THE HON. JUSTICE TSEKOOKO

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 2/1993

ORIG. CRIMINAL CASE NO. MT. 189/91-TORORO

ERIDADI Y. FAGAYO :::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

J U D G M E N T

This is an appeal by the appellant Eridadi Yoswa Fagayo whol I shall hereinafter refer to as the appellant. He was charged with the offence of assault occasioning actual bodily harm c/s 228 of the Penal Code Act in two counts before Magistrate Grade I sitting at Tororo. The trial court found him guilty and convicted him on both counts. He was sentenced to a fine of 500,000/= on each count or 1 year's imprisonment in default. He appealed against the conviction and sentence. He gave 3 poorly drafted grounds of appeal which were as follows (in a rather rephrased form):-

1. That the learned magistrate erred in law and fact when she believed prosecution evidence and disbelieved the defence.
2. That both conviction and sentence of the learned trial magistrate was excessive and harsh.
3. That the trial magistrate's decision has caused miscarriage of justice.

Mr. Okuku who appeared for the appellant argued the appeal generally. His first argument was that the learned trial magistrate had not evaluated the evidence on record properly which led her to come to a wrong decision and that if she had correctly considered the evidence before her she would have come to a different conclusion. In support of his argument he stated that the incident was supposed to

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have taken place at Butunga village but nearly all the prosecution witnesses came from different villages which was an indication that there might have been a concoction of evidence by the prosecution witnesses. Mr. Okwanga who appeared for the respondent maintained that there was overwhelming evidence before the trial magistrate which led her to convict the appellant.

This being the first appellate court it has the power to evaluate the evidence as given in the lower court and come to it's own conclusion but bearing in mind that the trial court had the chance of seeing the demeanour of the witnesses in the witness box: Pandya v. R. (1957)EA 336 and Williamson Diamond v. Brown (1971)EA1. I have examined the judgment of the learned trial magistrate and the evidence on record and I have found that the learned trial magistrate did not faulter in any way in her finding of fact as to what happened on that day. She evaluated the evidence as put before her and came to the conclusion that the appellant had actually attacked and assaulted the 2 complainants when they were digging. There was overwhelming evidence to establish that on that fateful morning the 2 complainants were peacefully cultivating on their land when the appellant decided to attack and beat them. It is true that some of the prosecution witnesses gave different names of different villages where they lived, but each of them explained as to how he or she came to be at the scene of crime; PW1 said she was digging nearby, PW2 and PW3 said they were digging at the place where they were attacked; PW4 said he was grazing his cattle within that vicinity; so there was nothing strange about prosecution witnesses being at the scene of crime on that day.

Mr. Okuku was of the view that the trial magistrate was wrong to first evaluate the evidence of the prosecution then come to the defence case to rebut that evidence, according to him that was wrong and he based his argument on the case of: Misaki Mukasa v. Uganda (1974)HCB 3, in that case Nyamuchoncho J.(as he then was) ruled that it was wrong for the trial magistrate to evaluate the

evidence of the prosecution in isolation and then turn to the defence case for rebutal of that evidence. While I agree with this proposition of the law I would like to say that the case of Mukasa was destinguishable from the present case because in that case the appeal was allowed on the ground that the prosecution was not strong enough to support a conviction but it was not because of the wrong approach taken by the trial court, in the present case the position is different as prosecution case was strong enough to sustain a conviction.

Another issue taken up by Mr. Okuku was that the learned trial magistrate did not consider the issue of conspiracy by the complainants against the accused. With due respect to the learned counsel I do not believe this point to be a valid one because in his evidence the accused spoke of there having been land dispute between him and one Samwiri Musiiho but Musiiho was not one of the witnesses, so I cannot see how the issue of conspiracy could have arisen in this case although the 2 complainants had some connection with Musiiho. In my view even if this issue of conspiracy had been considered by the learned trial magistrate she would not have come to a different decision in view of the evidence on record. In fact the appellant in his defence stated that he did not know why the two ladies had complained against him.

One other point raised by Mr. Okuku was that the medical evidence did not show that the 2 complainants had been injured. With due respect to the learned counsel, this argument is not borne out by the evidence on record because PW6 Edyau Martin testified that when he examined the 2 complainants he found that they had been injured and he classified their injuries as harm, so it is not true to say, as the learned counsel for the appellant says, that the medical evidence did not show that the complainants were assaulted.

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There was the issue of the contradictions which the learned counsel for the appellant argued very seriously. The law as stated in the case of: Uganda v. Ngirabakunzi & ors (1988-1990) HCB 40, which was quoted to me by the learned counsel for the appellant, is that where there are inconsistencies which are minor and can be satisfactorily explained such inconsistencies should be ignored but where they are major and go to the root of the case they should be resolved in favour of the accused person. It must be said with due respect to learned counsel for the appellant that in the present case I have not been able to discover any inconsistencies in the evidence as adduced by the prosecution witnesses. One of the alleged inconsistencies pointed out by the learned counsel for the appellant was that while some other witnesses spoke of the appellant having run away before the arrival of the police, other witnesses spoke of the police having found the appellant at the scene. I have gone through all the evidence as adduced by prosecution and I have found out that all prosecution witnesses are in full agreement that the police arrived at the scene when the appellant had already left. I have not come across any peace of evidence showing that the police found the appellant at the scene of crime. This alleged contradiction is certainly not supported by evidence on record.

On the defence of alibi which Mr. Okuku spoke about in passing, the law as stated in a number of cases including the case of: Sekitoleko v. Uganda (1967)EA 531 is that the defence does not have the burden of proving the defence of alibi but has only the burden of raising it. It is the duty of the prosecution to adduce evidence which may destroy that defence by putting the accused at the scene of crime at the time the crime was being committed. In her Judgment the learned trial magistrate dealt at length with the issue of defence of alibi raised by the appellant and she came to the conclusion, quite rightly in my view, that prosecution witnesses had actually put the accused at the scene of crime

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at the time the crime was committed. It has to be remembered that the accused was not a stranger to the witnesses and the incident took place at about 9.00a.m during broad day time so the question of mistaken identity does not arise.

The last matter to be raised by Mr. Okuku was that of sentence of 1,000,000/= imposed upon the appellant on both counts which he considered to be harsh and illegal. He felt it was illegal because I year's imprisonment in default of payment of a fine was improper it should have been 3 months. I agree with Mr. Okwanga's contention that the sentence in default is not illegal but legal because under section 192(d) of M.C.A as amended by Act 4 of 1985 the default sentence may be imposed up to 12 months imprisonment where the fine is above 100,000/=, in this case the fine of 500,000/= for each count was above that amount so a default sentence of 12 months on each count was quite in order. As regards to the issue of harshness of the sentence I have only to say that an appellate court can only enhance or reduce a sentence on appeal if special circumstances have been proved: e.g an appellate court will only interfere with sentence when it is satisfied that the sentence was based on wrong principle or that the sentence is so excessive so as to be unsustainable: Harris v. R. (1921)EALR 186; Monesamy v. R. (1931)13 LR K 55; R. v. Muhomed Ali (1948)15 EACA 126; James s/o Yaramu v. R. (1951) 18 EACA 147 and Ogalo Owoura v. R. (1954)21 EACA 270. In this case the maximum sentence for the offence was 5 years imprisonment. The learned trial magistrate gave reasons why she thought a sentence of a fine of 500,000/= for each count or 12 months was appropriate. I agree with her reasons namely that this was a Headmaster of a local senior secondary school who was expected by the community around him to respect the law, a thing which he did not do. His brutal attack on an elderly woman of about 70 years was certainly a behaviour which was unbecoming of a man in his position. I find no special

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circumstances to exist in this case so as to warrant this court to interfere with the sentence meted upon the appellant by the trial court. The sentence carries with it some element of warning to the appellant and people of his like not to involve themselves in such illegal acts.

In all these circumstances I find no merit in this appeal, it is accordingly dismissed.

Before I take leave of this matter, however there are two matters upon which I would like to make an observation, the first matter concerns the way the prosecutor and the defence counsel conducted the case at trial. The prosecutor seems to have had no time to cross-examine the accused although he cross-examined all the other witnesses whose evidence was actually based upon what the accused said; I share the view expressed by the learned trial magistrate on this same issue in her judgment. The learned defence counsel did not seem to have taken the case seriously as a result the accused at times was left to conduct his case personally in the absence of his counsel whose attendance of court was so irregular. Conduct of a case should be taken as a serious matter by all those concerned.

My second observation is about two procedural matters not observed by the learned trial magistrate. In the first place the record does not show that she ever recorded her finding of a case for the accused to answer although later on when the defence case started she informed the learned defence counsel that she had made such a ruling but the record does not say so which means she might have verbally made the ruling but forgot to write it down. In the second place the learned trial magistrate does not seem to have adhered to the provisions of section 126 of M.C.A in that she did not record having told the accused of his rights under that section. The irregularities did not however affect the outcome of the case although the learned trial magistrate ought to have

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addressed her mind to the two issues, I am only surprised that the appellant did not find it necessary to make them part of his grounds of appeal albeit such inclusion would not have altered the final outcome of this appeal.

C.M. KATO

JUDGE

10/4/1995