



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 47 OF 2010

LESIIT J.

REPUBLIC.....PROSECUTOR

VERSUS

YUSUF NKURU GITONGA.....ACCUSED

J U D G M E N T

The accused YUSUF NKURU GITONGA is charged with two counts of murder contrary to section 203 as read with section 204 of the Penal Code. In the first count It is alleged that on the 20th day of July, 2010 at Mtarakwa sub Location in Ngusishi Location of Buuri District within Eastern Province murdered Rosemary Kinyua and in the second count it is alleged that he on the same day in Mtarakwa Sub-location in Ngusishi Location of Buuri District within Eastern province he murdered Dominic Mwenda.

The prosecution called four witnesses. The evidence of the prosecution is that the accused rented a house from PW1, Esther Nkirote. Esther was not sure the date from which the accused rented the house from her but she testified that the accused had lived in her premises for about two months prior to the incident. She testified that the accused lived with his wife and child, whose name she did not know.

PW1 testified that on the 26th July, 2010 at 7 am she was called by a group of people who had gathered at the door to the house rented by the accused. There was a foul smell emanating from the house. She had no key for the door and therefore sent for the sub area PW2. PW2 went to the scene. PW2 testified that he went to the back of the house and removed a piece of timber through which he looked into the house and saw the body of a woman lying on a mattress on the floor covered with a blanket. He could also see the head of a child next to the woman. Eventually the police were called in. PW3 PC Akwiri told the court that he accompanied the OCS Timau Police Station and other police officer to a bar where they arrested the accused following a tip of. They then took the accused person to his rented house in PW1's premises. PC Akwili testified that they broke into the house and found the body of the wife and the son of the deceased. PW3 stated that they also recovered an axe and a kitchen knife Exhibit 1 and 2 which they carried as possible murder weapons. PW3 produced the post mortem form on the body of the wife of the accused as exhibit 3 and that of the son as exhibit 4. He also produced the PW3 form on the accused in which he was satisfied as fit to plead as exhibit 5.

The last witness was chief inspector Etyang who produced a charge and caution statement which he took from the accused. The accused retracted the statement and said it was produced after a trial within a trial. In that statement the accused narrates that he had a quarrel with his wife over a son she had given birth to which did not belong to him. It is stated in the charge and caution that he sent her away to return that child to his father. That was in January 2010. It is stated that the deceased kept returning with her son i.e in the month of March and also the month of July. It is stated that on the 19th July 2010 that the deceased returned with her son. The statement was further that at one am on the night of 19th and 20th July the deceased woman decided to kill her son and that she twisted the child's neck and put it in a paper

bag. That the deceased then started wailing saying that he the accused had killed her son. That the accused then got disappointed took an axe and hit her on the head. He then slept till 5 am when he woke up he found his wife was dead but the child was still alive. He said that he took a knife and slit his throat and then left the house. The statement was Exhibit 6.

The accused was put on his defence and he gave a sworn statement and called two witnesses. The accused put forward an alibi as his defence. He said that he left Timau on the 15th July 2010 accompanied by DW3, one Douglas whose services he had hired to assist him put up a timber house at home in Nkubu. He said that they worked until 26th when he and Douglas returned to Timau. On arrival to Timau he was called by a person on Zakayo with whom he had worked in the same company in the past. He said that he proceeded to a bar where Zakayo had asked him to go and that the moment he arrived Zakayo pointed at him and he was arrested. He denied committing the offence or having any motive to cause the death of his wife and his son.

DW2 David is the younger brother of the accused. His testimony was that the accused lived and worked in Timau. David testified that his brother the accused went to their home in Nkubu on the 15th July, 2010 accompanied by a person and that he remained there until the 26th July when he returned to Timau with his friend Douglas.

DW3 was Douglas his evidence was that the accused approached him to assist him build a house at home. He said that he agreed and that they travelled together from Timau to Nkubu on the 15th July 2010. He said that they started putting up a house from the 16th July, until the 25th July, they then returned to Timau on the 26th July.

The charge facing the accused is that of murder contrary to section 203 of the Penal Code. The prosecution must prove that the accused caused the death of his wife and son and that he was motivated by malice aforethought. The prosecution must adduce evidence which demonstrates that the accused committed an act or omission which caused the death of his family.

There was no eye witness for this offence. The prosecution is relying on circumstantial evidence. Murder can also be proved through circumstantial evidence. In the case of **SAWE –V- REP [2003] KLR 364** for the proposition that the circumstantial evidence in this case did not meet the requirement set in the cited case of **SAWE**, supra, the Court of Appeal held as follows:

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2.Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3.The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ...

5. ...

6. ..

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

The prosecution is relying on circumstantial evidence that the accused rented the house where the body of his wife and his son were found dead and badly decomposed. The prosecution is relying on the evidence of PW1 that two months before the bodies were discovered, the accused rented a house from her and lived in it with his wife and the child. PW1 was unable to tell the actual date when the accused rented the house from her. PW1 could not tell the movements of the accused into and from the house. She could not tell whether the accused had been living in that house continuously for the two months he had rented the house. PW1 explained that her rental houses were a distant from the main house where she lived and she did not usually visit the place and could therefore not tell the movements of her tenants.

The prosecution failed to establish that the accused spent the night when the deceased is likely to have been murdered in the house. The prosecution did not establish the actual date when the deceased and her son died. The charge reads that their death was caused on 20th July, 2010. The post mortem forms on the bodies of the deceased do not disclose the possible date of death of the deceased. All that the doctor noted was that the bodies were badly decomposed to the level where the skeleton exposed.

In the retracted charge and caution statement taken from the accused, the murder is said to have been committed on the 20th July 2010. This could be where the prosecution got the date 20th as the date when the murder was committed. The accused retracted the confession in the charge and caution. In the case of **Komora vs Republic 1983 KLR 583** the court of Appeal held;

1. “ There is no rule of law or practice that requires corroboration of a retracted confession before it can be acted upon, but it is improper to act upon it in the absence of corroboration in material particulars; unless the court is satisfied of its truth after a full consideration of the material facts and surrounding circumstances.

2. ...

3. A retracted confession occurs when the accused person admits that he made the statement recorded but now seeks to retract or to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that the statement was not a voluntary one (Tuwamoi v. Uganda [1967] EA p 84 & 88).”

In a later court of appeal case **Thiongo vs Republic (2004)1EA333** the court held:

“There is not rule of law that a court cannot act on a retracted and/or repudiated confession unless it is corroborated in material particulars. What exists is a rule of prudence that a court should be cautious to act on such a confession unless it is corroborated in material particulars (Tuwamoi vs Ugands [1967] EA 84 adopted) in the current case, the retracted confession was amply corroborated.”

I am guided by the two cases I have cited herein above. I have warned myself that it is trite that a repudiated confession can form the basis of a conviction but that the court should be cautious when acting on such a confession unless it is corroborated in some material particulars. In this case the accused person repudiated and/or retracted the confession produced against him in this case. I considered the surrounding circumstances of the case and found that the repudiated confession stood on its own in the

sense that there was no other evidence adduced by the prosecution implicating the accused in this offence. The prosecution did not bring any of the tenants to the houses owned by PW1 where the accused was living. This could have helped the court determine whether the accused was at his rented house at the time the murders took place. In absence of any evidence I find that there was no corroboration to the retracted confession.

The accused put forward an alibi as his defence.

The Court of Appeal in **UGANDA V. SEBYALA & OTHERS [1969] EA 204** where that Court adopted a decision made in the same year by Georges, CJ in **TANZANIA CRIMINAL APPEAL 12 D68** thus:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is then an alibi which is not particularly strong may very well raise doubts.”

I find that the prosecution case has not dislodged the alibi defence of the accused. I find that the prosecution case is so weak that the alibi defence of the accused has shaken the little evidence the prosecution has adduced against the accused. I therefore find that there is a possibility that the accused person was not at his rented home between the 15th and 26th July 2010.

I therefore give the accused the benefit of doubt and acquit him for the offence charged.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF NOVEMBER, 2011.

**LESIT, J.
JUDGE**