



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCR NO. 10 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

COLLINS WAFULA MAKALI.....ACCUSED

J U D G E M E N T

1. **COLLINS WAFULA MAKALI**, the accused herein is charged with offence of murder contrary to **Section 203** as read with **Section 204** of **Penal Code**. The particulars are that on 3rd December 2016 at Marimanti Police Station in Tharaka South, within Tharaka Nithi County he unlawfully murdered Grace Opiyo Owour (hereinafter to be referred as the deceased).

2. The accused denied committing and the case went for full trial where the prosecution presented a total of 10 witnesses while the accused chose to give unsworn statement of defence and no witnesses in defence.

3. A brief summary of prosecution's case shows that the accused person, a police officer attached to Marimanti Police Station had a relationship with the deceased as they cohabited together as man and wife. The incident leading to demise of the deceased occurred on 3rd December 2016 at night when the accused was on duty with a fellow female police officer. The deceased was reported to have gone see the accused and apparently a misunderstanding occurred which led to the shooting the deceased in the thigh which caused excessive bleeding. Efforts to rush her to hospital for treatment by her fellow police officers were in vain as she was pronounced dead on arrival.

4. Police Constable John Mbare (PW1) testified that he is based in Marimanti Police Station attached to crime branch and station armoury duties. He recalled that on 3rd December 2016, the material date, he was on duty from 6 am to 6pm when he handed over duty to P.C (W) Amina Wario (PW3) handing her a rifle No. Serial No.171147 and 25 rounds of ammunition. At the same time he stated that he gave P.C Collins Wafula (accused) rifle Serial No.173200 and 25 rounds of ammunition and that two signed the Arms Movement Register and took over sentry duties at the station as he left for his residence.

4. The witness (PW1) further testified that while he was in his house at around 9 pm, P.C. (W) Amina knocked at his door and went in a state of shock upon inquiry she told him that PC Grace (deceased) had been shot and was in critical condition. The officer then took Amina's gun and proceeded to the scene of Crime which was the report office at the police station reported to be 100 metres away from the residence of PW1. When he arrived he found Corporal Kamau (PW4) having disarmed the accused and holding the gun. He added that the accused was seated next to the deceased and that shortly thereafter other police officers arrived and tried to assist the critically injured officer (deceased) by rushing her to Gatunga Mission Hospital. He added that the OCS later came back from the Hospital and reported that the deceased had succumbed and passed on, on arrival.

5. The officer (PW1) clarified that the original Arms Register which he identified in court showed that entry No.2003 indicated that the accused picked rifle Serial No.173200 while entry No.2002 in the Register was in respect to PC (W) Amina Wario Rifle No.171147. He further clarified that both rifles were of AK 47 make. He was later recalled and testified that as per the duty Roster, PC Wafula (accused) and PC (W) Amina Wario were on duty from 6 pm on the material date (3rd December 2016) with PC Amina detailed to cell sentry while the accused was in report office. As a proof, he tendered the Arms Register as P. Exhibit 1 and Duty Roster as P. Exhibit 2. He further clarified at Marimanti Police Station, the cells and the report office are next to each other. He also testified that as per the Arms Movement Register, officer No.92557 which refers to the accused took the weapon (Rifle) and signed against his name. According to the Register the Rifle issued to Amina was returned on 4th December 2016 by PW1 but the Rifle issued to the accused was never returned and he explained that the same was treated as an exhibit (PW2) on her part, forwarded for forensic analysis.

6. P.C (W) Fridah Chelagat, (PW2) on her part, testified that she was also based at Marimanti Police Station doing general duties and that she had rented a house near the police station. She testified that both the accused and the deceased were her colleagues and had worked with them at Marimanti Police Station. She recalled that on 3rd December, 2016 at around 9.16 pm, while in her house she heard a gunshot emanating from the police station followed by a scream. She told this court that she came out and found her colleague PC (W) Teresia

Wambua and together they walked to the police station to find out what was happening. On reaching the police station compound, they found P.C (W) Amina and together they proceeded to the report office where they found the accused with rifle on one hand and the magazine on the other. She said that Corporal Kamau later came and disarmed the accused as they saw the deceased lying down in a pool of blood. She stated that a bullet had ripped through her thigh and she called the OCS on his mobile phone who arrived shortly thereafter. She further testified that the deceased was not on duty that evening and did not know how and why she went to the report office.

7. P.C (W) Amina Wario (PW3) testified that she was on duty with the accused on the material night with the accused. She confirmed that she took over the P.C Mbare (PW1) at 6pm on that date and took rifle No 171147 an AK 47. According to her the accused came to the station at around 8pm and told her that he was also going to be on duty that night and called P.C Mbare (PW1) who came and handed him an AK 47 rifle as well upon signing the Arms movement Register acknowledging receipt of the rifle. She stated that they both signed the Register for their respective arms and embarked on their sentry duties. She further recalled that the accused sat next to her and chatted with her for a while as they continued with their duty at the station

8. PW3 further testified that in the course of their conversations, the accused mentioned to her that he had had a little misunderstanding with Corporal Grace Opiyo (the deceased) who was not on duty that night. She added that the accused did not tell her the nature of the misunderstanding and that after a short while she left him at the report office as she went to the washroom located about 300 metres away. She stated that while in the washroom she heard a gunshot and immediately came out of the washroom and rushed back to the report office. As he went back she was joined by her colleagues P.C (W) Teresia and PC (W) Chelagat who had also rushed out of their houses to find after hearing a gunshot and wanted to find out what was happening.

She further testified that as they approached the report office they heard someone cocking a gun forcing them to stop but upon checking they noticed that it was the accused person who was holding his AK 47 on his right hand and a magazine in the left hand. She added that they approached the accused slowly and carefully and that P.C Teresa asked him to hand over the gun to her which request he turned down and when Corporal Kamau who had joined them and a Senior to the accused ordered him to surrender the firearm he obliged and gave him the firearm. They then rushed to where the deceased lay in a pool of blood and she asked Wafula what had happened she stated that he responded "**Mimi sina maneno**" but looked frightened.

9. The witness (PW3) told this court that they rushed the deceased to Gatunga Mission Hospital where she was pronounced dead on arrival. She clarified that she had earlier booked in for duty at 1810 hours and booked the accused as well because he had requested her to do so though he arrived much later. She further confirmed that she took over her duties that material night from P.C Mbare (PW1) who also handed her a rifle NO.171147. She said that she returned her rifle at 2100 hours to Mbare who later on registered that the gun was returned on 4th December 2016 .

10. Sgt Moses Kamau (PW4) another police officer based at Marimanti police station, on his part also stated that on the material night at around 9.10 pm, he heard a gunshot from the direction of police station barely 150 metres away from where he lived and he set out quickly to find out what it was all about and that on his arrival to the station he met 3 officers P.C Amina, Chelagat and Teresia coming from opposite direction but headed to station. He said that the lady officers were slightly ahead of him and that on reaching the station. PC (W) Teresia challenged P.C Wafula to surrender his gun to her but declined and instead stated that he was going to hand it to him which he did.

11. PW4 testified that he took the gun and then saw the deceased lying down in a pool of blood and when he inquired what had happened, the accused reportedly told him he had shot her. He then arranged for the deceased to be taken to hospital for treatment. He further added that he later handed over the gun to P.C Mbare. He added that the deceased lived next to him and had known about the differences she had with the accused thought he conceded that he was not aware about the details of the differences.

12. The evidence of PW2, PW3 and PW4 was corroborated by P.C (W) Teresiah Wambura who was also based at Marimanti Police Station. She stated that she also heard a gunshot from the police station and when she went there to check she met Fridah Chelagat (PW2) and Amina (PW3) also headed to the station and together they went and saw the accused from about 50 metres away standing at the entrance to the Police Station. They approached and when she asked him what was going on, he reportedly told them that he had shot P.C Grace Opiyo (deceased). She stated that she heard her groaning in pain as she lay down and she checked on her, she observed that she had been shot on the thigh. She further confirmed that she asked the accused to hand over the gun to her but he refused but when Corporal Kamau (PW4) emerged, he agreed to hand over the gun to him. She added that they then took the deceased to Hospital in a police vehicle as she was still alive but she was pronounced dead on arrival. The witness stated that she was aware that the deceased and the accused had a relationship and lived together.

13. Inspector Francis Irungu (PW6), the Deputy OCS Marimanti Police Station also gave corroborative evidence on what the other police officers witnessed that fateful night. He added that he attended post mortem examination done at Chuka Hospital mortuary by Dr. Kitili (PW7). He told this court that the body had a gunshot wound on the right thigh. He added that he knew both the deceased and the accused well and that they were lovers who lived together most of the time though each had been given a separate house at the police lines.

14. Dr. Justus Kitili (PW7) testified that he carried out post mortem examination on the body of the deceased on 6th December 2016 at Chuka Hospital Mortuary. He told this court from his examination he noted there was a bullet entrance on the thigh as well as an exit wound. He also found a torn internal right femoral artery and formed the opinion that the cause of death was excessive loss of blood due to a gunshot wound. He tendered the post mortem report as P. Exhibit 7. He also told this court that he did not recover any bullet in her body as the bullet had entered the lateral side of the thigh and exited through the medial aspect.

15. Inspector Rueben Kiptum Kibet (PW8) a firearm expert and examiner attached to DCI Forensic Ballistic Section, told this court that he was an expert in firearm identification and does ammunition identification and other related tool mark identification. He told this court that he was coming in to testify on behalf of his colleague inspector Kenneth Chomba who was also another expert in the said field and that the witness was attending to another case in Mombasa and had therefore stepped in as they had worked with him for more than 6 years and was familiar with his signature and handwriting. He also stated that he was present when the report was being prepared and they worked as a team in carrying out forensic examination on a firearm, an AK 47 Serial No.173200 sent to them for analysis. He told this court that the

rifle was marked as exhibit A and that it was tested to find out if it was capable of firing and the result was the firearm was capable of firing. He also stated that a magazine marked as exhibit B was tested to find out if it could be used together with exhibit A and its results were positive.

16. The witness further told this court that 23 rounds of ammunition marked CI to 23 were also received and examined and found to be ammunitions suitable for use with firearm exhibit A. He added that one spent cartridge case marked exhibit D was also received and on examination it revealed that its caliber was 7.62mm x 39 mm which is similar the round of ammunition marked CI to 23. It was the expert opinion based on comparative examination of exhibit D in conjunction with test cartridge cases fired from A revealed sufficient matching of ejector and bridge marking, there was sufficient evidence to conclude that Exhibit D was fired from AK 47 assault rifle serial No.173200 marked exhibit A.

17. The OCS Marimanti CIP Martin Wekesa. (PW9) also testified and largely corroborated what his officers had told this court. He added when he arrived at the scene of shooting on the material night, he found the deceased bleeding profusely and tried to stop the bleeding as first they rushed her to hospital. He told this court that he was aware that the deceased and the accused were in a kind of come - we stay kind of relationship and that they had cohabited for a period of about 8 to 9 months prior to the incident and that their relationship was characterized by constant quarrels which caused commotion at times in the police lines or where the police officers resided. He testified that at one occasion he directed the deceased to go back to her own house within the same compound.

18. The investigating officer Sgt Fred Wamalwa (PW10) on his part testified that on 4th December 2016 at around 8 am the DCIO - Francis Irungu Tharaka South allocated him this case to investigate. He revisited the scene - report office and described the scene to this court. He told this court that there were two chairs and one table at the verandah of the police station and one chair had a bullet mark (hole) on the front side and that same chair had blood stains which spread to the floor underneath the chair. He recovered an exhibit an AK 47 rifle at the armoury and 23 round of ammunition of 7.62 mm and marked them accordingly before forwarding them with an exhibit memo form to DCI Headquarters Ballistic Section for forensic analysis.

The witness tendered AK 47 Serial No.BA 173200 as P.Exhibit 6 (a) and its magazine P. Exhibit 6 (b), 23 live ammunitions in a brown envelope (exhibit 4)and spent cartridge (P. Exhibit 5), Arms Movement Register (P. Exhibit 1). He further told this court that he took the statements from witnesses and when he received the postmortem report revealing what had caused the death of the deceased he forwarded the file containing his investigation to the Office of Director of Public Prosecution for advise and further action.

19. When place on his defence, the accused chose to give unsworn statement of defence. He conceded that he was on duty on the material date and time with P.C (W) Amina Wario (PW3) and that PC Amina arrived earlier than him. He added that he joined her and proceeded with their normal duties until around 8.30 pm when P.C Amina went out speaking on her mobile phone leaving him behind in the report office.

20. He further told this court that he had placed his rifle on the table where he was sitting when the deceased reported went in asking him whether he had sent money to a child. According to accused the deceased appeared drunk and quarreled him on why he had not sent money to the child. The accused further went on that the deceased then grabbed the gun and cocked it and as he raised his hands pleading with her not to shoot, the gun discharged and hit the chair he was sitting and he struggled to snatch the gun from her and the gun discharged the second time while still on her hands and she fell down. He stated that he did not know that she had been hit. He said that he was shocked and as he felt dazed, his fellow officers came and approached him. He stated that he had been assigned 25 rounds of ammunition and that 23 rounds of ammunition were collected at the scene. He insisted that the gun was down when his fellow officers arrived and that he picked it and handed it over to Corporal Kamau.

21. In his final submissions through learned counsel Mr. Mutuma the accused contended that he acted in self defence after the deceased fired at him while seated. He points out that the fact that the deceased was shot in the thigh shows that there was no intent or malice arguing that if he intended to kill he would have shot to kill. He contends that none of the prosecution witnesses pointed to the existence of such an intention.

22.. The accused further contends that there is a missing bullet and that PW10 the investigating officer indicated that there was a hole on the chair which in his view shows that he was the one who was attacked. He cites the decision in ***Beckford -vs- Republic (1987) e ALL ER 425*** which stated that when a defence of self defence is raised, it must be disproved. He further relies on the case of ***Robert Mungai - vs- Republic (1982 - 88) 1 KAR 611*** where the Court of Appeal quashed a conviction on manslaughter as the Appellant had acted in self defence after being attacked at his home in the middle of the night.

23. The accused further submits that he had reason to believe that the deceased would kill him after she fired the first shot and that the prosecution has not proved the charge against him beyond reasonable doubt.

24. **Analysis and determination:**

The accused is facing a charge of murder contrary to **Section 203 of Penal Code** which defines the offence as follows:-

" Any person who of malice aforethought causes the death of another person by an unlawful act or omissions is guilty of murder."

The above definition raises 4 elements which must be established by the prosecution's case and proved. These are;

- i. That fact of death
- ii. Cause of death

iii. Actus reus (or proof that act/omission by accused caused the death)

iv. malice aforethought (*mens reus*)

22. There is no dispute that the deceased in this case P.C Grace Opiyo Owour is dead. Dr. Kitili (PW7) conducted the post mortem examination on her body and issued a Death Certificate No.0044226 and tendered post mortem report (P. Exhibit 7).

23 The cause of death of the deceased is also not contested. According to the post mortem (P. Exhibit 7) the cause of her death was hypolemic shock due to severe haemorrhage (excessive loss of blood) due to the gun shot injury. The deceased therefore died because she was shot on the thigh and the question as to who shot her brings me to the next question for determination.

24. **Actus Reus:**

It is not in doubt that the deceased was shot in her thigh as I have observed above and the evidence tendered by the prosecution witnesses (PW7, PW8 and PW10) indicates that she was shot with a bullet discharged from AK 47 rifle. The evidence I have in a summary reproduced above indicate that the rifle which shot her was the AK 47 Serial No. BA 173200. That rifle was tendered as P. Exhibit 69. The forensic analysis (P.Exhibit 8 (a)) tendered by forensic expert Inspector Reuben Kiptum (PW8) indicates that the recovered cartridge (P. Exhibit 5) was discharged from the AK 47 Serial No.173200. That rifle had been issued to the accused on the material night of the incident as per the Arms Movement Register (P. Exhibit 1). The accused in his defence admitted that the bullet that hit the thigh of the deceased was discharged from the gun he had. The only point of departure in so far as the defence and prosecution's case are concerned is that while the prosecution insists that the accused shot at the deceased, the accused claims that the deceased shot herself after trying to shoot him.

25. It is clear from the evidence tendered that there was no eye witness to the incident at the report office that fateful night and the only way to try and unravel what really happened one has to try and reconstruct the events leading to the shooting. The investigating officer (PW10) gave a description of the scene as follows. He told this court the incident occurred at the verandah of the police station and as one enters the verandah there were 2 chairs and one table on the right side. In one chair there was a bullet hole on the front side. He also found blood stains on the said chair and blood stains on the floor. PW3 the female officer who was on duty with the accused that same night told this court that they were seated together with the accused at the verandah and that she left him seated on his chair with a gun. She went to the washroom which was 300 metres away and says she spent 15 minutes there because "*she was not feeling well,*" According to her she left the accused seated "*facing toward the gate*" which I assume is the entrance to the police station. So if it is true that the deceased went to the station while drunk and quarrelsome as the accused says in his unsworn defence, how could she have managed to snatch the rifle from an alert officer doing sentry duties especially knowing that he was the only officer at the station at the time? Another important piece of evidence is the evidence of Amina (PW3) who spent time with him that evening prior to the incident. According to her, the accused reportedly told her that they had a misunderstanding with the deceased with whom he cohabited with. This fact was confirmed by the accused in his defence. He says that the deceased went to him at the report office and asked him if he had sent some money to the child and probably she became furious when the accused told her he had not sent. That narrative by the accused and PW3 clearly indicates that the two that is the accused and the deceased had quarreled for some time on issues to do with the money and hence the reason why the deceased went to the report office perhaps to find out if the money had been sent or not.

26. The accused says in his unsworn defence that he saw the deceased "**fall on the gun**" he had apparently left on the table and that the deceased cocked the gun as he lifted his hand pleading with not to shoot. That narrative to me does not convince me. If the deceased, a fellow police officer, trained and standing a few feet away had say snatched the gun cocked it and aimed it at the accused, could she really miss him if he was seated on the chair with his hands lifted up? I do not think so. I am also not persuaded that the accused was acting in self defence as he claims because really he was a man who had quarreled with his lover seated at the Report office with a loaded rifle an AK 47 and a lady she had quarreled earlier walks in, even if he had somehow left the gun on the table as he claims, could he give a "drunk" officer a chance to pick the rifle as he was seated and give her a chance to cock it and aim at him? Again, I do not think so.

27. Moreover looking at his conduct after the incident as told by his fellow officers (PW1, PW2, PW3 and PW4) it is apparent that he had shot at his lover. As the officers approached the scene when they heard the gunshot, they all heard a gun cocking which they explained was normal precautionary measure, as a gun is cocked after its magazine is removed to check and to ensure no bullet remains on its chamber or barrel that could accidentally discharge. The accused was apparently taking that precautionary measure as he waited to surrender the firearm and himself. The officers also were categorical that the accused stated that he had no issue. He is said to have responded this after being ordered to surrender the rifle "*sina ubaya.*" He told the officers that he had shot at the deceased and though that statement cannot be taken as confession, the fact that he chose to give unsworn statement in my view lessened the weight of his narrative as compared to the narratives given by prosecution witnesses.

28. It is true that he was given 25 rounds of ammunition and only 23 rounds were recovered meaning that one bullet was not accounted for. It is possible however as explained by the police officers and the ballistic expert that an AK 47 has settings of single shot, double and full blast and it is possible that that gun had been set at doubt blast meaning that a single shot could discharge 2 rounds of ammunition simultaneously. All prosecution witnesses (PW1, PW2, PW3 and PW4) all heard a single shot. The fact that they lived nearby and in separate houses shows that they could not have been mistaken. PW3 was also categorical that she heard a single gunshot as she was in the toilet. That fact in my view displaces the defence narrative that there were two gunshots one that hit the chair and the other on the deceased's thigh after a struggle. That could not have been possible because the witnesses surely could have heard two distinct shots being fired.

29. The accused in his submissions contends that once a defence raises an issue of self defence, it is upon the prosecution to disapprove it but the accused herein chose to give unsworn statement therefore shielded himself from probing questions in examination which could have perhaps disapprove him.

This court is not persuaded that the accuse herein acted in self defence in the manner he narrated the chain of events.

30. **Mens rea**

Section 206 of the Penal Code codifies that acts which can be interpreted to constitute malice aforethought. This includes intention to cause death or grievous harm or acting with indifference on whatever one's act would cause death or grievous bodily harm. The evidence tendered by PW3 indicates that the accused person had a quarrel with the deceased that fateful evening prior to his duties at the station. The OCS (PW9) also testified that the two had differed before. However given the evidence of PW3, an officer who was with the accused that night, it does appear to me that the incident was sudden rather than premeditated. She chatted with the accused for a while and she did not notice anything unusual. She also stated that the nature of the disagreement was not revealed to her and it would be difficult to speculate if the disagreement were of such magnitude as to have made the accused have an intention to kill or harm her. What is however clear is that the deceased went to the report office and a commotion erupted as a result of a disagreement and as a result of the ensuing struggle, the accused fired one shot which hit the deceased on her thigh. I am not persuaded that he had intentions to kill notwithstanding the disagreement. There is a possibility that there was a struggle and whether the struggle was for the gun is difficult to discern,

In the absence of the elements of *mens rea*, this court finds that the act by the accused in shooting the deceased on the thigh was accidental which means that he can only be guilty of a lesser charge of manslaughter.

31. This court from the foregoing, finds that the prosecution's case has not established and proved the offence of murder under **Section 203** of the **Penal Code** but has established and proved a lesser charge of manslaughter under **Section 202** of the **Penal Code**. He is hereby convicted accordingly for the offence of manslaughter contrary to **Section 202** of the **Penal Code**.

Dated, signed and delivered at Chuka this 31st day of October 2019.

R.K. LIMO

JUDGE

31/10/2016

Judgment dated, signed and delivered in the presence of Maari for state and accused person.

R.K. LIMO

JUDGE

31/10/2019