial. He also advised them to report the matter to the police. The accused went to Nambale police post to report the matter. He was arrested at the police station. At the station, he saw PW2, PW4 and PW8, before he was arrested. The witnesses were accompanied by the political opponents of the accused.

Both the defence and the State filed written submissions in this case. The defence argued that there was no evidence to link the accused with the death of the deceased and that the evidence relied on is wholly circumstantial. The act of killing was not proved and neither was mens rea.

The state on the other hand submitted that the circumstantial evidence is good proof that the accused murdered the deceased. The deceased's dying declaration mentions accused who was her boyfriend which is corroborated by the conduct of the accused including writing the note to pay for all funeral expenses.

It is not disputed that the evidence on record is wholly circumstantial. There is also the dying declaration of the deceased. PW2 and PW3 were man and wife, with PW3 being closely related to the deceased as a sister. Both testified that the deceased came home on 26/07/07 with the injuries on her head and on the knee. Each of the witnesses talked to the deceased separately and at different times. She told them that she had gone to visit the accused the day before the incident and spent the night there. On the material day she was in the house of accused with another woman whose name was not mentioned shelling maize. This was the day she disagreed with the accused whom she accused of raping her. The attack by the accused on deceased was triggered by deceased's attempt to run away as she rejected the accused's sexual advances. It is not clear whether the unnamed woman had left the house of accused or not at the time of the alleged attempted rape and attack. Moreover, the name of the said woman was not revealed. The doctor made no findings in regard to the genitalia of the deceased. PW2, PW3 and PW4 saw the injuries on the deceased and talked with her in the evening of the material day. She told these witnesses that the accused assaulted her after the two disagreed. The three witnesses were present when the accused admitted he fatally injured the deceased and pleaded for forgiveness. He wrote the note volunteering to meet the burial expenses in their presence. This note was produced in evidence by PW8. In the course of his investigations PW8 learnt of the intimate relationship that had existed between the accused and deceased. The accused denied the offence and said PW2 told him that the deceased fainted in their house and died. I did not believe the accused in that the doctor found the body with fatal injuries which caused the death in his opinion. The head injury was inflicted using a blunt object and the one on the right knee by a sharp object. The injuries were four (4) days old which corroborates the dying declaration of deceased that she was attacked on 26/07/07. Post-mortem was performed on 31/07/07 which was four to five days later. The dying declaration of the deceased which was heard by three close relatives points the commission of the actus reus to the accused. I agree with the State's submissions that the declaration is highly corroborated by the conduct of the accused. He bought the deceased medicine before she died. PW2 and PW8 testified to that effect before this court. PW2 kept informing the accused about the condition of the deceased. When she died, PW2 went to the house of the accused and called him. The two went to PW2's house and accused saw the body. The accused in his defence confirmed he saw the body but claims that he did not know whose it was. He was told it was a visitor of PW2 who had fainted in the house and died.

The note written by the accused in presence of PW2, PW3 and PW4 confirms further the involvement of the accused in deceased's death.

“I, Patrick Buluma ID. No. 11279166 hereby agree that I will take care of transportation expenses, coffin and 20 goros of maize towards the funeral expenses of the late F A who passed away on 28th July 2006...”

The question which arises is why the accused who was just a neighbour and a former area councillor committed himself to meet all the burial expenses whereas the deceased had her own relatives who would be expected to bury her. There is no doubt that this commitment was being traded in with a cover-up of the murder so that the accused after helping in the burial of the deceased would not be held responsible for the death.

I call it a cover up because the accused went on to state in the note:

“The late (meaning deceased) was epileptic and she died after collapsing and injuring herself while working for me ...”

PW1’s post-mortem findings disapproved the theory of the accused as to the cause of death. It was the doctor’s finding that the injuries were not caused by falling down. The cause was a blunt and sharp objects respectively. The deceased was not epileptic according to the doctor and her sister PW3. The note which was in the form of an agreement between the accused and relatives of the deceased was signed by all the parties including PW2 and PW3.

The evidence of PW2 and PW3 who were the key witnesses was credible and not shaken even on cross-examination.

In cross-examination of PW3, the wife and children of the accused were not at home at the time of the incident. This gave accused the opportunity to commit the offence.

I find that the circumstantial evidence on record is so overwhelming and well corroborated by the dying declaration. It proves that the accused inflicted the fatal injuries on the deceased which caused her death two days later. The prosecution have therefore proved actus reus on part of the accused.

The issue of mens rea comes into play at this stage. Did the accused have the intention to kill the deceased? The deceased explained in her dying declaration that she differed with accused when she resisted his sexual advances. This dying declaration forms an integral part of the prosecution’s evidence in this case. There was no evidence of provocation from the deceased as to make the accused act in the heat of passion. The injuries inflicted on the deceased were so severe that they resulted in her death only two days afterwards. The injury on the head was a penetrating one which was even leaking out. The doctor described the injury as severe. It is my finding that the intensity of the injury speaks volumes on the intention of the accused. He could not have intended otherwise but to cause the death of deceased. The accused was examined and found to be mentally sound at the time the offence was committed. He was of sound mental status at time of the incident.

I find that the prosecution have established mens rea on part of the accused. I find him guilty of murder as charged and sentence him to death.

Right of Appeal.

F.N. MUCHEMI
J U D G E
8/10/09