



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 29 OF 2009

REPUBLIC

VERSUS

P M M ACCUSED

J U D G M E N T

1. The accused, **P M M** is charged with the offence of murder contrary to **section 203** and **204** of the **Penal Code**.
2. The particulars of the offence are that on the 17th day 2009 at [**particulars withheld**] in **Makueni District** within the **Eastern Province** murdered **N M K**.
3. The prosecution case was that the deceased, **N M K** who was a water vendor and the accused were married and had ten children. On 17/3/09, the family of the deceased noticed he was missing from the homestead. On inquiries being made, the accused explained that the deceased had gone to **Nairobi** to look for work.
4. On 23/3/09, villagers noticed a foul smell was emanating from a borehole which was within the village. There was also presence of many houseflies around the borehole. A report was made to the police. The police officer among therein PW7 **Cpl. Benson Ekutu** and members of public retrieved a sack from the borehole. When the sack was opened it was found to contain the extensively decomposed body of the deceased. The body had cuts on the head. The accused who used to have domestic quarrels and fights with the deceased was the first suspect and was arrested and escorted to **Makueni Police Station**. During interrogations the accused recorded a statement in which she allegedly confessed to killing the deceased during the fight then threw the body into the borehole. The accused was subsequently charged with the offence herein.
5. This case was partly heard by **Hon. A. Makhandia J**, (as he then was). The judge has since been elevated to the Court of Appeal and I took over the matter at the stage of final submissions.
6. The accused in her defence gave sworn evidence. She stated that the deceased left for **Nairobi** on 17/3/2009 to look for work. That she had quarreled and after the deceased left they did not communicate. The accused further stated that she was arrested and escorted to the police station where she was given papers and told to sign the same. She denied having killed the deceased.
7. PW5 Superintendent Paul Mulandi Mbugua recorded a statement under inquiry from the accused. In the said statement, the accused confessed to having cut the deceased severally with a panga during a fight then put the remains in a sack and dumped the same in the well.
8. The evidence of the retrieval of the body of the deceased from the well was narrated to the court by the father to the deceased, PW1 **K S N** and the brother to the deceased, PW3 **P K K** and a neighbour PW4, **P M K**. The said family members who also identified the body of the deceased to the doctor who carried out the postmortem, PW6 **Dr. John Kinyanjui Ndung'u**. Although the doctor found two cuts on the deceased's head, he could not conclusively determine the cause of death as the body was extensively decomposed.
9. PW2 **W M** the sixteen year old daughter of the deceased testified that she had found some people

at home taking traditional liquor who also took supper with them. However, according to PW2 this was not unusual as her mother used to brew traditional liquor. According to PW2 her father had not come home by the time she went to bed at 9.00 p.m. According to PW2 this was unusual as the father used to come home late. The following day when she came from school her father was not in and the mother explained that he had gone to **Nairobi**. PW2 did not know how the deceased met his death but was aware of the domestic wrangles between the parents.

10. The total sum of the evidence of the family members of the deceased does not directly link the accused to the offence herein. PW 7 **PC Joseph Mugo** and PW9 the OCS at **Makueni Police Station** produced exhibits recovered from the home of the deceased, that is a bicycle suspected to have ferried the body to the borehole, 2 pangas, 2 knives, 2 pairs of grey trousers, a yellow T-shirt and a pair of “**Akala**” shoes. The evidence of these two police officers however failed to connect the recovered items to the death of the deceased.
11. The accused denied the offence and also denied having confessed to killing the deceased. The evidence against the accused other than the alleged confession is circumstantial evidence. The circumstantial evidence is not conclusive and fails to link the accused to the commission of the offence. Having domestic wrangles and the disappearance of the deceased from home does not necessarily translate into the guilt of the accused.
12. The Accused denied having confessed to having killed the deceased. The Court of appeal in **Peter Njagi Muchai & 3 Others –vs- R 2013 e KLR** while referring to the case of **Tumwani v Uganda 1976 EA 84** states as follows:-

“...a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that statement was not a voluntary one.”

13. The Court of Appeal further observed that:-

“We would summarize the position thus- a trial court should accept any confession which has been retracted or 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. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.”

14. In the instant case, there is no evidence to corroborate the retracted confession. The circumstantial evidence on record failed to connect the accused to the offence. Consequently, this court is left with no option but to give the accused the benefit of doubt and acquit him. The accused is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 17th day of February 2014.

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B. THURANIRA JADEN

JUDGE

