



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL CASE NO. 52 OF 2011

REPUBLIC.....PROSECUTOR

=VERSUS=

CATHERINE NDUNGE MUTHOKA.....ACCUSED

JUDGEMENT

1. The accused, **Catherine Ndunge Muthoka**, is charged with two counts of murder contrary to section 203 as read section 204 of the **Penal Code**. In count I, it is alleged that on the 15th August, 2011 at Athi River Bridge, Kabaa Sub-location Mbiuni Location of Mwala District within Machakos County, the accused murdered **AM**. In count II, it is similarly alleged that on the 15th August, 2011 at Athi River Bridge, Kabaa Sub-location Mbiuni Location of Mwala District within Machakos County, the accused murdered **ANN**.

2. PW1, **Dr Simon Kioko Muli**, on 26th August, 2011 carried out post mortem examination of the bodies of the deceased persons. In his evidence there were no external bodily injuries on both bodies but both bodies had peripheral and central cyanosis. Though he was unable to carry out internal examination of the bodies due to the decomposed status of the same, he formed the opinion that both the deceased died due to asphyxia secondary to drowning. PW2, **Sgt Charles Baraza**, testified that on 15th August, 2011, he had visited the scene when a report had been made by the accused that she had thrown her two children in the river. On that day, only the body of one child, **AM**, aged 5 years, was found. According to PW1, the accused had reported that she had found a new lover who gave her, as a condition for their marriage, that the accused gets rid of her children.

3. On 23rd August, 2011, PW2 was instructed by the OCS Yatta Police Station to proceed to the same river and on 24th August, 2016 he proceeded there and the accused informed them that she had thrown the second child on the lower side of the river towards Kitui. After searching for the child, they recovered the body of a three-year-old girl called Agnes, whose body had started decomposing.

4. PW3, **Cpl Michael Shikuku**, testified that on 23rd August, 2011 he was at Yatta Police Station when the accused was taken to the station on allegation of having killed her two children. On 24th August, 2016 they carried a search and recovered the body of **AN** aged 3 years old. It was his evidence that the accused confessed to the killing of the said children though he was not present during the confession. PW4, **Nyenyu Kombo**, the accused grandmother testified that in August, 2011, the accused went and informed her that she would be going to Nairobi and had gone to collect her children, **AM** and **AN**, who had been staying with PW4 for a long time. After the accused had been given the children she left with them. PW4 however testified that the children were recovered in the river though she was not present when their bodies were recovered. **RNM**, PW5, the accused's sister testified that on 15th August, 2011 at about 10.00 pm the accused went to her home alone and informed her that the former had come from their home and wanted to spend the night at PW5's house on her way to Nairobi and the following day the accused left for Nairobi but did not confirm whether she had arrived in Nairobi. The witness confirmed that the accused had three children, **AM**, **AN** and **N**. She however confirmed that PW4 went asking for the accused the following day though she was not aware of the reason. On 23rd August, 2011 PW5 heard from her grandmother that the children had been thrown into Athi River and she was present when the bodies were recovered and also identified the bodies at the mortuary.

5. PW6, **JM**, a *boda boda* rider, testified that on 15th August, 2011, the accused who was related to him, had come from Nairobi and wanted him to drop her home which he did. 30 minutes later the accused came out with a bag and two children, a boy and a girl aged 3-4 years and informed him to return them to a place called **Bishop Ndingi** Stage where he left them waiting for a vehicle and went back to his work. However, later after one hour when he went back the accused informed him that she had not gotten a vehicle and told him that she wanted to be dropped at Kabaa Market to buy some things to take to her sister R's house and proceed to Nairobi the following day. By that time, she was still with the children, one of whom he knew as **M**. PW6 left the accused at the said market and went back to his work. On 23rd August, 2011 he was informed by the *bodaboda* riders that the accused had thrown the children in Athi River and upon searching the river they recovered the body of the boy wearing the same clothes that he had on 15th August, 2011. The following day he was informed that the body

of the girl was found.

6. PW7, PC **Sammy Mukula Kimatu**, testified that on 23rd August, 2011 he was at Pangani Police Station where he was attached when he was asked by the OCS to accompany the accused to Yatta Police Station. According to him, upon interrogation by the OC Crime, the accused confessed that she had thrown the children into the river at the bridge.

7. After hearing the evidence for the prosecution, this court placed the accused on her defence. In her sworn testimony, the accused stated that the deceased, **AM** and **AN** were her children with **JM** with whom she separated in 2010. After separation she rented a house where she stayed with the children. Thereafter, she took the children to her grandmother's home and was sending money for their upkeep. Though she was communicating with the father on phone, the father was not assisting despite the fact that he was known to the children.

8. According to the accused, on 15th August, 2011 she was not with the said children. It was her testimony that she called their father in the morning and asked him to send money for food but the father informed her that if she wanted him to take care of the children she should take them to him. The accused informed the father that since she was at work she would ask for permission and fetch the children. After getting permission, she left, fetched the children, went to the father's house at Mukuru Kwa Njenga in Nairobi and left the children with him. She then proceeded with her work. Three days later she called him but being unable to get him, she decided to go and check what was happening but was then arrested.

9. According to her, the motorbike left her at the Bus stage before she boarded a vehicle to Nairobi. On 23rd August, 2011 some people, two men and one woman, went to her house in Mlango Kubwa Nairobi. While she knew one of them as **M**, she did not know the others. When asked where the children were, she answered them that she took them to the father. She was then told to accompany them to Pangani police station. We went to Pangani police station. At the station, she was told by **M** to confess so that the case could come to an end. However, they did not disclose to her what the case was about though she decided to accept in a statement not recorded by her. According to her, she loved the children and I was taking care of them hence the reason she went to Nairobi. She did not have any reason to drown them in the river and did not understand why the witnesses testified against her.

10. According to her, the children were staying with her grandmother and she had another child aged 4 years who is staying with her sister **RN** who testified in this case.

11. According to her, in cross-examination, she left Nairobi at 3.00 pm and arrived at her grandmother's place at Mwala at 5.00 pm, she took a motorbike which took her 30 minutes to arrive home. It was her evidence that she boarded a vehicle at Pangani which took two hours. It was her testimony that she stayed at home for about five minutes after which PW6 took her to the bus stage from where she returned to Nairobi. Asked about **RN**, she stated that she was her sister and that they never disagreed. She however denied that she went to her said sister's house at about 10.00 pm and claimed that the sister lied. As she did not spend the night at her place. According to her, though she was married to John in 2009, he did not pay any dowry and never visited her home. Similarly, she did not know their home. According to the accused, she arrived in Nairobi at 8.00 pm and took the children to him at Mukuru Kwa Njenga though nobody saw me with the children.

12. According to the accused he did not know where the children were found. She however reiterated that she accepted so that the case could end as she was told to do in a statement recorded by **M**, though she did not know him and neither were the children, her grandmother or her home information known to **M**. She however admitted that she was the one who took the children from her grandmother and she was the last person to be with them. In her evidence she was not aware if they are dead though she admitted that nobody else saw them after she took them.

13. In re-examination she stated that **M** was her cousin and he knew her a little though he did not know her children.

14. On behalf of the accused, reliance was placed on the case of **Republic vs. Dorothy Awuor Juma [2018]eKLR**, where the Court reiterated the three main ingredients of murder as proof of the fact and the cause of death of the deceased; proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the '*actus reus*' of the offence; and proof that the said unlawful act or omission was committed with malice afterthought which constitutes the '*mens rea*' of the offence.

15. According to the accused, all the prosecution witnesses testified that that the lifeless bodies of **AM** and **AK** were retrieved from River Athi on 23/24 August 2011. This coupled with the Post Mortem Reports Confirms the fact of death.

16. Regarding the proof that the death of the deceased persons was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the '*actus reus*' of the offence, it was submitted that though the prosecution alleges that it is the accused person who murdered the deceased, none of the prosecution witnesses testified to have seen the accused person murder the deceased. The witnesses who testified alleged that it is the accused person who confessed that she threw the children into the river.

17. It was submitted that the rules on confessions are well settled and reliance was placed on **Republic vs. Elly Waga Omondi [2015] eKLR**.

18. It was therefore submitted that it is evident from the testimonies of the various witnesses that no safeguards were made to guarantee the constitutional and legal rights of the accused during the time of the alleged confession. **PC Sammy Mukula** PW7 alleged that the accused confessed before the Officer in Charge of crime, Pangani Police Station. Though he says that he was present during the alleged confession, he confirmed that he was a Police Constable hence not qualifying as one of the officers envisaged by law to take confessions. He also did not state the rank of the officer in charge of the Station who was interrogating the accused and neither did the alleged officer testify. It is also clear from evidence that at no time was the accused allowed to have another person on her side during the purported confession. It also flows that the alleged confession was never recorded. Taking into account the law as set out above and the various testimonies, it was submitted that it is clear that the alleged statements by the accused person cannot be admissible as confessions.

19. According to the accused, the case is premised on mere suspicions and no cogent evidence. While it can be said to be characterized of circumstantial evidence, it does not meet the set out thresholds based on the decision in the case of **Republic vs. Samson Lotukei Loitasia [2017] eKLR**.

20. According to the accused, the prosecution case shows that other than the accused person, there are other persons who equally had the opportunity to kill the deceased, who were not exonerated from suspicion of having committed the offence by the prosecution, so as to leave the evidence pointing unerringly towards guilt of the accused. As such the evidence against the accused only raises grave suspicion against her, of which as was rightly pointed out in the case of **Neema Mwandoro Ndurya vs. Republic [2008] eKLR**, however strong cannot provide a basis for inferring guilt which must be proved by evidence.

21. It was submitted that none of the witnesses stated that he/she saw the accused person throw the minors to the river. It is also clear that from the evidence of **Nyenyeu Kombo**, PW4 that the accused left with the minors on 15th August, 2011 and that she was to take the minors to their father. It is also evident from the Statement from PW4 which was produced as exhibit 1 that PW4 alleges to have called a 'M' after some days and asked whether the children were with him. It was posed who this M was and why was he being asked whether he had the children. **Joseph Muange**, PW6, it was submitted testified that he took the accused who was going to Nairobi but instead decided to go to her sister's place after it got late to Kabaa stage together with her children on the night of 15th August, 2011. However, **RN** PW5 stated that the accused went home alone.

22. Being guided by the above cases and the evidence on record, it was submitted that nothing links the accused person to the death of the deceased and mere suspicion has never been a ground to convict an accused person.

23. Regarding the issue of malice aforethought, it was submitted that the prosecution has a duty to prove that the accused person had an intention to cause the death and relied on section 206 of the ***Criminal Procedure Code*** and **Roba Galma Wario vs. Republic [2015] eKLR**.

24. It was submitted that since the accused raised an alibi defence, it was incumbent on the prosecution to disprove the said alibi and prove the accused's guilt which the prosecution failed to do. According to the accused, since nothing on record shows that indeed the accused person committed the alleged offence, it cannot be said that the accused had the malice aforethought to murder the deceased when the prosecution has not established that the accused person caused the death. It was therefore submitted that the prosecution has failed to prove beyond reasonable doubt that the accused person caused the death of the deceased persons and the court was urged to acquit her forthwith.

25. On behalf of the State, **Miss Mogoi** relied on her submissions in opposition to the submission of no case to answer and after setting out the summary of the evidence, submitted that although the accused testified that she went straight to Nairobi on the same night and took the children to their father, the same was an afterthought that is only meant to save her skin. It was submitted that there is evidence on record by PW5, the accused's sister that on the same night when the accused picked the children, she went to the home of PW5 without the children and spent the night before leaving for Nairobi the following day. There was no reason given why her said sister PW5 would testify that she spent the night at her place yet she did not. At the same time, it is not possible that the accused would have taken the children to their father and managed to go back and spend the night at PW5's place. The same possibility is ruled out by the evidence of PW6 who gave the time lines between the time the accused went to pick the children and the time he dropped her at Kabaa.

26. The evidence of PW5 that the accused did spend the night at her home, it was submitted, is corroborated by the evidence of PW6 who testified that the accused had picked the children and when she missed a vehicle, she had asked him to take her and the deceased minors to Kabaa so that she could spend the night at her sister's place. PW6 took her to the said Kabaa and left her at the market as she went to buy something from the market to take to her sister.

27. Further, it was contended, the evidence that the children were taken to their father only came up at defence stage. The same was not raised when the accused was arrested in connection with the death of the minors neither did the same come up during the hearing of prosecution's case. Actually, the evidence of PW5 the sister of the accused and PW4 the grandmother of the accused and the one who was staying with the children was that the father/fathers of the two minors was unknown.

28. Further, it was submitted that since it is clear from the evidence that it was the accused who led the police to the river and the points where the bodies of the deceased minors were found, it is not possible that someone else could have committed the crime then the accused got to know where the same was committed. The accused knew where she had committed the offence from and it's through her information that the bodies were recovered hence there is no way she can exonerate herself from this.

29. It was submitted that the actions of the accused person of throwing the two deceased minors in Athi River at night after picking them from her grandmother's place and going to spend the night at PW5's place like nothing had happened, clearly demonstrates the intention of the accused of wanting to kill the children therefore the element of malice aforethought is established. There is no possibility that the deceased minors would have survived after having been thrown into the River hence the accused was well aware of the outcome of her action which was the death of the minors.

30. Although the evidence in this matter is circumstantial, it was submitted that the circumstantial evidence here in is so strong that it strongly points to the accused person as the one who had a hand in the death of the two minors and no one else. According to learned counsel, though the prosecution faced hostility from other witnesses who tried to divert from their earlier statements to the police, the same did not shake the prosecution's case at all as the same remained solid, consistent and believable as to the events of the evening and night of 15th August, 2011.

31. From the foregoing, it was submitted that the prosecution was able to prove that the accused had the intention to kill the deceased minors and she did actualize the intention by throwing them into Athi River and causing their death by drowning.

32. In view of the foregoing, the court was urged to pronounce a guilty verdict against the accused and duly sentence her for the brutal

murder of her own children.

Determination

33. The prosecution's case in summary is that the accused was the mother of the deceased, **AM** a boy and **AN** a girl who were apparently born out of wedlock, according to PW5. The said children used to stay with PW5, their great grandmother, the grandmother to the accused though the accused used to collect them and return them back to PW5. On 15th August, 2011 at 6.30 pm the accused, whom PW6 knew as they were related, alighted at a Bus Stage where PW6, a motor cyclist operator was plying his business, from Nairobi and found PW6 at the stage. The accused then told PW6 to take her home which PW6 did.

34. According to PW4, the accused's grandmother, the accused arrived home at around 7 p.m. and told her she had gone for the children and would be going back to Nairobi. After that the accused left with the children.

35. Thirty minutes after PW6 had dropped the accused at PW4's home, the accused came out with a bag and two children a boy and girl aged 3 -4 years and told PW6 to return her with the children to a place called Bustop at the stage where PW6 left the accused and the children waiting for a vehicle and proceeded with his work. However, when he returned to the place where he had left the accused he found that the accused had not yet gotten a vehicle and the accused told him to take her to Kabaa to sleep at the accused's sister's home which PW6 did. However, at Kabaa market, the accused told PW6 that she wanted to buy somethings from the market to take to her sister's house and PW6 left her there with the children.

36. According to PW5, on 15th August, 2011 at 10 pm, the accused went to her home and told her that she had come from home and wanted to spend the night at PW5's home on her way to Nairobi. According to PW5, the accused was alone. The accused spent the night there and the following day left for Nairobi. The following day, PW4 went to PW5's house and sought to know if the accused had passed by her house with the children and PW5 informed her that the accused had not been there with the children and PW4 left.

37. From the evidence of PW7, it was PW4, the grandmother, who communicated with the accused's relatives in Nairobi to inquire whether the accused had the children. It was thereafter that the accused was taken to the police station on 23rd August, 2011 and she allegedly disclosed that the children had been thrown into the river. Upon receipt of the said report, a search was mounted and the bodies of the two deceased children were recovered and the accused charged with murder. It was however not very clear from the evidence of PW2 the exact dates when the two bodies were recovered since his evidence disclosed two different dates. According to PW3, the accused was taken to the police station on 23rd August, 2011 and upon the search being mounted the body of the boy was recovered the same day while that of the girl was recovered the following day on 24th August, 2011.

38. The bodies of the deceased were identified by PW5 and post mortem examination was carried out by PW1 on 26th August, 2011. According to him both bodies had no external bodily injuries but in both cases peripheral and central cyanosis were present. He formed the opinion that the cause of death in both cases was due to asphyxia which was secondary to drowning.

39. The accused's evidence as stated above was simply that at the request of the children's father she collected them from PW4 and handed them over to their father and that she did not know what happened.

40. In this case, it is clear that no one witnessed the accused throwing the children into the river. It was however contended that the accused confessed that she did so as a condition to get married. The first issue for determination is whether that statement amounts to a confession and whether it is admissible. The Supreme Court in the case of **Republic vs. Ahmad Abolfathi Mohammed & Another [2019] eKLR** set to define what amounts to a confession and an admission and the application of sections 25A and 111 of the **Evidence Act** in relation thereto. The court held as follows at paragraphs 38 to 40 of the judgement;

“[38] It can be surmised therefore, that a confession is a direct acknowledgement of guilt on the part of the accused while an admission is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction.

[39] These distinctions can therefore be summarised as follows:

1. A confession untainted by any legal disqualification may be accepted as conclusive in itself of the matters confessed. An admission however, pursuant to section 24 of the Evidence Act, is not conclusive proof of the matters admitted though it may operate as an estoppel.

2. A confession is a direct admission of guilt while an admission amounts to inference about the liability of the person making the admission in the cause.

3. A confession always goes against the person making it. An admission may sometimes be proved by or on behalf of the person making the admission as stated in Section 21 of the Evidence Act.

4. Confessions are made in criminal cases while admissions are made in both criminal and civil cases.

5. Confessions must be voluntary but admissions need not be voluntary.

6. Confessions can only be made by the accused, admissions can be made by any person.

[40] From the foregoing, it is one thing to make a statement giving rise to an inference of guilt and another thing to confess to a crime. It is therefore evident that the distinction between a confession and an admission as applied in criminal law is not a technical refinement but one based on a substantive difference of the character of the evidence deduced from each. This is also buttressed by the fact that the law relating to admissions is distinctly set out in Part II (Sections 17-24) of the Evidence Act and that on confessions is outlined separately in Part III (Sections 25-32) of the same Act.”

41. The court went on to hold as follows:

“[43] The issue as we have stated is whether an admission which is received outside the provisions of Section 25A is admissible. In the cases of *Kennedy Otieno Odeny v. Republic* [2008] eKLR and *Thoya Kitsao Alias Katiba v. Republic* [2015] eKLR, in which confessions were not made in strict compliance with Section 25A, they were held inadmissible. However, in the cases of *Douglas Thiong’o Kibocho v. Republic* [2009] eKLR, and *Milton Kabulit & 4 Others v. Republic* [2015] eKLR, the Court of Appeal held that the repeal of Section 31 did not outlaw evidence received under Section 111(1) and went ahead to admit admissions made in those cases under that section.

[44] In this case, the prosecution claimed that upon being confronted with intelligence reports that the respondents had an explosive which they had hidden somewhere in Mombasa County, the 1st respondent led Police to the Mombasa Golf course where they had hidden the RXD explosive. The prosecution further asserted that the 1st respondent’s said act of leading the Police to the recovery of the RXD explosive is testimony of the respondents’ personal knowledge of the presence of the RXD explosive at the spot where it was found and that is admissible under Section 111(1).

[45] Section 111 reads:

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.” (emphasis added)

[46] In the above context, it is our view that, while confessions under Section 25A are often made to the Police during investigations, as counsel for the respondents argued, Section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved, to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only “within the knowledge” of the accused person so that if he does not offer an explanation, he risks conviction. Such a situation would arise, for instance, in a murder case where part of the prosecution case is that, prior to the deceased’s death, the accused person is the one who was last seen with him. This being our view, we find that the Court of Appeal erred in its decisions in the said cases of *Douglas Thiong’o Kibocho versus Republic* [2009] eKLR, and *Milton Kabulit & 4 Others v. Republic* [2015] eKLR that admissions made to Police in the course of investigations are admissible under Section 111(1) of the Evidence Act. As stated, that section cannot be invoked at the investigation stage but in the hearing of the defence case in the course of the trial when necessary.”

42. The admissibility of confessions was dealt with in *Republic vs. Elly Waga Omondi* [2015] eKLR, where in disallowing an alleged confession the court observed that:

“The law governing confessions in Kenya is the Constitution of Kenya 2010; the *Evidence Act* (Cap.80); the *Evidence (out of Court Confessions) Rules, 2009* and case law. Article 49 of the Constitution guarantees an arrested person certain rights including the right to be informed promptly, in language that the person understands, of the reason for the arrest; the right to remain silent and the consequences of not remaining silent; to communicate with an advocate, and other persons whose assistance is necessary and not to be compelled to make any confession or admission that could be used in evidence against the person. The law is very clear that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be

detrimental to the administration of justice (see Article 49 (4)). The right of an accused person to a fair trial is guaranteed under Article 50 (2) of the Constitution of Kenya 2010. Of particular relevance to us is Article 50 (2) (1) which guarantees him/her a right to refuse to give self-incriminating evidence. Generally confessions made by an accused person are not admissible in Kenya unless when they are made strictly under the law. But what is a confession? Section 25 of the Evidence Act defines a confession as follows:

“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

Section 25 of the *Evidence Act* was amended by Act No. 5 of 2003 and Act No. 7 of 2007 by inserting into the Act Section 25A which reads as shown below:

25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

The rules envisaged under (2) above are known as the Evidence (out of Court Confessions) Rules, 2009 hereinafter the Confessions Rules. Under these Rules, specifically under Rule 4 the rights of an accused are specified. This Rule requires the recording officer to ensure that the accused person chooses his preferred language of communication; is provided with an interpreter free of charge where he does not speak Kiswahili or English; is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment; is informed of his right to have legal representation of his own choice among others.

Rule 4(2) requires the recording officer to ensure that the accused has not been subjected to any form of torture and Rule 4(3) requires the recording officer to ask the accused person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

In addition to this, the Confessions Rules require the accused to be informed of the option to record his own statement in his preferred language or to have it recorded for him (Rule 7); the option to clarify or add anything in the statement after the same has been recorded (Rule 8) and the requirement to administer a caution before recording the statement (Rule 5). In addition to the legal provisions on this issue, there are numerous pronouncements by judges on the subject of extra-judicial confessions.”

43. In this case, part of the accused's statement amounted to a confession while part was merely an admission. However, the confessionary part clearly did not meet the legal threshold prescribed above and is hence clearly inadmissible and cannot be relied upon in convicting the accused herein. The part that constitutes admission is, however admissible. That being the position, as rightly appreciated by **Miss Mogoi**, learned counsel for the prosecution, the bulk of the evidence against the accused is purely circumstantial since absent the confession, there was no direct evidence linking the accused with the death of the deceased and the admissible part of the statement, absent any other evidence cannot be the basis of a conviction. It therefore follows that the court must rely on the circumstantial evidence if the case against the accused is to be proved. What is circumstantial evidence? When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. **Mativo, J** in **Moses Kabue Karuoya vs. Republic [2016] eKLR** expressed himself on the doctrine as hereunder:

“The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence, is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred. Thus, circumstantial evidence can be defined as relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence. It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly, typically when a witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered, but to bring a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. This follows from the requirement that guilt must be established.”

44. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

45. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In **Sawe vs. Rep [2003] KLR 364** the Court of Appeal held.

“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; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; 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; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

46. In R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135, in the Court of Appeal for Eastern Africa had this to say:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

47. In Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

48. In Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA and Chesoni Ag. J. A. held:-

“In order to draw the inference of the accused’s guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused.”

49. Therefore, for this court to find the accused guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of Simon Musoke vs. Republic [1958] EA 715 and Teper vs. Republic [1952] AC 480 as follows:

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

50. What were the circumstances of this case? The accused was the mother of the deceased. She picked up the deceased from her grandmother, PW4, on 15th August, 2011 on the ground that she was taking them with her to Nairobi. Though she denies it, according to PW5 and PW6 that evening she was at a place called Kabaa. According to PW6, she left the accused at Kabaa sometimes after 7.30pm while according to PW5 the accused arrived at her house at around 10pm. The reason why the accused was going to PW5’s place was, according to PW6, her inability to get a vehicle to take her to Nairobi. If that is the position that the accused’s evidence that she travelled back to Nairobi that day cannot be true. Both PW5 and PW6 cannot have concocted the story that that evening the accused was within the vicinity of Kabaa market. In any case the accused did not seriously challenge the evidence of these two witnesses.

51. What therefore happened between 7.30pm when the accused was last seen by PW6 in the company of the two deceased children and 10pm when she turned up at PW5’s house alone without the children is a matter which the accused ought to have explained. This is not to say that the burden was being shifted to her. It is the burden of the prosecution to prove its case beyond reasonable doubt and the accused need only to raise reasonable doubt either by putting forward an affirmative defence or by raising doubt on the prosecution case. In Mkendeshwa vs. Republic [2002] 1 KLR 461, the Court of Appeal stated that;

“In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.”

52. What I understand the court in Republic vs. Ahmad Abolfathi Mohammed & Another (supra) to be saying is that an admission may not necessarily be a confession. A person may for example say, ‘I know where the body of the deceased is’ and may proceed to take the police there. That is not the same thing as saying that the person has confessed to the murder because despite knowing where the body is he can still proceed to deny having played a role in the death of the deceased though as the Court noted the prosecution case would then comprise of a situation only “within the knowledge” of the accused person so that if he does not offer an explanation, he risks conviction, a situation that would arise, for instance, in a murder case where part of the prosecution case is that, prior to the deceased’s death, the accused person is the one who was last seen with him. However, where he says, ‘I killed the deceased’, that amounts to a confession and the law and the rules relating to admissibility of confessions kick in. In this case the accused’s mere denial that she did not commit the offence yet there is evidence that she is the one who disclosed where the bodies of the deceased were, a disclosure which in my view, though not amounting to a confession, amounted in view of the holding in Republic vs. Ahmad Abolfathi Mohammed & Another (supra) to an admission, definitely tips the scales of proof in favour of the prosecution’s version.

53. In this case there was evidence that the deceased were last seen with the accused who was their mother. Regarding the doctrine of “last seen with deceased” in a Nigerian Court case of Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006, that court, while considering the ‘last seen alive with’ doctrine held:

"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."

54. In yet another Nigerian case the court considering the same doctrine, in the case of Stephen Haruna vs. The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009 opined thus:

"The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."

55. In this case the deceased were last seen with the accused at around 7.30pm. At 10pm the accused appeared in the house of her sister, PW5, alone without the children and did not even mention them. After that the deceased were never seen alive again. Whereas in cases where the deceased are not related to the accused or have no close relationship, one may say that the accused has no business inquiring into where the deceased goes after they leave each other and therefore some other evidence may well be required; in a case such as this where the accused was the mother of the deceased, surely some strong evidence is required as to how she parted ways with the deceased. Her evidence that she took them to their father that same day is obviously untrue. The Court of Appeal for East Africa in Rafaeri Munya alias Rafaeri Kibuka vs. Reginam [1953] 20 EACA 226 observed that:

“The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

56. The principle applicable was well explained in the court of appeal case of Ernest Abanga Alias Onyango vs. Republic CA No.32 of 1990 that:

“This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it’s a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available.”

57. Having considered the evidence adduced before me in this case, I find that the inculpatory facts adduced in this case are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of her guilt. I cannot find any other existing circumstances weakening the chain of circumstances relied on.

58. In the premises I find that the prosecution has proved its case beyond reasonable doubt. Accordingly, the accused is hereby convicted of the murder of AM and ANN on the 15th August, 2011 at Athi River Bridge, Kabaa Sub-location Mbiuni Location of Mwala District within Machakos County.

59. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 15th day of October, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muli for Mrs Mutua for the accused

Miss Mogoi for the State

CA Geoffrey