THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MUKONO

CRIMINAL APPEAL NO. 01 OF 2018

(ARISING FROM KAYUNGA CRIMINAL CASE NO. 403 OF 2013)

1. **MUKASA STEPHEN**
2. **MUZAALE PETER :: APPELLANTS**

VERSUS

UGANDA :: RESPONDENT

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

Background

1. This appeal arose from the decision of Her Worship Nabafu Agnes dated 8th January, 2018 in which the Appellants were convicted of the offence of doing grievous harm contrary to section 219 of the Penal Code Act, Cap. 120 and sentenced to 6 years' and 7 years' imprisonment, respectively.

2. At the hearing of this appeal, Counsel Kiryoowa Jonathan from M/s KM Advocates & Associates appeared for the Appellants. Counsel Nanteza Victoria Anne, a State Attorney represented the Respondent. Counsel Nsubuga Samuel from M/s Henry Kunya & Co. Advocates was on watching brief for the compainant.

The Appeal

3. The Appellants' grounds of appeal as set out in the amended memorandum of appeal are as follows: -

   1) ***That the trial Magistrate erred in law and fact when she failed to properly evaluate the evidence against the Appellants as a whole thereby making an erroneous decision;***
   2) ***That the learned trial Magistrate erred in law when she delegated the statutory duty of the state in allocutus to the complainant rather than the State Attorney;***
   3) ***That the trial court erred in law and in fact when it ignored the Appellants' mitigating factors and convicted them to the maximum sentence, a sentence too harsh.***

4. In **Okeno v. Republic [1972] E.A. 32** it was held that it is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld.

   In **Kifamunte v. Uganda,** Supreme Court Criminal Appeal No. 10 of 1997, the Supreme Court stated that:

   "We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own

mind not disregarding the judgment appealed from but carefully weighing and considering it."

5. In resolving this appeal, I will consider all the three (3) grounds of the appeal in their orders and I will as well consider all the parties' submissions and rejoinder.

   Ground 1: That the trial Magistrate erred in law and fact when she failed to properly evaluate the evidence against the Appellants as a whole thereby making an erroneous decision.

   On this ground of appeal, the Appellants' counsel submitted that from the evidence of PW1 - Dr. Sabiti, his whole testimony was an exaggeration of the injuries the victim suffered. That on page 16 of the record of appeal, the doctor talks about injuries on the victim's internal organs including the kidney but he did not talk about any surgical procedure for the examination of the victim's kidney. That neither was it stated in his PF3. That the trial court took this whole exaggeration for the truth and used it against the Appellants. That PW2 the victim on the other hand did not mention in his evidence any assault by the accused that caused the injury to his kidney.

6. Counsel further contended for the Appellants that the trial court should have looked at the contradictions while evaluating the evidence. That the contradictions in the testimonies of PW2, PW3 and PW5 raise a lot of doubt as to whether they all witnessed the same events. That PW2 the victim stated that when he found a road block, he got out of the truck and was then confronted by the accused people who started assaulting him on the head after an argument. That PW3 on the other

hand told court that the assault on the victim started while they were still in the car and by over 20 people and that he immediately ran away into hiding, that is when he heard the victim PW2, being assaulted. That it is clear that PW3 did not witness the assault on the victim and what he saw while in the truck contradicts that of PW2.

7. Counsel averred that the evidence of PW5 is very inconsistent and that he said the event took place on the 7th September, 2022. That however, in his statement at police which was made in December, 2013, three months after the incident, he stated that the offence was committed on 5th September, 2012. That such an inconsistency should have been ruled in favour of the accused.

8. Counsel stated that it is settled law that where there are grave contradictions and inconsistencies in the prosecution case unless satisfactorily explained, they must be ruled in favour of the accused. Counsel cited the case of **Uganda v. Ngirabakunzi & Others (1988-1990) HCB 40**, where court held that the law on inconsistencies and discrepancies in the prosecution case unless satisfactorily explained, would usually result in the evidence of the witness being rejected. That in this case, the contradictions and inconsistencies were too grave and not satisfactorily explained. That the prosecution witnesses were qualified liars who didn't recognize the assailants on the night in question.

9. It was further submitted for the Appellants that the trial Magistrate further ignored, neglected or refused to consider the defences raised

by the Appellants but rather went by the contradictory statements of the prosecution witnesses. That every trial court has the duty to consider all the available defences for an accused person whether directly raised by him or her or otherwise implied through the trial.

10. That in the instant case, the accused persons raised a defence of alibi which the trial court did not expressly over rule in her judgment. That secondly, it is evident from both the prosecution and the defence witnesses that there was a grudge between the complainant / PW2 and the Appellants over possession of the land from which the contentious logs of timber were being transported. That this grudge was mentioned by PW6 and the 2nd Appellant and that the prosecution did not raise any evidence against this grudge or show that the charges against the Appellants were as a result of the dispute they had over the forest land. That this raised a substantial doubt in the prosecution case which the trial court should have ruled in favour of the accused.

11. Learned counsel supported the above argument with the case of **Ogwang Peter v. Uganda, Court of Appeal Criminal Appeal No. 104 of 1999** where the three Judges agreed that "..... He did not consider the possibility of the complainant having fabricated the evidence against the Appellant because of the grudge which they had. We are of the view that had the trial judge approached the matter in that way, he would have possibly come to a different decision. Prosecution did not adduce evidence to prove that the complainant was not prompted by the existing grudges to implicate the Appellant."

12. Counsel argued that throughout her judgment, the trial Magistrate only restated the evidence as it was adduced rather than evaluating its probative value and the relevance thereto. That she went on to rule that the Appellants participated in the commission of the offence just because they did not mention the other villagers who assaulted the complainant. Counsel prayed that this honourable court re-evaluates the evidence against the Appellants, makes a finding that the trial court poorly evaluated the evidence on record and wrongly convicted the Appellants and that the conviction be quashed and sentence set aside.

13. On the other hand, the Respondent rejected the Appellants' submissions. The Respondent's Counsel invited court to look at the testimony of PW1 on page 5 of the record where he stated during examination in chief that; "the victim was operated upon, ... he sustained injuries on the head and kidney which threatened his organs." That during cross examination of PW1, he stated "..... before going to the theatre, his speech was languish. He was able to mention the names of five people.". That he further testified that the operation took about 30-40 minutes. Counsel submitted that PW1 testified about the operation he carried out on PW2 contrary to the Appellants' submissions that he never mentioned any surgical procedure for the examination of the kidney of PW2. That it was the duty of the defence attorney to cross examine PW1 about the surgical procedure if he desired to know more about the methodology employed by PW1 in examining the victim.

14. The Respondent's counsel further submitted on contradictions that there are no contradictions and that the finding of the trial Magistrate is strongly supported. Counsel invited court to look at PW2's testimony at page 8 of the record. That there were no contradictions or inconsistencies concerning when the accused persons started assaulting the complainant. That PW6 also stated that the attack on the complainant started before he came out of the vehicle because the vehicle was pelted with stones before the accused persons forced the complainant out of the vehicle. That all the witnesses stated that the assault started when the complainant was still in the vehicle.

15. On the issue of the dates when the incident took place, counsel asserted that PW5 made it clear during cross examination that he was not sure of the date when the incident took place. That this is an honest witness and no wonder the trial Magistrate believed the witness. That this contradiction is minor and does not go to the root of the case. That PW2 was not a deliberate liar to warrant the trial Magistrate to disregard his testimony. That it is trite law that the trial court is at liberty to rely on part of the witness' testimony which is considered truthful and disregard the falsehoods. Counsel referred to the case of **Uganda v. Aurien James Peter, Criminal Case No. 012 of 2010**, where Justice Lawrence Gidudu stated that courts have stated in a number of cases that a witness may be untruthful in certain aspects of his evidence but truthful in the main substance of their evidence. Further, that a witness who has been untruthful in some parts and truthful in other parts could be believed in those parts where he has been truthful.

16. Regarding the defence of alibi, the Respondent's counsel contended that upon evaluation of the evidence, the trial Magistrate concluded that the accused persons were squarely placed at the scene of crime. That PW2, PW3, PW5 and PW6 testified to the fact that they identified the accused persons assaulting PW2. That the medical examination of the complainant by PW1 supports the finding of the trial Magistrate that the complainant sustained grievous harm which was inflicted by the accused persons. That page 9 of the lower court's judgment clearly indicates that the trial Magistrate properly evaluated the evidence before convicting the Appellants. That in evaluating the evidence on record, the trial Magistrate was alive to the defence of alibi and grudge. That there was no need for the trial Magistrate to mention expressly that she had overruled the defences raised by the accused person. That even if she had omitted to expressly mention that she had overruled the defences, such did not occasion a miscarriage of justice on the part of the accused person since their defences were inherently considered in the evaluation, placing the accused persons at the scene of crime.

17. The Respondent's counsel added that DW1 stated that he had no grudge with the complainant and that the complainant was his good friend, that he also admitted at pages 17 and 18 of the record that he was at the scene of crime immediately before the incident to stop the complainant from transporting the logs to his place. That DW2 stated in his defence that he was at the scene with DW1 where the complainant was loading the logs on the lorry and they tried to stop him

but he refused. That he further stated that he has a grudge because the complainant reported a case against him and that the particular of the case was never explained by DW2. Counsel averred that the trial Magistrate was right not to take into account the defence of grudge because it lacked the necessary detail.

18. Furthermore, that DW3 stated at page 31 of the record that he was not at the scene of crime and that the charges are motivated by a grudge which the complainant has against his father because of the land which he wanted to grab and is occupied by him. Counsel averred that the dispute was between the complainant and DW3's father and therefore the trial Magistrate was right to disregard it. In addition, that DW3 was placed at the scene of crime by the prosecution's witnesses.

19. That DW4 claimed not to have seen the people who assaulted the complainant and yet he saw A2 arriving and stopping the assailants from assaulting the complainant. That the question is, how did he see A2 stopping the assailants and at the same time failed to see the assailants? That DW4 was compromised by the Appellants and A3 was his in-law. That DW4 stated during cross examination that the complainant was taken by DW2 to the hospital and home whereas DW2 himself testified that he heard from a different source that the complainant had been taken to Kayunga Hospital. Counsel asserted that DW4 was not a credible defence witness and that the contradictions and inconsistencies between DW4 and DW2 are grave and go to the root of this case because they concern identification of

the accused persons at the scene of crime which is key in determining their participation in assaulting the complainant.

20. That the evidence of DW4 regarding non-participation of the accused persons should be rejected for being contradictory. That however, part of DW4's testimony should be maintained to corroborate the fact that the accused persons were at the scene of crime and had knowledge and planned the assault of the complainant because upon the complainant refusing to leave the logs, the accused persons warned him of the danger and indeed DW4 suspected the likely attack and they used another route which was not helpful.

21. That regarding the testimony of DW5, she must have been told by her husband A1 of what to testify in order to save him. That what is clear is that A1 was within the range of the scene of crime and was identified by various prosecution witnesses. That DW5 testified that A2 came to their home and picked A1 to go and advise the complainant. That by the testimony of DW5, both A1 and A2 were aware of what was happening and that it could not have been possible that A1 spent the entire night without knowing that the complainant had been assaulted. Counsel averred that when the complainant refused to be advised, both A1 and A2 mobilised and led a mob that attacked and assaulted the complainant.

22. Counsel added that DW6 stated that his father A1 came back home at 7:00 p.m. and at around 8:30 p.m. he heard an alarm, got a torch and went to see what had happened. According to the

Respondent's counsel, this testimony confirms that A1 was within the range of the scene of crime.

23. Counsel further contended that the law on contradictions and inconsistencies in the evidence of witnesses is now well settled in the case of **Alfred Tajar v. Uganda, EACA Criminal Appeal No. 167 of 1969** cited with approval in the case of **Uganda v. George Wilson Simbwa SCCA No. 37 of 1995**. The principles applicable to contradictions and inconsistencies were stated that in assessing the evidence of a witness, his consistency or inconsistency, unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected; that minor inconsistencies will not usually have the same effect, unless the trial judge thinks they point to deliberate untruthfulness. Counsel submitted that the contradictions, inconsistencies and discrepancies in the defence evidence are grave and they go to the root of the case and that they should not be relied on. Counsel prayed that this court dismisses the 1st ground of appeal since the trial Magistrate properly evaluated evidence on the court record.

24. In rejoinder to ground 1 of the appeal, the Appellants' counsel submitted that this ground is concerned with the over exaggeration of the injuries of the victim by PW1 and it also relates to the grave contradictions, inconsistencies and discrepancies in the testimonies of PW2, PW3, and PW5. That the burden of proof is on the prosecution to prove all the ingredients of the offence beyond reasonable doubt. That the burden never shifts except in some exceptional cases set

down by law. That the accused person is presumed innocent until proven guilty or otherwise pleads guilty. That it is not for the accused to prove his innocence. He or she only needs to call evidence that may raise doubt of his or her guilt in the mind of the court. That any doubt in the prosecution case has to be resolved in favour of the accused person.

25. Counsel cited section 101 (2) of the Evidence Act which provides that when a person is bound to prove existence of any fact, it is said that the burden of proof lies on that person. Further, that it is noted under section 103 of the Evidence Act that the burden of proof as to any particular facts lies on the person who wishes the court to believe its existence, unless it is provided by law that the proof of that fact lie on any reasonable doubt and nothing short of that will suffice.

26. That this being the 1st appeal, the Appellants are entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. That the appellate court must itself weigh conflicting evidence and draw its own conclusion.

27. That it is not the function of the appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. That it must make its own findings and draw its own conclusions. That only then can it decide whether the Magistrate's finding should be supported and that in doing

so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

28. It was concluded for the Appellants that in the instant case, bearing in mind the trite principle that an accused person should be convicted on the strength of the prosecution case and not on the weakness of the defense, it is respectfully submitted that any doubt, inconsistencies, discrepancies and contradictions ought to have been resolved in favour of the Appellants. Counsel prayed that this court be pleased to find merit in the 1st ground of the appeal

29. In order to determine whether there is any merit in any of the submissions made by the respective parties, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the judgment. It is imperative for a trial court to evaluate all the evidence and not to be selective in determining what evidence to consider. The conclusion which is reached whether to convict or to acquit must account for all the evidence. However, in the South African case of **Boesman Motlalentwa Mofokeng v. The State (A170/2013) [2015] ZAFSHC 13 (5 February 2015)** Motloung, AJ at page 8 of the judgment said that:

> *"…… by requiring the trial court to consider and weigh all evidence does not mean that the judgment of the trial court must include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the*

summary of the evidence led must indeed entail a complete embodiment of all the material evidence led."

30. I have perused through the lower court record of proceedings and found PW1's testimony on pages 16 and 17, where he testified among others that he classified the injuries sustained by the complainant / victim as grievous harm because they were life threatening injuries which were sustained on the head, back and kidney and that these threatened his organs. Further, that there were multiple bruises on the back, face, thigh, buttocks, left hand and arm. He stated that the complainant was operated which operation took about 30-40 minutes from start to finish. During cross examination, PW1 stated that the complainant was semi-conscious and able to speak though his memory was weak. That his mental facilities were still okay to remember events and that before going to the theatre, his speech was languish and he was able to mention the names of 5 people. Earlier during examination in chief, PW1 testified that the victim was able to recall Muzaale Peter (the 2nd Appellant), Mukasa Stephen (the 1st Appellant), Walusimbi B., Tugume and Muhangire.

31. Having done the medical examination 14 hours after the complainant sustaining the injuries, this court is convinced that PW1 was being very truthful and consistent in his testimony considering the fact that he never knew the complainant before but just got him admitted in Kayunga hospital while he was on duty. He even testified that the wounds were still fresh when he was examining the complainant meaning he was able to clearly classify the category

under which the harm lied as he did. I find no exaggeration in PW1's evidence as claimed in the Appellants' submissions. They were in my judgment merely the narration of what he found during the medical examination of the victim / complainant.

32. The Appellants counsel submitted that the contradictions in the testimonies of PW2, PW3 and PW5 raise a lot of doubt as to whether they all witnessed the same events and that they were too grave and not satisfactorily explained which the trial court could have ruled in favour of the Appellants. The Respondent's counsel on the other hand argued that the contradictions, inconsistencies and discrepancies in the defence evidence are grave and they go to the root of the case and that they should not be relied on.

33. Considering the burden and standard of proof in criminal cases and based on presumption of innocence enunciated in Article 28 (3) of the Constitution of the Republic of Uganda, 1995, an accused person can only be convicted by a court of law on the strength of the prosecution case and not on the weakness of defense case. In that regard, this court will majorly consider whether there were serious contradictions and inconsistencies in the prosecution case to warrant consideration by the trial court. Contradictions and inconsistencies vary in their nature and importance. Some are minor while others are not. Some concern material issues, others peripheral subjects.

34. The law on the effect of contradictions and inconsistencies in the prosecution evidence was articulated in the case of **Obwalatum**

Francis v. Uganda, Supreme Court Criminal Appeal No. 30 of 2015, where the Supreme Court held that:

> *"The Law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained."*

35. Having critically scrutinized the lower court record of proceedings, PW2, PW3 and PW5 all testified to have seen the Appellants at the scene of crime during the incident and indeed they all stated in their testimonies that the 2nd Appellant had a spear with him. They squarely placed both Appellants at the scene of crime and this rebutted the defence of *alibi* raised by the Appellants.

36. As to the contradictions and discrepancies pointed out in the Appellants' submissions, my view is that they are very minor and trivial which do not necessarily warrant the demolishing of the credibility of the witnesses' testimonies. In my judgment, no miscarriage of justice was occasioned by the trial court ignoring the pointed contradictions and inconsistencies since none of their consideration could have changed the fact that the offence was committed and that the Appellants being at the scene of crime were indeed involved in the commission of the offence. Accordingly, this court finds that the trial Magistrate properly evaluated all the evidence on court record and

arrived at the right conclusion. Hence I find no merit in the 1st ground of appeal and it is hereby disallowed.

37. **Ground 2: That the learned trial Magistrate erred in law when she delegated the statutory duty of the state in allocutus to the complainant rather than the State Attorney.**

The Appellants' counsel submitted that the trial Magistrate at the conclusion of the judgment only convicted the Appellants but did not mention the offence for which they were being convicted. That this contravenes Section 136 (3) of the Magistrates Courts Act, Cap.16 and that she went ahead to deliver judgment in the presence of A1 without giving the other accused persons sufficient notice for the same.

38. That from pages 50, 51, and 52 of the record of appeal, the trial Magistrate allowed the complainant to take on the duty imposed on the State by Practice Directions No. 55 and 56 of the Constitution (Sentencing Guidelines for Courts of Judicature), Legal Notice No. 8 of 2013 which require the state to adduce the convict's antecedents which include previous criminal record, sufficient facts to enable court make an appropriate sentence, impact of the crime on the community, the offender's background and the circumstances under which the offence was committed, among others. That all this required the professional ability of the State Attorney and not the complainant / victim of the crime.

39. Counsel averred that in the instant case, the trial Magistrate allowed the complainant to express all his anger and hatred for the

convicts and it's not surprising that she handed each of them the maximum sentence. Counsel prayed that this court finds merit in this ground of the appeal and accordingly quash the sentence against the Appellants for having been made through an irregular process and set them free.

40. The Respondent's counsel opposed this ground of appeal submitting that ordinarily, it is the prosecutor's duty to lay before the sentencing court aggravating factors and propose an appropriate sentence under paragraphs 55 and 56 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013. That however, this duty is not restricted to the prosecutor *per se*. That under Section 133 (2) of the Magistrates Courts Act, courts have a duty to establish from all parties the surrounding circumstances or antecedent of a case or accused person in order to arrive at an appropriate sentence. That paragraph 14 (2) of the Sentencing Guidelines provides for victim impact statements from which the sentencing court is mandated to hear from the victim of crime and take into consideration the outcome of the inquiry.

41. That it is trite law that a trial court has the discretion in sentencing but this discretion has to be exercised judicially. Counsel contended that the trial took into account the mitigating and aggravating factors in arriving at the sentence. That in the instant case, the prosecutors were on strike and the courts had to operate normally to dispense justice and that there was no miscarriage of justice by the complainant informing court of the impact of the crime and the aggravating factor in

the absence of the prosecutor. Counsel prayed that court finds no merit in the 2nd ground of appeal and dismisses it.

42. The Appellants counsel re-joined that submission of the Respondent's counsel and stated that citing Section 133 (2) of the Magistrates Courts Act was misleading. He submitted that under the said section, court is only mandated to hear from the prosecution and not the victim. That further, the accused person ought to be given an opportunity to confirm, deny or explain any statement made about him or her by the prosecution before passing sentence.

43. That in the present case, the trial Magistrate erred in law when she purported to inquire into the character and antecedents of the accused person from the victim of the offence under trial. That moreover paragraphs 55 and 56 of the Sentencing Guidelines (supra) confer the duty to adduce aggravating factors squarely of the prosecution and no one else. Counsel argued that framers of this auspicious law were mindful of the fact that a crime victim is most likely to lie against the convict if given a chance to present aggravating factors. It is prayed for the Appellants that ground two succeeds and that the sentences against the Appellants be nullified.

44. It was submitted for the Appellants that the trial Magistrate at the conclusion of the judgment only convicted the Appellants but did not mention the offence for which they were being convicted. It is true that during sentencing, the trial court made no mention of the offence with

which the Appellants were being sentenced. Section 136 (3) of the Magistrates Courts Act, Cap. 16 provides that:

> *"In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code Act or other law under which, the accused person is convicted."*

45. This court notes that the Appellants were charged with and tried for the offence of doing grievous harm contrary to Section 219 of the Penal Code Act, Cap. 120 which was clearly mentioned on page 1 paragraph 1 of the lower court's judgment as required by Section 136 (3) of the Magistrates Courts Act, Cap 16. This implies that the Appellants were being sentenced for the same offence mentioned in the judgment and no other offence which was well within their knowledge. I find no contravention of Section 136 (3) of the Magistrates Courts Act, Cap.16 as claimed by the Appellants' counsel and I over rule that argument.

46. It is further argued for the Appellants that the trial Magistrate allowed the complainant to express all his anger and hatred for the convicts and it's not surprising that she handed each of them the maximum sentence. The complainant at page 51 of the lower court record of proceedings stated thus: ***"According to the lawful (which I think he meant unlawful) acts of the convict, I pray for a stronger punishment so that he can serve as an example. The convicts assaulted me, left me thinking I was dead. I pray for a maximum sentence. I also do not need any form of compensation from the convict. He should be punished for what he did."***

47. Paragraph 6 (d), (g) and (i) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 provides for the general sentencing principles. It provides thus:

> *"Every court shall when sentencing an offender take into account—*
>
> *(d) any information provided to the court concerning the effect of the offence on the victim or the community, including victim impact statement or community impact statement;*
>
> *(g) the circumstances prevailing at the time the offence was committed up to the time of sentencing;*
>
> *(i) any other circumstances court considers relevant."*

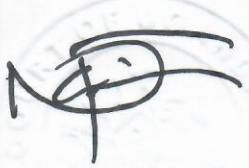
48. My interpretation of the above provision of the Sentencing Guidelines is that court may make inquiry from any person as it deems fit including the complainant or victim of crime as the trial court did. I find needless to fault the trial court for giving the complainant/victim the opportunity to talk before sentencing the convicts. It would have been very unfair for the trial Magistrate to ignore his presence in court considering the fact that the State Attorney in personal conduct of the case was unable to attend court since they were on strike at the time and yet court had to operate normally. I am not convinced with the Appellants' submission that the complainant assumed the duties of the prosecutor. In my judgment, the complainant was justly allowed to express himself as the victim of crime as it has always been the practice with most courts and this did not cause any injustice to the Appellants. The Appellants were also given an opportunity to address

court before sentencing and they pleaded for leniency. The 2nd ground of the appeal also fails.

49. **Ground 3: That the trial court erred in law and in fact when it ignored the Appellants' mitigating factors and convicted them to the maximum sentence, a sentence too harsh.**

Learned counsel for the Appellants submitted on ground 3 that the trial Magistrate sentenced the Appellants to the maximum sentence of seven years. That on page 51 of the record of appeal, the trial Magistrate while sentencing the 1st Appellant told him that she was giving him 6 years' imprisonment out of the 10 years. Learned counsel submitted that the maximum sentence for the offence of causing grievous harm contrary to Section 219 of the Penal Code Act, Cap. 120 is seven years' imprisonment, not 10 years.

50. That the Appellant in his mitigation, told court that he prayed for lenience (which court should have taken as a sign of remorsefulness), that he is a family head and also with a dependant mother. That he is a leader in the community. That the 2nd Appellant whose advocate declined to present his mitigating factors on page 53 of the record of appeal, prayed for lenience, that he has children to take care of together with his dependent parents. That he also prayed for an alternative sentence to imprisonment. That court instead based on his failure to appear for the previous hearing to rule that he is not remorseful and that she then handed him the maximum sentence of seven years' imprisonment.



51. Counsel argued that the decision of the trial Magistrate was very harsh in the two sentences and a disregard of paragraph 14 of the Sentencing Guidelines in Legal Notice No. 8 of 2013. That in any mitigation of a sentence, where a convict prays for lenience, the trial court should give reasons why they should not consider the prayer for lenience and the reasons for handing the convict, the maximum sentence. That in the instant case, the trial Magistrate rejected all the mitigating factors raised by the Appellants and did not give any reasons for that decision. That this is a clear case where this court being an appellate court needs to quash the sentence or consider reducing the same and he invited court to do so.

52. The Respondent's counsel argued that it is trite law that a trial court has a sentencing discretion and the appellate court will not interfere with the sentence of the trial court unless there has been a misdirection on the principle or the sentence is illegal or manifestly excessive. That the trial Magistrate took into account the aggravating factors on the last page of the record of proceedings to include, that A2 had absconded from court without jurisdiction and was not remorseful. That the convict conceded that he feared to come to court and kept away and further stated that his lawyer was aware. That the trial Magistrate further considered the statement of the complainant where he asked for a harsh punishment to serve as an example to other criminals. Counsel opined that the aggravating factors outweighed the mitigating factors hence justifying the maximum sentence of 7 years' imprisonment for A2.

53. Learned counsel however conceded to the fact that the trial Magistrate erred in law when she held that the penalty of doing grievous harm is 10 years and sentenced A1 to 6 years' imprisonment. That there was however no miscarriage of justice since the punishment given is within the prescribed penalty. That the trial Magistrate took into account both the mitigating and aggravating factors at page 41 of the record of proceedings before sentencing A1 to 6 years' imprisonment. That the trial magistrate was lenient to A1 because she passed the sentence of 6 years whereas the maximum sentence was 7 years. Counsel prayed that this court confirms the conviction and sentence of the Appellants and dismisses the appeal.

54. In rejoinder, the Appellants' counsel contended on the maximum sentence of 7 years that this defeats the basic principle of sentencing for court to take into consideration the maximum sentence upon conviction. That in this case the Appellants were ultimately exposed to an illegal sentence once the trial Magistrate thought that the maximum sentence was 10 years instead of 7 years thereby making the sentence meted upon them unjustified and illegal. On the whole, counsel prayed that this appeal be allowed wholly with the result that the Appellants' convictions and sentences be set aside.

55. Being the first appellate court, this court has to also determine whether the Appellants were correctly sentenced in respect of the offence with which they were charged. It will not interfere with the trial court's judgment on the sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the law. If the trial

court misdirected itself, this court will interfere as it deems fit including substituting its own order or decision for that of the trial court. This may include an order setting aside or altering the sentence. This court must consider whether the trial court correctly applied the law or legal principles in arriving at its judgment in respect of both the conviction and sentence.

56. The Appellants' counsel submitted that the sentence imposed by the learned trial Magistrate was harsh and excessive whereas the Respondent's counsel disagreed and supported the sentence imposed by the learned trial Magistrate though it was conceded for the Respondent that the trial Magistrate erred in law when she held that the penalty of doing grievous harm is 10 years' imprisonment and sentenced A1 to 6 years' imprisonment.

57. Section 219 of the Penal Code Act, Cap 120 provides thus:
"A person who unlawfully does grievous harm to another commits a felony and is liable to imprisonment for seven years."

58. Taking into account the law and submissions for both parties on this ground of appeal, in my judgment, the trial Magistrate did not apply the law correctly when she stated that the maximum penalty of the offence of doing grievous harm is 10 years' imprisonment leading her to impose each of the Appellants to a sentence of 6 years' and 7 years' imprisonment, respectively. Had she considered the correct maximum penalty of 7 years' imprisonment for the said offence, the mitigating

factors as well as the fact that the Appellants were first time offenders, their actual sentences could have been less than those imposed.

59. I agree with the submission of the Appellants' counsel that the Appellants were exposed to illegal sentences once the trial Magistrate thought that the maximum penalty was 10 years' imprisonment instead of 7 years' imprisonment. Accordingly, this court sets aside the sentences imposed on the Appellants by the trial court for being harsh and excessive. This court now proceeds to determine a fresh sentence for each of the Appellants pursuant to section 34 of the Criminal Procedure Code Act, Cap 116 to impose a sentence on each of the Appellants. Each Appellant shall serve a sentence of imprisonment for 3 years to run from the date of this judgment for the offence of doing grievous harm contrary to section 219 of the Penal Code Act, Cap. 120. The 3rd ground of the appeal therefore succeeds.

60. In conclusion, this appeal is dismissed as to conviction for the reasons stated in this judgment and is partially allowed as to sentence on the terms herein set out. The Appellants' bail pending appeal is hereby cancelled.

I so order according.

This judgment is delivered this ...31st... day of ...Oct.... 2022 by

FLORENCE NAKACHWA

JUDGE.

In the presence of:

(1) Counsel Kiryoowa Jonathan from M/s KM Advocates & Associates for the Appellants;

(2) Counsel Nsubuga Samuel from M/s Henry Kunya & Co. Advocates on watching brief for the complainant;

(3) Mr. Mukasa Stephen, the 1st Appellant;

(4) Mr. Muzaale Peter, the 2nd Appellant;

(5) Ms. Pauline Nakavuma, the Court Clerk.