IN THE HIGH COURT OF UGANDA AT SOROTI

CRIMINAL APPEAL 13 OF 2013

ARISING FROM KAABONG -KOTIDO CRIMINAL CASE. 38 OF 2013.

LOMODO FRANCIS V UGANDA

JUDGMENT BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

The appellant appeals the decision of HW Byamugisha Derek grade one magistrate dated 9th May 2014 , sitting at Kaabong on five grounds of appeal that i will refer to later in the judgment.

At the hearing of the appeal, the appellant was represented by Mr. Isodo while Mr. Noah Kunya, SSA appeared for the state.

I carefully listened to oral submissions of both counsel and i have given them due consideration.

The duty of an appellate court is to re-evaluate the evidence adduced in the lower court and arrive at its own conclusion bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses.

The appellant was charged with doing grievous harm c/s 219 of the penal code Act. It was alleged that the accused person and others still at large on 24th September 2013, at Lopedo road in Kaabong district unlawfully did grievous harm to Lodou Dida Julious.

The prosecution had a duty to prove ingredients of grievous harm found in section 2 of the penal code. Grievous harm is defined therein as

> 'any harm which amounts to a maim, or dangerous harm, or seriously or permanently injures health or likely to injure health. It extends to permanent disfigurement, or permanent injury to any external or internal organ or sense.'

From a reading of the judgment, the trial magistrate was aware of these ingredients.

Prosecution also had to prove that it is the appellant who inflicted the injuries and lastly that the conduct of the accused was unlawful in the sense that the injuries inflicted were not in self defense or if in self defense, the force used was excessive.

From both the prosecution and defense evidence, it is not in dispute that the appellant was at the scene of crime on Lopedo road on the night of 24.9.2014 when the complainant PW2 Lodou Dida was injured.

Evidence of injuries sustained was provided by PW1 Dr. Charity Oneko who examined PW2 on PF3. She found a cut wound on the right eye and multiple abrasions on the knees, and skin and other parts of the body.

While the witness classified the injuries as grievous harm, i am hesitant to agree with her. The photographs tendered in court of PW2 in hospital as well as an account of the injuries by PW2 Lodou and PW2 Dr. Oneko point to assault accessioning bodily harm as opposed to grievous harm. Certainly the complainant was not permanently maimed. Abrasions or bruises, a 3 inch cut wound above the eye that had healed at the time he testified in May 2014 point to assault occasioning bodily harm.

An examination of the record shows that PW2 went out of her was to give evidence on the circumstances of the assault, a departure from what is expected of an expert witness who attests to findings of a medical nature only .State prosecutors and Attorneys should desist from leading medical officers on what they were told by the complainants . To do so risks having the medical officer ruled as not being credible as he or she may record biased findings.

Having found that the magistrate ought to have made a finding that the complainant suffered actual bodily harm, i turn to whether the harm was unlawfully caused.

The presumption is that every harm is unlawful unless there is evidence that the accused needed to defend himself.

Although the trial magistrate found that it is the appellant who attacked the complainant, his own evidence suggests the contrary. He admits he followed

the appellant who was walking along Loped road. In his own words at page 7, the complainant testifies,

> 'I followed him and we approached Lopedo road about 5 to 10 meters from the round about. The accused stopped and i also stopped and parked the car and came out and walked towards the accused and he moved eastwards, i.e Lopedo road. I called the accused what is the problem the accused told me you come and he continued walking.'

Clearly it is the complainant who followed the appellant on the night of 24.9.2013.

To justify his conduct, the complainant testified that he was responding to the appellant who had called out to him. In defense, the appellant testified that he left Namulen's bar where the complainant and himself had been drinking at about midnight. The two had discussed one Brenda who appears to have been the subject of both their affections. When he left the bar, he came across the complainant with Brenda. As the appellant attempted to assault Brenda, the complainant boxed the accused on the eye who retaliated.

The complainant's testimony that he was assaulted by the appellant and two other people whom he named as Lemukol and Lowakori is suspect. His inclusion of these two persons was intended to aggravate the circumstances of the assault. His testimony that he was called by the appellant and attacked because he had spoke ill of prominent persons in the area is a park of lies.

Dexh. 2, a PF3 on which the appellant person was examined by Dr. Amgello on 25.9.2013 shows that he sustained injuries classified as 'harm'.

However, the fact that the complainant sustained a cut wound on the eye is evidence that it was inflicted by the appellant.

This is a case where it's the word of the complainant against the word of the appellant as it is the two who were at the scene that night.

The two men fought and the complainant sustained more serious injuries than the appellant although i have found that the injuries suffered by the complainant do not fit the description of grievous harm.

The fact that the complainant sustained more serious injuries means unnecessary force was used by the appellant in defending himself.

In the premises, the assault was unlawfully caused.

The trial magistrate erred when he convicted the appellant of grievous bodily harm when he should have convicted him of assault occasioning actual bodily harm.

At the commencement of the hearing, counsel for the appellant dropped the 1st, 2nd grounds of appeal and argued grounds 3, 4, and 5.

Ground three is that the trial magistrate erred when he convicted the appellant of causing grievous bodily harm. Counsel submitted that both ought to have been charged with affray. I have found that the appellant used unnecessary force in defending himself. I also found that the injuries suffered by the complainant did not fit the ingredients of section 219 of the penal code. Ground three succeeds.

Ground four is that the trial magistrate did not properly evaluate the evidence as a whole.

I have found that the trial magistrate, while correctly entering a guilty verdict for the appellant, convicted him of an offence that did not match the evidence.

Ground six is that the sentence of three years and seven months was excessive.

As the appellant ought to have been convicted of a lesser offence, the sentence is excessive under the circumstances and i need not belabour the principles on interfering with sentence. I just want to observe that the trial magistrate did not factor into the sentence he imposed, the period spent on remand as recommended by the sentencing guidelines.

Although the appeal has succeeds on all grounds, i will substitute the orders of the trial magistrate as follows.

1. The appellant is convicted of assault occasioning actual bodily harm c/s 227 of the penal code.

2. A sentence of four months imprisonment is substituted taking into account that the appellant was on remand from 27.9.2013 when he was charged to the date of conviction on 9.5.2014. . A total of eight months on remand.

3. As the appellant has served part of that sentence since 9.5.2014, the rest of the sentence is suspended and he is release from custody.

4. Should the appellant commit any offence during the period of suspension, he will be arrested and made to serve the full sentence.

Before i take leave of this appeal, although counsel abandoned grounds one and two, these two grounds deserve mention for the benefit of the trial magistrate and the prosecutor.

The gist of the two grounds is that the trial magistrate erred when he admitted the charge and caution statement.

PW4 No. 26163 DC Luba in his testimony, made reference to the plain statement he recorded from the accused person at which point, the prosecution prayed to have it tendered as an exhibit. The appellant objected to its admission at which point the trial magistrate ordered the accused person to go to the witness stand for cross examination on oath.

What the trial magistrate did was to conduct a trial within a trial. This would have been in order if the witness who recorded the statement had been of the rank of Assistant Inspector of police or above. In any case, the statement is called a charge and caution statement and not a plain statement.

The investigating officer is free to record a plain statement but it cannot be used in evidence because the safeguards against a statement made through coercion or duress have not been observed. Under no circumstances should a plain statement to a police officer be tendered by the prosecutor or admitted as evidence. These safeguards were outlined in **Supreme Court Criminal**

Appeal 1 of 1998 Festo Androa Asenua and another v Uganda. The police officers of the rank of ASP and above are aware of these safeguards.

A copy of this judgment will be sent to the trial magistrate for him to note this requirement.

DATED AT SOROTI THIS 22ND DAY OF AUGUST 2014.

HON. LADY JUSTICE H. WOLAYO