IN THE COURT OF APPEAL
AT ELDORET

CORAM: O'KUBASU, ONYANGO OTIENO & VISRAM, JJ.A.

CRIMINAL APPEAL NO. 286 OF 2010

BETWEEN

DAPHIN NASIMIYU ……..……..…….. APPELLANT

AND

REPUBLIC ……...….....…….. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Bungoma (Mbogholi Msagha, J) dated 5th November, 2009

in

H.C.CR.C. NO. 1 OF 2006)
****

JUDGMENT OF THE COURT

In an information dated 28th December, 2008, the appellant, ***DAPHIN NASIMIYU***, faced two charges both of murder contrary to ***Section 203 as read with Section 204 of the Penal Code***. In the first count she stood charged with the murder of ***Augustine Wasike*** and in the second count, it was alleged she murdered ***Joseph Wasike***. Both were her sons and the offences took place on 7th December, 2005 at Nasusi Village, Nasusi Sub-location, Maeni Location in Bungoma District within Western Province. She pleaded not guilty to both charges but after the full hearing which began with the aid of assessors but somehow proceeded without them in respect of the last two witnesses, the learned Judge of the superior court, Mbogholi Msagha, J who took over the hearing from W. Karanja, J midstream, found her guilty as charged, convicted her and sentenced her to death in respect of the first count but ordered the sentence in respect of the second count to remain in abeyance.

The appellant felt dissatisfied with the conviction and sentence and hence this appeal.

From what will be clear later in this judgment, we shall set out the facts that gave rise to the charge as briefly as possible.

As on 7th December, 2005, the appellant and Daniel Wasike (PW 1), were married. They had two children, Augustine Wasike and Joseph Wasike, both deceased. They lived near Daniel's mother's house. Daniel's mother was Susan Wasike (PW 2). On 7th December, 2005 at about 1pm, Daniel who had been to see his friends went back to his house. He found the appellant and their two children. They looked well. The appellant had allegedly sold Daniel's maize and on finding this out, Daniel was not amused. He

ordered the appellant to return the money she had received for the maize already sold and to return the maize she had not sold.

Further, the appellant also wanted to go to see her parents at home but Daniel prevailed upon her not to go. Thereafter, Daniel left and went for football practice. Daniel's mother, Susan, was alone in her house at about 2pm. It was her evidence that at that time, the appellant went to collect the two deceased children from her house. She had earlier left the children at her house when she went to the *shamba*. As she took the children to her house, a visitor went to Susan's house and asked Susan to take her to the Chief of their location. Susan went outside, heard some sounds coming from the appellant's house. Susan went to the door of the appellant's house, tried to open the door but the door was locked from outside. She called out the names of the children but there was no answer. She stood there outside. The appellant then opened the door and ran outside towards the Chief's camp. Susan got into the house. She found Joseph with three deep cuts on the head and neck. She ran to the market place. She saw the appellant at Sosio river raising her hands. A passerby on a bicycle removed the appellant from the river. She was taken to the AP Post. Susan went back home and found a *panga* and rope at the scene. In cross examination later, this witness gave a different version of her evidence altogether particularly as to when she saw the bodies of the two deceased. She said:

"I took my visitor to the Chief's office, when I came back, I found accused's house open. The kids had been killed before I went to the Chief. My visitor also heard the thud from the accused's house. ..... I did not see her jump into the water. I was just told."

Be that as it may, Edward Wasike Watete, (PW 3), the appellant's father in law, was informed about the incident by Susan and went with her to Nasusi market. He went to the house and found the bodies of the two deceased. He also saw a *panga* and a rope. Edward, Daniel and Susan all assumed that the *panga* they found in their house was the one used for killing the children and a rope they found in the house was used by the appellant in an attempt to commit suicide. It was also alleged that one of the rafters she allegedly attempted to use for hanging herself snapped and hence her failure to accomplish the suicide action. Charles Chelangat (PW 4), an Administration Police at Kimilili District Officer's office, received a report from an unknown person that the appellant had been seen jumping into Sosio river. He, together with others went to the river and found the appellant whose clothes were all wet. They took her to the AP's camp as they had been informed that she had killed her children. AP Chelangat said in his evidence that the appellant appeared to be in shock and was not talking and was unconscious. The APs then went to the appellant's house. They found the two deceased. They called police who responded and the bodies were put in the police vehicle. CIP Hesbon Nyaroche (PW 6) was at Kimilili Police Station on 7th December, 2005. He received a cell phone call from an unknown caller who informed him that two children had been murdered at Nasusi village. He, together with PC Wasike and PC Musau went to the scene, took the bodies of the deceased and put them into the police vehicle and then rearrested the appellant. The bodies were taken to the mortuary while the appellant was taken to the Police Station. Dr Ayunga (PW 5) did a post mortem on the bodies and found that the cause of death in the case of Augustine was cardiac arrest due to severed neck by a sharp object; and in the case of Joseph was cardiac arrest secondary to severe cut on the right side of the head in supraclacular area. Later, after investigation, the appellant was charged with the two offences of murder as stated above.

In her defence, the appellant vehemently denied having killed her children. She did not know how the two children met their death. On 7th December, 2005, she left home for the river to fetch water. On her return, she went to fetch firewood near the river. At that time, the two children were at their grandmother's house having taken some porridge. On her return, she prepared food and they ate. Thereafter, she left them in bed as she returned to the river to fetch water again. This was between 1.00pm and 2.00pm. She had not locked the door. When she returned home at about 3.00pm she pushed the door with her leg. She saw a mattress on the floor and blood. She was shocked and the jerrican on her head fell down. She pushed the door and saw a blanket covering the dead children. They had been killed. She remembered that earlier when she first returned from fetching water the first time, she found Susan with a person she did not know. That person was a man. They were near her house and were standing and talking. When she discovered the murdered bodies of her children, Susan told her to take heart. Her response was that what had been done to her was unbearable. She then ran off and ran upto river Sosio and because of the shock,

she fell into the river. She lost consciousness and regained it later. She felt pain for losing her children. She denied having attempted to commit suicide and that she tied a rope in a rafter in an attempt to take her own life. She added that she was not on good terms with Susan as she was in a different religious sect from Susan and further, Susan did not like her children as they were boys whereas Susan wanted girls. It was as a result of the above that she did not report the incident to the police immediately.

The above, is a summary of the facts that were before the trial court. The trial commenced before Ombija, J on 23rd March, 2006. However, on that day all the learned Judge did was to examine those who presented themselves to serve as assessors at the hearing for during that period the provision of trial by assessors was still effective and had not been repealed. After he examined the assessors and empanelled them, a hearing date was taken. That was 23rd May, 2007. Come that date, the matter was placed before Karanja, J as apparently, Ombija, J had been given a transfer. On 23rd May, 2007, the trial started with the aid of those assessors, namely Silas Simiyu Mabunde, Bernard Khaoya Wakhungu and Joseph Nyongesa Matende. Four witnesses were heard – (those were the main witnesses) with the aid of assessors. Thereafter, the case was adjourned from time to time for one reason or another till 26th July, 2009, about two years later and after the provision for trial with the aid of assessors had been repealed. Again, the trial began before another Judge altogether, this time, Mbogholi Msagha, J. Whereas the learned Judge on taking over the matter duly complied with the requirements of ***Section 201 (2) as read with Section 200 (3) of the Criminal Procedure Code***, his attention was unfortunately not drawn to the fact that the trial began in this case with the aid of assessors and needed, pursuant to the provisions of ***Section 23 (e) of the Interpretation and General Provisions Act Chapter 2, Laws of Kenya***, to continue with the aid of assessors. He proceeded with the case as if there was no need for assessors at all and indeed made no mention of the assessors whatsoever. In the case of ***WILSON UHURU BAJE VS REPUBLIC, CRIMINAL APPEAL NO 116 OF 2009***, this Court stated in a similar situation as follows:

"Lastly, the trial started with the aid of assessors and in law had to continue with them till the end. We appreciate the fact that midstream, the provision of trial with the aid of assessors was removed from our Criminal Procedure Code, but that repeal, like most other legal provisions, did not have retrospective effect. It was, in our view, improper for the learned Judge to drop the assessors and even worse, to fail to give any reasons as to why he did so."

In this case, the trial with the aid of assessors which was at the time the offence was committed and at the time the trial started, a right of the appellant, was denied her midstream after four witnesses had given evidence. This was not proper. It is unfortunate that this point was not canvassed on appeal before us as it would appear both learned counsel did not notice the flaw and our attention was not drawn to it then, but it is a matter of law and we cannot ignore it. The effect of the above is that the trial was viciated in that though started with the aid of the assessors, the same were dropped midstream with no reasons given.

What next? Should we order a retrial? As this issue was not canvassed, we did not get the advantage of the input of both counsel on whether or not to order retrial. We have considered the law on circumstances where a retrial would be ordered. In the case of ***PASCAL CLEMENT BRAGANYA VS R (1952) EA 152***, the predecessor in this Court stated:

"We accept the principle that retrial should not be ordered unless the court is of the opinion that on a proper consideration of the admissible, or potentially, admissible evidence, a conviction might result."

That decision was adopted in the case of ***AHMED SUMAR VS REPUBLIC, (1964) EA 481*** and particularly at ***paragraph 483*** where the court having cited the part we have reproduced above added:

"Each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."

In this case, the offence took place on 7th December, 2005, close to six years back. The appellant was

arrested on the same day and so has been in one custody or the other including being in prison awaiting execution of this sentence for close to six years. Apart from that, we have also perused carefully the evidence that is before us and it is on this issue that we set out a summary of the evidence above. None saw the appellant committing the offence. The only evidence upon which the court convicted her was that of Susan and that of the Doctor who conducted the post mortem examination. Susan did not see the appellant committing the offence. The appellant on her evidence stated that when she returned from fetching water from the river, Susan and another man she had not seen before were near her house where the children were left by Susan and they were talking. There is no evidence as to who this man was; what he was discussing with Susan near appellant's house where the children were left. Susan in her evidence is not clear as to what happened. In examination in chief, she said that it was when this visitor told her to take him to the Chief's office that she went outside and heard some sounds which on checking led to her discovering that the two children were murdered, yet in cross examination, she stated that she took the visitor to the chief's office and when she came back she found appellant's house open and the kids had been killed before she took the visitor to the Chief. One finds it odd that Susan should have discovered the death of her two grandchildren and still just take this visitor to the Chief's office. Either way, the unexplained presence of another person in the appellant's compound makes it difficult to accept that this case, which could only be proved on circumstantial evidence, could succeed in the light of the fact that considering the guiding principles that would enable a court of law to convict on circumstantial evidence such as are enshrined in the well known case of ***REPUBLIC VS KIPKERING ARAP KOSKE AND ANOTHER, (1949) 16 EACA 135*** as read with the case of ***SIMON MUSOKE VS R (1958) EA 715*** which consolidated the case of ***SAMSON VS R (2003) KLR 364***, the inculpating facts would be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of her guilt. We think, with that mysterious man near the appellant's house at about the time the offence could have been committed, a serious gap is left in the entire case. That being our view of the matter, we are not of the opinion that if retrial is ordered, a conviction might result.

In the result, we make no order for retrial. The appellant is released forthwith unless otherwise lawfully held.

Dated and delivered at Eldoret this 11th day of November, 2011.

E. O. O'KUBASU

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

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

DEPUTY REGISTRAR