REPUBLIC OF KENYA

IN THE HIGH CCOURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 144 OF 2011

(Consolidation of BGM HCCRA NO 144/2011, 145 OF 2011 & 146 OF 2011)

(CORAM: F. GIKONYO J)

PETER WAFULA JUMA.....1ST APPELLANT

SAMWEL JUMA NYONGESA.....2ND APPELLANT

PENINAH NASIMIYU WAFULA.....3RD APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by D. WANGECHI, DM II (Prof) in BGM CMCCRC NO437 OF 2011 made on 16.8.2011)

JUDGMENT

Consolidation

[1] **PETER WAFULA JUMA, SAMWEL JUMA NYONGESA** and **PENINAH NASIMIYU WAFULA** had initially filed separate appeals, to wit; **BGM HCCRA NO 144 OF 2011, BGM HCCRA NO 145 OF 2011** and **BGM HCCRA NO 146 OF 2011** respectively. On 11.11.2013, these appeals were consolidated and file number **BGM HCCRA NO 144 OF 2011** was made the controlling file. In that consolidation, **PETER WAFULA JUMA, SAMWEL JUMA NYONGESA** and **PENINAH NASIMIYU WAFULA** assumed 1st, 2nd and 3rd Appellants, respectively. In this judgment, except where it is necessary or the context requires reference to the particular Appellants, I shall refer to them as the Appellants.

The charge

[2] The Appellants jointly faced a charge of assault causing actual bodily harm contrary to section 251 of the Penal Code. Particulars of the offence were that; on the 18th day of October, 2009 at Ndakaru village, Namwacha sub-location, East Bukusu location in Bungoma South District within Western province, the Appellants jointly unlawfully assaulted MARTIN WANAMBISI BARASA thereby occasioning him actual bodily harm. They were tried for the offence, convicted and sentenced each to pay a fine of Kshs. 2,000, and in default to serve six (6)

months imprisonment.

The appeal

[3] The Appellants were aggrieved by the conviction and sentence, and filed separate appeals through M/S J.S. KHAKULA & COMPANY ADVOCATES. But all of them proffered similar grounds of appeal reproduced below.

> ***a) The learned trial magistrate was openly prejudiced against the Appellants and that prejudice has resulted injustice;***
>
> ***b) The learned trial magistrate erred in law in convicting the Appellants on the unsatisfactory and contradictory testimonies of prosecution witnesses; and***
>
> ***c) The learned trial magistrate erred in law by shifting the burden of proof from the prosecution to the accused.***

[4] Mr D.M. Wanyama, the learned counsel for the Appellants submitted that the evidence of the prosecution was characterized by contradictions; the complainant at one point talked of having been admitted in hospital for one day while at another for three days; the dates of recording statements also differ; the complainant said his leg was fractured while the doctor said there was no fracture; and dates for the filling of the P3 Form also differ. For these reasons, the Appellants feel they should receive justice through this appeal.

The state opposed the appeal

[5] Mr Kibelion, the learned state counsel opposed the appeal. He submitted that the Appellants were properly charged with and convicted for assault. The Appellants assaulted the complainant on 8.10.2009 at 6.00pm and he saw them well. He knew them all. He gave an account as to how they attacked him with sticks thus injuring him. He was treated for the injuries. PW2 and PW3 rushed to the scene after they heard PW1 screaming. PW2 and PW3 saw the Appellants beating PW1 and they identified them. They fled when they saw PW2 and PW3. PW2 and PW3 assisted in taking PW1 to hospital. The assault took place in broad day light-the light was sufficient to identify a person. In the circumstances, the conviction was safe and the sentence was really lenient.

<u>COURT'S ANALYSIS</u>

Duty of the court

[6] The court is under a duty to evaluate evidence recorded by the trial court and come to own findings and conclusions, except, however, I should make an allowance for the fact that I neither saw nor heard the witnesses. See **OKENO v REPUBLIC [1973] EA 32** where it was held:

> *"**An Appellants on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination** [Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"*

[7] With the exception of ground (b), the other two grounds basically raise issues which I think

I should determine straight away. I propose to deal with ground (a) and (c) first and in that order, and then ground (b).

Alleged open prejudice by trial magistrate

[8] A claim of bias or prejudice by the trial magistrate against a judicial officer is a grave juridical issue as it imputes a serious charge on the conduct of the officer. The Appellants have raised it as ground 1 and posit that the prejudice resulted into injustice to the Appellants. Such ground should be raised where evidence is readily available on record, for it requires strict and specific proof. The court had occasion to consider impleading of bias in an appeal in the case of **HIGH COURT OF KENYA AT MERU CRIMINAL APPEAL NO 238 OF 2010 (MAKAU & GIKONYO JJ)** and stated as follows:

> ***We have perused the judgment and the entire record of the trial court; we have not found anything which suggests bias on the part of the trial magistrate. Bias in its legal connotation entails prejudice on the part of the trial magistrate that he decided the case on extraneous factors rather than the law. Black's Law Dictionary, 7th Edition clearly sets out that Bias entails:-Inclination, prejudice; Judge's bias usually must be personal or based on some extrajudicial reasons. And further it states that Prejudice entails:-A preconceived judgment formed without a factual basis, a strong bias. No wonder the law requires that the facts constituting bias must be specifically alleged and established. It is a kind of allegation which requires the counsel making it to first establish presence of bias that can be proved, and then make a conscientious decision to raise the matter only where proof is readily available. The law is tailored that way, in recognition of the fact that an allegation of bias imputes a serious charge on the integrity of the trial court and the propriety of the proceeding. The word bias assumes a particular legal meaning in any judicial proceeding and it should not, therefore, be used just loosely. It is most desirable that care should be taken before making a submission such as the one made herein. We say no more on that issue. The ground fails.***

[9] In line with the above observation, I too do not find anything which would suggest an open prejudice by the trial magistrate against the Appellants. It is desirable that, when a judicial officer exhibit open bias or prejudice against a party in a proceeding, as is being claimed in this appeal, the Appellants should make an application in the original proceedings for the trial magistrate to recuse herself, rather than wait for the same trial court to complete the trial only to raise it during the appeal. Except where the record is so soiled in a manner that prejudice could easily be discernible, I do not think a ground of appeal based on alleged bias or prejudice would be an easy one for the appellate court to determine as it would be by the trial court. I say these things because this court is a court of record. Ground 1 fails and is rejected.

Shifting burden of proof

[10] The Appellants placed as a ground of appeal; ***that the trial magistrate shifted the burden of proof to the Appellants***. Before I determine whether

the trial magistrate shifted the burden of proof to the Appellants, let me engage a little useful discourse. The subject of shifting the burden of proof is quite elusive as it is important especially in criminal cases. In other jurisdictions, shifting of the burden of proof is referred to as 'reverse burden'- a term I do not like using for it blurs the subject completely; shifting the burden of proof is much simpler, easy to understand and expressly represents the subject. Nonetheless, the subject on shifting the burden of proof becomes more complicated when one realizes that the expression ''**Burden of proof''** entails; ***'legal burden of proof'*** and ***'evidential burden'.*** The two should not be confused, and I will write something to elucidate on what each entails later. Of instant benefit to this appeal is that, after a long raging debate, dating back to the late part of 1700, on whether or not legal burden of proof could shift under any circumstances, it is now a well settled principle of law that, the legal burden of proof in criminal matters never leaves the prosecution's backyard.

Viscount Sankey L.C in the case of **H.L. (E)* WOOLMINGTON V DPP [1935] A.C 462 pp 481** in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> ***''Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception…No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''***

[11] Kenya adopted common law tradition and the position on legal burden of proof in criminal cases is as stated by Viscount Sankey L.C (ibid); the prosecution bears the legal burden of proof throughout the trial. In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except is so far as it creates only evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law. This law is consistent with and upholds the constitutional right of the accused; presumption of innocence, not to give incriminating evidence and to remain silent. Did the trial magistrate shift the legal burden of proof to the Appellants?

[12] I have perused the entire proceedings and I do not find anything which suggests that the trial magistrate shifted the legal burden of proof to the Appellants. The trial magistrate evaluated all evidence including that of the defence and came to the correct conclusion. I can just suppose that perhaps the Appellants mistook some statements by the trial magistrate to mean shifting of the legal burden on the Appellants, such as:

> ***''In my view, the injuries are consistent with assault using sticks. There is no doubt or contrary evidence adduced''.***

Or;

> ***''The 1st accused did not offer any defence as he elected to remain silent''.***

[13] But those statements do not amount to shifting of the legal burden. They were made within the context of the entire judgment, and when they are so read, they are perfectly consistent with the law. I, therefore, find and hold that the trial magistrate was alive of the law on legal burden of proof in criminal cases and she did not at any time or at all shift it to the Appellants. Her finding was that the prosecution discharged its burden of proof and had proved the case beyond any reasonable doubt. That ground fails.

[14] As I exit this ground of appeal, let me fulfil the promise I made; a précis on the difference between legal burden of proof and evidential burden.

Burden of proof: Legal burden of proof and evidential burden

[15] As I have already stated, the expression ''burden of proof'' entails two distinct concepts; ''legal burden of proof'' and ''evidential burden''. The two are different, and understanding the distinct application of each is essential. It is also important to understand the position of the law on burden of proof in criminal cases and civil cases; there is a marked difference especially on the legal burden of proof. We shall deduce that difference in the application of the legal burden from the sources I am going to quote below.

Legal burden of proof; does it shift?

[16] According to ***Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:***

> ***13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.***
>
> ***14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.***

[17] It is clear that the legal burden of proof in criminal cases is only one, and rests upon the shoulders of the prosecution; it remains constant throughout the trial and does not shift. Remember what I said earlier on this and the words of ***Viscount Sankey L.C (supra).*** Over the years, any discussion or attempt to deviate from the norm, or put in other words, to provide for the shifting of the legal burden of proof to the accused, has generated extreme jurisprudential controversy and caused problems of interpretation of statutes authorizing the shift in systems which uphold the principle of the Rule of Law and Human Rights. In many jurisdictions, Kenya included, such statutory provisions allowing the shifting of legal burden of proof in criminal cases have been declared by the courts to be unconstitutional for being inconsistent with the constitutional right to presumption of innocence and to remain silent, or have been deliberately read-down that they impose no more than evidential burden on the accused in order to make them compatible with the Constitution. The latter step of 'reading down' of a statutory provision is often taken in reliance on a Constitution that requires legislation to be construed in a manner that is consistent with it as is the case with the Constitution of Kenya, 2010. The policy considerations of this approach is; 1) to respect the will of the legislature; 2) to preserve the integrity of our statute law so far this is possible; and 3) to uphold the principles of justice enshrined in the Constitution. It is worth of note that, one might say that normally, creation of evidential burden on a party, or a shifting of an evidential burden only is unlikely to be held unconstitutional, but what really matters is the court testing the constitutionality of the shift; the decisive character and effect of the evidential burden so created on the rights of the accused. See **R v LAMBERT [2002] 1 All ER 2; R v OAKES [1986] 1 S.C.R. 103; TSE MUI CHUN v HKSAR (2003);** and **S v COETZEE AND OTHERS [1997] ZACC 2** which analysed a great many other decided cases on the subject.

[18] Does the legal burden shift? In criminal case, it does not. But in civil cases, there could be separate legal burden of proof and lying on different parties in a case with more than one issue; for instance; in a case founded on negligence, legal burden of proof of breach of duty and damages lies upon the plaintiff; while proof of contributory negligence lies on the defendant. It will also shift to the party who must make substantiation of a particular allegation or fact.

Evidential burden: does it shift?

[19] Evidential burden initially rests on the party with the legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence. On this, see ***Halsbury's Laws of England para 15***. Evidential burden is the basis for the practice in criminal law where the trial court makes a ruling as to whether the prosecution has adduced ***prima facie*** evidence as to warrant the accused person to be placed on his defence. See section 211 of the Criminal Procedure Rules. Even in civil cases, when ***prima facie*** evidence is adduced by the plaintiff, evidential burden is created on the shoulders of the defendant who must be called upon to prove the contrary. In both cases, where evidential burden has been properly created in law, the accused and the defendant are entitled to call for evidence in rebuttal, and where the evidential burden is not discharged, judgment may be entered against the defendant- in case of a civil case- or a conviction against the accused- in case of a criminal case. Except, it must be understood that, judgment or conviction will not be entered

because the defendant or the accused did not call for evidence in rebuttal; but because the plaintiff or the prosecution, as the case may be, has proved its case to the required standard. Needless to state that, the standard in civil cases is on a balance of probabilities and in criminal cases is beyond any reasonable doubt. The trial court will therefore, have to evaluate the entire evidence after the defendant or the accused has not offered any evidence to determine whether the case has been proved to the standard before entering such judgment or conviction on the evidence. The right to presumption of innocence or to remain silence in criminal cases is, therefore, not infringed. By this small treatise, I have justified the position I have adopted in my decision on ground (c) of the appeal, which also casts indents in the resolution of any issue around the question of burden of proof whenever it arises.

Whether evidence was unsatisfactory and contradictory

[20] The Appellants impleaded that: ***The learned trial magistrate erred in law in convicting the Appellants on the unsatisfactory and contradictory testimonies of prosecution witnesses.*** The advocate for the Appellants submitted that there were material contradictions on the date or recording the statement, the period the complainant was admitted in hospital and when the P3 Form was filled. PW1 had initially stated that he recorded his statement on 9.10.2009 but when he was shown the actual statement he recorded, he corrected the earlier mistake and confirmed that he recorded the statement on 28.09.2009. On admission in hospital, he simply said he was admitted in hospital and he did not state the period of the admission. I have perused the record and there is nowhere PW1 told the trial court that he was admitted in hospital for a particular period of time. I think the source of confusion is that counsel for the Appellants referred to the evidence which had been recorded by the predecessor to the succeeding trial magistrate; but as the case started ***de novo,*** that evidence is of no use. The other supposed contradiction; that PW1 said he suffered a fracture whereas the doctor said there was no fracture. I do not think PW1 is an expert in medical field to give an expert opinion on the exact nature of his injuries. PW1 could only give a general description of the injuries he suffered. The doctor's work is to give expert medical evidence about the exact nature of the injuries PW1 suffered. And that is why he was called as a witness. The doctor confirmed there was no fracture and that clarification resolves any supposed contradiction in the evidence of PW1. I do not see any material contradiction which would benefit the Appellants in this case.

[21] PW1 gave a coherent account as to how the Appellants jointly assaulted him with sticks injuring him. The doctor confirmed that PW1 sustained injuries and medical evidence in form of a P3 Form was produced in court. The assault was unlawful. PW2 and PW3 saw the Appellants assaulting PW1 with sticks; they then ran away when they saw PW2 and PW3 approaching the scene. PW1, PW2 and PW3 knew the Appellants well and saw them in the act. It was 6.00pm in a broad day light and it was not difficult to identify the Appellants as the people who assaulted PW1. The evidence before the trial magistrate was water-tight and overwhelming; it proved the charge of assault beyond any reasonable doubt. The sentence meted out was most lenient. I, therefore, uphold the conviction and sentence by the trial magistrate. The appeal is dismissed.

Dated and signed at Nairobi this 20th day of January, 2014

F. GIKONYO

JUDGE

Dated, signed and delivered at Bungoma this 20th day of January, 2014

A MABEYA

JUDGE