**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA, AT MASAKA**

**Criminal Appeal Number 04/2011**

**(Arising From Kalisizo, 02-CR-0091-2010**

**Naluwemba Annet**

**Nakayiwa Jesca :::::::::::::::::::::: Appellants**

**VERSUS**

**Uganda :::::::::::::::::::::::::::::::: Defendant**

**BEFORE: HON JUSTICE V.F. MUSOKE-KIBUUKA**

**JUDGEMENT**

The two appellants were jointly charged, before a Magistrate Grade I, at Kalisizo, with two distinctive offences. In count No 1, they were charged with criminal trespass C/S 302 of the Penal Code Act. In cont number two, the appellants were charged with indecent assault C/S 128 (3), of the Penal Code Act.

The gist of the two offences was the allegation that on 18th March, 2010, at Lwamba village, in Rakai District, the two appellants entered upon the home of Najjuma Leocadia with intent to intimidate insult or annoy her and in the process they insulted the modesty of Najjuma Leocadia by uttering words which intruded upon her privacy.

The two appellants were convicted of both offences by the lower court. Each was sentenced to 3 months imprisonment for each offence. The trial Magistrate ordered that two sentences were to run consecutively.

The memorandum of appeal contains three grounds namely that,

1. the learned trial Magistrate erred in law and fact when she held that the appellants had committed the offences;
2. the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence thereby reaching an erroneous decision; and
3. the consecutive sentences were harsh and excessive in the circumstances.

In respect of the offence of criminal trespass contained in count number one, Mr. Kikirengoma argued both ground number one and number two together. Mr. Kikirengoma's submission was short and precise. It was that there was no evidence adduced by the prosecution to prove beyond reasonable doubt the essential ingredient of entry, by the appellants, upon the property in possession of the complainant. Ms. Kiiza Anne, on the other hand, submitted that that all the essential ingredient of the offence of criminal trespass, had, indeed, been proved beyond any reasonable doubt.

This is a court of appeal of first instance. It is under duty to subject the evidence on record to a fresh scrutiny and

made it's own conclusion bearing in mind the important fact that it never observed the witnesses in court and is, therefore, disabled, to that extent, to assess their credibility or veracity of their evidence. ***Dinkerrai Ramkrishna Pandiya vs. R. [1957] E.A. 336 And Okeno vs. Republic [1972] E.A. 32.***

Court duly agrees with the submission of learned counsel for the state, Ms. Kiiza, that there was abundant evidence led by the prosecution that proved beyond any reasonable doubt that the two appellants entered unto the property of the complainant and intimidated her with threats and obscenities uttered by them. At page 4 of the record, PW1, the complainant testified:

> ***" I came home and I saw A2, holding a stick, standing in my door way***. ***A1 was also at a small distance away in my court yard. Jesca said, " You woman you are a mulogo. I am going to beat you on the head and break it" she said that since I was a mulogo the grey heirs were also in my buttocks. She said that the grey heirs were also in my vagina and that I pass urine badly. That I was feaces. That when she pupus I will lick her anus. Also A2 said repulsive words that I be witched her mum. She said that if her mum died her uncle would bring a jerrycan of petrol and burn my house with me inside."***

Even when PW1 was put to stringent cross examination on the point of the two appellants entering unto her property to abuse and threaten her, she was never shaken. She stated in cross-examination, at P5 of the record:-

> " ***I was present when they abused me. They abused me at my home in the yard. They came to my home. I am an immediate neighbour they came from their home crossed the road and came to up Bijja. The 2nd accused came to my yard. I've never gone to their garden. "***

The evidence of PW1 was materially corroborated by both PW2 and PW3 who were eye-witness to the incident. On entry to the complainants home, PW2 stated at Pg. 6 of the record:-

> ***"Their houses face each other. Later, they crossed to the complainant's home and Annet said the complainant was a witch and had finished killing all the people in the home; that if she killed more people Kojja had said he would buy a jerryean of petrol and burn her in the home."***

Similar corroboration to the evidence of PW1, in relation to the fact of entry by the two appellants to her home or property and abusing her and threatening her is provided by PW3, at page 9 of the record of proceedings. The witness states:-

"***Jesca and Annet went up to the old woman's court yard. Jesca was holding a stick and she told the old woman to bring her head and she breaks it. The old woman was sitting on her verandah."***

The evidence of PW1, which learned counsel Mr. Kikirengoma relied upon to submit that the old woman was not at home, appears to have been quoted out of context. It is clear from the record that the old woman was at first not at home when the appellants went to her home. She was in the garden digging. She came home and found the appellants at her home. They then subjected her to those abuses and threats. PW3 also clarifies that point in her evidence.

The learned trial Magistrate considered the denials of both appellants as against the evidence of the three prosecution witnesses. She rejected the defences and accepted the prosecution's evidence. Even if it were true that there was a grudge existing between the two families, PW2 and PW3 were not parties to that grudge. This court finds no reason to fault the learned trial Magistrate finding. There was sufficient evidence warranting the conclusion which she reached. Accordingly both grounds one and two must fail.

Consequently the submission made by learned counsel for the appellants in respect of proof beyond reasonable doubt of the offence of indecent assault, in count number

2, must also fail. It must fail because it was based purely upon the presumption that the complainant was not at her home when the two appellants were alleged to have gone there and, therefore, she could not have been indecently assaulted. Upon the evidence on record, this court finds that the complainant was present at her home when both appellants attacked her there and abused and threatened her with annoying and very indecent utterances.

On the third ground of appeal relating to the sentences, the learned trial Magistrate imposed a sentence of 3 months imprisonment upon each appellant in respect of each of the two offences. The maximum sentence in respect of each offence was one year.
Mr. Kikirengoma's submission was that the sentences were harsh and excessive. Ms. Kiiza supported the sentences imposed by the trial court as being appropriate and neither harsh nor excessive.

The record shows that the convicts were first offenders. As a principle, a sentencing court is expected to pass such sentences as is in proportion with the seriousness of the offence. The sentence passed by a trial court must reflect the justice of the case. The court must ensure that a deterrent sentences is not imposed except in deserving cases only. ***Uganda Vs. Charles Eliba (1978) HCB 273.***

In court's view, the sentence of 3 months imprisonment, for an offence whose maximum sentence is one year, and

considering the status of first offender, would, certainly, not be hash or excessive. In court's view the sentences imposed by the trial court in this case adequately reflected the justice of the offences which the appellants were charged with.

The only troubling aspect of the sentencing appears to be the order which was made by the learned Magistrate to the effect that the sentences were to run consecutively.

The question which comes to the mind of an appeal court is whether the learned trial Magistrate was alive to he provisions of section 192 (1), of the Magistrate Courts Act, Cap. 16. And if she was alive to the provisions of that section, whether there was need to make the order which she made to the effect that the sentences run consecutively. Section 192 (1) of the MCA, provides:-

> ***" 192 (1) where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him or her under the first conviction or before the expiration of that sentence, any sentence of imprisonment which is passed upon him or her under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or of any part of it; ……."***

With the above provision of the law in place, why then did the trial Magistrate order that the sentences were to run one after the other? The answer may partly lie in the fact that the court may have been aware of the principle that it is not appropriate for a court to leave too or more sentences to run consecutively where the offences of which the offender is convicted were committed during the same transaction such as those in the instant appeal.

This principal was discussed and relied upon by ***Sir Udo Udoma, CJ, in Avone vs. Uganda [1969] E.A. 129.*** The learned Chief Justice stated in the case:-

> ***"On the other hand, it seems clear that the sentences passed on the appellant were bad in law. The three counts of which the appellant was convicted arose out of the same transaction. The Magistrate was wrong in law to have ordered the sentences to run consecutively. "***

In order to justify a departure from the principle the learned trial Magistrate ought to have given justifying reasons. She gave none. This court also has not found any.

Since there is no good reason why there should have been a departure from the well-known principle and also bearing in mind the facts and circumstances of this case. Accordingly the order requiring the two sentences, in respect of each appellant to run one after the other, is set aside an account of being bad in law. It is substituted

with an order requiring the two sentences, in either case, to run concurrently.

Save for the order that the two sentences, with regard to either appellant, run concurrently, the appeal is dismissed.

**V.F. Musoke-Kibuuka**
**(JUDGE)**
**19/07/2013**