THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL APPEAL NO.35 OF 2023

ARISING FROM BUGANDA CHIEF MAGISTRATES COURT CASE NO.007 OF 2022

ASHABA COLLINS **APPEALLANT**

VERSUS

UGANDA **RESPONDENT**

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

Background

The appellant, Ashaba Collins was convicted on 2 accounts of Attempted Murder contrary to sections 204 of the Penal Code Act. It was alleged by the prosecution that on the 23/11/2021 at 5:30pm at Bombo Road, Silver Arcade Building, the appellant shot a one Atugonza Hannington in the leg and it was amputated as a result. On the same day, it was also alleged that the appellant shot a one Pale Paul in the left thigh, and in the right shoulder.

At the trial, the prosecution led 6 witnesses while the appellant led evidence on his own behalf. At the end of the trial, the appellant was convicted and sentenced to 17 years' imprisonment on each count and the sentences were to run concurrently hence this appeal.

Being dissatisfied with both the conviction and sentence, the appellant appealed on the following grounds;

1. **That the learned trial magistrate erred in law and in fact when she convicted the appellant of attempted murder, without proof of malice aforethought, intention or motive to murder**

by the appellant, and in disregard of the appellant's defense of self-defense and occasioned a miscarriage of justice.

2. **That the learned trial magistrate erred in law and in fact when she convicted the appellant after a trial marred with grave and incurable procedural irregularities incapable of promoting a fair hearing of the appellant thereby occasioning a miscarriage of justice**
3. **That the learned trial magistrate erred in law and in fact in imposing a sentence of 17 years which is illegal, harsh and excessive in the circumstances**

The appellant filed his written submissions while the respondent submitted orally. I have considered their arguments in resolving this appeal.

Duty of this court

This being a first appeal, this court will be guided by the established principles of handling a first appeal. The court is under a duty to review the evidence of the case, 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. **See: Kifamunte Henry V Uganda, S.C Criminal Appeal No. 10 of 1997.**

Ground one

It is the contention of the appellant that he was convicted without proof of the key ingredient of malice aforethought or intention. He contends that the trial magistrate only considered the prosecution evidence in total disregard to his defense evidence in proving that the appellant had an intention to kill the victims.

The appellant in this case was charged with the offence of attempted murder contrary to section 204 of the Penal Code Act. The said section provides as follows,

"Any person who—

(a) attempts unlawfully to cause the death of another; or (b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life."

I also make reference to section 386 of the Penal Code Act which states as follows: -

(**1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.**

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

From the above legal provisions, the main ingredient of an attempted offence is the intention to commit the said offence, whether or not the same is

actually carried out to fruition or not. This intention is what constitutes the criminal intent or men's rea of the offence while the actual execution of any act in an attempt to commit the crime is the actus reus.

In the case of **Kijjambu Emmanuel V Uganda HCCA No.009 of 2022** it was held that the offence of attempted murder is proved by evidence of a failed or aborted attempt to murder another person. An intention is a question of the mind and can only be deduced from the overt act taken in an attempt to commit the offence. Evidence of the nature of the weapon used, the frequency of its use on the victim, the parts of the body attacked and the conduct of the accused before and after the fact are used to make an inference as to the intention of the accused person.

The acts of an accused person must be considered and determined as to whether they were intended for the death of a victim and a determination must be made on whether there was an intention to commit the act, which will all be a question of fact.

In the present appeal, two of the prosecution witnesses who were victims testified that the appellant shot and injured them. PW1 was shot in the leg while PW3 was shot on the right palm, right shoulder and leg. Their evidence remained consistent throughout the trial.

Furthermore, PW5 Kyankatuka Ethezer the medical officer who examined PW1 and PW3 testified that the victims had sustained serious injuries and had lost a lot of blood. PW1's leg was amputated as a result of the gunshot wounds and PW3 had sustained serious injuries on his right thumb, right shoulder and left thigh as a result of the shooting. The cause of the said injuries were bullets. This medical evidence corroborated the evidence of PW1 and PW3 the victims

The victims also testified that the appellant directly pointed at them a gun insisting that he was going to shoot them. This evidence is corroborated by the evidence of PW2 who testified that the appellant shot at two people in the parking yard of Silver Arcade building Bombo Road. The appellant was also positively identified. The intention in this case is deduced by the nature of weapon and the nature of injuries sustained by the victims.

It can be safely concluded that the actions of the appellant to pick a gun and directly shoot and injure PW1 and PW3 amounted to an attempt to take the victim's lives. This in my view was not mere assault by a dangerous weapon. It entailed a conscious decision to aim and injure the victims with one of the victims having their leg amputated as a result. If the result of such act was not meant to cause fatal harm, one would wonder what other intention the appellant would have had in doing so.

The possible defense of accident cannot be sustained for the mere fact that there were two victims who suffered serious injuries as a result of the shooting. I am unable to believe that the appellant shot and injured two people by accident. The circumstances of this case point to a calculated attempt on the lives of the victims.

Accordingly, it is my finding that both the mens rea and actus reus in respect of the offence of attempted murder were present in the actions of the appellant and this was adequately proven in the trial court. The intention is manifested by the manner in which the appellant shot the two victims.

Ground two

It is the contention of the appellant that the trial was marred with grave and incurable procedural irregularities incapable of promoting a fair hearing of the appellant thereby occasioning a miscarriage of justice. It is contended that whereas the appellant was convicted and sentenced by H/W Tusiime

Sarah the then Chief magistrate at Buganda Chief Magistrates Court, he was initially tried by a different magistrate. It is the appellant's submission that the convicting magistrate heard only part of the case and was not in position to make a just decision.

One of the important principles of criminal law is that the judicial officer who hears and records the entire evidence must give judgment. In **Kyakurugaha v Uganda Court of Appeal Criminal Appeal No. 51 of 2014** it was held that except where it has been established that it is no longer practicable or convenient, only a judge who has tried the case, that is heard all the evidence in the case; should be the one to dispose of that case on the basis of the evidence adduced before him.

Section 144 of the Magistrates Courts Act provides an exception to the rule that only a person who has heard the evidence in the case is competent to decide whether the accused is innocent or guilty. It provides as follows;

Whenever any magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the trial and is succeeded, whether by virtue of an order of transfer under this Act or otherwise, by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence so recorded by his or her predecessor, or partly recorded by his or her predecessor and partly by himself or herself, or he or she may resummon the witnesses and recommence the trial; except that—

(a)in any trial the accused may, when the second magistrate commences his or her proceedings, demand that the witnesses or any of them be resummoned and reheard;

(b)the High Court may, whether there is an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was held, if it is of opinion that the accused has been materially prejudiced by that evidence, and may order a new inquiry or trial.

The section is intended to meet the case of transfers of Magistrates from one place to another and to prevent the necessity of trying from the beginning all cases which may be part-heard at the time of such transfer.

The section also empowers the succeeding Magistrate to pass sentence or to proceed with the case from the stage it was stopped by his preceding Magistrate. The successor Magistrate can act on the evidence recorded by his predecessor either in whole or in part. If he is of the opinion that any further examination is required, he may recall that witness and examine him, but there is no need of re-trial.

The section also deals with part-heard cases, when one Magistrate who has partly heard the case is succeeded by another Magistrate either because the first Magistrate is transferred and is succeeded by another, or because the case is transferred from one Magistrate to another Magistrate. The second Magistrate need not re-hear the whole case and he can start from the stage the first Magistrate left it.

Most importantly, the section requires the accused person to demand if need be that the witnesses be summoned and reheard. I have perused the record and there is no evidence that the appellant demanded the second magistrate to resummon or rehear the evidence. This is no such evidence on record.

Secondly, the appellant must show that he was materially prejudiced by that evidence. No prejudice has been shown; it is clear that the second magistrate relied on the evidence recorded by his predecessor to convict the appellant.

It is therefore within the discretion of the succeeding magistrate to either summon the witnesses again or proceed with the evidence already recorded. The use of the **"may"** in that section implies that it's within the discretion of the magistrate to make that determination or not. The appellant has failed to show how materially prejudiced by the new magistrate considering the evidence already on record. The record indicates that the appellant was accorded a fair hearing at all stages of the trial. This ground is dismissed.

Ground three.

The appellant contends that the sentence is illegal for not deducting the exact period the appellant has spent on remand, and that it was also harsh and excessive in the prevailing circumstances.

The position of the law on the period spent on remand is provided for under Article 23(8) of the Constitution. It provides that,

Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment

The Supreme Court in **Rwabugande Moses Vs Uganda SCCA No.25 of 2014** gave meaning to the above provision. "**It is our view that the taking into account of the period of remand by court is necessarily arithmetical. This is because the period is known with certainty and precision……."**

The sentencing notes of the learned trial magistrate were that **"This being a serious case, the convict is sentenced to 17 years in prison on each count including period spent on remand to run concurrently."**

With due respect, that sentence was couched in general terms. That the sentence includes the period spent on remand by the accused is ambiguous. It cannot be unequivocally ascertained that the court accounted for the remand period in arriving at this sentence. Am in agreement with the appellant therefore that the trial magistrate was in error for failure to properly consider the period spent on remand.

As to whether the sentence was harsh and excessive, 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 trial 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: **See: Ogalo s/o Owousa vs. R (1954) 21 E.A.C.A. 270**

The maximum punishment for offence of attempted murder is imprisonment for life. In sentencing the appellant, the learned trial magistrate considered the aggravating factors which were that one of the victim's leg was amputated and that victim had undergone costly medical treatment. The learned trial magistrate also noted that the appellant was not remorseful however the lack of remorsefulness cannot be used as an aggravating factor. Be that as it may, I find that there was no miscarriage of justice, the sentence of 17 years was justified as the offences committed by the appellant could have led to the death of the victims.

But having found that the period of remand was not considered, I shall invoke the powers of this court under section 14 of the Judicature Act. I shall proceed to vary the sentence by considering the period of remand of the appellant.

The appellant before his sentence and conviction had been on remand for 1 year,4months and 12 days. This period if deducted from the 17 years comes to 15 years,7 months and 18 days.

Accordingly, the appellant is sentenced to a term of imprisonment of 15 years,7 months and 18 days starting from the date of conviction. Both these sentences shall run concurrently.

Save for the adjustment of the sentence to take into account the period spent on remand, I find that the appeal has no merit and is hereby dismissed.

Right of Appeal explained.

I so order.

JUDGE

4/4/2024