THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
HOLDEN AT KAMPALA
HCT-CR-CN-0081 OF 2011

BIRUNGI HASSAN AND OTHERS:::::::::::::::::: APPELLANTS
VERSUS
UGANDA:: RESPONDENT

BEFORE; THE HON. JUSTICE LAMECK N. MUKASA

JUDGMENT:

Representation:

Mr. Nesta Byamugisha of Counsel for the Appellants

Ms Alpha Ogwango State Attorney for the Respondent

Court clerk

Mr. Kutosi Charles

JUDGMENT:

The Appellants Birungi Hassan and Gariyo Henry, were jointly charged with Rashid Doha, convicted of the offence of Doing Grievous Harm contrary to section 219 of the Penal Code Act and were each sentenced to 12 months imprisonment by the Buganda Road Chief Magistrate Court.

The Appellants appealed against the decision on the following grounds:

1. The learned trial Chief Magistrate erred in law and fact when she failed in her duty to evaluate the evidence thereby occasioning a miscarriage of justice.

2. The learned trial Magistrate erred in law and fact when she treated the evidence of the prosecution and that of the defendant separately in convicting the Appellants.
3. The learned trial Chief Magistrate erred in law and fact in convicting the appellants on the basis of the Prosecutions case which was not proved beyond reasonable doubt.

At the hearing, the above grounds were reframed by counsel for the Appellants into one ground;

> ***In convicting the Appellant for the offence of doing grievous harm the learned Trial Chief Magistrate erred in law and fact.***

Counsel for the Appellants submitted that on the evidence on record the Appellant should not have been charged or convicted of the offence of Doing Grievous Harm. PW4, Dr. Nsereko Mukasa, who examined the complaints found extensive multiple bruises, swelling and tenderness in various parts of the complainant's body which the witness classified as grievous harm. He found the injuries consistent with assault with blunt instruments like hard plastic pipes, with considerable force. The witness defined ***"Grievous Harm"*** as "harm amounting to a maim or seriously affecting health of an individual". On police Form 3, exhibit P1, "Grievous harm" is defined as:-

> *"Any harm which amounts to maim or dangerous harm, or seriously or permanently injures health or which is likely to injure health or which extends to permanent disfigurement or to any permanent injury to any internal or external organ, membrane or sense".*

and ***"Maim***" is defined to mean:-

> **"The destruction of any external organs, membrane or sense".**

Mr. Byamugisha quoted the definition of "Maim" in the Cambridge International Dictionary of English where it is defined as:

> ***"To injure a person so severely that a part of their body will not work as it should".***

Counsel submitted that from the evidence there was no part of the complaint which was maimed in the context of the above meaning. Section 21 of the Penal Code Act stipulates:

> ***"Any person who unlawfully does grievous harm to another commits a felony and is liable to imprisonment for seven years."***

The section is under Chapter 21 of the Penal Code Act which provides for offences endangering life or health.

In her submission Counsel for the State conceded that the injuries sustained did not amount to maim as there was no permanence of injury. She however contended that there was harm as defined in police form 3.

As a first appellate Court this Court has a duty to re-evaluate all the evidence before the lower court and make up its own mind. See Pandya vs R. (1957)EA 336, Kifamunte Henry vs Uganda SCCrim Case No. 10 of 1997.

The best evidence as to classification of body injuries is the medical evidence. The doctor's findings were only multiple bruises swelling and tenderness. There was no evidence of any permanent disability or destruction of any bodily part of the complaint.

The evidence on record cannot sustain a conviction for the offence of Doing Grievous Harm contrary to section 219 of the Penal Code Act.

Ms. Ogwang submitted that the evidence was sufficient to prove the offence of occasioning bodily harm Section 236 of the Penal Code Act provides:-

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

"Harm" as defined on PF3 means any bodily hurt, disease or disorder, whether Permanent or temporary. The doctor's evidence clearly shows that the complainant suffered bodily injuries.

Section 87 of the Trial on Indictment Act provides:-

> ***"When a person is charged with an offence and facts are proved which reduces it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it".***

It is similarly provided by section 145 of the Magistrate Courts Act.

The issue is whether it was the Appellants or any of them who so assaulted the complainant. The complainant Ochan Daniel Anthony (PW1), testified that on 1st April 2009, he had gone to Imperial Royale Hotel to deliver a printer to one Pamela at a workshop in the Hotel. That as he was going out he met A2 Birungi Hassan (1st Appellant) who greeted him and told him he had been looking for him. A2 called A1, Rashid Doha and A3, Gariyo Henry (2nd Appellant). The three led him down stairs. That A1 told him to lie down, he refused then A1 hit him with a cable and A3 kicked him and he fell down. A2 said this is a smart criminal. A1 took him to a shower room, turned on water which started pouring on him and hit him several times. That he was taken on a patrol vehicle to Jinja Road Police Station.

"I was bruised all over the body, I was wet and could not walk,".

That he was hit all over the body using a cable and pipe. He further stated:-

"A1 assaulted me seriously A3 kicked me, A2 did not touch me but only encouraged the others by saying that I was a smart criminal…….. The assaults started at 4.30 p.m. I spent with these people between 2 hours to 3 hours……".

In cross-examination he stated:

"A1 could have assaulted me for thirty minutes….He was using a cable, I was down trying to protect myself……"

PW3 Opolot Alfred Michael, the Chief Security Officer, Golf Course Hotel, testified that on 1st April 2009 he was called by A2 that they had arrested a person who was about to steal a laptop. He went to Hotel Royal; and found the complainant under arrest seated down. That A1 picked a computer cable

and started using it to assault the complainant. A3 then kicked him. He further stated:-

> ***"A2 was moving up and down, he came later with police officers. As we were discussing with the police officer on how to take the suspect, A1 picked him and took him to a next room where he dumped him in water, they were there for three to four minutes. Ochan came back wet, dripping with water"……I tried to caution A1 and A3 but they could not listen……."***

In his testimony Birungi Hassan, the 1st Appellant admits stopping and questioning the complainant. He stated that he took the complainant and handed him to his immediate boss, Rashid Doha(A1). That he left to go to CPS to handle another case.

The 2nd Appellant, Gariyo Henry (A3) in his testimony denied kicking or in any way assaulting the complainant. He testified that as he passed the security office he saw many people on the floor. That Rashid Doha told him that the complainant was a thief. He left and went home.

In her judgment the learned Chief Magistrate held:

> ***"Much as the evidence shows that A2, Hassan Birungi did not physically assault the complainant, he was present and encouraged the other accused persons, A1 and A3 by saying that the complainant was a smart criminal. He stood by while the complainant was being brutally beaten by A1 and A3. He is also held liable. The evidence against A1 and A3 is unequivocal".***

Counsel for the Appellants submitted and I agree, as the learned Chief Magistrate also found that the 1st Appellant Birungi Hassan did not at all assault the complainant. He initiated the arrest but did not participate in the assault.

The prosecutions evidence clearly point to Rashid Doha (A1) as the principal or key assailant.

The complainant and PW3 testified that the 2nd Appellant Gariyo Henry kicked the complainant once and he fell down. The 2nd Appellant admits in his testimony being at the scene of assault though denies kicking or at all assaulting the complainant. The prosecution evidence shows that he kicked the complainant which was an assault. It is immaterial how many times he did it. The fact that the 2nd Appellant assaulted the complainant was proved beyond reasonable doubt.

Ms Ogwang submitted that on the evidence on record all the three accused persons were guilty as joint offenders under section 20 of the Penal Code Act.

It states:-

> ***"Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of that purpose an offence is committed of such a nature that its commission was probate consequence of the prosecution of that purpose, each of them is deemed to have committed the offence".***

In Hajji Birikadde vs Uganda (1986) HCB 6 the Court of Appeal held that in order to prove common intention it is not necessary to prove a prior agreement between the assailants. It is sufficient if their intention can be inferred from the presence of the appellant, his actions and omission to disassociate himself from the attack.

The evidence shows that the common purpose which all the accused persons set out to do was to effect an arrest of a suspected thief. True the arrest was initiated by the 1st Appellant and it was done. The 1st Appellant never participated in the assault committed thereafter. The complainant testified that:-

> ***"A1 told me to lie down, I refused and then A3, kicked me and I fell."***

The second Appellant only participated to the extent of this single kick which can be justified in effecting an arrest. Despite the 1st appellants statement that the complainant was a smart criminal he was moving up and down to get the police to take away the complainant. That shows that his sole intention was to effect the arrest. The medical evidence does not point to any bodily injury attributable to the kick.

Considering all the evidence adduced before the lower court I find that there was no sufficient evidence adduced to prove the offence of either doing grievous harm or assault occasioning actual bodily harm against any of the two appellants.

The appeal succeeds. I accordingly set aside the conviction and sentence by the lower court. The Appellants are set free forthwith.

LAMECK N. MUKASA
JUDGE
8/11/2012