IN THE COURT OF APPEAL
AT NYERI
(CORAM: WAKI, AGANYANYA & VISRAM, JJ)
CRIMINAL APPEAL NO. 118 OF 2008 (R)
BETWEEN

PAMELA KARIMI .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Meru (Sitati, J.) dated 18th January, 2008
in
H.C.CR.C. NO. 142 OF 2003)
****

JUDGMENT OF THE COURT

In her judgment dated 18th January, 2009 and erroneously titled *"Judgment of the Court"*, instead of simply *"Judgment"*, the learned Judge (Sitati, J) states, at the beginning of her judgment, as follows: -

"1. The enactment and operationalisation of the STATUTE LAW (Miscellaneous Amendments) ACT 2007 abolished the role of assessors in murder trials with effect from 15.10.2007.

2. As a result thereof, I have decided that there will be no summing up in this case hence this judgment. I believe that the decision I have taken will not prejudice the accused in any way. The assessors who have sat with me during the trial are forthwith discharged. They are however entitled to payment of attendance allowances incurred todate."

The learned Judge clearly erred in discharging the assessors, half way through the trial, and in concluding that such a decision would not prejudice the appellant. ***Section 23 (3)*** of the **Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya**, stipulates as follows:
"23(3)(e) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not –

.....

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."

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."

The trial, without the aid of assessors, was clearly a nullity, and a violation of the rights of the appellant. It was her right at the time to be tried with the aid of assessors to its logical conclusion. And, clearly, she suffered prejudice. So, then, what next? Should we order a re-trial as the learned Assistant Director Public Prosecutor suggested we do?

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 of 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 1st June, 2003, and the appellant was arrested on the same day, and has been in custody for over eight years. Apart from that we have examined the evidence before the trial court, and which we shall now summarise here.

In the early morning of 1st June, 2006, at about 5.00 am, the appellant and her husband set off on a short journey to Kaaria market, a distance of about three Kilometres from their home. That is the last time they were seen together. The last person to have seen them was their 13 year old daughter, ***B.G*** (PW1) (B), who told the court that her parents were headed to the market, on a bicycle, to settle some money debt. B's father rode the bicycle, while her mother, the appellant, sat as a passenger. The previous night, according to B, one ***Munene*** came home. It was around 8 p.m. Her father was not home, but her two sisters ***Purity Muthoni*** and ***Emily Kendi*** were. Their mother gave Munene some Shs.700/=. She could not say for what purpose.

At about 8 am on the following day, some three hours after the couple had set off on the journey to Kaaria Market, the appellant was seen returning home alone, pushing the bicycle. On her way home, she met ***Bernard Murangiri Ndubi*** (PW3) (Bernard) and related to him how she and her husband had had an encounter with a snake as they were riding, and how they fell down and damaged the bicycle, whereupon her husband asked her to return home with the bicycle as he proceeded to the market. Later that morning, her husband's mutilated body was found in the bushes, some 50 metres from the road. There was a trail of blood, indicating clearly that the body had been dragged to the spot from the road.

The appellant was arrested the same day, and subsequently charged with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. It was alleged that she murdered ***Elias Mutiria Rugia***, her husband, on 1st June, 2003 at Kaare Village, Kiera Location, Meru South District.

After hearing ten prosecution witnesses, and the sworn testimony of the appellant, the trial Judge came to the conclusion that the circumstantial evidence in this case pointed to no other conclusion than that of the guilt of the appellant. Here is how the trial Judge expressed herself:
"Bessy's undisputed evidence establishes that the accused person was the last person to be seen with the deceased and that that being the case it is only the accused person who could, under the provisions of section 111 (1) of the Evidence Act explain how and where she parted company with the deceased. This fact was only peculiarly within the knowledge of the accused. She of course tried to explain that the

deceased had opted to proceed alone on the journey and asked the accused to return home after the unfortunate incident with the snake. I do not believe that explanation by the accused person; and this being the case, a rebuttable presumption arises that the accused knew under what circumstances the deceased died. This is a presumption of fact that this court is entitled to make under the provisions of section 119 of the Evidence Act. (See ***James Mugambi Mchene - vs - Republic*** *–* ***CR.A. No. 29 of 2002*** *at Nyeri).*

34. It is also noteworthy that the accused took more than two hours to make her journey back home after she allegedly parted company with the deceased, in addition to coining a story that the bicycle was too damaged to be used on that journey. The stories about the snake and the damaged bicycle were a convenient way of dealing with the issue of the unexplained disappearance of the deceased person. All these circumstances taken together have satisfied me of the guilt of the accused person. Further, I do not find any co-existing circumstances which would weaken or destroy the inference I have made. In my view, the prosecution has discharged the burden cast upon it by the law of justifying the inference of guilt of the accused person.

35. It also came out from the evidence that even after the accused eventually "became aware" of the deceased's death, she had no interest in going to the scene where the body was found. Such lack of interest could only mean that the accused already knew how the deceased had died. I therefore have no doubt in my mind that the accused by herself and or together with others killed the deceased and dragged him into the bush where his body was found. Those who killed the deceased must have done so with precision. They lost no time and ensured that the body was safely tucked away in the bushes some 50 - 60 metres from the road before taking off."

The only evidence in this case is circumstantial. No one saw the appellant committing the offence. The trial Judge relied solely on the testimony of a single, 13 year old witness, and on the fact that the appellant was the last person to have been seen with the deceased, and the onus was on her under ***section III (1)*** of the Evidence Act to explain how and where she parted company with the deceased, an onus that the learned Judge thought had not been discharged.

However, the learned Judge completely disregarded the evidence of the appellant, given under oath, and upon which she was cross-examined, that she and her husband fell off the bicycle following an encounter with the snake; that the bicycle got damaged in the process; that she had to push the bicycle all the way back home; that at some point she had to repair the bicycle, hence a two hour delay. The other concern expressed by the learned Judge was that *"she had no interest in going to the scene where the body was found…..such lack of interest could only mean that the accused already knew how the deceased died"* is completely misplaced. It would be preposterous to convict someone on such a hypothesis, even in the absence of any evidence before the court. Here, in this case, the appellant clearly explained why she did not go to the scene. Here is what she said under oath:

"Though I wanted to go to the scene, one James Marangu cautioned me against going because he said I might commit suicide after seeing my husband. Marangu said he had seen my husband's body."

Finally, in our view, the trial Judge failed to consider how, the appellant on her own, could have killed the deceased on the road, and drag the body some 50 metres into the bush. Neither the Information nor the evidence alleged that the appellant was assisted by someone else. We have serious doubts that one woman could have accomplished that task on her own. On our part, we are of the view that the evidence on record is nowhere near the test laid down in respect of circumstantial evidence as set out in the case of ***R. V KIPKERING arap KOSKE & ANOR*** ***(1949) 16 EACA 155*** that the inculpating facts would be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt. On the contrary we find that the co-existing facts and circumstances weakened, if not destroyed the inference of guilt.

That being our view of the matter, we are not of the opinion that if retrial is ordered, a conviction might result. Accordingly, we make no order for retrial. The conviction of the appellant is set aside and the sentence is quashed. The appellant is released forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 1st day of December,2011.

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR