THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CR-CN-0040-2009

(FROM BUSIA CRIMINAL CASE NO. 628/2009)

NASIBIKA PETER WEJULI……..APPELLANT

VERSUS

UGANDA…….RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

The appellant Nasibika Peter Wejuli represented by M/s Majanga & Co. Advocates is related to the complainant Fulumera Nabwire. The complainant is grandmother to the appellant. They lived in the same compound. According to the complainant's testimony she refers to the appellant as a village mate whom she had known for 2½ years. It is the appellant who refers to the complainant as grandmother.

This appeal is against the judgment and orders of the Magistrate Grade I Busia given on 1st December 2009 wherein he found the appellant guilty of the offences of Assault occasioning actual bodily harm contrary to section 236 of the Penal Code Act and Malicious damage to property contrary to section 335(1) of the Penal Code Act.

The appellant was sentenced to 5 years imprisonment on each of the two counts. The sentences were to run concurrently.

The state is represented by Alpha Ogwang the Resident State Attorney Mbale.

The memorandum of appeal contains four grounds to wit:

1. That learned trial Magistrate erred in law and fact and occasioned a substantial miscarriage of justice in failing to consider the defence of claim of right by the appellant in the circumstances of the case.
2. The learned trial magistrate erred in law and fact and occasioned a substantial miscarriage of justice in failing to afford the appellant a fair trial by admitting on record the appellant's plain police statement made at the police while the appellant was in custody.
3. The learned trial Magistrate erred in law and in fact in failing to exhaustively review and consider the evidence on record.
4. In the Alternative and without prejudice to the above 3 grounds the learned trial Magistrate erred in law in imposing a manifestly harsh and excessive sentence upon the appellant.

The appellant moved this court for orders that:

a) The appeal be allowed.
b) The conviction and sentence be set aside.
c) In the alternative reduce or set aside the custodial sentence.

I allowed both counsel to file written submission in support of their respective cases.

I have considered the said submissions in relation to the evidence adduced in the lower court and the judgment of the lower court's trial Magistrate. I have related the same to the grounds of appeal. This being a first appellate court its duty is as was pronounced in the often quoted case of ***James Nsibambi v. Lovinsa Nankya HCCA 84 of 190*** per Odoki J (as he was) and I agree that,

> "*An appellate court on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh exhaustive examination. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions. Only then can it decide whether the Magistrate's findings can be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness*."

Having this statement of the law in mind, I will now deal with the grounds of appeal as argued by learned counsel for the appellant.

Grounds 1 and 3

According to Mr. Majanga learned counsel for the appellant, the trial magistrate failed to consider the defence of claim of right after failing to exhaustively review the evidence on record. That the appellant had a claim of right on the trees which he cut.

On the other hand, the learned Resident State Attorney contends that the appellant had no honest claim of right to the said trees. That the appellant did not, whether by mistake or not, believe that the property in the trees was his. The State Attorney relied on the testimonies of PW.1, PW.2, and PW.3 and submitted that the trees were planted by the complainant's (PW.1's) late husband not the appellant. That the appellant cannot claim the trees which are in the complainant's compound when the two homes were on two separate sides of the road. That the appellant' claim that he planted the trees are false.

In his defence, the appellant testified that:

> *"…At around 12:00noon, the fence of the kraal of goats had fallen. I got a panga from the house, I cut some trees. I share the same compound with the complainant Fulumera*

Nabwire who is my grandmother. The time I was cutting the trees my grandmother was not around I got the poles I had cut and started repairing the kraal fence at around 2:00p.m. At the time there was no problem. That the trees are mine and I planted them. It is not true that my trees were planted by my grandfather."

The appellant alleged that he had a grudge with his grandmother about land his brother and grandmother wanted to sale.

According to PW.1 Fulumera Nabwire she testified that on 1 December 2008 at around 6:00p.m, while at home, she heard trees being cut and falling. On going there she found the appellant at the scene. When she asked him why he had cut her trees, the appellant failed to answer but proposed that they negotiate over the matter so that she does not forward the matter to the Gombolola. That when she continued to argue with the appellant, he grabbed and assaulted her twice on the buttocks, legs and all over the body. That the appellant told her that women do not have authority over land and trees. That the complainant's husband donated the land the appellant lives on.

A defence of claim of right is provided for under S.7 of the Penal Code Act thus:

"*A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud*."

As rightly pointed out by Mr. Majanga learned counsel for the appellant, a honest belief whether justifiable or not that the property is the appellant's own would negative the element of *mens rea*. That an appellant's honest claim would negative *mens rea* and would warrant an acquittal of an accused person. ***Byekwaso Mayanja Sebalijja v. Uganda [1991] HCB 15***.

This is the general position but court has to be satisfied that there was a possibility (a reasonable and not fanciful possibility) that there were grounds on which the appellant could claim that the trees he cut were his even though he was mistaken. In that case the appellant would be entitled to acquittal.

Upon perusal of the prosecution evidence, I am not convinced that the appellant had a honest claim of right on the trees he cut. That land the appellant lives on was donated to him by the complainant and her late husband. I did not doubt the evidence of the complainant that the trees were planted by her husband. The trees were in the compound of the complainant near her house. When the appellant was found cutting the trees, he proposed a settlement so that the matter is not reported to the Gombolola. The appellant and complainant (PW.1) do not share a compound. The appellant's home is on the upper side of the road whereas the complainant (PW.1's) home is on the lower side of the road. PW.2 and PW.3 confirmed that the appellant did not share a compound with PW.I. They confirmed that the trees in question belonged to PW.I. I agree with the submission by the learned Resident State Attorney that the appellant's claims that he planted the trees were baseless and lie. The defence of claim of right was and is not open to the appellant. There was no honest claim over the trees.

In my considered view therefore, the charge of malicious damage to property is tenable since I have found that the defence of bonafide claim of right is not open to the appellant. He knew he was doing wrong and he arrogantly told his grandmother that women do not own land or trees. Grounds 1 and 3 will fail.

Ground 2

In her submission, the learned resident State Attorney agreed with learned counsel for the appellant that the trial magistrate erred in law and fact by admitting on record the appellant's plain police statement. She submitted however, that no miscarriage of justice was occasioned.

According to the certified record at P.12 thereof, the state said,

> "*The witness is saying different facts from his statement I wish to tender his statement in evidence*."

The accused in apparent objection said:

> "*I didn't put my signature on my statement*."

Then summarily the court admitted the statement in evidence as follows:

> "*Statement tendered in evidence as prosecution exhibit B.*"

In his judgment, the trial magistrate considered this evidence. This was wrong because the procedure for admitting the said evidence was not followed. The

appellant should first have been cross examined on the statement after the person who wrote the statement was called to exhibit it in court.

A police statement cannot become evidence against the maker since it is not on oath. Its purpose is merely to contradict evidence on oath.

If prosecution intended to use the statement in evidence then it ought to have been handled as provided under S.23 of the Evidence Act. Since the appellant was already in police custody the statement should have been made in the presence of an officer of or above the rank of Assistant Inspector or a Magistrate after a caution.

Although this be the case, still a conviction based on such statement must be corroborated by other material evidence in support of the confession implicating the maker.

In the instant case, I agree with the submission by learned counsel for the appellant the trial magistrate did not satisfy himself on the correctness or accuracy and truth of the statement he admitted in evidence. The statement was wrongly admitted. This ground of appeal would succeed to that extent.

Although the statement was erroneously admitted, there was other strong evidence as outlined above to prove the offence of malicious damage to property. This case did not solely depend on the evidence of the statement. As a first appellate court I will disregard that part of the evidence and maintain my earlier finding. I agree with the Resident State Attorney that the trial Magistrate arrived at his final decision after evaluation of all the evidence on record and not the accused person’s

police statement only. I have found no miscarriage of justice. This case is distinguishable from ***Uganda v. Emukulat Martin HCCRA 48/1994*** because in the latter case, there was no other evidence on record sufficient to support the conclusion of the trial magistrate. Ground 2 therefore fails.

Learned counsel for the appellant did not address court on the charge of assault occasioning actual bodily harm c/s 236 of the Penal Code Act.

Ground 4:

The appellant was convicted on both counts as charged and was sentenced to 5 years imprisonment on each count to run concurrently. According to Mr. Majanga learned counsel for the appellant, the maximum sentence for assault occasioning actual bodily harm c/s 236 is 5 years imprisonment. That the trial magistrate awarded the appellant the maximum sentence which was harsh. The learned resident State Attorney contends that the sentence was not harsh because the appellant beat up his 60 year old grandmother. That the sentence running concurrently reflected leniency.

I agree with the principles governing sentencing which were laid down in the case cited by learned counsel for the appellant ***UGANDA V. CHARLES ELIBA [1978] HCB*** per Odoki Ag. J as he was. The said principles are echoed in a South African case of ***THE STATE V. MUKWANYANE (1995), Case No.CCT/3/94*** of the Constitutional Court of South Africa. Although this decision referred to the death

penalty, the pronouncements are relevant to all sentencing processes. It was held *inter alia* that,

> "*Mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused persons conduct, and these factors must then be weighed with the main objectives of punishment which have been held to be: deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention……..*"

In the instant case, both charges with which the convict was charged carry a maximum sentence of five years imprisonment. The learned trial magistrate sentenced the appellant to the maximum on both counts and ordered the sentences to run concurrently. The convict is a first offender. His mitigation was that he is on ARVs and had a chest problem. That his wife who was helping in sustaining the family was told not to do manual work for 6 months. His children have stopped going to school. He prayed to be put on community service. The State asked for a deterrent sentence and compensation to the complainant.

I will agree with learned counsel for the appellant that the sentence of 5 years on each count to a first offender coupled with an order of compensation of 100,000/= to the complainant was harsh in the circumstances. The assault was not grave. The damage to the trees was also not extensive. The court ought to have considered the manner in which the offence was committed, the actual loss and the prevalence of the offence and then the circumstances of the offender which include his social position and his character to guide it to arrive at a fair and well balanced view of the gravity of the offence of assault and malicious damage.

Although the learned trial magistrate had discretion to impose sentence which the appellate court may not interfere with unless it is illegal or based on wrong principles, I am of the view that in this case, the learned trial magistrate based his maximum sentence to a first offender on wrong principles.

Appeal will be allowed on ground 4 regarding sentence. The maximum sentence of 5 years on count I and 5 years on count 2 are hereby quashed and set aside.

I will substitute therefore a sentence of 6 months on the charge of assault and 8 months on the charge of malicious damage to property. The order for compensation is set aside since no reasons were given for its arise. In any case the appellant is serving sentence. Sentences to run concurrently.

This appeal is allowed to the extent outlined. I so order.

Musota Stephen

JUDGE

10.8.2010

10.8.2010

Appellant in court.

Namakoye Resident State Attorney on brief for Alpha Ogwang.

Kimono Interpreter.

Resident State Attorney: We are ready to receive judgment.

The appellant in court.

Court: Where is the lawyer?

Namono: We normally hold brief for Mr. Majanga. I hold brief.

Court: Judgment delivered.

Musota Stephen

JUDGE

10.8.2010