THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-CM-0028-2003

(From HCT-05CR-CN-066-2003

((From MBR-0O-CR-CO-0667-2002)

ASAPH KAKURU ……APPELLANT

- vs

UGANDA ……...RESPONDENT

BEFORE: THE HON JUSTICE P. K. MUGAMBA

JUDGMENT

The appellant was on 26th November 2003 convicted of Doing Grievous Harm by the Chief Magistrates Court Mbarara. He was subsequently sentenced to imprisonment for 1 year. He was also to pay Shs. 1,000,000/ as compensation to the victim. This appeal is against conviction and the custodial sentence.

Let me note at the outset that the appellant was first charged under section 212 of the old Penal Code Act. It has since become section 219 of the current Act. Essentials remain the same.

In his memorandum of appeal the appellant sets out four grounds which are the following:

1. The learned Chief' Magistrate erred in law in holding that the offence allegedly committed amounted to grievous harm.

2. The learned trial Chief Magistrate erred in rejecting the accused's testimony that Kankiriho participated in the scuffle and further holding that there was no struggle for a panga between him and PWI.

3. The learned Chief Magistrate did not evaluate the evidence adduced by the accused but instead believed the evidence by the prosecution wholesale without any proper analysis.

4. The sentence imposed on the accused was excessive in the circumstances.

Regarding the first ground of appeal Mr. Kahungu-Tibayeita, counsel for the appellant, argued that the severing of a finger or part of it does not amount to grievous harm. He cited for support *Francis Kiiza - vs- Uganda [1983] HCB 12* where it was held that loss of a tooth by the complainant did not amount to conviction of the assailant for doing grievous harm. Another case counsel cited was that of *Uganda - vs- George Ogwang [1978] HCB 233* where the complainant's small finger was fractured. It was held on appeal that such fracture did not lead to the conclusion that the offence of doing grievous harm had been committed. Counsel was emphatic that the case of *George Ogwang* was on all fours with the present case. He said the learned Chief Magistrate had erred when she held that the offence of doing grievous harm had been committed in the present case.

I have stated earlier that the offence under review is defined under S. 219 of the Penal Code Act. Section 2 (f) of the same Act defines grievous harm inter alia as any harm which amounts to a maim. And section 2 (6) of the Act defines a maim as the destruction or permanent disabling of any external ---organ. PW1, PW2 and PW3 in their testimonies stated that PW1 had his fingers cut. The appellant does not deny this either. PW5 gave medical evidence and produced the medical report. The report shows that there was loss of parts of digits and external haemorrhage. He classified the injuries inflicted as grievous harm. That also was the finding of the learned Chief Magistrate. I do not find the two authorities quoted by learned counsel apt. It is not clear how old the complainant was in *Francis Kiiza.* Who is to tell whether it was not owing to the tender age of the complainant court found the injury was not of a permanent nature because after the milk tooth is extracted another tooth takes its place thus averting the prospect of permanent harm? As for the *George Ogwang* case one cannot seriously argue that a finger which has had a fraction of it severed bears any similarity to a finger that has been fractured. In any case while the former is of a permanent nature the latter is but temporary.

I agree with the learned State Attorney in his contention that the holding of the Chief Magistrate was properly arrived at as concerns the offence charged.

Coming to the second ground of appeal, only the appellant herein gave evidence implicating Kankiriho in the scuffle. The appellant also introduced in his evidence the element of a struggle for a panga between the appellant and the complainant. Others of the witnesses who were present at the scene and later testified were unanimous in stating that Kankiriho was at the time the events unfolded inside the well. What is more, there is no mention by anybody save the appellant of a struggle for a panga on the occasion. From all the foregoing this ground cannot succeed.

The third ground of appeal castigates the finding of the Chief Magistrate blaming it on failure to properly analyze the prosecution as well as the defence evidence. It is contended by the appellant's counsel that the judgment was biased as it relied only on the prosecution evidence. Counsel stated that the complainant was part of a mob that invaded the appellant's land and that consequently the appellant had used reasonable force to repulse the invasion. Counsel noted that that fact was not taken into account by the learned Chief Magistrate in his finding. Another matter counsel says the Chief Magistrate did not consider was that the tip of the complainant's finger had been cut off by one of the mob.

I did not find any of the above concerns borne out either in the evidence generally or in the judgment. The presumptions just do not add up. Even assuming that the appellant was annoyed at finding so many people on land he considered his there was no urge for him to take out a lethal weapon and inflict the injury he did on anybody, let alone the complainant. There is overwhelming evidence it was the appellant who inflicted the injury complained of. There is no way Kankiriho who was at the time inside the well could have been involved. It was the finding of the Chief Magistrate that the evidence given by the appellant was simply not credible. I find the Chief Magistrate properly evaluated the evidence before her and I elicit no bias in the process. Misinterpreting evidence or a document is not evidence of bias. See: *Libyan Arab Uganda Bank Bagalaliwo - vs- Adam Vasialidas, SCCA No. 9/85* (unreported)

On the final ground, I agree with the learned State Attorney entirely. Given that the maximum sentence for the offence is 7 years' imprisonment the sentence of 1 year's imprisonment is by no means excessive.

All in all this appeal stands dismissed.

P. K. Mugamba
Judge
10th March 2004

10th March 2004
Appellant in court
Ms Amumpaire for the State
Mr. Rutazaana court clerk
Court:
Judgment read in court.

P. K. Mugamba
Judge