THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT FORT PORTAL

CRIMINAL APPEAL No. 0021 OF 2008

(Arising from Fort Portal Chief Magistrate's Court Crim. Case No. 557 of 2007)

ASIIMWE KAHIIGWA ……. APPELLANT

VERSUS

UGANDA ……..……..…….. RESPONDENT

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY - DOLLO

JUDGMENT

The appellant, Asiimwe Kahiigwa, was charged with the offence of doing grievous harm contrary to section 219 of the Penal Code Act. The particulars of the offence, was that he had committed this offence against one Kisembo Patrick on the 4th day of August 2007 at Kyakazini village, Kabarole District. He had denied the charge; and was therefore tried, and convicted by His Worship Godfrey Kawesa Magistrate Grade One of Fort Portal Chief Magistrate's Court, and sentenced to three years imprisonment. This appeal is against both the aforesaid conviction and sentence.

The memorandum of appeal, which was prepared and signed by the appellant himself, comprises five grounds; to wit, that:

1. The trial Magistrate erred in law and fact in holding that there was any attack causing grievous harm when the complainant has no sign of cut or disfigurement on his body to justify so.

2. The trial Magistrate erred in law and fact in convicting the appellant relying on prosecution evidence which contradicted each other in material particulars where the complainant alleges to have been attacked on the 4/8/07 and went for a police form to proceed to Buhinga hospital on 13/8/07 which is 9 days later brings a total doubt on the allegation.
3. In another contradicting statement of the complainant he said that he was treated by Virika Hospital but did not bring any medical document to justify so.
4. The original police form was not produced to court and a photocopy which was produced looked forged and unbelievable.
5. The appellant was not given opportunity to defend himself. All of a sudden he was stopped and put on cross examination and was not given time to bring his witnesses, and finally the punishment of three years without alternative opportunity was exceedingly harsh on an innocent person.

The appellant then concluded his memorandum with a plea which, in effect, urged this Court to quash his conviction and set aside the consequential sentence.

The appeal was argued by Cosma Kateeba, and Noah Kunya – learned counsels for the appellant and respondent, respectively. Counsel for the appellant, quite rightly, consolidated and argued the first four grounds together, as they were in effect all alleging that there was no evidence on which the trial magistrate could have founded a conviction. He also split the last ground into two; with the first leg being an allegation that the trial magistrate denied the appellant an opportunity to defend himself, and the second that the sentence imposed was excessive in the circumstance of the case.

The consolidated grounds of appeal having faulted the trial magistrate in his evaluation of the evidence on record, I am under duty, as a first appellate Court, to subject the evidence on record to fresh evaluation and scrutiny; and have the

powers to reach my own conclusions on the matter. In the trial the prosecution called four witnesses in a bid to prove its case.

PW1 – the alleged victim of the assault – testified that the appellant, a neighbour, had assaulted him from his (victim's) home alleging that his goats had destroyed the former's potato crops; and that this assault was committed in the presence of the wife of the appellant, and the Secretary for Defence. He stated that the appellant had wrestled him down on the graveyard in a banana plantation which was covered with stones. He testified further that the appellant had hit him on his left finger with the blunt end of the panga, and tried to cut his throat. In the struggle for the panga he had got cut in the finger.

The appellant tried to strangle him but he was rescued by his daughter and a wife to a neighbour, as the Defence Secretary had fled upon seeing the appellant attack and overwhelm him. He stated further that he was treated first at Virika Hospital for blood clot, pain, and cut wounds; and was referred to Buhinga Hospital where he was admitted for four days. He then reported the matter to the chairperson LC1 who referred him to police. The police arrested the appellant from an LC Court where reconciliation proceedings between them was going on; and in which the accused had offered shs 100,000/= as compensation.

PW2, a neighbour of PW1 who had responded to the cries for help sounded by PW1, testified that he found the appellant 'slapping' PW1 with a panga all over the body. She pleaded with the appellant not to kill PW1. At the behest of his wife with whom he was assaulting PW1, the appellant had picked a panga from his wife and attempted to cut PW1 but instead cut a banana plantation. She saw PW1 bleed from his left fingers. The appellant and his wife then fled the place where many people had gathered following the alarm she had sounded. In cross examination she stated that the appellant sat on PW1 and assaulted him all over the body; and that the appellant had his panga while his wife had hers.

PW3 who was a resident at the home of PW1 testified that she witnessed when the appellant grabbed and pulled PW1 to the graveyard, strangled, boxed, and kicked him; and also slapped him with a panga which cut PW1 on the left hand. PW1 lay on the ground bleeding from the nose and mouth. All this time the Defence Secretary stood and watched; while the wife of the appellant urged him to kill PW1 and litigate with a dead body. The appellant in an attempt to cut PW1 had cut a banana stem instead. She corroborated the testimony that there was a process of reconciliation in which the appellant had agreed to compensate PW1 with shs. 100,000/= before he was arrested by the police.

PW4 the medical officer who had examined PW1 upon referral by the police testified that he had found the victim with bruises on the right leg, and a swelling on the base of the left index finger which was stiff with pain; and in his opinion the injuries could have been caused by two objects, one light and the other blunt. He classified these injuries as harm as they were temporary. He was also told of a history of bleeding from the nose and mouth, and loss of consciousness; and in the medical report – which was admitted in evidence as Exh. PI – the witness had found that the victim could not rotate his neck. Apart from the neck immobility which he testified was a fracture, he classified these as grievous harm; as they could become permanent and harm the health of the victim.

In his brief judgment, after believing the prosecution witnesses that the assault did take place, the trial magistrate correctly discounted the classification of injury on the complainant PW1 as grievous harm due to the fact that this was founded not on a clinical examination of the victim, but rather on a reported bleeding given by the patient as history of what he had suffered. The victim had in fact reported to PW4 a few days after the event, having first had treatment at Virika hospital before going to police from where he was referred to PW4. The findings by PW4 of PW1 having suffered the bruises on the leg and the injury on his finger supports the evidence by

the victim and other eye witnesses that the accused had wrestled and thrown him in a graveyard, and assaulted him with a panga.

Despite the inconsistencies about who had the panga which the accused used in the assault – which are really minor – the evidence on record is clear that the accused had in fact 'slapped' PW1 with the panga in the course of the assault – meaning the accused had deliberately used the flat side of the panga to assault the victim. There was thus no intention on his part to occasion any grievous harm on the victim. The trial magistrate was thus justified in reducing the offence to the minor cognate offence of assault occasioning actual bodily harm in contravention of section 236 of the Penal Code Act, and of which he convicted the accused (appellant). Having made the finding above that in this regard the trial magistrate had properly evaluated the evidence adduced at the trial, I have no reason to differ.

On ground 5 of the appeal, counsel for the appellant contended that the appellant had not been afforded the opportunity to defend himself. The appellant had indicated he had two witnesses to call in his defence, but the case was closed before he could do so and judgment entered. Counsel argued that this made the trial defective and this Court ought to order a retrial on that account, unless to do so would in itself occasion an injustice.

From the record of the proceedings it is clear that the appellant was put him on his defence, and his rights explained to him. In his defence, the accused denied commission of the offence although he conceded he met PW1 that day. In effect his defence was not an alibi. He then sought to call two witnesses, and the matter was adjourned to another date for further defence hearing. On that date to which the hearing had been adjourned, what transpired is that the State counsel is inexplicably recorded to have closed the case; whereupon the Court adjourned the case for judgment, and the appellant was convicted. The intervention by the State counsel in the defence case and his purported closure of the case was certainly wrong.

State counsel had no business interfering with the defence case in that manner. Only the trial magistrate could for good reason decide that the defence case should close. That notwithstanding I have to determine whether the denial by the Court to have the appellant, who had in fact defended himself, produce witnesses to testify on his behalf had occasioned a miscarriage of justice. It is a constitutional right of an accused to be heard in his or her trial; and this includes adducing evidence through witnesses. Defence evidence can only serve to punch a hole and throw doubts in the prosecution case thereby leading Court to resolve the doubts in favour of the accused.

However, to determine whether the defect in Court's failure to allow an accused call witnesses to testify on his or her behalf amounts to a miscarriage of justice must depend on the facts and circumstance of each case. This has to be looked at in the light of the legal requirement that the burden is on the prosecution to prove its case against the accused beyond reasonable doubt; and that this burden of proof does not shift, except in certain cases, of which this is not one. I am of the considered view that the failure by the trial Court to allow the appellant call his witnesses did not in the circumstance of this case occasion a miscarriage of justice to the accused.

The second leg of ground 5 of the appeal is that the custodial sentence of three years was excessive in the circumstance of the assault. The record is that the convict was a first offender. The trial magistrate remarked that the convict did not appear remorseful. This however went contrary to the evidence on record that the convict had earlier sought out the victim for reconciliatory compensation; and in fact the police had arrested him from an L.C. sitting pursuant to that purpose. The other remark that the convict had attempted to cut the victim's throat is not borne out by the evidence as he had all the opportunity to do so but instead chose to use the flat side of the panga to consistently 'slap' the victim.

In sum, I therefore find that the custodial sentence of three years was excessive and rather disproportionate in the circumstance of this case; and while I uphold the conviction, I reduce the custodial sentence to six months in jail. Since in fact the period of six months has just elapsed, unless he is being held in prison for any other lawful cause, he must be released forthwith.

Chigamoy Owiny – Dollo

RESIDENT JUDGE; FORT PORTAL

13 – 07 – 2009