THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CR-CN-0033-2011
(Arising from Tororo Criminal Case No. 464/2010)

MUJUNE JOSHUA……..APPELLANT

VERSUS

UGANDA……RESPONDENT

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an appeal from the judgment and orders of the Magistrate Grade I sitting at Tororo. The appellant **Mujune Joshua** represented by M/s J.M. Musisi Advocates was convicted of causing grievous harm c/s 219 of the Penal Code Act. He was sentenced to one year's imprisonment. He was dissatisfied with both the conviction and sentence hence this appeal. The appeal is based on the following grounds.

1. That the learned trial Magistrate erred in law and fact when he convicted and sentenced the appellant based on inconsistent and contradicting testimonies of the prosecution witnesses.
2. That the learned trial Magistrate erred in law by convicting and sentencing the appellant having evaluated the evidence on record in his favour.
3. That the learned trial Magistrate erred in law by sentencing the appellant based on the weakness of the defence case.

The respondent is represented by **Mr. Ayebare** the Resident Senior State Attorney Mbale.

During the hearing of the appeal, court allowed either party to present their respective submissions in writing.

When I perused the lower court's record, I noted that prosecution called 3 witnesses in support of its case. These included the complainant. The defence called 2 witnesses including **DW.1 Nasirumbi Grace** and **DW.2 Opio James Patrick**. When I read the judgment by the learned trial Magistrate, I agreed with the submission by **Mr. Musisi** that the learned trial Magistrate was alive to the ingredients of the offence as he ably outlined them at P.5 of the judgment except that for grievous harm to exist the injury must amount to a maim.

The duty of a first appellate court was outlined in the Supreme Court case of ***KIFAMUNTE HENRY VS. UGANDA SCCA NO.10 OF 1997*** where it was held *inter alia* that in an appeal against conviction, 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 appellate court has a duty to rehear the case and reconsider the material before the trial judge or magistrate. The appellate court must then make its own mind without disregarding the judgment appealed from but carefully weighing and considering it. In this regard, I have done what is expected of me while presiding over this first appeal. I have studied the evidence on record and the judgment of the learned trial magistrate.

I will go ahead and deal with the appeal as argued by learned counsel for the appellant.

According to learned Resident State Attorney he acknowledged the existence of contradictions and inconsistencies in the prosecution evidence but explains it as complement of each other by witnesses. That such complaint by the appellant is misplaced. He also agrees with the appellant that PW.3's evidence is not at par in most respects with other witnesses' evidence but relies on the case of ***Uganda v. Rutaro (1976) HCB 162*** and ***Uganda v. George W. Yiga [1977] HCB 217*** which at the time they were decided allowed court to;

(i) Believe the evidence of a contradicting witness and reject the part containing lies.

(ii) Reject the whole evidence of such witness who may be telling lies, but act on the rest of the evidence.

(iii) Accept reasonable explanation for the inconsistencies in the evidence that the inconsistencies and contradictions are explained by the scene of crime because;

(a) The assault took place at night in a bar which was dark inside.

(b) The participants had been drinking and most of them were drunk as evidenced by the abusive language they used and even their conduct in assaulting one another.

(c) The offence took place in November 2010 and hearing was in June 2011.

(d) The defence evidence shows that some customers were chewing an intoxicating her known as Mairungi.

That the inconsistencies were minor and negligible which did not affect the substance of the case.

I am in agreement with **Mr. Musisi** on the law governing contradictions and inconsistencies. The law that allows admission of evidence of a witness who has been truthful in one part and false in another area of his or her testimony admitted in part is obsolete and the courts of law have long varied this position. The law now governing inconsistencies or a discrepancy is that grave inconsistencies if not satisfactorily explained will usually result in the evidence of the witness being rejected. Grave inconsistency or contradiction is the one that goes to the root of the case.

Therefore the complaints of the appellant that the learned trial magistrate went against his own discovered contradictions and inconsistencies is founded and in this regard, the trial magistrate erred in law and fact.

For example, in his judgment at P.6 paragraph 8 the learned trial magistrate found that whereas PW.1 testified that the accused used a cue stick to beat him, PW.2 did not state so. That while PW.2 testified that the accused pushed a stool on which PW.1 was seated at the time of causing PW.1 to fall, PW.1 himself who is the complainant did not say so in his evidence.

The trial magistrate was surprised that PW.2 testified that the accused pushed PW.1 from a stool and yet the complainant failed to testify to that vital fact. If such a thing had been done to him the complainant who was the victim of such action resulting into injury would have stated so.

The learned trial Magistrate observed at P.6 paragraph 9 of his judgment that PW.3 contradicted himself and no explanation was given for the contradiction when he testified that he saw the accused, his Askari inside the bar pushing PW.1 and **Oyam** while the accused was armed with a stick before the two started jointly beating PW.1 and **Oyam**. However in cross examination, PW.3 contradicted himself by stating that neither PW.1 nor **Oyam** were assaulted inside the bar as he had earlier stated in his testimony. On these contradictions the learned trial Magistrate noted thus:

> ***"PW.3's evidence in a way rather leaves court in darkness as to what he experienced at the said material time with regards to the events if any that allegedly took place inside the bar in his presence."***

The record indicates that PW.3 testified that an unspecified man used a stool to strike PW.1. It is on record that PW.3 did not identify this man to be the appellant. See paragraph 1 of P.7 of the judgment. It is further observed by the trial magistrate that the State prosecutor did little to assist PW.3 to reconcile what he had stated both in his testimony in chief and in cross-examination. He concluded that it would appear that PW.3 was not in shasha bar at the time of the alleged offence or else he had already left or was engaged in something else which obstructed him from following what was going on. The trial magistrate stated that;

> ***"I can't see any other reasonable explanation for this contradiction."***

He then concluded that there was no basis for supporting the complainant's allegation that the accused broke PW.1's hand by throwing a stool at him as

claimed by PW.1 in his evidence in chief. That it is not surprising to have heard PW.3 saying in cross-examination that "a certain man used a stool to strike Mugoya" PW.1. See Paragraphs 6 and 7 of Page 7 of the judgment.

Just as was rightly submitted by **Mr. Musisi** I am equally surprised why the learned trial Magistrate failed to rely on his own observations as entailed in his judgment regarding the gross inconsistencies and contradictions in the testimonies of PW.1, PW.2 and PW.3 in determining the case against the appellant. There is no evidence to show that the appellant hit PW.1 with a stool. It is an established principle of law that the burden of proof in criminal matters is on the prosecution to prove the guilt of an accused person beyond any reasonable doubt. ***SEKITOLEKO V. UGANDA [1967] E.A. 531***.

The learned trial Magistrate ought to have rejected the entire testimony of PW.2 given the falsehoods in accordance with the law.

It appears that the trial Magistrate shifted the burden of proof to the accused person when he failed to consider the gross inconsistencies and contradictions of the prosecution witnesses and his assertion that the defence should have called the barmaid as its witness. The learned magistrate stated that the bar attendant should have been called to throw more light on the case.

I agree with the appellants' counsel that this implied that doubt had been created in the magistrate's mind enough to lead to the acquittal of the appellant. The learned magistrate should not have based his conviction on the defence weakness.

The other witness the learned trial magistrate disagreed with was the expert witness. He stated that the expert witness who was called by the prosecution was not a medical Doctor but an orthopedic paramedic who had an experience of only 3

years. The trial magistrate observed at Page 9 of judgment that PW.4's testimony need not be relied on as he was not an expert. He however went ahead to convict the appellant basing on the medical report simply because it was not challenged. This was a grave contradiction by the trial court. The trial Magistrate further disregarded his own observation on PW.4's report that there was no conclusive justification for how the complainant sustained the injury since pw.4 gave options of theories of how it happened in an inconclusive report.

I did not agree with the learned State Attorney that learned counsel for the appellant was suggesting that only a medical doctor can fill PF.3 or classify injuries. The appellant's argument is that having rejected the medical evidence and the expert, the trial court erred when it turned around and based its conviction on it. I agree with the RSA that the competence of a witness relates to the nature of his training if any and the work such a witness has engaged in so far as relates to the opinion and skills acquired by practical experience but having rejected the evidence of PW.4, it was erroneous for the trial Magistrate to rely on the same to convict.

As rightly observed by both learned counsel and the learned trial Magistrate the assault took place at night in a dark bar where revelers had been drinking, chewing mairungi and most of whom were drunk and unruly assaulting each other.

In my view therefore at the time of the confrontation the complainant was so drunk to observe what was going on or who injured him. There is a possibility that he injured himself.

On the available evidence therefore, prosecution did not prove the case against the appellant beyond any reasonable doubt. The learned trial magistrate procedurally went wrong while admitting and evaluating the evidence adduced by the prosecution. He erred in disregarding his unequivocal observations which would have led him to a finding of not guilty.

Consequently I will allow this appeal. The conviction is hereby quashed and sentence set aside.

Stephen Musota

JUDGE

24.01.2013