



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 18 OF 2015

REPUBLICPROSECUTOR

VERSUS

JAMES OTIENOACCUSED

JUDGMENT

1. **James Otieno** 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 15th day of June 2015, at **Milimani** estate in Busia County, he murdered **Emily Omondi**.
3. The prosecution case was that the accused returned home and started insulting the deceased. He slapped her and knocked her down. This is when the deceased grabbed the gun from him and threatened to kill him. The accused managed to wrestle the gun from her and shot her. She later succumbed to the injuries while undergoing treatment.
4. **James Otieno**, the accused, in his defence denied any involvement in the murder. He contended that after the deceased had threatened to kill him, she shot herself.
5. The issues for determination are:
 - a) Where did the shooting occur;
 - b) How did the shooting happen;
 - c) Whether the accused was the one who shot the deceased or she committed suicide; and
 - d) Whether the offence of murder was proved against him.
6. What has emerged from the evidence on record is that the accused and the deceased were constantly fighting and it would appear from the evidence there were accusations of unfaithfulness. This was borne out in the evidence of eleven years old Elizabeth Jenel (PW1) who testified that she used to see the two fighting. Corporal Irene Violet Achieng (PW3) testified that she learnt from the deceased that the accused had impregnated a girl and that that was why he wanted the deceased to vacate the house.
7. In the evidence of corporal Irene Violet Achieng (PW3), said that the deceased told her that before the incident, the accused asked a neighbor what he was talking to his wife. Elizabeth Jenel (PW1) also testified of the man who was at the fence whom the accused asked what he was doing. After the man told him that he was looking for his dogs, he turned to her and enquired:

“... So this is what usually happens here?”

This man is Godfrey Wekesa (DW2) who in his evidence confirmed that the accused had asked him what he was doing there.
8. According to the evidence by the prosecution, the shooting was inside the couple's house. This is in the evidence of Elizabeth Jenel (PW1) who testified that after the accused shot the deceased on the shoulder, he changed from his uniform and put on civilian clothes before rushing out. She also said that she wiped the blood that was spread all over in the house.
9. The evidence of AP inspector Rodgers Waholi (PW7) who visited the scene, was that there were drops of blood from outside going inside up to the bed where he found the gun.

10. The accused contended that the shooting was outside the house. His contention was supported by Godfrey Wekesa (DW2). This version is not convincing for there is no evidence that after the shooting the deceased entered the house. The evidence of the accused is that he went and called Kinyua a driver who assisted to take the deceased to the hospital.

11. I therefore make a finding that that the shooting of the deceased was inside their house.

12. The prosecution evidence is that when the accused returned home on the fateful morning, he was in a foul mood. After asking Godfrey Wekesa (DW2) what he was doing at the fence, he made a suggestive statement to PW1. As he entered into the house, she testified that she heard him say:

“Nimechoka na Malaya, kuja ukae hapa” translated into English, **“I am tired with a prostitute, come and sit here”** According to this witness, the deceased asked the accused why he was maligning her. She then saw the deceased attempt to snatch her phone from the accused. The accused smashed the phone on the floor before slapping the deceased. A fight ensued between the two and the deceased took the gun and went out with it. She threatened to kill the accused. The accused followed her and snatched the gun from her. The two returned to the house. The accused then told the deceased that he was the one who was going to kill her. He shot her on the shoulder and she fell down.

13. According to the version of the accused, his wife called him after he had reported on duty and informed him that there was some urgent matter that required his attendance at the residence of the chief magistrate where they were guarding. He then called Kinyua, the driver of the chief magistrate and informed him that he was rushing home shortly. Upon his arrival home, he placed his rifle on the bed and the deceased picked it and ran out with it. This is when she threatened to kill him. When he was unable to convince her to hand the gun to him, he ran into the house and closed the door. After a while, he opened the door. The deceased made a few steps backward and shot herself. He rushed to Kinyua’s house and enlisted his assistance to take the deceased to hospital. According to him, the deceased committed suicide.

14. The contention of the accused lacks substance. If indeed the deceased had informed him of an emergency at the chief magistrate’s residence, then the first thing he ought to have asked Kinyua who was still at the residence was about the alleged emergency. Kinyua was the driver of the chief magistrate. Instead, he only informed him that he was rushing home shortly. Upon his arrival, he did not make any enquiries at the residence of the chief magistrate or from Kinyua concerning the alleged emergency. I therefore make a finding that his wife did not inform him of any emergency.

15. The accused and Godfrey Wekesa (DW2) wanted the court to believe that this was a case of suicide. Their version was supported by Elizabeth Jenel (PW1) when she was recalled to testify. This was not supported by the other evidence on record and neither was there an explanation as to why PW1 changed her version after she had been recalled. It can only be concluded that she was interfered with as the prosecution had earlier feared when they opposed the accused to be released on bond. Interestingly, when Macharia Benson (PW5) a pathologist testified, he was not questioned on the possible distance of the gun barrel from the entry point. This could have confirmed or contradicted the suicide theory. I therefore find that the evidence on record has established beyond any reasonable doubts that the accused is the one who shot and fatally injured the deceased.

16. From the evidence on record, the deceased had threatened to kill the accused before he fatally shot her. The evidence of Elizabeth Jenel (PW1) was that she threatened the accused after he had insulted and slapped her. We cannot therefore make a finding that the accused was acting in self defence; he was the aggressor.

17. In order for a conviction for the offence of murder to be founded on the evidence on record, the prosecution must prove the existence of malice aforethought. In **Black’s Law dictionary, 10th Edition** malice aforethought is defined as:

The requisite mental state for common-law murder, encompassing any one of the following (1) the intent to kill (2) the intent to inflict grievousbodily harm (3) extremely reckless difference to the value of human life (the so-called “abandoned and malignant heart”), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule).

18. Section 206 of the Penal Code gives instances when malice aforethought may be proved. It provides:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

19. When the deceased threatened to shoot and kill the accused while wielding the gun, the accused may have felt that his life was in danger. The height of the deceased was indicated in the post mortem form as 152 cm (4.98 feet). Though the height of the accused was not testified to, my estimation is that he is about 6.5 feet tall or thereabouts. Other than height, the accused is endowed with a huge body. After wrestling the rifle from the deceased, he ought to have used his physique to subdue her. This he did not do but used the gun against her. This was uncalled for.

19. In the instant case, given the circumstances that led to the fatal shooting of the deceased by the accused, I make a finding that malice aforethought was not proved. However, the prosecution has proved beyond any reasonable doubt the lesser offence of manslaughter. I accordingly reduce the charge of murder to that of manslaughter. I acquit the accused of the charge of murder. I find him guilty and convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DELIVERED and SIGNED at BUSIA this 18th day of December, 2019

KIARIE WAWERU KIARIE

JUDGE