REUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, SHAH & BOSIRE JJ.A)
CRIMINAL APPEAL NO. 144 OF 1989
BETWEEN
BEATRICE MUTHINA MUSYOKA.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Machakos (Mr. Justice Togbor) dated 25.1.89

in

H.C.CR.C. NO. 22 OF 1987)

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JUDGMENT OF THE COURT

The appellant, Beatrice Muthina Musyoka (Beatrice), was convicted on 25th January, 1989 of murdering Musyoka Muindi, who was her husband, (the deceased), on the night of 11th - 12th March, 1987 at Kivaa market of Masinga Location of Machakos District and sentenced to death.

The deceased and Beatrice lived in one single room where they cooked and slept. On the night of 11-12th March 1987 John Musau Kilinzo (PW4) then the chairman of Kivaa sublocation Kenya African National Union Branch, received a report of some disturbance at plot 11, room 5, where the deceased and Beatrice resided. He went to the place and called out the deceased but there was no response. When he called out for Beatrice she replied but on being asked to open the door, she refused to do so. Whilst peeping through the door which had gaps, he saw the deceased lying down naked with blood on his body. He banged the door to get Beatrice to open the same. She eventually opened the door and tried to run away but was restrained by PW4 and one Mutungi. When he saw the deceased, he found him dead with a deep cut on his forehead with fresh blood. Beatrice admitted killing the deceased.

When asked what he understood by the word disturbance, he said he understood that there was a quarrel between Beatrice and the deceased. He was told by two men, Mwangangi and Mwethi that there was a quarrel and struggle inside room 5. Both these persons were not called to give evidence at the trial.A policeman (rank not given), one Jackson Musundi (PW6) proceeded to the scene and found the deceased lying on the floor, dead, in a lot of blood. He noticed one cut on the forehBeeaadt.rice made a charge and caution statement to Inspector Silas Nguriuki which statement was produced in evidence without any objection from the defence. In the charge and caution statement Beatrice stated that after having had supper at an eating-house at Kivaa both her and the deceased went home to sleep. The deceased woke up at 2.00 a.m. to look for his donkey where he had tied it "to make it ready to fetch

water". He came back to go to sleep and told Beatrice to wake him up at 6.00 a.m. He took off his clothes to go to sleep when he heard some foot-steps outside the house. He asked Beatrice who would that person be, but Beatrice replied that as he had locked the room from outside when he had gone to look for his donkey, she would not know who it could be. He then slapped her and kicked her on the stomach. She became angry and when he was asleep she took an axe and hit him three times with it.

In her unsworn testimony in court Beatrice narrated the incident leading upto the checking up on the donkey at 2.00 a.m. in consonance with what she said in her charge and caution statement. Then she changed the version of events. She stated that upon re-entering the room the deceased inquired of some offending smell in the room. Beatrice told him that she had relieved herself in a basin inside the room. The deceased then kicked the offending basin outside and closed the door and when doing that he heard someone passing outside screaming. He questioned Beatrice who that person could be. Beatrice replied to the effect that she could not know as she was inside the room. He then hit her and she fell down. As she tried to stand up he hit her again and kicked her on that part of her stomach where a caesarian section operation had taken place. As she tried to raise herself up she saw him holding an axe and when struggling to get the axe from him she accidentally cut him with it from which cut he died.

The superior court (Torgbor, J) held that on the totality of evidence it was difficult to believe that the death was accidental and rejected that version "without more". The learned judge preferred the prosecution's case upon considering that Beatrice had enough time to cool down after the initial quarrel; that she waited until after the deceased went to sleep and then hit him with the axe; that the act of killing was therefore premeditated; that such act was confirmed by using the axe not once, nor twice but thrice.

What is important is that there was only one blow according to witnesses who actually saw the wound. The postmortem report also confirms that the cause of death was "severe bleeding due to cut wound across the face". If the axe was used three times it could possibly lead one to conclude that the assailant was actuated by malice aforethought. We are not saying that one blow only could negate malice aforethought. What has weighed on our minds is the fact that there being only one cut by the axe the killing may not have been premeditated. It could have been an injury inflicted in the heat of the moment whilst Beatrice was being assaulted by the deceased more so because the appellant's statement that the deceased's kick on her stomach caused her severe pain was uncontroverted.

The learned judge's finding of three fatal blows having been inflicted does not stand the scrutiny of evidence. It is clear that there was only one blow inflicted. If the learned judge had properly directed himself on this piece of evidence, he would perhaps have come to the conclusion that there was some provocation. Directing ourselves to the issue we are left in some doubt as to whether Beatrice intended to kill the deceased.

Another issue that was canvassed before us was the alleged sketchy manner in which the learned judge summed up to the assessors all of whom found Beatrice guilty of murder. The summing up as recorded reads as follows:

"10.30 a.m.

Coram as before.

Summing up to assessors on the following:-

1.The Charge.

2.The evidence - challenged and unchallenged.

3.Issues arising - (a) provocation (b) accidental death (c) malice aforethought/premeditation.

4.Findings Assessors retire at 11.10 a.m. to consider their opinion."

It is difficult for us to say whether the summing up was such as to fully explain to them the law and whether the assessors' attention was drawn to salient features of the case. Were they explained that a kick in the stomach might possibly cause such pain as to provoke the appellant to retaliate" We cannot say what the learned judge said to the assessors on that aspect.

In the case of **Kenga Kaingu Mweni & 2 others vs. the Republic, Criminal Appeal No. 42 of 1977,** (unreported), it was pointed out by this Court follows:

"This Court again in the case of Joseph Mwai Kungu vs.

Republic, Criminal Appeal No. 68 of 1994 (unreported)

endorsed the views expressed in the case of **Washington**

S/O Odindo v. R [1954] 21 EACA

392 about summing up toassessors in this way:

"The opinions of assessors can be of great value and

assistance to a trial judge, but only if they fully understand

the facts of the case before them in relation to the relevant

law. If the law is not explained and attention not drawn to the

salient facts of the case, the value of the assessors' opinions

is correspondingly reduced. The instant case was essentially

one where the assessors should have had the benefit of a careful

summing-up if any weight was to be attached to their opinions. The

failure of the learned judge to sum-up largely negatived the value of the assessors."

This Court in **Kungu's** case then concluded:"We would, for

our part, now emphatically assert that the practice of summing-up to

the assessors is a thoroughly sound one and has been followed

for so long that it has acquired the force of law."

As things stand now, as pointed out earlier, we do not know exactly what the assessors were told. Were they told that the unsworn testimony of Beatrice as opposed to her charge and caution statement may lead them to believe that there was provocation" That the cooling down time was not long enough" In these circumstances we are left with no alternative but to give the benefit of the doubt to Beatrice and conclude that all ingredients of the offence of murder were not proved beyond any reasonable doubt. We are however of the view that the lesser charge of manslaughter was proved to the standard required in criminal cases.

For these reasons we allow the appeal, quash the conviction for murder and substitute it with a conviction for manslaughter. The appellant has by now spent nearly twelve years of incarceration. We are of the view that she has paid her debt to the society and on that account we order her immedate release from prison, unless otherwise lawfully held.

Dated and delivered at Nairobi this 8th day of October, 1999.

J.E. GICHERU
.....
JUDGE OF APPEAL

A.B. SHAH
.....
JUDGE OF APPEAL

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.