



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Case 8 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

MARY WANJIKU GITONGA.....ACCUSED

J U D G M E N T

Mary Wanjiku Gitonga (*hereinafter referred to as the Accused*) is charged with the offence of murder contrary to *Section 203* as read with *Section 204* of the Penal Code. It is alleged that on the 7th day of January 2005 at Unjiru village in Kirinyaga District within Central Province she murdered Johnson Muchura Munene (*hereinafter referred to as the deceased*). This being a criminal case, the burden is entirely upon the prosecution to prove beyond reasonable doubt that the Accused did commit the offence. If there is any doubt the benefit must go to the Accused who must then be acquitted.

Eight witnesses testified on behalf of the prosecution. Briefly their evidence was as follows: -

The deceased who hailed from Unjiru village in Kirinyagah District was employed as an Administration Police Officer attached to Wilson Airport in Nairobi. The Accused was the wife to the deceased. On 2nd January 2005, the deceased and Accused arrived at their rural home in Unjiru village accompanied by their two sons aged about 11 years and 5 years. They were in the village for several days during which period they interacted with the deceased's brother Benson Muthike Munene (P.W.4) who maintains that the relationship between the deceased and Accused was quite cordial.

On the 7th January 2005 at about 12.30 p.m, the Accused telephoned her brother Titus Muraguri Gitonga (P.W.8) who was then working and living in Nairobi, and informed him that she was on her way to his house and wanted him to go to his house early from work as she needed to see him. P.W.8 arrived at his house a few minutes past 6.00 p.m. He found the Accused and her two sons. The Accused looked disturbed and was crying. P.W.8 tried to talk to the Accused person but for a while she was not able to discuss her problem. After about an hour the Accused informed P.W.8 that she had ran away from her home because her husband had beaten her that morning. She claimed she was feeling pain all over the body. After about another one hour, the Accused explained to P.W.8 that her husband had an axe when He was beating her and that there was a struggle between them and she managed to disarm her husband but in the process she hit him with the axe and thereafter she ran away as she feared that her husband could follow her and beat her some more.

P.W.8 convinced the Accused that it was important that they go to her matrimonial home and find out what might have happened. The next morning they left for Kirinyagah. They passed through Kimunge Police Station where they made a report and were accompanied to the Accused's home by Cpl. Fabian Wanjohi (P.W.5) and P.C. James Njue (P.W.6).

There is contradictory evidence as to how the door to Accused's house was opened. However, upon opening the door to the house they found the deceased lying on the bed covered with a blanket. Upon removing the blanket they noticed that the body had two deep cuts on the left upper side of the head and near the ear. The Accused led the police officers to the kitchen where they recovered a blood stained axe. She also led the officers to the bedroom where the officers recovered 20 rounds of ammunition from a box in the children's bedroom. The officers also noted that there was a pool of blood on the pillow and bed sheets also on the floor flowing under the bed to the bedroom door. They did not notice any signs of struggle inside the house.

The axe and rounds of ammunition were handed over to P.C. Jillo Huka (P.W.7) who also visited the scene accompanied by other officers including Inspector Ernest Maringa (P.W.3) who took photographs of the scene. The recovered exhibits and the photos were all produced in evidence.

On 11th January 2005 Dr. Paul Mbalu (P.W.1) performed a post mortem examination on the body of the deceased which was identified to him by P.W.4. Dr. Paul Mbalu noted two deep cut wounds. He concluded that the cause of death was severe head injury due to deep cuts. On 15th January 2005, Dr. Abraham Gatangi (P.W.2) examined the Accused and found that she was physically and mentally normal. He filled a P3 form which was produced in evidence. The Accused was subsequently charged with the murder of her husband.

In her defence, the Accused gave an unsworn statement and called no witnesses. She explained that on 3rd January 2005, 3 men went to their house and warned the deceased either to "*give them the bullets or return their money.*" On 5th January 2005 the same people came back and informed the deceased that they were giving him the final warning. The Accused then told the deceased that if He had bullets or money belonging to those people He should give them. The 3 people then left saying they would come back. After the 3 men left the deceased started beating the Accused telling her that she should never talk about things which she did not know of.

On 6th January 2005, the Accused woke up in the morning and continued with her chores. The deceased woke up at about 8.00 a.m. She served him with his breakfast and went back to her chores. After about 30 minutes the deceased called the Accused into the house. He asked her whether she knew the 3 men who had come to their house the previous day. The Accused said that she did not know them. He then demanded to know why she was saying they should be given bullets or money. The Accused explained that though she did not know the men, she did not want them to fight. Thereafter the deceased started beating the Accused. The Accused managed to escape and hid in the kitchen. After 5 minutes she heard him leave the house whereupon the Accused took her two children and left for Nairobi.

The next day she was on her way to her brother's house when her cell phone rang. She noticed that it was her husband's number. When she took the phone a male voice told her that her husband died in the house. The Accused proceeded to her brother's house. Her brother arrived at 6.00 p.m. but she was unable to talk to him until two hours later when she explained to him how she had disagreed with her husband and about the message that she had received. She spent the night at her brother's house and the next day they went with him and one Simon Kibuba to Kimunya Police Post where they reported the matter. They then hired a taxi and went with police officers to her home. She noticed that the door to her house was not locked. On entering the house they found her husband lying on the bed dead. The police searched the house and recovered a set of handcuffs and two packets of embassy cigarettes whose contents Accused did not know.

One officer went outside the house and came back with an axe. The Accused maintained that she did not know where the officer got the axe from. The Accused was then escorted to the police station and it was while at the station that she noticed that the embassy cigarette packets contained bullets. The Accused therefore maintained her innocence.

From the evidence that has been adduced it is common ground that P.W.5 and P.W.6 visited the home of the deceased following a report made by the Accused and P.W.8, and that the deceased was found

lying dead inside his house with 2 deep cut wounds. The evidence of Dr. Paul Mbalu confirms that the deceased died as a result of these injuries. The question is, how did the deceased sustain these injuries?

Both P.W.5 and P.W.6 testified that they found the house of the deceased locked and that the Accused opened the door with a key, and also that the Accused led the two witnesses to a kitchen next to the house of the deceased from where they recovered an axe. Both witnesses maintained that there were no signs in the house of any struggle having taken place and that the body of the deceased which was found covered with a blanket was only clothed with an inner-wear.

I have considered this evidence against that of the Accused that she escaped from the house after her husband beat her up, and that when she went to the house with the police officers they found the door not locked and that she did not know where the officers got the axe from.

I have also considered the evidence of the Accused's brother Titus Muraguri Gitonga (P.W.8) regarding what the Accused told him i.e. that the deceased was beating the Accused and in the ensuing struggle, the Accused managed to wrestle an axe from the deceased in the process hitting the deceased with the axe before she escaped and ran away. I note **Section 25 A** of the Evidence Act which provides as follows: -

“25A. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court.”

I have therefore considered with anxiety the admissibility of the evidence of P.W.5, P.W.6 and P.W.8 regarding the conduct of the Accused and particularly what Accused told P.W.8 which was in actual fact incriminating and capable of leading to a reasonable inference of guilt on the part of the Accused.

I do not however see how the evidence of the Accused's conduct and what she told her brother can be excluded given the spontaneous way in which the information was given. This was the Accused's own brother to whom the Accused turn to for help after the incident. The witness struck me as a very honest and conscientious person who had absolutely no reason to lie. Moreover **Sections 6 and 8 (2)** of the Evidence Act provides as follows: -

“6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.

8 (2) The conduct of any party, or of any agent of a party, to any suit or proceedings, in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

(4) The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements.”

In my considered view the evidence of P.W.5, P.W.6 and P.W.8 is relevant as part of the *res gestae* explaining the conduct of the Accused person as influenced by the facts in issue i.e. the murder of her husband which Accused was in the process of reporting. The evidence is therefore admissible under **Section 6 and 8 (2)** of the Evidence Act. I believe and accept the evidence of P.W.8 and find that it was consistent with the evidence of P.W.5 and P.W.6. I therefore reject the Accused's contention that she had no knowledge of the axe and find that she did in fact tell P.W.8 about her using the axe and also led P.W.5 and P.W.6 to the recovery of the axe.

P.W.8 was positive that they found the door to the house of the Accused closed although He does not recall whether the door was actually locked. This is understandable given P.W.8's explanation that He remained behind when the Accused and police officers first entered the house. Both P.W.5 and P.W.6 were however positive that the door was locked and that it was the Accused who opened the door with a

key. I again believe and accept the evidence of P.W.5 and P.W.6. that the door was locked and Accused opened it with a key.

Although the Accused claimed that there was a struggle between him and the deceased before she escaped, it was evident that there was no sign of any struggle in the house. The deceased who was only dressed in his underpants appears to have been caught unawares whilst in bed and appears to have offered little or no resistance. The injury suffered by the deceased was not a single cut wound, evidence of an accidental injury during a struggle, but two very deep cut wounds, leaving no doubt as to what the assailant intended to do. Moreover the fact that the assailant was able to neatly cover the body with a blanket after the commission of the offence negates any notion of the offence having been committed whilst in a hurried attempt to escape. Further there was no evidence that the Accused suffered any injuries or bruises as a result of any struggle.

The Accused tried to cast suspicion on some unidentified persons who had a deal with the deceased to buy some bullets from the deceased. However I find no substance in those allegations. If the Accused was killed by intruders the house would have shown obvious signs of a struggle. Moreover the person would have taken away the bullets but instead the bullets were recovered in the house I therefore reject the evidence of the Accused in this regard. Notwithstanding the lack of forensic evidence, I am satisfied that the circumstances which have been established, lead to the irresistible conclusion that the axe produced in court was the weapon used to inflict the injuries upon the deceased, and that the injuries were actually inflicted upon the deceased by the Accused. I find no co-existing circumstances that weaken this inference of guilt on the part of the Accused.

A question arises as to whether the Accused person did have the intention to cause the death of the deceased or to do grievous harm to the deceased. As per the evidence of P.W.4 the relationship between Accused and deceased was said to be cordial. There was no evidence of any apparent motive that the Accused may have had to cause the death of the deceased. Nevertheless, the circumstances in which the offence was committed as explained above and given the fact that there was no evidence that the Accused was in any imminent danger or that she was acting in self-defence, leads me to the conclusion that the Accused for some unexplained reasons had a deliberate intention to cause the death of or to do grievous harm to the deceased.

I therefore concur with the unanimous opinion of the Assessors and come to the sad conclusion that the Accused person with malice aforethought caused the death of the deceased. I find her guilty of the offence as charged and convict her of the same.

Dated, signed and delivered this 20th day of July 2007.

H. M. OKWENGU

JUDGE