



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO 7 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

HELLEN WAMBUI SINTEYIA.....ACCUSED

JUDGEMENT

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased Roy Ibrahim. She pleaded not guilty. The prosecution called eleven witnesses in support of the charge.
2. The accused pleaded not guilty and did not call any witnesses in her defence.

The case for the prosecution

3. The prosecution called Gutej Singh (Pw 1), who was a farm manager, in Simba Estate Limited. Pw 1 testified that the deceased was his co-employee. On 20th January 2015 at about 9.30 pm, he heard gun shots. It was his evidence that the deceased usually came home drunk and shot in the air. Shortly thereafter the accused went to his house. She told him that the deceased had assaulted her in the house. Pw 1 then asked her where the deceased was. Pw 1 then accompanied her to the house of the deceased. Upon arrival in that house Pw 1 saw the deceased in his bedroom with blood oozing from his chest. Pw 1 saw a gun by the side of the deceased. The accused then collected her belongings and stuffed them in a bag. She then went out of the camp. People, who were outside the house of the deceased, forced her into the camp. She did not explain what happened to the deceased. The matter was reported to the police. The police arrived at the scene. Pw 1 testified that the deceased used to drink alcohol almost daily and when he was drunk he used to shoot into the air. Finally, Pw 1 testified that the clothes of the deceased were blood stained.

4. In addition to Pw 1 the prosecution, called Fredrick Ochieng Otieno (Pw 2). Pw 2 was a cook of the deceased. Pw 2 testified that the deceased and the accused used to drink hard drinks (Smirnoff vodka). It was also his evidence that they made supper with his co-cook, (Jane Minayo Pw 5). It was his further evidence that they made supper for the deceased at 8.00 pm. At 9.00 pm. PW 2 left the house of the deceased. At 9.30 pm, he saw the deceased in a pool of blood and next to his bed was a gun. According to him, both the deceased and accused were drunk. The accused appeared tipsy. The accused was crying and they were unable to communicate with her. The accused was in a white vest and she also had injuries.

5. Furthermore, the prosecution called Jane Minayo (Pw 5). Her testimony was that she was a cook of the deceased. She supported the evidence of Pw 2 that the deceased and accused were drinking Smirnoff vodka. She heard the deceased asking '*what are you doing there*' and ten minutes later she heard a loud bang.

6. James ole Mayo (Pw 4), was a watchman at Simba Estate Limited. His evidence was that at 9.00 pm he switched off the generator. He then saw the accused come out of the house of the deceased and went to the house of Pw 1. Pw 1, Pw 4 and the accused then returned to the house of deceased. Pw 4 accompanied them. He saw the body of the deceased leaning against the wall. Finally, it was his evidence that the deceased and accused used to quarrel often.

7. Furthermore, the prosecution called doctor Titus Ngulungu (Pw 6), who performed a postmortem on the body of the deceased on 28th January 2015 at Narok referral hospital. The body was identified to him as that of the deceased by Harban Singh Dhillown (Pw 3). He was the employer of the deceased. His findings were as follows. The deceased was middle aged and a native of India. The external appearance of that body showed the following. The body was embalmed. Cyanosis due to lack of oxygen. Gunshot wound below clavicle on left chest above the nipple. A bullet entered through left chest and exited through the right buttock. The 2nd to 8th ribs were fractured and bruised.

8. Furthermore, in respect of the internal organs, the findings of the doctor were as follows. The diaphragm was lacerated. The cardiac muscles were lacerated at the root of the aorta. There were fractures of the lumbar sacral region. The cause of death was due to gunshot injuries to the heart, diaphragm, and lacerations of internal organs close to the gunshot wounds. The report was produced as exhibit 5.

9. According to the doctor, the gunshot was close range due to narrow entry and exit holes. While under close examination, the doctor testified that *'The shot was very close contact i.e. less 5 cm.'* He continued to testify that *"The shot was fired almost at contact"*

10. The ballistic expert report was put in evidence by consent as exhibit Pexh 6, before me while the gun was produced as exhibit 6A. The firearms examiner's report (Pexh 6) shows the firearm was in good general and mechanical condition and capable of being fired. The report also shows that the two fired cartridges exh B1 and B2 were fired from the shot gun (Pex 6A). Witnesses Pw 1 to Pw 6 testified before Meoli, J and witnesses Pw 7 to Pw 11 testified before me.

11. The first scene visiting officer was APC Sgt Kipkemoi Kimambai (Pw 7), who was attached to Nkori Nkori A.P. police camp. It was his evidence that he responded to a call from Simba estate farm. Upon arrival there he found the following. The window had grills. The sitting room was disturbed. There were broken bottles in the sitting room. The face of the lady who later turned to be the accused was blood stained. Her clothes were also blood stained. The accused told Pw 7 that the deceased had killed himself. The accused was seated in the sitting room. Pw 7 saw a gun on top of the bed in the bedroom. The body of the deceased was on the floor next to the wall in a sitting position. Blood was oozing from the left chest. The bedroom was not disturbed. The gun was four feet away from the deceased.

12. Apart from the first scene visiting officer, the prosecution called No 46623 Cpl Paul Kiilu (PW 8), who was attached to the scenes of crime Narok CID. He took photographs of the scene of the house of the deceased. Upon arrival at the scene at Ngorengore, he saw the following. The body of the deceased was on the floor in a pool of blood. He saw two bullets that were fired. One was fired directly on the chest of the deceased. Another was fired at the blanket. The doctor found the theory that the deceased shot himself to be impossible. In this regard photographs 13 and 14, which are part of Pex 2 a, b, c, and d are relevant. It was the further evidence of Pw 8 that the bullet entry was through the left chest and it exited through above the buttocks. This is clear from photograph numbers 12 to 15. There was also a hole in the blanket which is visible in photograph 6. The body of the deceased and the gun were five meters apart. There was smoke around the hole in the blanket, which suggested that the firing was recently done. This appears in the recalled evidence of Pw 8.

13. In addition to the foregoing evidence, the prosecution called Lawrence Kinyua Muthuri (Pw 9), who was the Government analyst. After analyzing the exhibits, from the scene of crime that were forwarded to him, he concluded as follows. The DNA on the polo shirt, vest, seat cushion and towel were similar to the blood sample drawn from the accused. Furthermore, the DNA profile generated from the blood stains on the bed cover matched the DNA profile generated from the blood sample of the deceased. The report of the analyst was put in evidence as exhibit 8.

14. On 22nd January 2015 the accused was examined by Hillary Kiptoo (Pw 11), who was the clinical officer. Pw 11 upon examination found as follows. She had a discolouration of the left eye and tenderness on the nasal bridge. She told Pw 11 that the deceased assaulted her and then shot himself. Pw 11 produced his report as exhibit 9 (a) and his treatment notes as exhibit 9 (b).

15. The prosecution also called No 74509 Cpl Solomon Njoroge (Pw 10), who was the investigating officer. Pw 10 visited the scene of crime. Upon looking at photograph 2 of exhibit 7 (a), he testified that there was no forced entry from the rear of the residential house of the deceased. He also testified that the accused was sitting in the sitting room and was bleeding from the nose. In that sitting room there were signs of struggle. The coaches, table and chairs were disturbed. The body of the deceased was in the bedroom in a pool of blood. The shot gun was one metre away from the bedroom door. And two metres away from the shot gun lay the body of the deceased, beside the bed.

16. Furthermore, there was a spent cartridge on the bed with a hole through the bed cover and mattress, which exited at the other end.

17. The employer of the deceased was licensed to possess the shot gun. The deceased used the gun either to scare birds or animals that came to destroy the crops.

18. Pw 10 demonstrated in court how it was not possible for the deceased to have shot himself using the shot gun. He testified that *"the bullet entry on body of the deceased was above the breast on the left side. The bullet exited on his right buttock. It travelled and exited diagonally. If the deceased placed his thumb finger to fire from above his breast, the exit could have been on same of left hand side of the body. One has to hold the gun units pistol grip and in that position he can only fire using the thumb finger the index finger could not reach the trigger. If the deceased held the pistol gun using his right hand, he could only fire using the thumb finger because the index finger could not reach the pistol grip."*

The case for the defence

19. The accused gave sworn evidence and called no witnesses. The accused testified that she is a business lady in Narok town, where she sells cosmetics. She described the deceased as her boyfriend, whom she knew in 2007 and the father of her two children. It was her evidence that on 20th January 2015 the deceased rang her telling her to meet him at Ololulunga at 3.00 pm. She told him to await until she closed her business. She was unable to go. Instead she continued with her business until 5.30 pm, when she closed. She then went and met the deceased at Ololulunga. The deceased asked her as to why she had not gone as he had told her. She told the deceased that she was unable to do so, because she had many customers. She then entered the vehicle. The deceased was very angry, to the extent that he was unable to breathe. He then ignited the vehicle and drove at between 120 KPH and 130 KPH and told her that she was going to die with him. He was angry because she had failed to go and meet him at Ololulunga at 3.00 pm.

20. While en route to Simba estate the deceased drove the vehicle into a bridge so that both of them could die. In response she got hold of his arm and persuaded him to go home and resolve the issue. He then braked instantly and as a result he hit the bridge. While driving, the deceased was drinking his Smirnoff vodka, until they arrived at the camp in Simba estate, between 7.00 pm and 7.30 pm. As they were approaching the gate, he did not await the watch man to open the gate, because he was enraged. The watch man ran and opened the gate. As they were alighting from the vehicle he threatened her telling her that *"Leo nitaona."* He then entered the bedroom and locked himself. Thereafter he came out, having changed his clothes and now wore a towel.

21. He then went to the kitchen and took another Smirnoff vodka and drank the whole of it. He got enraged when he found out that the accused had poured out his vodka. He then told Alfred Ochieng to go and get him two more bottles of vodka from his vehicle. He did so. The deceased now drunk directly from the bottle. He then told his cooks to hurry up in cooking and leave his house. They complied. In the course of drinking the vodka the deceased disagreed with the accused, because the latter had hidden his Smirnoff vodka. She hid it as the deceased was so drunk that he was now staggering. The accused went and brought back the Smirnoff vodka that she had hidden. He then knocked the bottle against the floor.

22. The accused then decided to leave their bed room for the visitor's room. As a result, he grabbed her to stop her from entering that bed room. He started to slap her and hit his head against her face. As a result, she started to bleed from her nose until she became unconscious. He tried to stop her bleeding. After ten minutes the accused regained her conscious. It is at that point in time that she heard a snoring sound. She then went to the bed room. There she saw the deceased at a corner of the bed room bleeding from his chest. She then tried to stop the bleeding using her hands. After failing to stop it, she went to call the neighbouring assistant manager. She then asked this assistant manager whether he heard the sound of a gun. He told her that even if he had heard the sound of a gun, he was used to the deceased firing his gun after drinking. It is for that reason that he did not wake up to find out what was going on. She denied knowing how to use a gun.

23. He then accompanied the accused to the bed room of the deceased. He found him lying at the corner of his bed room. The assistant manager then called the workers in that place. The police were then rang, who arrived and then took photographs. She was then arrested and taken to Narok police station. She was then taken for mental assessment. Thereafter she was taken to court and given a free bond until she was formally charged in court for this offence.

ISSUES FOR DETERMINATION

24. I have considered the totality of both the prosecution and defence evidence in the light of the applicable law, including the submission of counsel for the accused and I find the following to be the issues for determination.

1. Whether or not the accused caused the death of the deceased.
2. Whether or not the evidence supports murder or manslaughter.
3. What are the appropriate orders to be made?

ISSUE 1

25. It is common ground that the accused was a girlfriend of the deceased. It is also common ground that the accused was a common visitor in the house of the deceased. I believe the evidence of Frederick Ochieng (Pw 2) and Jane Minayo Lugai (Pw 5), who were the cooks of the deceased, that the deceased and accused were drinking hard drinks (Smirnoff vodka). According to Pw 2 the deceased appeared drunk but accused had not become tipsy although she had also drunk. It was the evidence of Pw 5 that she heard the deceased while in the sitting room say: **"what are you doing there.?"** After ten (10) minutes she heard a loud bang. These circumstances show that the deceased was alert as to what was happening around him. Hence the question as to what was the accused doing where she was. I find that the loud bang which PW 3 heard were the two gun shots, one of which fatally shot the deceased. In the circumstances then prevailing as at that time, I find it is the accused who shot the deceased. Soon the co-worker of the deceased (Pw 1) called out while standing at the door of Pw 5 that the deceased was dead. It is important to point out that the accused had gone and told Pw 1 that the deceased had assaulted her. She did not then tell Pw 1 that the deceased had committed suicide. The issue of the deceased committing suicide is found in defence evidence of the accused. It was her evidence that the deceased had driven his vehicle while coming from Ololulunga in a suicidal manner. She told the clinical officer, Hillary Kiptoo (Pw 11), who examined her on 22nd January 2015, in respect of her injuries that she had been assaulted by a person known to her, who later shot himself dead on 20th January 2015. The law in this regard according to *Tekerali son of Korongozi & others v. Regina (1952) 7 EACA 259* is that the initial report of an incident reflects the accurate picture of what actually transpired from which the accuracy of subsequent statements may be gauged. Additionally, the first complaints to persons in authority also provide a safeguard against later embellishment or a made-up case. In the instant case, the accused made a first report of assault against her to PW 1, who was a farm manager in Simba Estates Limited. She did not tell PW 1 that the deceased had committed suicide. The issue of the accused telling PW 1 that the deceased had committed suicide was the natural and neutral matter to be expected of her. She did not do so. She only came up with the suicide theory after the police (PW 7) had been informed of the death of the deceased. This is clearly an afterthought in the light of the fact that the suicide theory was not incriminating against herself in any way.

26. Her initial report was that the deceased had assaulted her. The issue of the deceased committing suicide was not part of what the accused told Pw 1.

27. There is further evidence in her conduct after she fatally shot the deceased. In respect of her conduct, there is the evidence of the colleague co-manager of the deceased, Gutej Singh (Pw 1) and that of the camp watch man, James ole Mayo (Pw 4). According to Pw 1 the accused took him to the bedroom of the deceased. While there the accused went about collecting her belongings and stuffed them in a bag. She then went out of the camp. A group of people forced her back to the camp. There is further corroborating evidence of the watch man, who testified that **"I know that the deceased and the accused quarreled often. Hellen run out of the house."** That there were two gun shots is confirmed by the evidence of the investigating police officer, Cpl Solomon Njoroge (Pw 10), one of which fatally shot deceased and the other that went through the mattress and bed cover and exited at the other end see photographs Nos. 5, 6 and 7 of exhibit 7.

28. The conduct of the accused of packing her belongings and leaving the camp and her running out of the house following the fatal shot is consistent with her having shot the deceased. Furthermore, there is further evidence that shows the accused shot dead the deceased. This is found in the evidence of Dr Titus Ngulungu (Pw 6), who during the time he was performing the postmortem, demonstrated how the deceased would not have shot himself (see photographs 12, 13 and 14 of exhibit 7). After doing so, he concluded that it was not possible for the deceased to have shot himself. In this regard also there is the evidence of the investigating police officer (Pw 10), who demonstrated in court that it was not possible for the deceased to have shot himself.

29. Furthermore, there is evidence from the two cooks (Pw 2 and Pw 5) of the deceased that it was only the accused and deceased, who were in the house of the deceased during that fateful night. This also confirmed by the investigating police officer, who testified that there was no forced entry into that house. This meant in terms of circumstantial evidence that it was only the deceased and accused who were in exclusive control of that house. The issue of a third party intruding does not arise in the circumstances, which could have weakened the chain of the circumstantial evidence.

30. It is important to point out that although Pw 1 to Pw 6 did not testify before me, their evidence has a ring of truth. More importantly, it is equally important to point out that the provisions of section 301 of the Criminal Procedure Code (Cap. 75) Laws of Kenya were complied with, before I took over the case from Hon. Lady Justice Meoli, who had taken the evidence of six witnesses. The accused informed me 27th February 2018 that she wanted the case to proceed from where it had reached, which position was confirmed by her counsel, Mr. Onduso. Mr. Onduso submitted that the circumstantial evidence fell short of proving the offence. He further submitted that there was no evidence submitted on the lifting of fingerprints from the shot gun in this court. In this regard, I find from the evidence of PW 10 that the late Chief Inspector Ochieng and Cpl Kiilu dusted the shot gun for fingerprints. The fingerprint dusting report was not received by PW 10, since Chief Inspector Ochieng died in a fatal road accident before handing over the report to PW 10. PW 10 was also unable to get the said report from the other forensic examiners.

31. I find that the fingerprint dusting report was important, but it was not the only evidence against the accused.

32. Finally, I find from the totality of the prosecution and defence evidence that it is the accused who fired the fatal shot in the light of the circumstantial evidence which irresistibly points to her guilt.

ISSUE 2

33. Furthermore, the issue of the shot gun firing accidentally does not also arise; since the report of the ballistic expert (exhibit Pexh. 6), shows that the shot gun was in good general and mechanical condition and was capable of being fired. It therefore follows that the accused fired (which is the *actus reus*) the fatal shot and in addition to the one that went through the mattress and the bed cover. The accused used a lethal weapon, that is the shot gun and fired directly into the body of the deceased. In the circumstances, I find that the deceased was possessed of malice aforethought (*mens rea*) in terms of section 206 of the Penal Code. I do not believe her evidence that she did know how to use a gun. I found her to be an intelligent but an untruthful witness.

ISSUE 3

The upshot of the foregoing is that I find that the prosecution has proved the offence of murder beyond reasonable doubt. I find the accused guilty of murder contrary to section 203 as read with 204 of the Penal Code. Furthermore, pursuant to section 322(1) of the Criminal Procedure Code, I hereby convict the accused of murder.

Judgement dated, signed and delivered at Narok in open court this 28th day of January, 2019 in the presence of Mr. Omwega for the state and Mr. Onduso for the accused.

J. M. BWONWONGA

JUDGE

28/1/2019