**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable
Criminal Appeal No. 8 of 2015

In the matter between

**UGANDA** **APPELLANT**

**And**

**AKAKA RAPHAEL** **RESPONDENT**

**Heard: 12 February 2019**

**Delivered: 28 February 2019**

**Summary: appeal from acquittal for the offence of Doing Grievous Harm.**

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**JUDGMENT**

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**STEPHEN MUBIRU, J.**

Introduction:

[1] The respondent was charged with the offence of Doing grievous harm C/s 219 of *The Penal Code Act*. It was alleged that on 2nd July, 2014 at Layibi Down Shop, Techo Parish in Gulu District they unlawfully did grievous harm to Ojok Patrick.

[2] The prosecution case was that the respondent and the complainant were neighbours, sharing a common boundary. The complainant planted some flowers along that boundary to form a hedge. On 2nd July, 2014 at around 6.30 pm, the complainant returned home from work, only to find the respondent uprooting the hedge with a hoe. The complainant questioned the conduct of the respondent and in anger the respondent raised his hoe, aiming to hit the

complainant with it. The complainant warded it off with his hand but it hit him on the right thigh, fracturing the thigh bone. He collapsed in pain onto the ground and cried out for help. He was taken to hospital where an x-ray examination confirmed he had sustained a simple fracture of the right femur.

The appellant's evidence in the court below:

[3] The complainant testified as P.W.1 and stated that on 2nd July, 2014 at around 6.30 am upon return home from work, he found the respondent with another person digging up and cutting his flowers. He asked the respondent why he was cutting his flowers and the respondent retorted with verbal abuse. The respondent raised a hoe (P.E.5) in an attempt to cut the complainant with it. The complainant raised his hand in defence and the hoe hit his thigh. He collapsed to the ground as he had sustained a broken right thigh bone. He was carried to Gulu Regional Referral Hospital where an x-ray (P.E.1) confirmed that he had sustained a fractured thigh bone.

[4] P.W.2 Dr. Ocitti Moris testified that on 3rd July, 2014 examined the complainant who told him he had been hit with a hoe the previous evening. He had a tender swollen thigh. He could not walk. He had sustained an horizontal fracture of the distal femur (lower bone of the thigh). P.W.3 Amaro Imelda, a niece to the complainant, testified that while the respondent was digging in the compound at home at around 6.30 pm, the respondent was annoyed by a question asked by the complainant as to why he was digging his compound and the respondent hit him on the right thigh with a hoe. The complainant fell onto the ground and began crying in pain.

[5] P.W.4 Anywar George, a brother of the complainant, testified that at around 6.30 pm on 2nd July, 2014 he heard P.W.1 cry out, "mother I am dead." He ran to the home of P.W.1 and found him lying face down on the ground. He had sustained a broken leg. The leg bore the mark of a hoe and was swollen on one side. He secured an ambulance and took the complainant to hospital. The complainant

was admitted to Gulu Regional Referral Hospital for four days and was then referred to Mulago hospital for orthopaedic treatment. He received treatment at a cost of shs. 3,000,000/= It cost him shs. 500,000/= to secure a special hire taxi to bring him back home from Kampala. P.W.5 No. 41823 D/WC Abalo Monica, a scene of crime officer, visited the scene on 3rd July, 2014. She found a line of recently dug flowers in the compound. She also saw footmarks indicating there had been a struggle. She took a photograph (P.E.2) of the scene of crime. The wife of the respondent brought out the hoe from her house that had been used to assault the complainant. She then went to the hospital where she took a photograph of the complainant (P.E.3). P.W.6 No. 56357 D/C Kanamuwanji John Paul testified that on 3rd July, 2014 he received an exhibit of a hoe with a bamboo handle and kept it in the exhibit store.

The respondents' evidence in the court below:

[6] In his defence as D.W.1, the respondent stated that on 2nd July, 2014 he was digging at his home at around 6.00 pm when the complainant came riding his motorcycle. He sat at his veranda and began asking the respondent why he had dug his flowers. The respondent retorted that he had not exceeded the boundary and if the complainant had any issues with that, he should report to the L.C. The complainant jumped from his veranda with a stick that was V-shaped at one end and hit the respondent on the shoulder with it. The respondent left the scene and went to report to the police. He did not hit the complainant with a hoe and did not know how it got involved in the case at hand.

[7] D.W.2 Odoki Cyprian, testified that on the morning of 2nd July, 2014 the respondent reported a case of trespass onto his land by planting of a hedge. The respondent began uprooting, by digging out, the flowers that formed the hedge. At around 6.00 pm when the complainant came riding his motorcycle, he sat at his veranda and began asking the respondent why he had dug his flowers. The complainant came from his veranda with a stick and attempted to hit the

respondent with it but missed. They both began struggling for the stick. The complainant lost balance and fell onto some bricks the respondent had been gathering. He failed to stand up and was crying in pain saying his leg was broken. P.W.4 came and took him to hospital. D.W.3 No. 59966 D/C Kasadha Awali testified that on 2nd July, 2014 at around 9.22 pm D.W.2 Odoki Cyprian reported a fight that had taken place between the accused and the complainant. He came with an acacia stick that has been used in that fight.

Judgment of the court below:

[8] In his judgment, the trial magistrate found that there were contradictions in the evidence of the complainant P.W.1 Ojok Patrick and that of P.W.4 Anywar George. Whereas the complainant said he sent his children to call P.W.4 Anywar George, P.W.4 said he heard his brother cry and he responded to the cry. The evidence of P.W.1 Ojok Patrick, P.W.2 Dr. Ocitti Moris and P.W.3 Amaro Imelda was thus tainted by falsehood. The evidence of P.W.5 No. 41823 D/WC Abalo Monica who saw signs of a struggle at the scene corroborated that of D.W.2 Odoki Cyprian who witnessed the respondent and the complainant struggle for a stick. P.W.1 Ojok Patrick admitted that the spot of struggle seen in the photograph was on his side of the land. None of the prosecution witnesses alluded to that struggle. P.W.1 Ojok Patrick could not have struggled on the ground after he was hit with a hoe. It is also doubtful as to whether he fell onto bricks as stated by D.W.2 Odoki Cyprian. The cause of the injury was therefore not established. The charge was not proved beyond reasonable doubt and accordingly the respondent was acquitted.

The grounds of appeal:

[9] Being dissatisfied and aggrieved by that decision, the appellant appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact in his interpretation and application of the law relating to the standard of proof in criminal cases.

2. The learned trial Magistrate erred in law and fact on the assessment, interpretation and application of the law relating to contradictions and inconsistencies.
3. The learned trial Magistrate erred in law and fact in importing and using conjectures and fanciful theories and not evidence on record as his reasons to acquit the respondent.

Arguments of Counsel for the appellant:

[10] In his submissions in support of those grounds, the Senior Resident State Attorney argued that the complainant explained that he raised his hand in an attempt to defend himself against being struck with a hoe but it nevertheless landed on his right thigh. He denied having picked any stick to attack the respondent. P.W.3 corroborated that testimony. P.W.4 found the complainant on the ground crying in pain. The respondent denied having used a hoe yet it was picked by P.W.5 No. 41823 D/WC Abalo Monica from the wife of the respondent and was tendered in evidence without objection.

[11] He submitted further that although the complainant alleged he was assaulted with a stick, he never took it to the police nor did he report a case of assault there. Evidence about the struggle over a stick was introduced by D.W.2 Odoki Cyprian and not the respondent. There was no evidence of bricks at the scene and that version was never put to the complainant during his cross-examination. The SOCO visited the scene the following day after it could have been tampered with. The trial magistrate failed to determine whether or not the contradictions in issue were minor or grave. Although there were discrepancies over whether P.W.2 was called to the scene or responded to the complainant's cry, it was not in doubt that he came to the scene and found the complainant in pain. These were minor inconsistencies and they did not point to deliberate untruthfulness. There was no evidence pointing to any of the prosecution witnesses having been

coached yet the court in a conjectural manner found so. The decision should therefore be quashed and the respondent found guilty.

Arguments of Counsel for the respondent:

[12] In reply, counsel for the respondent submitted that the trial magistrate rightly acquitted the respondent after a proper evaluation of the evidence on record. The appeal lacks merit and should be dismissed.

Duties of a first appellate court:

[13] This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it"). An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [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 finding and conclusion; 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] E.A 424*).

The essential elements of the offence:

[14] For the respondent to be convicted of the offence of Doing grievous harm C/s 219 of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. The victim sustained grievous harm.
2. The harm was caused unlawfully.
3. The accused caused or participated in causing the grievous harm.

Whether he victim sustained grievous harm:

[15] Concerning the first element, bodily “harm” means any bodily hurt, disease or disorder whether permanent or temporary. The nature of grievous harm is defined by section 2 (f) of *The Penal Code Act* as any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense.

[16] The differences between "bodily harm" and "grievous harm" therefore are; (1) in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent (2) a mental injury may amount to grievous harm but not to bodily harm (3) in order to amount to bodily harm, the physical injury must "interfere with" health, whereas in the case of grievous harm, the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health.

[17] Both definitions require an impact on "health" yet that word is not defined by the Act. In *Tranby [1991] 52 A Crim R 228*, the Court of Criminal Appeal (Queensland) had occasion to consider the meaning of the word "health" as it appears in the definition of "grievous bodily harm" contained in section1of *The Criminal Code* (with similar wording to section 2 (f) of *The Penal code Act*). The

facts were that the appellant bit the complainant's left ear, severing a substantial portion of the lobe. He was convicted of doing grievous bodily harm. The severance did not affect the complainant's capacity to hear, and the only residual effect was a permanent cosmetic disability. The question arose as to whether that injury should be regarded as an injury to health, there being no question that the injury was not permanent. By a majority it was held that such an injury was not an injury to health.

[18] The question of whether or not the injury amounts to "bodily harm" is one of degree, which can only be decided by reference to the facts in each case. In determining this question, it is necessary to focus on the injury and its immediate consequences. Therefore, to show that the grievous harm occurred, the prosecution will rely the victim's testimony or medical records, or the testimony of doctors, or some combination thereof. The ordinary sense of the term health focuses on the functioning of the body, which of course may often be impaired by disease or illness but also by deliberately inflicted injury. An injury that has no consequence upon the functioning of the body does not involve impairment of "health."

[19] The fact that the victim has been left with only a cosmetic disability is irrelevant if the immediate consequences of the injury interfered temporarily with his or her health. It is relevant also to consider the nature of any treatment received and whether any part of the body was unable to perform its functions fully, either as a result of pain or otherwise and there may well be other relevant matters.

[20] For example, in *Pollyanna Nungari Wayne v. Michael Gerard Boldiston, (1992) 108 FLR 252; (1992) 85 NTR 8*, the victim sought medical treatment, and a number of stitches were inserted to stem the flow of blood. The victim was also given painkillers, and she was in a distressed condition whilst at the hospital. She felt a lot of pain, and was dizzy for a week, her ability to chew food properly was interfered with for about a week, her ability to move her eyes was temporarily

interfered with by pain, and her ability to speak normally was also temporarily affected. In these circumstances the Supreme Court of the Northern Territory of Australia found that the assault did interfere with her health and therefore did result in bodily harm within the meaning of that expression in the Code. the appellant reached over the counter at the complainant's place of work and slashed her across the face with the broken glass, in retaliation for the complainant having hit her in the face with a stone three days before.

[21] In the instant case, it was the testimony of P.W.2 Dr. Ocitti Moris that when he examined the complainant on 3rd July, 2014 he found that the complainant had a tender, swollen thigh. He could not walk. He had sustained an horizontal fracture of the distal femur. It was the testimony of the complainant that as a result of this injury he collapsed to the ground, felt excruciating pain and had to be carried by ambulance to Gulu Regional Referral Hospital and later to Mulago Hospital. This was corroborated by his brother P.W.4 Anywar George, who testified that he heard the complainant cry out, "mother I am dead." He ran to his rescue, secured an ambulance and took the complainant to hospital. The complainant was admitted to Gulu Regional Referral Hospital for four days and was then referred to Mulago hospital for orthopaedic treatment. Finally, Police Form 3A (exhibit P.E.1) was exhibited in court indicating that when the complainant was examined on 3rd July, 2014, the injury was classified as "grievous harm." In find that the injury sustained by the complainant substantially impaired his normal bodily functions and thus seriously injured his health so as to constitute grievous bodily harm.

Whether that harm was unlawfully caused:

[22] The second element required proof that the injury sustained by the complaint was caused unlawfully. This requires proof of an intentional wrongful act against another without legal justification or excuse and may be as a result of motives such as anger, hatred or revenge. The prosecution case is that it was caused by

an act of aggression. Exhibiting aggressive, threatening behaviour toward another or expressing a threat to cause physical harm, resulting in the complainant harbouring reasonable fear for his or her physical safety, is an unlawful or wrongful act of assault. Threat of harm generally involves a perception of injury. Assault and battery usually occur together. Causing real physical harm to someone else with intent of causing physical harm without his or her consent, is also an unlawful or wrongful act. Physical contact with the body of the victim graduates the crime of assault into one of battery.

[23] The evidence must therefore show a volitional act, done for the purpose of causing or threatening harmful or offensive contact with another person or under circumstances that make such contact substantially certain to occur, and that such contact occurred in fact. Justifications would include consent of the victim and self defence, defence of others, or defence of property. To prove self-defence, the accused must show the assault was reasonably necessary to protect the accused against equal or greater bodily harm that would have been inflicted by the victim.

[24] According to section 101 (3) of *The Magistrates Courts Act*, where in any proceedings any child of tender years called as a witness gives evidence by virtue of that subsection on behalf of the prosecution, the accused will not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating the accused. Her evidence is corroborated by that of the complainant. It is further corroborated by that of the complainant's brother P.W.4 Anywar George, testified that when he came to the complainant's rescue, he saw that the broken leg of the complainant bore the mark of a hoe and was swollen on one side. This evidence was consistent with the findings of P.W.2 Dr. Ocitti Moris as demonstrated in Police Form 3A (exhibit P.E.1) indicating that the most likely cause of injury was "assault with a blunt force."

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[25] Rejecting that evidence as unreliable, the trial Magistrate found that the inconsistence between P.W.3 and P.W.4 as to whether or not he was called to the scene or responded to upon hearing his brother scream implied the entire evidence was unreliable. The trial court misdirected itself on this account. It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002* and *Uganda v. Abdallah Nassur [1982] HCB*). The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

[26] What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case. In the instant case, the circumstances in which P.W.4 came to the scene was a peripheral issue compared to his observations upon arriving at the scene. The trial court was not justified in according it the importance it did.

[27] The trial court further relied on the evidence of P.W.5 No. 41823 D/WC Abalo Monica, a scene of crime officer, who visited the scene on 3rd July, 2014 and took a photograph (P.E.2) of the scene of crime, which indicated what appeared to be a sign of struggle at the scene. On basis of that photograph, the trial

Magistrate opined that P.W.1 Ojok Patrick could not have struggled on the ground after he was hit with a hoe. In relying on that evidence, the trial court failed to properly guide itself for a number of reasons. Not only did this evidence fail to rule out the fact that this was a consequence of the rescuers who came to lift and take away the complainant who had collapsed at that spot but also the possibility of contamination was not ruled out.

[28] Firstly, the evidence was taken from a crime scene that had not been preserved before the Scene of Crime Officer (SOCO) visited it. The events had occurred the previous evening and the witness visited the scene the following day. The trial court ought to have cautioned itself about the consequence of failure to preserve a scene of crime. Failure to protect a crime scene properly may result in the destruction or altering of evidence. Too much time elapsing between the crime and the investigation can lead to missing information and contamination.

[29] The process of collecting evidence from a crime scene is stringent; law enforcement officers must employ exacting techniques to avoid tampering with the evidence. Without use of these techniques, evidence may be lost, contaminated or overlooked. Moreover, improper collection of evidence can be deemed inadmissible in court or at a trial.

[30] The following steps are recommended to be taken by a law enforcement officer when collecting evidence: (i) the officer must secure and preserve the crime scene. Before evidence can be collected, the scene must be taped-off and secured to prevent further contamination. The crime scene must be formally established; a perimeter must be secured to only allow the entry of necessary personnel. The scene should also be photographed before any evidence is collected.; (ii) the officer must put on gloves and protective clothing to prevent contamination. The officers must first collect evidence that is fragile or susceptible to the elements. For example, hair, seminal fluid or other liquid evidence can be contaminated or lost quickly; (iii) the officers or investigators

must use cotton swabs or gauze to gather liquid evidence, such as blood. Items containing seminal fluid or blood should be transported into paper bags to hold moisture and prevent bacteria from forming. When collecting hair, thread or fibres, the officers must use tweezers.

[31] Each piece of evidence must be placed individually in sealed bags or containers; (iv) for fingerprints, the officer must employ a special powder that adheres to the oil found on the human finger. When a print is detected it will be “lifted” through the use of a special adhesive. This tape is placed on a glass slide, marked and then transported into a sealed plastic evidence bag; (v) for larger pieces of evidence, such as weapons or clothing, the officers must use plastic gloves when transporting the items. It is essential that the officers or agents at the scene do not contaminate the evidence with finger prints, liquids, bacteria or anything else that would manipulate the item or alter its surface.

[32] Secondly, the images in the photograph of what appeared to be foot-prints were not subjected to any forensic analysis. Forensic podiatry is a branch of forensic criminal investigation. Forensic podiatrists study footprints and footwear and apply sound and researched podiatry knowledge and experience in forensic investigations, to show the association of an individual with a scene of crime, or to answer any other legal question concerned with the foot or footwear that requires knowledge of the functioning foot. There are three main areas of practice within forensic podiatry, each focused primarily on providing analysis and criminal identification; Footprints, Gait Analysis (on video footage) and Footwear. According to forensic podiatric studies, the odds of a "chance match” for a footprint in the general population is one in 1.27 billion (see Robert B. Kennedy et al., “*A Large-Scale Statistical Analysis of Barefoot Impressions*,” Journal of Forensic Science 50, no. 5 (September 2005): 1071–1080).

[33] Given the distinctiveness of footprints, finding commonality and relationships between compared footprints allows for the conclusion that the same person

could have made the footprints. Once a footprint is discovered, it should be photographed. Photographs should include a ruler to show scale, and the camera should be positioned parallel to the plane of the footprint. Positioning light sources at oblique angles to a footprint may enhance its visibility. Footprints that have three-dimensional qualities, such as those made in sand or mud, should be cast after they have been photographed. Some of these aspects of the footprints subjected to analysis may include the position, shape, and contour of the toes and the overall shape of the footprints.

[34] In the instant case, there is no evidence that the footprints were similar in shape and size to those of the complainant or the respondent. When multiple footprints are found at a crime scene that was left unpreserved for that long, contamination cannot be ruled out. Failure by P.W.5 No. 41823 D/WC Abalo Monica to study and understand it, greatly diminished its value. The trial Magistrate therefore misdirected himself when he relied on such evidence to conclude that there was a scuffle between the complainant and the respondent before the complainant sustained the fracture. This was an aspect of the respondents case to the effect that the respondent assaulted with a stick, D.W.2 then witnessed a scuffle between them as they fought for that stick culminating in the complainant falling onto some bricks that the respondent had been collecting hence the fracture. The trial Magistrate rightly rejected that explanation too.

[35] In any event, if that were to be a true version, it would not exonerate the respondent. It is his aggression that would have indirectly caused the injury sustained by the complainant. It is trite that if the accused engages in aggressive behaviour, and the complainant in trying to escape from the accused as a consequence of that aggression suffers injuries, then the accused may be guilty.

[37] A charge laid upon the basis that a person has sustained injuries while trying to escape from assault by the accused requires proof that: (1) that the victim immediately before he or she sustained the injuries was in fear of being hurt

physically; (2) that his fear was such that it caused him or her to try to escape; (3) that whilst he or she was trying to escape, and because he or she was trying to escape, he or she sustained the injuries; (4) that his or her fear of being hurt there and then was reasonable and was caused by the conduct of the accused; (5) that the accused's conduct which caused the fear was unlawful; and (6) that his or her conduct was such as any sober and reasonable person would recognise as likely to subject the victim to at least the risk of some harm resulting from it, albeit not serious harm, and it is unnecessary to prove the accused's knowledge that his conduct was unlawful (see *Reg v. Mackie (1973) 57 Cr App R 453 R v. Dalby [1982] 1 WLR 621; [1982] 1 All ER 916; [1982] Crim LR 439; (1982) 74 Cr App R 348 at page 352; R v. Russell & Russell (1987) 85 Cr App R 388; [1987] Crim LR 494; Kong Cheuk Kwan v. R (1986) 82 Cr App R 18; R v. Lane & Lane (1986) 82 Cr App R 5; [1985] Crim LR 89; R v. Dawson, Nolan & Walmsley (1985) 81 Cr App R 150; R v. Mitchell [1983] QB 741; [1983] 1 WLR 676; [1983] 2 All ER 427; (1983) 76 Cr App R 293 & R v. Pagett (1983) 76 Cr App R 279 at page 292* and *Director of Public Prosecutions v. Daley [1979] 2 WLR 239*).

[38] The nature of the threat is of importance in considering both the foreseeability of harm to the victim from the threat and the question whether the victim's conduct was proportionate to the threat, that is to say that it was within the ambit of reasonableness and not so daft as to make it his own voluntary act which amounted to a *novus actus interveniens* and consequently broke the chain of causation. For example in *R v. Williams & Davis [1992] Crim LR 198; [1992] 1 WLR 380; [1992] 2 All ER 183*, the accused picked up a hitchhiker on the way to a festival. The hitchhiker jumped out of the car when it was travelling at 30 mph, hit his head and died. The prosecution alleged that the defendants were in the course of robbing him when he jumped out and thus their actions amounted to constructive manslaughter. the court found that the victim's act was not within the range of reasonable responses available to the victim in the circumstances.

[39] This required consideration of the victim's psychological state and any particular characteristics of the victim and an acknowledgement that the stress of the situation or event may lead to the victim acting without thought. In this case however there was not enough evidence that the acts of the accused had led to the victim's reaction being within the range of reasonable responses available to him

[40] On the other hand, in *Director of Public Prosecutions v. Daley, [1980] AC 237* the accused had an argument with the deceased, who ran from them, tripped on a concrete ramp and fell. He died a few days later. The accused had thrown stones at him while he was running from them. The prosecution alleged that he died as result of being hit by the stones and charged the accused with murder. It was suggested that the deceased died as a result of his fall onto the ramp. It was held that although there was no sufficient evidence that his death was the result of injuries received by being hit by stones, there were only two ways in which the deceased could have received the injuries which caused his death, that is, either by being hit by stones thrown at him by the accused or by his fall over the concrete ramp. Since the court was not satisfied that the deceased's death was caused by being hit by stones, the only probable and reasonable conclusion was that he died as a result of the injuries he received when he fell onto the concrete ramp as he was running away from the accused. There was sufficient evidence that this was a case of "manslaughter by flight" and accordingly the conviction of the accused for manslaughter were upheld.

[41] In the instant case, since the trial court was not satisfied that the injury was caused by falling onto a pile of bricks, the only probable and reasonable conclusion was that it was caused by being hit with a hoe as witnessed by P.W.1 and P.W.3 and corroborated by P.W.2 and P.W.4. Had the trial court properly directed itself, it would inevitably have come to that conclusion.

Whether the respondent caused or participated in causing the grievous harm.

[42] Lastly, there had to be evidence proving beyond reasonable doubt that the accused caused or participated in causing the grievous harm sustained by the complainant. In the instant case the respondent admitted being at the scene and that there was an altercation between him and the complainant. His version only being that it is the complainant who assaulted him instead and fell down in the process onto some bricks, and that is how the complainant sustained the injury. The respondent's version having been rejected as incredible for not being supported by the evidence on record, the prosecution disproved his defence. The trial court therefore should have found that the prosecution had proved beyond reasonable doubt that the respondent was the aggressor and not the complainant.

Order :

[43] In conclusion therefore, I find that had the trial magistrate properly directed himself he would have convicted the respondent. For that reason the appeal is allowed. The decision of the trial court is quashed. Instead the respondent Akaka Raphael is found guilty and is accordingly convicted of the offence of Doing grievous harm C/s 219 of *The Penal Code Act*.

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Stephen Mubiru

Resident Judge, Gulu

SENTENCE AND REASONS FOR THE SENTENCE

[44] The respondent has been found guilty and convicted of the offence of Doing grievous harm c/s 219 of *The Penal Code Act*. In his submissions regarding the appropriate sentence, the learned Senior Resident State attorney has prayed for a deterrent sentence on the following grounds; the respondent acted in a barbaric manner by attacking his neighbour. Conflict over land is prevalent in the

circuit and it has to be curbed. The complainant inquired why the respondent was cutting down his flowers. His response is uncalled for. The complainant suffered a broken thigh bone. The x-ray revealed this and the medical doctor's testimony. He underwent medical treatment and suffered both physical and mental trauma. He spent money in the course of the treatment. P.W4 brought evidence of expenditure. He was on remand for only three days and was granted bail. He was remanded on 7th July, 2014 and he was brought to court ion 10th July, 2014 on production warrant. This is a serious offence which attracts a maximum of seven years' imprisonment. He prayed that the court be pleased to sentence him to six years' imprisonment and to compensate the complainant for the suffering and expense.

[45] In mitigation, counsel for the respondent has sought lenience on grounds that; the respondent is a first offender, married with five children and four dependants. The maximum of seven years' imprisonment is correct. The court may give a non custodial sentence under section 108 (2) of *The Trial on Indictments Act*. He prayed that the court gives a non-custodial sentence and orders the victim to be compensated. He also prayed that the respondent is allowed to pay that compensation in instalments over a period of three months.

[46] In his *allocutus*, the respondent stated that he has a problem with the back bone and survives on corset and his wife is in the same position and he needs physiotherapy. His source of income is from employment as a teacher under Ministry of Education in a tertiary institution. He has no previous criminal record. He reported to the L.C. I who is the rightful authority and tried to comply with the law. He can still be a good citizen if cautioned. He is sorry for the crime. It was difficult to approach the relatives of the complainant for reconciliation because of the anger they had.

[47] In his victim impact statement, the complainant has stated that he suffered and faced many problems after the injury. He was carried naked from Gulu to

Kampala. For three months he could not work and he was terminated from his employment. For two years he had no job yet he has a family. Up to now he is still undergoing treatment. For five years the respondent has never apologised to him. He only waved at him when he returned from hospital. He should serve a custodial sentence and be ordered to compensate the complainant.

[48] The offence of Doing grievous harm c/s 219 of *The Penal Code Act* is a felony attracting a maximum punishment of seven years' imprisonment. The court is guided by the sentencing practice as seen in previous decisions such as *Isale Paul and another v. Uganda, H. C. Criminal Appeal No. 0022 of 2013* where in a judgment delivered on 27th August 2014, sentences that had been imposed by the trial court of payment of fines of shs. 3,000,000/= and in default, two years and six months' imprisonment plus the payment of compensation of shs. 1,000,000/= for the offence of Causing Grievous Bodily Harm C/s 219 of *The Penal Code Act,* were set aside and substituted with one imposing a fine of shs. 300,000/= and in default, two years and six months' imprisonment and shs. 100,000/= as compensation.

[49] In that case, the first appellant stabbed the complainant in the abdomen and shoulder with a sharp object later identified as a pair of scissors. In *Baganda Bernard v. Uganda, H. C. Criminal Appeal No. 0001 of 2016* a sentence of two years' imprisonment and compensation of shs. 1,500,000/= to the Complainant for the medical expenses incurred for the offence of Causing Grievous Bodily Harm C/s 219 of *The Penal Code Act* were upheld. In that case the appellant assaulted the complainant with an iron bar which occasioned grievous harm and loss of consciousness. In *Shimanya Geoffrey v. Uganda, H. C. Criminal Appeal No. 0009 of 2015* a sentence of a fine of shs. 3,700,000/= or twenty four months' imprisonment in default, plus an order that out of the said fine three million shillings was to go to the victim as compensation for the offence of Causing Grievous Bodily Harm C/s 219 of *The Penal Code Act,* was upheld. In that case the appellant inflicted a cut on the head and mouth of the victim leading to loss of

consciousness. Medical evidence showed that the victim sustained a cut would at the back of the head.

[50] In the instant case, the offence was committed within the context of a dispute over land. The respondent chose to take the law into his own hands, thereby inflicting severe bodily injury on the complainant that resulted in hardship due to loss of his job. According to section 110 of *The Trial on Indictments Act*, the discretion to impose the sentence of a fine is exercised where the relevant penal provision renders the offence punishable with a fine or a period of imprisonment or alternatively imprisonment as well as a fine. Section 219 of *The Penal Code Act* does not provide for the option of a fine as part of the possible sentence.

[51] I am however cognisant of the judicial practice of imposing fines in respect of first offenders instead of custodial sentences, by virtue of section 108 (2) of *The Trial on Indictments Act* which permits a sentencing court to impose a fine in addition to or instead of imprisonment. Although the respondent is a first offender, the offence he committed deserves a deterrent sentence considering the level of violence involved and the rampant incidents of violence erupting from disputes over land. I have considered the fact that the victim suffered pain for several months and that a deadly weapon was used, which factors place the case into the category of one of substantial gravity.

[52] Those circumstances of substantial gravity are mitigated by the fact that the respondent is a first offender who stands to be punished for a single offence and who has no other offences to be taken into consideration. He has also expressed remorse and does not seem to have had a history of violence. The offence seems to have been the product of a sudden fit of rage. In the circumstances I am disposed to think that a deterrent but primarily reformative sentence will be sufficient. It is for that reason that imposition of a hefty fine, should *prima facie* be adequate. It is on that basis that I sentence the respondent to s fine of shs.

2,000,000/= (two million shillings) or to serve three (3) years' imprisonment default.

[53] Section 126 of *The Trial on Indictments Act* confers discretion upon a trial court, in addition to any other lawful punishment, to order the convicted person to pay another person such compensation as the court deems fair and reasonable, where it appears from the evidence that, that other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit.

[54] This power to award compensation is intended to reassure victims of crime that they are not forgotten in the criminal justice system. Criminal justice increasingly looks hollow if justice is not done to the direct victim of the crime. In some cases, the victims lack the resources to institute civil proceedings after the criminal case has ended. The idea behind directing the convict to pay compensation to the complainant is to afford immediate relief so as to alleviate the complainant's grievance. It is a measure of responding appropriately to crime as well as reconciling the victim with the offence.

[55] There are obvious advantages of allowing one court to deal with the criminal and civil liability of damage caused by the offence such as; avoiding unnecessary litigation, by allowing one court to deal with both criminal and civil liability and thus secure just treatment for both the accused and the victim of the offence and saving the victim of the offence time and costs of recovering compensation or damages in a subsequent civil suit. It provides the victim with a speedy and inexpensive manner of recovering reparation. It requires no more of the victim than a request for the order. It can also be an effective means of rehabilitating the accused because this order quickly makes the accused directly responsible for making restitution to the victim. The practical efficacy and immediacy of the order helps to preserve the confidence of society in the criminal justice system.

[56] Section 126 of *The Trial on Indictments Act* is designed to accord civil justice to the victim within the criminal trial. By this provision, criminal prosecutions constitute a single proceeding, in which the criminal / civil line becomes blurred. For that reason, invoking this provision should be undertaken after careful consideration of whether or not there is no real danger of causing injustice in the criminal proceedings, since the discretion to award compensation must be exercised judiciously. A Prosecutor who desires the court to make such award needs to lead evidence relating to proof of the injury resulting out of the criminal act, and provide material to court during the prosecution case on basis of which the assessment of compensation will be made.

[57] While the court has discretion to order compensation under this provision for damage caused by the offence, it must satisfy itself not only that the offender is civilly liable, but that if a civil suit were instituted against him, he would pay substantial compensation. This means in practice that the court has to decide whether the criminal punishment is enough, or whether there is a need for compensating the victim who has suffered injury, in addition to criminal punishment which may be imposed on the convict. The victim claiming compensation must, however, establish that he or she has suffered some personal loss, pecuniary or otherwise, as a result of the offence, for which payment of compensation is essential, such as would be recoverable in a civil suit. Whether a victim who has suffered injury as a result of the commission of an offence would recover compensation in a civil suit depends very much on the nature of damage caused by the offence. Sometimes criminal proceedings may be a sufficient remedy.

[58] From the procedural perspective, the power to order compensation under section 126 of *The Trial on Indictments Act* is subject to the basic rules of a fair hearing. In order to afford an accused ample and fair opportunity to meet the claim for compensation, during the prosecution case, the court should hear prosecution evidence regarding this aspect as part of its case generally against the accused.

That way the accused will have been given ample opportunity to reply or respond to evidence relevant thereto, and at the defence stage, to adduce such evidence as he or she may deem necessary, for rebutting the claim for compensation, or the assessment thereof. If this is done during and as part of the trial of the criminal liability of the accused, the court will at the same time have heard the evidence relating to proof of the damage resulting out of the criminal act and relevant to the assessment of compensation such that upon conviction of the accused, it will be in position at the same time to determine, assess and order compensation.

[59] In the instant case, I find that there is sufficient material before the court showing that the complainant sustained material physical injury damage as a consequence of the offence committed for which substantial compensation is recoverable in a civil suit. Whereas the power to impose fines is limited, section 126 of *The Trial on Indictments Act* does not impose any such limitation. Just like the power to award general damages in civil proceedings, the power to award compensation appears to be at large but that jurisdiction cannot be exercised at the whims and caprice of a trial court.

[60] There is nothing though like a power without any limits or constraints. That is so even when a court may be vested with wide discretionary power, for even discretion has to be exercised only along well-recognised and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity. Although I do not read the section as requiring exact measurement such as is expected in proof of special damages in a civil suit, since the provision is clearly not intended to be in substitution for the civil remedy, the court should be slow to make an assessment and award of substantial amounts as compensation without clear evidence of a definite amount by admission or other proof, otherwise it risks descending into purely civil consequences of the facts that constitute a crime. Section 126 of *The Trial on Indictments Act* is not to be used *in terrorem* as a substitute for or reinforcement for civil proceedings.

[61] It is true that on account of its discretionary nature the sentencing process is traditionally permitted to proceed largely on the basis of information rather than on the basis of evidence. But the special nature of orders for compensation requires that they be made only on the basis of evidence by admission or otherwise. The section does not spell out any procedure for resolving a dispute as to quantum; its process is, *ex facie*, summary but I do not think that it precludes an inquiry by the trial magistrate to establish the appropriate amount of compensation, so long as this can be done expeditiously and without turning the sentencing proceedings into the equivalent of a civil trial. The trial magistrate should have been mindful of the fact that had the complainant been forced to undertake a civil suit to recover the sum, he would have been forced to prove his loss in a stricter manner and the fact that prospect of obtaining in a summary way from the court in exercise of its criminal jurisdiction an order of compensation equivalent to a judgment in a civil suit is an open invitation to resort to the criminal process mainly for the purpose of obtaining the civil remedy, especially in cases of crime against the person committed by persons against whom a civil condemnation is likely to be of some practical value.

[62] For that matter, an award of compensation must be reasonable. What is reasonable will depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the loss suffered the justness of claim by the victim, the ability of accused to pay and other relevant circumstances. This requires an inquiry, albeit summary in nature, to determine the paying capacity of the offender, unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that the first and the most effective check against any arbitrary exercise of discretion is the well-recognised legal principle that orders can be made only after proper evaluation.

[63] The criteria which a court must consider in determining whether an order of compensation should be made in addition to another sentence passed have been set out by the Supreme Court of Canada in *R. v. Zelensky, [1978] 2 S.C.R. 940*. There Laskin C.J. stated at p. 961:

> The Court's power to make a concurrent order for compensation as part of the sentencing process is discretionary. I am of the view that in exercising that discretion the Court should have regard to whether the aggrieved person is invoking s. 653 (*in pari materia* with section 197 of *The Magistrates Courts Act*) to emphasize the sanctions against the offender as well as to benefit himself. A relevant consideration would be whether civil proceedings have been taken and, if so, whether they are being pursued. There are other factors that enter into the exercise of the discretion, such as the means of the offender, and whether the criminal court will be involved in a long process of assessment of the loss, although I do not read s. 653 as requiring exact measurement.

[64] Laskin C.J. further observed that a compensation order should only be made when the amount can be readily ascertained, and only when the accused does not have an interest in seeing that civil proceedings are brought against him in order that he might have the benefit of discovery procedures and the production of documents.

[65] Obviously, though, neither the production of documents nor the examination for discovery will be of much, if any, significance if the amount owing to the victims is fixed and acknowledged. “Where the amount lost by the victims of the appellant's criminal conduct is admitted it would not be sensible to require them to incur the additional expense of undertaking civil proceedings to establish their loss, nor do I believe that it would assist in the appellant's rehabilitation to permit him to put his victims to this additional trouble and expense” (aptly stated by Martin J.A. in *R. v. Scherer (1984), 16 C.C.C. (3d) 30, at p. 38*). A victim of crime in a situation

where the amount involved is readily ascertained and acknowledged by the accused should not be forced to undertake the often slow, tedious and expensive civil proceedings against the very person who is responsible for the injury. In such situations, it would be unreasonable to deny the practical necessity for an immediate disposition as to reparation by the criminal court which is properly seized of the question as an incident of the adjudication over the criminal accusation.

[66] Section 126 of *The Trial on Indictments Act* confer discretion upon a trial court, to order "such compensation as the court deems fair and reasonable." This requires that as long as the damage is financially assessable, the amount ordered should be proportional to the damage caused by the wrongful act. An important consequence of the principle of proportionality is that orders of compensation should not be punitive in nature. The amount determined by court should exclusively be aimed at remedying the damage caused through the wrongful act, and not conceived as an exemplary measure. The aim should be to redress only direct damage and loss resulting from the illegal act, leaving out those damages and losses which are too indirect or remote.

[67] The court therefore takes a compensatory approach based on the principle of *restitutio in integrum*. The amount assessed by court should be exclusively aimed at remedying the damage caused through the wrongful act, but not as an exemplary measure. The aim should be ordering payment of a sum corresponding to the value which restitution in kind would bear, taking into account the ability of the accused to pay the compensation awarded. Unlike a civil court which when awarding general damages is bound to wipe out the legal and material consequences of the wrongful act by re-establishing the situation that would exist if that act had not been committed, irrespective of the defendant's ability to pay, a criminal court is required to take into account the ability of the convict to pay the compensation ordered, but remembering that such ability should not be the controlling factor in every case. A criminal court will

therefore order compensation intended to re-establish the situation that would exist if that act had not been committed, to the extent of the convict's ability to pay.

[68] An order of compensation in a criminal trial is not necessarily full reparation for the damage occasioned. The criminal court may order partial restitution if it appears the damage caused is more than the convict will be able to pay. The requirement to consider the convict's ability to pay though does not necessarily require the court to order partial restitution. The court may, for example, order an indigent convict to pay a substantial sum in restitution after reviewing the convict's employment status, expenses, liabilities, and living situation.

[69] For that reason, the trial court is not only required to assess the damage caused to the extent that it is financially assessable, but also to inquire into the paying capacity of the offender, unless the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. In determining whether to order compensation under section 126 of *The Trial on Indictments Act*, the sentencing court should consider; (a) the amount of the loss sustained by the victim as a result of the offense; and (b) the financial resources of the convict, financial needs and earning ability of the convict and the convict's dependents, and such other factors as the court deems appropriate, bearing in mind the consideration in *United States v. Mounts, 793 F.2d 125* at page 128 where the court observed that "while a [convict's] ability to pay is a consideration in the determination of restitution . . . indigency is not a bar to an order of restitution."

[70] In *United States v. Mounts, 793 F.2d 125*, this was an appeal from an order of restitution entered by the district court following the appellant's guilty plea on one count of a fourteen-count indictment. The appellant claimed on appeal that the district court erred in ordering restitution for the victim's losses associated with thirteen counts of the indictment for which he did not plead guilty. The district

court had found by a preponderance of evidence from the arraignment and sentencing proceedings, that the complainant was a victim who had sustained losses as a result of the appellant's criminal actions. With regard to count fourteen, to which the appellant pleaded guilty, the court found that the complainant had sustained a loss of US $ 273, representing the cost of reinstating Monroe's lapsed life insurance policy. With regard to counts one through thirteen, the court found that Monroe had sustained a loss totaling US $ 4,186, representing the total amount of the thirteen forged checks. The court ordered the appellant to pay restitution in the total amount of $4,459, “or such lesser amount as shall be determined in the civil lawsuit now pending in the Wyandotte County District Court.” On appeal, the court observed that such orders are intended to “restore the victim to his or her prior state of well-being' to the highest degree possible.” The court relied on that compensatory purpose in rejecting a restrictive interpretation of the term "offense" that would exclude losses caused by criminal acts which were not alleged in the indictment and for which the appellant was not convicted, and stated;

> In determining the amount of loss to a victim for purposes of awarding restitution …….., a district court is not limited either by the amount specified in the indictment or the specific transactions alleged in the indictment. Taking into consideration the evidence adduced at trial and the evidence presented in the sentencing phase of the case, a district court may order a defendant to pay restitution to any victim for the amount of loss sustained "as a result of the offense.”…… the amount of restitution, however, must be definite and limited by the amount actually lost by the victims. The court must be able positively to identify each victim to whom restitution is due and, in addition, the defendant must be given the opportunity to refute the amount ordered. Finally, the amount of restitution ordered must be judicially established…… If “offense” is not restricted to the specific acts for which conviction was had or for which the defendant

pleaded guilty, the fact that such acts are contained in the indictment and the defendant did not plead guilty to them does not automatically preclude them from becoming the basis of restitution….. an order of restitution [may be made] for losses incurred by the victim as a consequence of the defendant's criminal acts other than those for which a guilty plea was entered, when there is a significant connection between those other criminal acts and the crime for which a guilty plea was entered….. We therefore hold that when there is evidence that the defendant committed other criminal acts that had a significant connection to the act for which conviction was had or for which a guilty plea was entered, a sentencing judge may order restitution for losses resulting from such acts if the Government can prove both that the defendant caused such losses, and the amount of such losses, by a preponderance of the evidence.

[71] In his testimony. P.W.4 indicated that over shs. 3,000,000/= was incurred in medical and transport cots to restore the complainant's health. I have taken that sum to be reasonable compensation the complainant since it was not controverted during the trial. The respondent is therefore ordered to compensate the complainant, P.W.1 Ojok Patrick, in the sum of shs. 3,000,000/= payable within a period not exceeding three months from today. Full indemnity may be pursued in a civil court.

[72] The respondent is advised that he has a right of appeal against both conviction and sentence within fourteen days.

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Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : Mr. Omia Patrick, Senior Resident State Attorney.

For the respondent : Mr. Martin Oloya.