



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL 83 OF 2007**

**BETWEEN**

**MARY WANJIKU GITONGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Nyeri (Okwengu, J.) dated 20<sup>th</sup> July, 2007*

*in*

***H.C.C.R.C. NO. 8 OF 2005)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**Mary Wanjiku Gitonga**, the appellant herein, was tried before Okwengu, J. sitting with assessors on a charge of murder contrary to **section 203** as read with **section 204** of the Penal Code, the particulars of the charge being that on the 7<sup>th</sup> day of *January, 2005* at Unjiru Village in Kirinyaga District of Central Province, the appellant murdered **Johnson Muchira Munene** hereinafter “*the deceased*”.

The deceased was the appellant’s husband and he worked as an Administration Police Officer at Wilson Airport in Nairobi. The appellant and the deceased lived in Nairobi but it is apparent from the recorded evidence that at the time of the alleged murder, the two with their children were on holiday at their home in Uthiru Village, Kirinyaga District. **Benson Muthike Munene (P.W.4.)** was a brother of the deceased. On 8<sup>th</sup> *January, 2005* police officers came to the home of the appellant in the company of the appellant and the appellants’ brother **Titus Muraguri Gitonga (P.W.8.)**. Among the police officers who visited the home of the deceased with the appellant were Police Constables **James Njue (P.W.6.)** and **Jillo Huka (P.W.7.)**. Titus, the appellant’s brother was also present as was Benson, the brother of the deceased whose home was some 120 metres away from that of the deceased and the appellant. Upon receiving the report of the death from the appellant, her brother Titus and another cousin, the party proceeded to the home of the deceased. James Njue swore:-

***“At the scene the suspect [appellant] opened the main door to a house with a key which she had. The lock was a union lock. On entering the house we found the body of a man whom***

*the suspect identified as Johnson Muchiri Munene lying on the bed covered with a blanket. There was blood which was flowing into the sitting-room. It was flowing from the bed-room towards the sitting-room.*

*I uncovered the body and noticed a deep cut on the left side of the head near the ear. We also recovered an axe which the suspect showed us. It was inside the kitchen I guarded the scene while Cpl. Wanjohi went back to the station with the suspect.”*

In the superior court, the appellant was represented by counsel, Mr. Gitahi. When Mr. Gitahi cross-examined Constable Njue, he answered as follows:-

*“The windows to the house were grilled with a wire-mesh grill. Everything else in the room was intact including clothes which were on a line. The boxes were also intact. There were no signs of a struggle. Apart from uncovering the body and looking at it I did not do anything else .....*”

Constable Huka also gave similar evidence.

**Inspector Ernest Maringa (P.W.3.)** was a scenes of crime officer based at Embu Provincial CID Headquarters. He was summoned to the home of the deceased and arrived there at 8.10 p.m. on 8<sup>th</sup> January, 2005. Upon arrival at the scene:-

*“I observed that the head had an injury on the left side and there were blood stains on the pillows and beddings. There was also a flow of blood under the bed. I took five photographs as follows:-*

1. *A view of the house from the outside.*
2. *A view of the deceased lying on the bed.*
3. *A view of the bed-room showing blood on the floor.*
4. *A close-up view of the face of the deceased and the blood-stained beddings and pillows.*
5. *A view of the injury on the left side of the bed.”*

These photographs were produced during the trial and photograph No. 2 shows the deceased lying on his back dressed only in a blue under-wear. The witnesses who arrived at the scene first said they found the deceased lying on the bed in that position and covered with a blanket and when he was uncovered, he had on only an under-wear.

We set out these details because both Mr. Kaigai the learned Principal State Counsel, and Mr. Njuguna Kimani for the appellant, in the end agreed that while it was the appellant who killed her husband she did so either in self-defence because it was the deceased who first attacked the appellant using the axe or that she only used excessive force. Both learned counsel asked us to reduce the charge to one of manslaughter.

We see no basis on the recorded evidence why we should adopt that view. The appellant herself said the deceased assaulted her and she managed to escape from the house. She never said the deceased attacked her with an axe and that she snatched the axe from him and attacked him with it. This is what she told the Judge and the assessors:-

*“After about 30 minutes my husband called me into the house. He asked me whether I*

*knew the 3 persons who had come to our house on the 5<sup>th</sup>. I said I did not know them. He asked me why I was saying he should give them the bullets or money. I explained to him that though I did not know the men, I did not want them to fight. My husband then started beating me. I got an opportunity and then escaped and went to hide in the kitchen. After 5 minutes, I heard my husband come out of the house and close the door. I pipped (sic) outside and saw him go into his brother's home. I called my children washed them and decided to go back to Nairobi where we were living.*

*We spent the night. The next day I decided to go and explain to my brother what had happened. While I was on the way my mobile phone rang and I saw it was my husband's phone number. When I took it a male voice told me that my husband had died in the house. I telephoned my brother and told him he would find me in his house .....*"

So the appellant never admitted that she killed her husband as was contended before us. Of course, looking at the entire record, nobody else could have killed the deceased. It could only have been the appellant. The deceased, as we have seen, was found lying in his bed and covered with a blanket only. If the appellant snatched an axe from him during the fight, then it means that the deceased could not have been fighting using an axe while lying on his back. The other inference would be that after cutting the deceased with the axe, the appellant carried him and neatly put him lying on his back in the bed, undressed him, covered him with a blanket and then left the house. All these theories look wholly improbable, and they were directly contradicted by what his brother, Titus said.

We were told that what the appellant told Titus was inadmissible because it amounted to a confession in terms of **section 25A** of the Evidence Act Chapter 80 Laws of Kenya. We think that would be enlarging the provisions of **section 25A** beyond reasonable limits. The kind of confessions which are not admissible are stated to be as follows in **section 26**:-

***"Section 26. A confession or any admission of fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."***

The repealed **section 28** of the Act then set out the circumstances under which such confession or admission could be admitted in evidence, i.e. if the confession was made before a magistrate or before a police officer of or above the rank of or a rank equivalent to, an inspector.

At present, confessions or admissions by accused person can only be admissible in evidence if it is made before a court, but we must not confuse ***"person or persons in authority holding out any inducement, threat or promise having reference to the charge ....."***. The various amendments introduced in the Evidence Act were necessary because it was generally believed police officers, who would be persons in authority over an accused person, were either inducing them to make such confessions or admissions or were beating the confessions out of them.

Titus was the brother of the appellant. He could not, by any stretch of imagination, be called a person in authority over the appellant and who could induce, threaten or make a promise advantageous to the appellant to make the appellant think that she would stand to gain an advantage or avoid any evil of a temporal nature in connection to the death of her

husband. Titus was merely listening to his sister and his evidence qualified as oral evidence which must be direct. **Section 63** of the Act defines what direct evidence is:-

**“63 (1) Oral evidence must in all cases be direct evidence.**

**(2) For the purposes of subsection (1) ‘direct evidence’ means:-**

- (a) *with reference to a fact which could be seen, the evidence of a witness who says he saw it;*
- (b) *with reference to a fact which could be heard, the evidence of a witness who says he heard it;*
- (c) .....
- (d) .....

It was agreed that it was the appellant herself who went to Titus in Nairobi and told Titus what had happened between her and the deceased. Titus, we have held, was not a person in authority over the appellant and the evidence of Titus could not be held to be inadmissible on that basis. The evidence could be disbelieved and rejected but it was admissible.

Titus told the superior court what he heard the appellant say about what had happened between her and her husband at their house in Kirinyaga before she left with the children to go to Nairobi. It was only after the appellant had spoken to Titus that Titus advised her that they go to the police and when the police visited the Kirinyaga home in the company of the appellant and Titus, they found the deceased lying on the bed dead. The evidence of Titus and the other witnesses such as the two police officers was accepted by the trial Judge and the assessors. There can be no compelling reason for us to reject the prosecution evidence which the trial court accepted. There would be no legal basis for our doing so.

We were told by counsel that there was no malice aforethought on the part of the appellant; there had been no previous tension between the two and their relationship had been cordial. For our part, we think and are satisfied that the appellant and the deceased must have had a dispute over some issue just before the deceased was killed. We were told that the deceased attacked the appellant with an axe, that the appellant somehow disarmed him and killed him with his own weapon. But the circumstances in the house where the deceased was found dead clearly militate against any such theory. There was no injury at all upon the appellant herself. The house was undisturbed with no apparent signs of a struggle. Taking into account all these circumstances, including the fact that the deceased was found lying on his back in the bed wearing only an under-wear, the logical inference to draw is that the appellant must have attacked the deceased while he was lying in bed. She attacked him using an axe and cut him on the head. Malice aforethought is proved where an intention

**“to do grievous harm to any person .....,”** is

shown.

In using the axe to cut the deceased on the head, the appellant as a reasonable person must have known or ought to have known that she would at the very least cause grievous bodily harm to her husband; she ended up killing him.

In the circumstances we see no reason to interfere with appellant’s conviction for murder. The conviction was fully justified by the evidence on record. We dismiss the appeal against the conviction.

On sentence, we were told that the President had commuted the sentence of death to one of life imprisonment. There is no basis upon which we can intervene on the sentence and the appeal against the sentence also fails.

*Dated and delivered at Nyeri this 29<sup>th</sup> day of October, 2010.*

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**M. OLE KEIWUA**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**