



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL CASE NO. 7 OF 2014**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**JOHNSON IRERI NJIRU.....ACCUSED**

**JUDGMENT**

1. The accused person herein Johnson Ireri Njiru faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the charge were that; *“on the 4<sup>th</sup> day of March, 2014 at Kiaragana village, Njeruri sub location in Embu County, murdered John Njuki Njeru Kamau”*.
2. The accused person pleaded not guilty to the charge and the case proceeded for trial. The prosecution called nine (9) witnesses in support of their case and at the close of the prosecution’s case, the accused was placed on his defence and he chose to remain silent.
3. The brother to the deceased, namely Felisio Nyaga Njuki testified as PW1. It was his evidence that on the 11<sup>th</sup> day of March, 2014, he was preparing to go to the office when he received a telephone call from Pastor Njue, a neighbour, who told him that he had seen dogs eating a human body in a coffee bush which bush is about 600 meters from his home. He decided to go to the scene in the company of one David Ndege Gatari who is his neighbour and while on the way they met one Emily Wangari (PW2) who is the area assistant chief who joined them and they proceeded to the scene together.
4. On arrival at the scene they saw a human head with no fresh and upon embarking on a search, they saw part of a lower jaw and on observing the teeth, they were that of his brother Njeru Njogu alias Kamau (the deceased in this case). He stated that he recognized the teeth as his deceased brother’s teeth were brownish due to smoking as he was a heavy smoker which had changed the colour of his teeth. He enquired from the people who had gathered at the scene the whereabouts of his brother who was living in a rented house about 300 meters away from that place. That they recovered some body parts that were collected and put in a sack and were taken by the police to Embu Level 5 Hospital mortuary.
5. He went to Runyenjes Police Station and offered to pay for a DNA test to confirm if the recovered body parts were those of his brother but the police advised him to wait for investigations to be done. On the same day in the afternoon, he learnt that village elders and members of the public had gone to the house of the accused person. He went to the house of the accused where he recovered and identified a pair of sandals, shirt and a jacket belonging to his deceased brother.
6. Emily Wangari Kanyi who testified as PW2 was the assistant area chief. She accompanied PW1 to the scene on the 11<sup>th</sup> March, 2014. On arrival at the scene there was a foul smell. They saw a human head without fresh and there was a big sack near there. She called the OCS Runyenjes who came to the scene while in the company of other officers and the head was preserved in a polythene bag.
7. Also recovered at the scene was the upper body part from the waist to the neck. Later the same day, in the company of PW1, they went to the accused persons house and they saw a pair of sandals, shirt and jacket which PW1 said belonged to his deceased brother. She called the AP Commandant Sp. Charles Machinji who sent his officers who took the exhibits with them.
8. PW3 (Cpl. Cyrus Achokor), PW4 (PC Joel Lagali), PW5 (Cl. Julius Makhupe and PW6 (Sp. Samuel Nasio) were among the police officers who visited the scene of the crime and were among the officers who were present when the body parts were recovered.
9. On the 12<sup>th</sup> day of March, 2014, the accused herein handed himself to the police and reported how a notorious thief who had been stealing his property had gone to his compound with intent to steal. That the said thief threw stones at him which hit him on his mouth knocking out his teeth. In self-defence, he picked a stone and had hit the thief on the head killing him instantly.
10. This report was taken by PW6 who in the company of PW5 and PW7 and the accused person went to the accused person’s home where he led them to a place behind the house where he said the murder had occurred. They recovered a stone suspected to have bene the murder

weapon and a sack.

11. It was the evidence of PW6 that the accused showed them how he had dragged the body of the deceased to a nearby toilet in the compound and that he had tried to burn the body after it had started decomposing using banana leaves and kerosene. He further stated that after a few days, dogs started eating the remains of the body. He also told them that he used a sack to carry the remains to a place near the stream and led them where the remains were recovered. PW6 took the accused to Julius Makhupe for recording of a confession which he recorded and the same was produced as evidence after trial within trial was conducted upon retraction of the confession by the accused person.

12. PW8, Dr. Joseph Thuo of Embu Level 5 Hospital assessed the accused person and concluded that he was mentally fit to stand trial. The report was produced as exhibit (3). The post mortem report was produced by PW9, Dr. Phyllis Muhonja on behalf of Dr. Maingi. The doctor formed the opinion that the cause of death was head injury due to blunt trauma.

13. As already stated, at the close of the prosecution's case, the accused herein was put on his defence and he elected to remain silent.

14. The court has considered the evidence on record as was adduced by the nine (9) prosecution witnesses. The accused faces a charge of murder. The offence of murder is defined under Section 203 of the Penal Code as follows: -

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

15. The ingredients for the offence of murder which the prosecution must prove beyond any reasonable doubt are;

***1) Proof of the fact of death of the deceased;***

***2) Proof of the cause of death;***

***3) Proof that the accused by an unlawful act or omission caused the death of the deceased.***

***4) Proof that the said unlawful act or omission was committed with malice aforethought.***

16. As for the proof of death, the evidence available to the court is that of Felisio Njuki, a brother to the deceased. It was his evidence that he visited the scene after he received information that dogs had been seen eating a human body. He stated that among the body parts that they found at the scene was the lower jaw. That the teeth were visible and on observing them, it appeared the teeth were for his brother Njeru Njogu alias Kamau. It was his further evidence that the teeth of his brother were brownish due to smoking as he was a heavy smoker which had changed the colour of his teeth.

17. He went to Runyenjes police station and offered to pay for a DNA test to confirm that the recovered body parts were those of his brother but the DNA test was never done. From this piece of evidence, it is clear that PW1 was not certain that the lower jaw that he saw belonged to his brother and it is for this reason that he had offered to pay for a DNA test to confirm that the body parts were indeed his brother's.

18. In cross-examination, he stated that when he attended the post-mortem, the doctor did not ask him to identify the body parts or whether they belonged to his brother.

19. The evidence of PW9 is also very critical in this case. The said witness a Dr. Phyllis Muhonja, is a forensic medical officer working at Embu Level 5 Hospital. She produced a post-mortem report which was prepared by Dr. Maingi who conducted the post-mortem on the 18/03/2018 on the body of John Njeru Kamau (the deceased herein). She stated that there were skeletal bones available for post mortem and they were identified by PW1 and Justin Nyaga, in the presence of PC Musa Nderitu of Runyenjes police station. The said witness did not tell the court how they were able to identify the skeletal bones and how they were able to connect them to the deceased herein.

20. In her evidence, the doctor stated that it was not possible to determine the sex, race, apparent age, nutrition, physique and height because only skeletal bones were available. She further stated that it was not recorded in the report how the identification was done. Further that, there is no reference of DNA test in the report.

21. In her professional opinion, a DNA test should have been ordered. Though in the doctor's opinion, the cause of death was head injury due to blunt force trauma, the person named as the subject of the report was not identified. No DNA report was availed to prove that the remains were those of the deceased herein. Given the state of the remains, it was difficult to believe that PW1 was able to identify the remains as those of his brother (the deceased herein) as there were no features for identification.

22. The only way the remains would have been identified was by carrying out a DNA test which, sadly, was not done despite PW1 having offered to pay for the same. It is no wonder that PW9 was of the opinion that a DNA test should have been ordered. In this regard, I associate myself with the decision of Hon. Maureen A. Odero, J. in the case of **Republic Vs Margaret Robi Kerioba Criminal Case No. 59 of 2012.**

23. On the proof of the cause of death, though PW9 in her evidence stated that the cause of death was head injury due to blunt force trauma, there was no direct evidence linking the accused to the cause of death. None of the prosecution witnesses saw and/or connected the accused with the death of the deceased. Though PW1 and PW2 testified to the effect that when they went to the accused person's house they saw a pair of sandals, a shirt and a jacket, which PW1 said belonged to the deceased, those items were not produced as exhibits and none of the prosecution witnesses referred to them.

24. The prosecution has relied on a confession that was given by the accused person and which was recorded by PW5 (CI Julius Makhupe). The accused was sent to him by PW7 (CI Harrison Muteti) who, in his evidence stated that he interrogated the accused person herein. In the said statement, it is stated that the accused in the company of some police officers visited the scene and he showed them the place near the front door of his house where he said he hit the deceased with a stone.

25. Further that, the accused led the police officers to another place behind his homestead where they found some remains of ashes. Further that the accused stated that he had placed the body there and burnt it after keeping it in his house for 3 days. He then led them to his coffee plantation about 500 meters away where he said he threw the burnt remains of the body.

26. The accused person retracted the confession but after conducting a trial within trial, the court found that the confession taken from the accused was voluntary in accordance with the rules and ordered that the same be admitted in evidence.

27. In his submissions, counsel for the accused submitted that evidence of a retracted confession cannot alone sustain a conviction but there has to be other sufficient evidence connecting the accused with the offence. Reliance was made on the case of **Ndiba vs Republic [1981] KLR 103** in which the court held that: -

***“A retracted statement should not have been admitted in evidence and a conviction based on it cannot in law stand. In the absence of any other sufficient evidence connecting the appellant with the offence of which he was convicted except such a statement, then the conviction cannot stand. Conviction quashed and sentence set aside.”***

28. In regard to retracted confessions, the Court of Appeal in **Criminal Appeal No. 14 of 1979** while referring to the case of **Republic vs Muthiwel [1935] 2EACA 66** in which the court held that it would be unsafe to convict on the retracted confession in that case and it adopted as a correct statement of the law the rule of practice referred by Sir Grimwood Mears, CJ in **Emperor Vs Shambbu** and the judgement quotes this rule as follows **(1932) ILR 54 All at page 358**

***“The evidentiary value of a retracted confession is very little and it is a rule of practice, as also a rule of prudence, that it is not safe to act on a retracted confession of an accused person unless it is corroborated in material particulars.”***

29. The law on this subject of confession is concisely summarised in **Woodroffe and Ameer Ali (9<sup>th</sup> Edition) at page 277**, in the following words; -

***“It is unsafe for a court to rely on and act on a confession which has been retracted, unless after consideration of the whole evidence in the case, the court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated in material particulars by credible independent evidence or unless the character of the confession and the circumstances under which it was taken indicate its truth.”***

30. Closer home, in the East African Court of Appeal in **Tuwamoi Vs Uganda [1967] EA 84 at page 91** letter G in the following words; -

***“...a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true.”***

31. After the consideration of the whole evidence in the case, I am not in a position to come to the unhesitating conclusion that the confession is true.

32. In the end, I find that the prosecution was unable to prove the case against the accused person beyond any reasonable doubt.

33. Accordingly, I hereby acquit him and order that he be released forthwith unless otherwise lawfully held.

34. It is so ordered.

***Delivered, dated and signed at Embu this 28<sup>th</sup> day of July, 2021.***

L. NJUGUNA

JUDGE

.....for the Accused

.....for the Respondent