THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.055 OF 2022

NAKIGULA JALIA----------APPEALLANT

VERSUS

UGANDA----------RESPONDENT

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

The appellant being dissatisfied with the decision of Her Worship Nsenge Roseline wherein she was convicted of one count of Assault contrary to section 235 of the Penal Code Act and another count of Criminal Trespass contrary to section 302 of the Penal Code Act and was sentenced to a custodial sentence of one year.

Being aggrieved with the both the sentence and conviction, she preferred this appeal on the following grounds;

1. **That the learned Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence as a whole leading to the conviction of the appellant.**
2. **That the learned Chief trial magistrate erred in law and fact when she relied on evidence of a minor.**
3. **That the learned trial Chief magistrate erred in law and fact when she sentenced the appellant to a manifestly excessive sentence.**

The appellant prayed for the appeal to be allowed, conviction and sentence set aside.

The appeal was presented by way of written submissions. In this regard, I have perused and considered the written submissions filed by the appellant and those of respondent.

Consideration

The duty of this court as a first appellate court was stated in the case of **Kifamunte Henry V Uganda, S.C criminal Appeal No. 10 of 1997** where court held that;

"The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

Similarly, in criminal cases, the prosecution bears the burden to prove the offence against the accused. This burden of proof does not shift to the accused to prove himself innocent. The burden of proof always rests on the prosecution. This cannot be over emphasized, the prosecution must adduce evidence to discharge its burden of proof. **See**: **Woolmington V DPP [1935] A.C 462**

At the trial in the lower court, the prosecution produced 7 witnesses while the defense had the accused herself as the only witness

Ground one

That the learned Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence as a whole leading to the conviction of the appellant.

The first count with which the appellant was charged with is assault occasioning actual bodily harm contrary to section 236 of the Penal Code Act. It provides that;

"Any person who commits an assault occasioning actual bodily harm commits a misdemeanor and is liable to imprisonment for five years."

The prosecution must therefore show that there has been an assault, and that the assault resulted into actual bodily harm. There must be an intention and the assault must have taken place.

The element of men's rea in the offence of assault occasioning bodily harm is satisfied by proving that the accused had the intention to assault.

In the instant case**, PW1 Dr. Karren Assimwe**, testified that on the 22/03/2021, she was at home watching television when her daughter requested to use the latrine, that she told her maid to escort her since the latrine was outside. It was her evidence that later on, she was called by her maid who told her that someone else was in the toilet and that her daughter was trying to scream.

It was her testimony that she found the accused strangling her daughter, that the accused then turned on her and started boxing her on her stomach. That she made an alarm and some neighbors came to her rescue.

The accused was identified as Mama Able. A knife and certain liquid was also recovered from the latrine

PW1 also testified that she sustained serious injuries in the Pelvic region and spent 100,000/= for treatment that night

PW2, Amito Cinderalla also testified that the accused found her in the toilet and started strangling her, that the accused had a knife in her pocket. That it was her mum who rescued her from the accused who was pulling her. She testified that she sustained injuries on her head. The prosecution tendered in Police form 3 which indicated the injuries she sustained during the attack. The medical evidence of PW6 who examined the victim also showed that the victim had some injuries on the neck and some swellings around the left ankle which were classified as harm.

Even the other witnesses PW3 to PW7 testified to the same effect.

It is clear that the accused had formed the intention to assault the complainants when she attacked PW1 and PW2 well knowing that her actions would harm them. The learned trial chief magistrate cannot be faulted, the prosecution proved beyond reasonable doubt that it is the accused who assaulted the complainants

On the second count of Criminal Trespass, section 302 of the Penal Code Act provides that

Any person who—

(a)enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person; or

(b)having lawfully entered into or upon such property remains there with intent thereby to intimidate, insult or annoy any person or with intent to commit any offence, commits the misdemeanor termed criminal trespass is liable to imprisonment for one year.

In the case **Uganda v Kinyera & 3 Ors (Criminal Session 374 of 2018)** ***[2018] UGHCCRD 297***, it was stated that for the accused to be convicted, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. **Intentional entry onto property in possession of another.**
2. **The entry was unlawful or without authorization.**
3. **The entry was for an unlawful purpose.**
4. **That it is the accused who entered onto the premises in those circumstances.**

In the instant case, PW1 testified that she rushed to the toilet and found the accused strangling her daughter, the accused person was not staying in these premises as indicated by her evidence, that entry onto PW1 latrine was deliberate and intentional, PW1 did not authorize that entry, this in my view constituted a direct trespass on her premises. She was not a visitor and had no business being in the toilet with PW2.

As regards the element that the entry was for an unlawful purpose, this requires proof of a specific intent to commit an offence or to intimidate to annoy any person in actual possession of the premises: **See: Kigorogolo v. Rueshereka [1969] EA 426).**

It may also involve a person who or, after having lawfully entered into or upon such property, remains there with the intention thereby to intimidate, insult or annoy any person in possession of such property. See: **Uganda v Kinyera & 3 Ors (Criminal Session 374 of 2018) (*Supra)***

Furthermore, since the offence of criminal trespass is dependent on the intention of the offender, intention at the time of entry or thereafter is material for determining liability for this offence. In order to constitute the offence of criminal trespass, it is not necessary that the accused actually commits an offence or actually intimidates, annoys or insults the person in possession of the property, mere intention to do so will amount to criminal trespass. This intention can be inferred from the circumstances but it must be actual and not a probable one.

In the instant case, the accused person entered onto PW1's premises without her consent, she was not staying there, and as already noted above her intention at the time of entry was to assault or cause harm to the complainants. I therefore find that this offence was also proved beyond reasonable doubt

The learned trial magistrate therefore properly evaluated the evidence on record when she convicted the accused person of the offences she was charged with. Ground one fails

Ground two

That the learned Chief trial magistrate erred in law in fact when she relied on evidence of a minor

The general rule under Section 177 of the Evidence Act is that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

The appellant contends that PW2 was a minor aged 15 years and therefore a voire dire test was required before she could testify

Section 101(3) of the Magistrates Court Act provides:

"Where in any proceedings any child of tender years called as a witness does not, in the opinion of the court understand the nature of an oath, the child's evidence may be received though not given on oath, if in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

The record indicates that the PW2 understood the importance of an oath, her evidence was on oath and in the opinion of the trial court, the witness was possessed of sufficient intelligence to justify the reception of her evidence. PW2 understood the nature of an oath and the learned trial magistrate cannot be faulted for relying on her evidence to convict the appellant

This ground also fails.

Ground three

That the learned trial Chief magistrate erred in law and fact when she sentenced the appellant to a manifestly excessive sentence

The law is also settled that an appellate court will only interfere with a sentence imposed by a trial court if it is evident that it acted on wrong principle or over looked some material factor, or if the sentence is illegal or manifestly low or excessive in view of the circumstances of the case.

The principles upon which an appellate court may interfere with a sentence passed by a trial court were stated by the Supreme Court in the case of **Kyalimpa Edward Versus Uganda, Criminal Appeal No.10 of 1995;**

"An appropriate sentence is a matter for the discretion of the sentencing judge; each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."

The maximum sentence upon conviction for the offence of assault occasioning bodily harm is five years while that for criminal trespass is one year

In sentencing the appellant to one-year imprisonment, the learned trial chief magistrate considered the fact that the accused was a mother, a first time offender and remorseful. She also considered that the actions of the accused could have resulted into death.

It is therefore my considered view that this sentence was lenient in the circumstances and cannot be said to be excessive, it was arrived at after a careful consideration of all the mitigating and aggravating factors and was justified. The ground also fails

This appeal is accordingly dismissed.

I so order.

JUDGE

19/12/2022