IN THE COURT OF APPEAL

AT ELDORET

(CORAM: WAKI, MWERA & MURGOR, JJ.A.)

CRIMINAL APPEAL NO.11 OF 2012

BETWEEN

DORCAS JEMUTAI SANG..................APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an Appeal from the decision of the High Court of Kenya at Eldoret (A. Mshila, J.) dated 8th December, 2011

in

HC.CR.A.NO.212 OF 2009)

****

JUDGMENT OF THE COURT

The appellant, ***Dorcas Jemutai Sang***, was charged with the offence of causing actual bodily harm contrary to ***Section 215 of the Penal Code***, in the Principal Magistrate's Court at Kapsabet. The particulars of the charge were that on 13th October, 2007 at Ngoroin Village, Nandi North District, she assaulted ***Stella Kirwa*** thereby occasioning the said ***Stella*** actual bodily harm.

Evidence before the lower court was that on the material day at about 10.00 a.m. when ***Stella*** (PW1) was going to the shops, the appellant, with her two children attacked her injuring her on the mouth, chest, left hand and leg. She was treated at a local dispensary. A report made to a local police station, led to the appellant's arrest and subsequent charge. Having considered all the evidence of the witnesses, including ***Naumi Chepleting*** (PW2), ***Sammy Kiplagat*** (PW3) who claimed that they were eyewitnesses, and ***Daniel Keittany*** (PW5), a clinical officer, the learned trial magistrate was satisfied that the appellant was identified as the one who caused injury to PW1. The same was certified as harm as per the P3 form produced. The prosecution had therefore, proved its case, despite the defence, of which the learned trial magistrate said the following:

> ***"The accused has denied, but she was identified by several independent witnesses nor (sic) did she call any witness to support her defence."***

We reproduce that part of the judgment as it was argued as a ground of appeal. The appellant was nonetheless, convicted and fined Sh.20,000/= in default to serve 2 years in prison. She paid the fine but then appealed to the

High Court.

The High Court, ***Mshila, J.*** heard the appeal and, in the judgment set out on a ground-to-ground basis, dismissed it. Again, because of what the learned Judge stated in her judgment, which formed the grounds of appeal before us, we are obliged to reproduce part of that judgment as follows:

> ***"I shall proceed to ground (iv) of the appeal and say that it was a significant fact that the appellant did not call or failed to call any witness at the trial."***

She added:

> ***"In an adversarial legal system like the one in Kenya, a party greatly undermines their case by failing to call witnesses. In this respect I find that this is not a ground to*** (sic) ***quashing the trial court's decision."***

As stated earlier, the appeal was dismissed by the High Court which, in essence, confirmed the conviction and the sentence meted out by the lower court.

Being further dissatisfied with that decision, the appellant has come before us by way of the second appeal which ***Mr. A. K. Magut***, learned counsel argued on two grounds, having consolidated the five grounds as per the memorandum of appeal. ***Mr. Z. G. Omwega,*** Assistant Director of Public Prosecutions, conceded the appeal.

The main arguments presented by ***Mr. Magut*** were based on the shifting of the burden of proof generally, and the lack of re-evaluation of the evidence by the first appellate court. Counsel told us that when the magistrate remarked in his judgment, as quoted above:

> ***"…that she (the appellant) did not call any witnesses to support her defence,"***

and the learned Judge remarked;

> ***"---that it was a significant fact that the appellant did not call---any witnesses at the trial,"***

thereby undermining her case in the adversarial system as obtains in Kenya, all that should be seen and read to mean that both courts below shifted the burden of proof from the prosecution to the appellant. We heard that this went contrary to the principle in criminal prosecutions where the duty to prove a charge laid against an accused person always lies on the prosecution and it is not for the accused person to prove his/her innocence by calling witnesses in that regard.

Moving to the next ground of lack of reevaluating the recorded evidence and coming to her own conclusions, we heard that the learned Judge did not do that and instead wholly relied on what the learned magistrate found, to arrive at the conclusion dismissing the appeal. In this regard the earned Judge was said to have abdicated her duty as the first appellate court and therefore this appeal must be allowed. Counsel cited to us the cases of ***Soki vs Republic** [2004] 2 KLR 21* and ***Mwangi vs Republic** [2004] KLR 28*.

On his part ***Mr. Omwega*** also held the view that it is apparent from the record that both the lower court and the High Court appeared to shift the burden of proof to the appellant which was contrary to the principle known and applied in criminal prosecutions. It is generally established and accepted, he asserted, that the prosecution should prove the guilt of an accused person and not the accused to prove his/her innocence. Counsel concluded, while agreeing with ***Mr. Magut,*** that the record does not show that the learned Judge, sitting as the first appellate court, reevaluated the evidence on record to draw her own conclusions as to the guilt or otherwise of the appellant. In conceding the appeal, ***Mr. Omwega,*** however asked us to order for the retrial of the appellant saying that the witnesses could be availed in the event such an order was made. ***Mr. Magut*** did not agree that his client be retried.

This being a second appeal, we are enjoined by the provisions of ***Section 361 of the Criminal Procedure Code***, and as has been enunciated in countless decisions of this Court including ***Njoroge vs Republic*** ***[1982] KLR 388,*** wherein it was stated in that case that:

> ***"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless these findings were shown not to be based on evidence."***

In this appeal we are satisfied that the two grounds argued before us were indeed points of law.

Beginning with the ground regarding the burden of proof in criminal prosecutions, it is trite law that it shall always and invariably fall on the prosecution, unless ***Section 111 of the Evidence Act,*** applies. It reads in the pertinent part as follows:

> ***"111.(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 law creating the offence with which he is charged and the burden of proving any fact especially with the knowledge of such a 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 circumstance 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. …"***

Thus by the operation and requirement of the provision of law above, the prosecution is enjoined to prove the guilt of an accused person to the satisfaction of the court beyond a reasonable doubt but where evidence tendered by the prosecution or in the defence, creates a reasonable doubt that the accused person committed the offence, he/she shall be acquitted. But if the accused person claims that existence of some circumstances or facts bring the case against him within any exception or exemption and he/she has such knowledge, he/she has the burden to prove the same. Therefore, other than the exception, the burden of proof in criminal cases always rests with the prosecution and cannot and should not be seen to shift to the accused person. Accordingly, all judicial officers conducting criminal prosecutions should ensure that at no

time does the burden of proof shift to the accused person and, more importantly, such a judicial officer should not appear in his/her decision to shift that burden.

In the present case we are satisfied that both the courts below appeared to or shifted the burden of proving innocence on the appellant. This we say in the light of the quotations we have reproduced above where the learned trial magistrate stated that the appellant:

> ***"…did not call witness to support her defence,"***

and the learned Judge remarked that:

> ***"…it was a significant fact that the appellant did not call …any witness at the trial."***

By these sentiments, both the courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground.

The second ground regards the duty of the first appellate court to re-evaluate the evidence on record in order to come to its own conclusions as to the guilt or otherwise of an accused person. In the case of ***Okeno vs Republic [1972] EA*** this Court said:

> ***"It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."***

The ***Soki*** Case (supra) reiterated the same principle. We have carefully gone over the judgment of the High Court. The impression left is that the learned Judge did set out all the seven grounds of appeal before her and proceeded to determine each. She concluded that:

> ***"I find no reason to fault the manner in which the trial magistrate conducted the trial nor in the manner he exercised his discretion in convicting and sentencing the appellant."***

And with, that the appeal was dismissed thereby confirming the lower court's decision to convict and the order on sentence.

This Court has stated before, on the persuasive authority of the Ugandan Supreme Court decision in ***Uganda Breweries Ltd v Uganda Railways Corporation [2002] 2 EA 634,*** that there is no set formula to which a re-evaluation of evidence by a first appellate court should conform. The extent and manner in which re-evaluation may be done depends on the circumstance, of each case and the style used by the first appellate court. The Court is expected to scrutinize and make an assessment of the evidence, but not necessarily write a judgment similar to that of the trial court. As a different Court stated in ***Odingo & Another vs Bunge, No.10/89***,

> ***"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."***

We have examined the record of the first appellate court before us and in our view, and with due respect to the learned Judge, she appeared not to have performed her duty as the first appellate court, which was to reconsider the evidence on record, evaluate it herself and come to her own conclusions. This would have meant that the Judge re-examine the evidence of each prosecution witness in the light of the defence, and conclude that the prosecution indeed proved its case beyond a reasonable doubt. There was nothing of the sort on the High Court record and so we conclude that the learned Judge did not dispose of the duty placed on her sitting on the first appeal. And in failing to do that, we are satisfied that this ground must also succeed. Indeed had she done so, she could have come across the illegal sentence imposed by the lower court, namely, a fine of Sh.20,000/=, in default to serve two years in prison. That was an unlawful sentence because the default prison term provided for under ***Section 28 of the Penal Code*** in the circumstances as this, is six months imprisonment. Had the appellant not paid the fine she could have served an unlawful sentence.

We have said enough on the appeal save to conclude that ***Mr. Omwega*** correctly conceded the appeal on the aforesaid grounds. He asked us to order a retrial. As this Court stated in ***Benard Lolimo Ekimat vs R. Cr. Appeal No.151 of 2004*** (UR):

> ***"There are many decisions on the question of what appropriate case could attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."***

The interests of justice do not so require in this case.

In the result, we allow this appeal, decline to order a retrial and direct that the fine imposed and paid by the appellant be refunded.

Dated and Delivered at Eldoret this 22nd day of May, 2015

P. N. WAKI

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JUDGE OF APPEAL

J. W. MWERA

…...

JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR