THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRMINAL APPEAL NO. 71/93

ARISING FROM CRIMINAL CASE NO. 58/93

OF CHAHI COURT- KISORO/KABALE

ERIYA NGAMBEKI :::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

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

BEFORE: THE HONOURABLE MR. JUSTICE F.M.S. EGONDA—NTENDE

JUDGMENT

The appellant, Eriya Ngambeki, was convicted on two counts by Magistrate Grade I at Kisoro. The first count was causing grievous harm contrary to Section 212 of the Penal Code Act. The second count was obstructing Police Officers in due exercise of their duty contrary to Section 106 of the Penal Code Act. He was sentenced to a term of imprisonment of 2 years on the first count and 6 months on the second count and the sentences were to run concurrently. He now appeals against such conviction and sentence.

The Prosecution called 5 witnesses in support of these charges. PWI was Semasaka Joseph, the complainant who was recorded to be R.C.II Chairman for Bunagana Parish and a resident of Kasibo village.

On the 21/4/93 he escorted 2 Police Officers who were executing a Warrant of arrest against Baryelekana of Bunagana village. They reached his home at about 6:00 p.m. Baryelekana initially resisted arrest until he was forcefully handcuffed. He accepted to go to the Police. When they reached Kadihiro Trading Centre they found a crowd of people including the appellant, his eon Tegela, and several others both unknown a known to PWI, The Appellant asked where the prisoner was being taken and the witness told to the Police. He demanded a letter and was shown a copy of the warrant of arrest. His son said it was forged and the Appellant told the witness to

release Baryelekana and told the crowd to beat the witness group was a thief. Stones were thrown at the witness ad Baryelekana was untied by Ngambeki. Police Officers shot in the air and they moved away from the scene without Baryelekana.

PW2 was Pangalas Mbarulekyeye and Headmaster of Bunagana Primary School, Re accompanied the chairman R.C.II, the Police Officers and to Baryelekana's home on the 21/4/93, Baryelekana initially refused arrest until he was tied up. He accepted to go to the Police. On the way they met a big group of people in which the accused was. The group stopped the witness and his party and asked where they were taking the suspect. They were told the arrested person was being taken to the Police and the warrant of arrest was shown to them. They objected calling it forged, and the Appellant and the witness's group should be beaten. Stones were thrown aimed mainly at PWI who was hit on the chest by the ribs and fell down. Baryelekana was untied by the Appellant and his group. A Police Officer shot upwards but in vain. The witness assisted the chairman by taking him home as he had fallen unconscious. The following day PW1 reported to the Police and was forwarded to hospital.

PW3 was Dr. Ndgagizimana Damman attached to St. Francis Mutolere Hospital. He testified that on 22/4/93 he examined PW1 and found on that/the chest cage of Semasaka there was confusion, After an X—ray he found that the fifth rib was broken. He classified the injury as grievous ham. A medical form was admitted in evidence.

PW4 was No.27630 PC Naku attached to Bunagana Police Post. He testified that on the 21/4/93 they had a warrant of arrest to arrest Pascal and in the company of PWI, PW2 and another Police Officer went to Pascal's home to arrest him. He initially resisted but after application of reasonable force to his hands were tied up. After walking for about a Kilometer they met a group of people in which the Appellant was. They demanded for a warrant of arrest which was shown to them. They resisted and one said unless the witness and his group finished them they wouldn't let them go. They threw stones at the witnesses group and PWI was hit by a stone on the ribs. 3 bullets were shot to scare the Appellant and his group without success. The arrested person was untied. The witness returned to the station.

PW5 was No.27289 PC Adiku attached to Bunagana Police Post. He stated that armed with a warrant of arrest for Pascal from court he went in the company of LC.II Chairman PWI, PW2 and R.C.II Secretary for Information to arrest Pascal. They found him at his home and he violently resisted arrest claiming the warrant of arrest was forged. Force was applied and he was arrested. On the way they met a group of people including the Appellant. They demanded for the warrant of arrest. It was shown to them and was dismissed as a forgery. Appellant told the witnesses group that they could not take the suspect unless all of them were killed. They started throwing stones to the witnesses' party and one hit the Chairman on the chest. 3 bullets were fired? The suspect was untied by the Appellant and his group. They left without Pascal and the following day PW1 made a report. With that evidence the Prosecution closed its case.

The defence called 4 witnesses including the Appellant himself who testified on oath.

The Appellant, Eriya Ngambeki, gave evidence on oath. H stated that on 21/4/1993 he went to attend a wedding of his niece at Gihuranda. In his own words during cross examination "on 21/4/93 I went to the party at 8:00 p.m." and, I stayed the night there," Later on still in Cross examination he states:-

"At 6:30 I was at the place where I slept."

He stayed the party the whole night and left the following day.

The second defence witness was Baryelekana Pascal who is referred to in the proceedings as DWI. He was arrested on the 21/4/93 by Police Officers in the company of W PWI and others and while on his way to the Police Station they met a group of elders at Kadihiro who said that he could not be arrested at night. In his own words ho states:—

"At Kadihiro some elders came and said I wouldn't be arrested at night. They left me there, our Defence Secretary went and united me then next day I reported to the Police."

The third defence witness was Joseph Sanura referred to as DW2. He had a party at his home and he invited the Appellant who is brother in—law. The Appellant turned up with his two wives and one son. He states that the Appellant arrived at the party at 2:00 p.m.

The fourth witness was Rurakunda Augustine, a son of the Appellant, referred to in the proceedings as DW3. He stated—

“On 21/4/93 it was early morning, father told me I would carry beer to the wedding at 2 p.m. We set off, went to a wedding at Rukindi. We drunk and spent a night there. We spent the whole day there up to 2 p.m. The following day at 2 pm. the Owner of the wedding bid us farewell…..”

During cross examination he stated—

“It is true I went to Rukindi we arrived there at about 3:30p.m.”

The fifth witness was Henry Shuma who was a Chief in the area. On 24/4/3 he received from Bunagana Police Post instructing the witness to tell John Tegemi, Butera, Sebahungu, Baryelekana and Baganda to report to the Police Post for having assaulted the Appellant. The following day he went to Kisoro Police and explained that some of these people were not there. He was given another letter to summon the ones present. The second letter included the names of the Appellant which had not been included in the first letter. The letter was put in evidence.

From the evidence above it is not in dispute that DWI was arrested b Police Officers in the company of the Chairman R.CII Bunagana and other civilian officers between 6.00 and 6:30 p.m. on the 21/4/93. As they proceeded to the Police Post at Bunagana they met a group of people at Kadihiro Trading Centre, who stopped them. There is disagreement between the defence and prosecution whether the Appellant was among the group that stopped PW1’a party. Notwithstanding that disagreement it is not in dispute on the evidence from both sides that the group that was found at Kadihiro Trading Centre effectively stopped PW1’s party and released DWI. Some bullets were fired in the air and stones were thrown at PW1’s group leading to the injury of PWI as described by PW3, a Medical Officer. The prosecution in m view has established:-

(a) That PWI was assaulted and suffered grievous bodily harm.

(b) That the Police were obstructed in the execution of a warrant of arrest on DWI,

The questions that confronted the trial court and now still confront this court are:—

(i) Whether the Appellant was present at the material time at Kadihiro Trading Centre and obstructed the Police in execution of the warrant of arrest against DWI.

(ii) Whether the Appellant was present at the material time at Kadihiro Trading Centre and threw a stone at the PW1 which injured him.

The Appellant has set up the defence of Alibi. On the material and time he claimed that he was a way attending a wedding party for the whole night and came back the following day in the afternoon. It is the law that once an accused sets up Alibi as a defence it is the duty of the prosecution to adduce such evidence as would destroy the defense of Alibi. There is no duty on the defence to prove the alibi. The burden of proof rests on the prosecution to show that the defence of alibi does not hold water by placing the accused firmly at the scene of the crime.

Where the accused adduces evidence in support of the defence of alibi a court is entitled and indeed duty bound to consider such evidence as offered together with the evidence by the prosecution and determine beyond reasonable doubt whether or not the accused committed the crime or crimes in question.

Grounds No1, 2, and 3 of the Appellants Memorandum of Appeal are in essence one ground to the effect that the trial court ought to have found that the Appellants alibi had not been disproved and should have succeeded. Indeed when this was pointed out to learned counsel for the appellant, Mr. Kanyunyuzi, he argued it as one ground. He submitted that the Appellants evidence on alibi ought to have been believed by court. In his view it was buttressed by the evidence of DW4 — Shuma the Chief who in the first letter of 24/4/93 from the Police no reference was made to the Appellants name as one of the people who assaulted PW1. In the cross examination of DW4, it was brought to his attention that the appellant was arrested and released on Police bond prior to the writing of the letter of 24/4/93. This may well be sufficient explanation as to why the appellant’s name appeared in the 2nd letter and not the first letter to the witness.

The evidence of the Appellant is not quite consistent on the question of time. The Appellant states that he was at the party at 8:00 p.m. and later that he was at the place where he slept at 6:30 p.m. which is the same place as where the party was held, DW3, his son claims that they

left 2:00 p.m on 21/4/93 and arrived at 3:30 p.m. Even if one allowed some margin of error if they had no watches the between 3:30 p.m. and 6:30 p.m. or 8:00 p.m. is very wide.

DW2. Joseph Sanura in whose hose the party was held stated that the Appellant arrived at 2:00 p.m. This is inconsistent with the evidence of the appellant and his son DW3.

The prosecution placed the Appellant at 6:30 p.m. or soon thereaft.er at the head of the group that assaulted PWI on 21/4/93 at Kadihiro Trading Centre. He was identified by all the prosecution witnesses. According to DW3 — the Appellants son — the journey from the Appellants home to the party place was one hour and a half. It was therefore possible to be at Kadihiro Trading Centre at 6:31 p.m. to 7:00 p.m and still attend the party the Appellant speaks of.

The inconsistency in the Appellants evidence as regards time with regard to the events of 21/4/93 seems to reflect an attempt to place the Appellant away from the scene of crime at the material time. This attempt in my view is unsuccessful. The Appellant was placed by unshakeable evidence at the scene of the crime and I would thus reject the defence of Alibi.

Counsel for the Appellant then argued grounds No.4, 6 and 5 in that order I will proceed to consider them. Ground 4 is to the effect that the learned trial Magistrate erred in believing evidence of the prosecution which was inconsistent. He submitted that the witnesses never mentioned the Appellant as having thrown a stone that hit the PWI. But this is not true. The evidence of PWI is clear on this point. He names the Appellant as having thrown the stone that hit him. The other prosecution witnesses testify that the Appellant appeared as the leader of the, group. Even if the Appellant was not identified as the person who had thrown the stone that hit PWI there is enough evidence to show the existence of a common intention to obstruct the execution of the warrant of arrest against DWI and the assault of PWI. The Appellant led the group and participated in, its unlawful actions. He would thus still be liable to be convicted as a principal offender.

Counsel attacked the evidence of PWI who had testified that DW2 was handcuffed but had been untied by the Appellant. He wondered how he could have been untied by the Appellant when handcuffed. Looking at the evidence of the prosecution and the evidence of DW2 himself it is clear that DW2 was tied. Handcuffing may have been the wrong expression by a layman but

DW2 was definately tied at the time of his arrest and untied at the time of his release. In the main I find no inconsistency in the evidence for the prosecution. Ground No.4 therefore fails.

Ground No.6 was to the effect that the above errors constituted a miscarriage of justice. Counsel for the Appellant submitted that the trial Magistrate closed the Appellants case without allowing the Appellant time to call his last witness. This, however, is not true. It is the Appellant who closed his case and offered to call no further evidence on 3/8/93. If the record is not accurate it should have been specifically attacked on this aspect probably with an affidavit sworn by the Appellant. Accused is recorded to have stated after the evidence of DW4 on 3/8/93 as under:-

> "Accused: My other witness is not here, I close the defence case at this stage."

He made no application for adjournment on that day as he had done on the previous occasions. Of course in cases where an accused is not represented the trial court has a duty to explain to the accused his rights so as to ensure that he is afforded a fair trial. The ease for the defence opened on 23/7/93. The Appellant testified and it was adjourned to 26/7/93. The trial Magistrate was sick on that day. It was fixed for hearing on 28/7/93 but was apparently heard on 27/7/93. DWI testified. It was adjourned to 30/7/93. DW2 testified on 30/7/93. It was adjourned to 2/8/93 and DW3 testified on that date. It was adjourned to 3/8/93 for another defence witness to be called. On 3/8/93 DW testified and the Appellant closed his case. Considering that a trial ought to be from day to day until completion I see no prejudice suffered by the Appellant on this score.

Counsel for the Appellant argued that the conviction was bad in law because the trial court did not state the law under which the Appellant was convicted. This is contrary to the provisions of S.134 (1) f the MCA. The trial court commenced its judgment in the following manner:—

> "Accused Eriya Ngambeki is charged on two counts. Under the first count he is charged of causing grievous harm c/s 212 of the Penal Code Act..... On the second count accused is charged of obstructing Police Officers in due execution of their duty c/s 106 of the Penal Code Act. Particulars ..."

At the end of his Judgment the Magistrate stated:—

> "Having found as above, I find that the prosecution's case outweighs the defence. The prosecution has made out its case beyond all doubt and I find accused guilty of the charges and I do convict accused on both counts as charged."

I think it is clear which offences the Appellant was convicted of. It may be preferable that as the court pronounces the conviction it should in the same breath specify the exact law and offence in respect of which the conviction relates. The Magistrate may have been inartistic in his approach but I find that he complied with Section 134(3) of the MCA.

Ground No.5 dealt with sentence. It was argued that the trial court was to, harsh and did not take into account the age of the Appellant. He is stated to be 63 years old. The trial court considered in sentencing that cases of this nature are on the increase. The Appellant was dealt a deterrent sentence to deter other people from taking the law in their hands and to protect law abiding citizens.

No evidence was adduced to show that these particular offences were on the increase in the area. The trial court therefore had no basis in arriving at this conclusion perhaps save a statement by the Prosecutor for a maximum sentence so that others learn from him. The value of stiff sentence as a deterrent to the commission of crime is doubtful. Retribution or punishment may easily explain the need at times for stiff sentences.

It is important that in ordinary circumstances the punishment not only fits the crime committed but the offender as well. In order to determine this there must be sufficient information before the court led both by the Prosecution and Defence. This may present no difficulty where an accused is represented as his Advocate will canvass every possible point to the accused's benefit. But where the accused is unrepresented, mitigation assumes even greater importance as the accused is unlikely to understand what are the mitigating circumstances and how should they be presented to court. More often than not, the accused will just say 'I pray for lenience.' This is what practically occurred in this case. The following is recorded:—

> "Allocutus:

Accused: - I pray for mercy because I have a wife under pregnancy with no one to look after her."

In arriving at a fair sentence the trial court where possible should determine the extent of blameworthiness of the offender. Why was the crime committed? As the accused was not represented the court ought to go a little further and examine the accused so as to determine all mitigating factors in favour of the accused and take the same into account as well as the aggravating factors that may exist in the circumstances of each particular case before passing sentence. This was not done in this case. The learned trial Magistrate just concluded:—

"There is no reasonable explanation from the accused why he behaved the way he did."

Without having inquired or examined the accused in this regard at all. He then went on to take into account the so called increasing commission of the offence of obstruction of Police Officers in the execution of warrant of arrests without receiving any evidence to substantiate this matter. It is thus not surprising that the learned trial Magistrate arrived at a rather harsh sentence for count No.1.

I notice that the Appellant was sentenced on 11/8/93 arid, has now served period of over slightly six months. The sentence imposed on him for count No.1 is reduced to such a period as will allow him to walk out of this court a free man this morning. It is accordingly reduced to 6 months imprisonment. I will leave the sentence for count No.2 at six months and order that they were to run concurrently.

The appeal in s far as it relates to sentencing is allowed and dismissed in so far it relates to conviction. So be it.

F.M.S. EGONDA NTENDE

JUDGE

22/2/1994