IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal l Appeal No. 0005 of 2018

In the matter between

UGANDA **APPELLANT**

And

ORYEM BOSCO OLAKA **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Criminal Law— *Doing grievous harm C/s 219 of The Penal Code Act. — In the case of grievous harm, the injury to health must be permanent or likely to be permanent, the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health, whereas, to amount to bodily harm, the injury to health need not be permanent — There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as the perpetrator or an active participant in the commission of the offence. — The prosecution will ordinarily show that the grievous harm occurred by adducing the victim's testimony or through medical records, or the testimony of doctors, or some combination thereof — the question of whether the injury amounts to "bodily harm" is one of degree, which can only be decided by reference to the facts in each case. —The evidence must therefore show a volitional act, done for the purpose of causing harmful or offensive contact with another person or under circumstances that make such contact substantially certain to occur, and that such contact occurred in fact .*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent was charged with the offence of Doing grievous harm C/s 219 of *The Penal Code Act*. It was alleged that on 6th April, 2017 at Juba village in Lamwo District unlawfully did grievous harm to Locaa Andrew Lopalamoi.

The appellant's evidence in the court below:

[2] The prosecution case was that there was a land dispute between the complainant and the father of the respondent. During the year 2015, the dispute was resolved in favour of the complainant but he was ordered to refund shs, 50,000/= On multiple occasions the complainant was summoned to the L.C but he declined to attend contending that the matter had been resolved. On the fateful evening, the respondent went to the home of the complainant to deliver another summons. The complainant opened the door and the respondent handed the summons to him. The respondent then proceeded to hit the complainant on the chin with an object, kicked him and then hit him on the back of the head. The complainant closed the door but realised he was bleeding from a wound on the chin and at the back of the head. The following morning he reported to the L.C.1 Chairperson who referred him to the police from where, four days later, he went for medical examination. The wound at the back of the head was classified as grievous harm.

The respondent's evidence in the court below:

[3] In his defence, the respondent testified that on 6th April, 2017 at around 3.00 pm he went to the home of the complainant intending to serve summons. He did not find anyone at home and he left the summons with the L.C. Chairperson. On his way back from a clinic at the trading centre where he had taken his sick child, he passed by the hone of the complainant and found his wife sleeping. The complainant was not at home. The following day he returned to the home of the complainant her he was insulted by the complainant's daughter had told the

complainant had been assaulted the previous evening. He did not assault the complainant since he was at home nursing his sick child at the time the complainant was allegedly attacked. D.W.2 Oriba Sam testified that the complainant had been drinking at his bar on the evening of 6th April, 2017. He left in a drunken state at around 9.00 pm but fell in the process and could have hurt himself, although he did not see the injury because it was dark. D.W.3 Obuk James testified that he escorted the complainant home because he was drunk. He had no injuries on his body at the time. The following day he learnt that the complainant had been assaulted from his home and had sustained injuries.

Judgment of the court below:

[4] In his judgement, judgment delivered on 26th February, 2018 the trial Magistrate found that the prosecution proved beyond reasonable doubt that the complainant was assaulted during the evening of 6th April, 2017. The medical officer testified that the injury on the head was a tearing of the skin while that in the chin was a bruise. During his testimony, he re-classified by downgrading the injury from grievous harm to harm. It is the complainant and his wife who implicated the respondent in inflicting the injuries. Both witnesses knew the respondent before and could not have been mistaken in their identification of the respondent as the perpetrator. However, the testimony of D.W.3 Obuk James though showed that the complainant was too drunk when he was taken back home. In this witness' opinion, his father was too drunk at the time to have been able to stand on his own. He could not have sobered up in less than an hour to be able to open the door for the respondent and to remember who could have hurt him. He could have sustained the injury in his state of drunkenness. Much as they proved that the complainant was assaulted and that he sustained harm as a result, the prosecution failed to prove that it is the respondent who assaulted the complainant. The respondent was accordingly acquitted of the offence of Assault occasioning actual bodily harm C/s 236 of *The Penal Code Act*.

[5] Counsel for the appellant filed a notice of appeal but did not file a memorandum of appeal nor submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did the respondents file submissions. However, considering that under section 28 (1) of *The Criminal Procedure Code Act*, a criminal appeal is commenced by a notice in writing signed by the appellant or an advocate on his or her behalf, it was incumbent upon this court to consider the merits of the appeal, despite the lapses of the appellant.

Duties of the first appellate court.

[6] This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it").

[7] An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should 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 witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

Ingredients of the offence of Doing grievous harm.

[8] For the respondent to be convicted of the offence of Doing grievous harm C/s 219 of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. The victim sustained grievous harm.
2. The harm or injury was caused unlawfully.
3. The accused caused or participated in causing the grievous harm.

1st issue; whether the victim sustained grievous harm.

[9] Bodily harm is any physical injury that interferes with health. Section 2 (f) of *The Penal code Act* defines "grievous harm" as any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense. The differences between the two definitions are (1) that in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent (2) a mental injury may amount to grievous harm but not to bodily harm (3) in order to amount to bodily harm, the physical injury must "interfere with" health, whereas in the case of grievous harm, the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health. Both definitions use the word "health" which is not defined by the Act.

[10] The prosecution will ordinarily show that the grievous harm occurred by adducing the victim's testimony or through medical records, or the testimony of doctors, or some combination thereof. The question of whether the injury amounts to "bodily harm" is one of degree, which can only be decided by reference to the facts in

each case. In determining this question, it is necessary to focus on the injury and its immediate consequences. An injury that has no consequence upon the functioning of the body does not involve impairment of "health." The fact that the victim has been left with only a cosmetic disability is irrelevant if the immediate consequences of the injury interfered temporarily with her health. It is relevant also to consider the nature of any treatment received and whether any part of the body was unable to perform its functions fully, either as a result of pain or otherwise and there may well be other relevant matters. The ordinary sense of the term health focuses on the functioning of the body, which of course may often be impaired by disease or illness but also by deliberately inflicted injury.

[11] In, *Pollyanna Nungari Wayne v. Michael Gerard Boldiston, (1992) 108 FLR 252; (1992) 85 NTR 8*, the victim sought medical treatment, and a number of stitches were inserted to stem the flow of blood. The victim was also given painkillers, and she was in a distressed condition whilst at the hospital. She felt a lot of pain, and was dizzy for a week, her ability to chew food properly was interfered with for about a week, her ability to move her eyes was temporarily interfered with by pain, and her ability to speak normally was also temporarily affected. In these circumstances the Supreme Court of the Northern Territory of Australia found that the assault did interfere with her health and therefore did result in bodily harm within the meaning of that expression in the Code. The appellant reached over the counter at the complainant's place of work and slashed her across the face with the broken glass, in retaliation for the complainant having hit her in the face with a stone three days before.

[12] In the instant case, P.W.1 Locaa Andrew Lopalamoi, testified that in the evening hours of 6th April, 2017 he was struck on the chin and back of the head. He bled from both injuries. The following morning he reported to the police. He was given a medical form which he took to Lukung Health Centre III. He was examined and treated. The injury was classified as grievous harm sustained from assault. P.W.2 Owona Charles testified that early morning of 2nd July, 2017 at around

9.00 am, he saw an injury on the cheek and another on the back of the complainant's head. His clothes were soiled with blood. He wrote a letter referring him to the police post. P.W.4 Anek Trezina, wife of the complainant, testified that she was at home when she heard noise outside and saw the complainant bleeding from the cheek and the head. The complainant told her that he had beaten him shortly after being handed a letter.

[13] P.W.3 Okumu George a medical Officer at Lukung Health Centre III testified that he examined the complainant on 10th July, 2017 (four days after the incident) and found that he had a lacerated wound one to three days old at the back of the head. In his opinion, a blunt object must have been used to inflict the injury. He classified the injury as grievous harm, but the wound being only skin-deep, he re-classified it as "harm" during his testimony. There was no wound on the cheek but mere tenderness. The medical form was tendered in evidence as exhibit P. Ex.1. On basis of all that evidence, I find that the injury sustained by the complainant interfered temporarily with his health but was not life threatening. The prosecution did not prove classification as grievous harm but only as actual bodily harm.

2nd issue; <u>whether that harm or injury was caused unlawfully</u>.

[14] This requires proof of an intentional wrongful act against another without legal justification or excuse and may be as a result of motives such as anger, hatred or revenge. Exhibiting aggressive, threatening behaviour toward another or expressing a threat to cause physical harm resulting in the complainant harbouring reasonable fear for his or her physical safety is an unlawful or wrongful act. Threat of harm generally involves a perception of injury. Causing real physical harm to someone else with intent of causing physical harm without his or her consent, is also an unlawful or wrongful act. Assault and battery usually occur together. Physical contact with the body of the victim graduates the crime of assault into one of battery.

[15] The evidence must therefore show a volitional act, done for the purpose of causing harmful or offensive contact with another person or under circumstances that make such contact substantially certain to occur, and that such contact occurred in fact. Justifications would include consent of the victim and self-defence, defence of others, or defence of property. To prove self-defence, the accused must show the assault was reasonably necessary to protect the accused against equal or greater bodily harm that would have been inflicted by the victim.

[16] It was the testimony of P.W.1 Locaa Andrew Lopalamoi that he was attacked from his home in the evening hours of 6th April, 2017. He was struck on the chin and back of the head. This is corroborated by his wife P.W.4 Anek Trezina, who testified that she was at home when she heard noise outside and saw the complainant bleeding from the cheek and the head. The complainant told her that he had beaten him shortly after being handed a letter. That the injury could have been sustained as a result of a fall during the drunken state of the complainant, as stated by the trial Magistrate in his judgment, is not supported by evidence.

[17] Many times a gap in the direct evidence may result in inferences of other possible causes. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. Other plausible theories or other reasonable possibilities must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. For an inference to be reasonable, it must rest upon something more than mere conjecture. The prosecution may need to negative reasonable possibilities, but certainly does not need to disprove every possible conjecture which might be consistent with the injury. The bare possibility of an alternative cause should not present a court from finding the fact of causation, if that cause is the only inference open to reasonable persons upon a consideration of all the facts in evidence. Decisions are not made on the basis of mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or

public feelings. In the absence of proof of a material fact necessary to support a basic inference, the court enters the field of conjecture. A finding of causation only reflects the recognition that no plausible evidence of other possible causes was presented at trial. There can be no inferences unless there are objective facts from which to infer other facts which it is sought to establish (see *Caswell v. Powell Duffy Associated Collieries Ltd., [1940] A.C. 152 at 169*). An inference that does not properly flow from the established facts is mere conjecture and speculation.

[18] In the instant case, it was the evidence of the complainant's son D.W.3 Obuk James that when he carried the complainant back home, he was too drunk and he left him lying down on a sleeping mat. By that time he had no injury. It is not possible from that context to infer the possibility that he sustained the injury as a result of a fall in a drunken state. He first complained of the injury about an hour later when his home had been visited by a person intending to deliver summons. That person had been seen by his wife P.W.4 Anek Terezina, shortly after which she heard noise outside and saw the complainant bleeding from the cheek and the head. In those circumstances, there was no evidence suggesting an excuse of justification for the attack on the complainant. The prosecution proved beyond treasonable doubt that the injury was not sustained, not by a fall, but rather by a deliberate unjustified attack on the complainant. It was an unlawful attack.

3rd issue; <u>whether the accused caused or participated in causing the injury</u>.

[19] There should be credible direct or circumstantial evidence placing the accused at the scene of the crime as the perpetrator or an active participant in the commission of the offence. In his defence, the respondent raised the defence of alibi; he was at home nursing his sick child at the time the complainant is alleged to have been assaulted.

[20] The accused does not have to prove that alibi. The burden is on the prosecution to place the accused at the scene of the crime, and sufficiently connect him to the commission of the offence (see *Uganda v. Sabuni Dusman [1981] HCB 1*; *Uganda v. Kayemba Francis [1983] HCB 25*; *Kagunda Fred v. Uganda S.C. Criminal Appeal No. 14 of 1998*; *Karekona Stephen v. Uganda, S.C. Criminal Appeal No. 46 of 1999* and *Bogere Moses and Kamba v. Uganda, S.C. Criminal Appeal No. 1 of 1997*). Where prosecution evidence places the accused squarely at the scene of crime at the material time, the alibi is destroyed (see *Uganda v. Katusabe [1988-90] HCB 59*).

[21] To disprove that defence, the prosecution relied on the testimony of P.W.1 Locaa Andrew Lopalamoi, who stated that it was around 7.00 pm. He had just returned home from a mediation meeting when he heard a knock at the door. When he opened the door he saw the accused who handed him a letter. The accused told him the letter was from the L.C and it was to the effect that the subject matter of the mediation had been determined way back in 2012. He was suddenly attacked by the respondent but he managed to lock the door after being hit on the chin, kicked and hit on the back of the head. P.W.4 Anek Trezina, wife of the complainant, testified that she was sleeping at home when the respondent came to deliver a letter. The respondent declined to leave it with her. Shortly she heard noise outside and saw the complainant bleeding from the cheek and the head. The complainant told her the respondent had beaten him shortly after handing a letter to him.

[22] Where prosecution is based wholly or substantially on the correctness of the evidence of an identifying witness, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166*; *Roria v. Republic [1967] E.A 583*; *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. I of 1997)*. The prejudice often associated with identification evidence is that, although mistaken, it is frequently

given with great force and assurance by the person who made the identification. A mistaken witness can be a convincing one and a number of such witnesses can all be mistaken (see *R v. Turnbull [1976] 3 All ER 54*).

[23] In order to satisfy itself that the evidence is free from the possibility of mistake or error, the court considers; whether the witness was familiar with the accused, whether there was light to aid visual identification, the length of time taken by the witness to observe and identify the accused and the proximity of the witness to the accused at the time of observing the accused. In the instant case, both witnesses knew the respondent very well, being the son of person with whom they were undergoing mediation. They claim to have seen him at very close range, at arm's length. He talked to both of them, implying that they not only identified him visually but also by voice. The evidence is free from the possibility of mistake or error.

[24] In his defence, the respondent testified that he had been to that home multiple times that day intending to serve summons personally upon the complainant. Even when he was told to leave it behind due to the complainant's absence from the home at the time he insisted he had to affect personal service. It is unbelievable as he stated in his defence that he did not attempt to go back to that home the following day to serve summons. This is in stark contrast with his behaviour on the fateful day in effecting personal service of the summons. That conduct corroborates the evidence of identification.

[25] In addition, the respondent's alibi was raised for the first time during his defence. It was never put to the prosecution witnesses. It is trite that the accused's case should be put to the prosecution witnesses in cross-examination. In other words, it is desirable that what the accused relies upon be put or suggested to the prosecution witnesses so that they can refute or explain (see *Browne v. Dunn (1894) 6 R 67 (HL*). That rule of practice is necessary both to give the witness the opportunity to refute or explain or otherwise deal with that other evidence, or the

inferences drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.

[26] When the accused's version is not put to the prosecution witnesses during cross-examination, the Court could draw a reasonable inference that what the accused finally said in his or her evidence did not form his instructions to his counsel, and hence was an afterthought. An accused who fails to avail himself or herself of the opportunity to put his case to the prosecution witnesses during cross-examination, cannot expect that his or her story kept a secret until when he is giving own evidence, will receive much credit.

[27] I find that on basis of the respondent's persistence in his attempt to serve the summons on the fateful day followed by a sudden unexplained loss of interest, the fact that both identifying witnesses knew him and that in his defence he placed himself at the scene of the crime within hours of the attack, the fact that the complainant and P.W.4 not only saw him but he heard him speak, there is no possibility of error. Although the complainant been drinking alcohol prior to the attack, his identification evidence is corroborated by that of his wife and the respondent himself. That evidence disproved the alibi defence of the respondent that was only raised as an afterthought.

[28] Nevertheless, the prosecution having failed to prove that the injury inflicted on the victim was life threatening, the element of grievous harm was thus not proved. Accordingly I find the respondent not guilty of the offence of Doing grievous harm C/s 219 of *The Penal Code Act* and he is accordingly acquitted of that offence.

[29] However, according to section 145 of *The Magistrates Courts Act*, when a person is charged with an offence and facts are proved which reduce 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 (see also *Uganda v. Leo Mubyazita and two others [1972] HCB 170; Paipai Aribu v. Uganda [1964] 1 EA 524 and Republic v. Cheya and another [1973] 1 EA 500*). The minor offence sought to be entered must belong to the same category with the major offence.

[30] Section 145 of *The Magistrates Courts Act* envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence. In the instant case, the only distinction between the offence of Doing grievous harm C/s 219 of *The Penal Code Act* and the offence of Assault occasioning actual bodily harm C/s 236 of *The Penal Code Act*, is that the injury in the firmer is life threatening while in the latter it is not. Therefore by a process of subtraction, the offence of Assault occasioning actual bodily harm C/s 236 of *The Penal Code Act* is minor and cognate to that of Doing grievous harm C/s 219 of *The Penal Code Act*, and a person indicted with the latter offence and facts are proved which reduce it to the former, he or she may be convicted of the minor offence although he or she was not indicted with it. The circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence too. The Charge under section 219 of *The Penal Code Act* gave the accused notice of all the circumstances constituting the offence under section 236 of *The Penal Code Act* for which he can be convicted.

Order:

[31] In the circumstances, I find that had the trial magistrate properly directed himself he would have convicted the respondent. The appeal is accordingly allowed. The judgment of the trial court is set aside. Instead the respondent Oryem Bosco Olaka is found guilty and is accordingly convicted of the offence of Assault occasioning actual bodily harm C/s 236 of *The Penal Code Act*.

[32] Since the judgment has been delivered electronically, consequently a warrant of arrest returnable on 10th September, 2020 at 2.30 pm is issued for purposes of producing the respondent before court for sentencing.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant :

For the respondent :