

.THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CR – CN – 0025 OF 2015

(Arising from Criminal Case No. FPT – 00 – CR – CO – 369 of 2015)

UGANDAAPPELLANT

VERSUS

KYAMULESIRE SWITHEN

MUGANZI PATRICKRESPONDENTS

RWATOORO CHRISTOPHER

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

This is an appeal against the decision of His Worship Ngamije Mbale Faishal, Magistrate Grade; Fort Portal delivered on 11/11/2015.

The Respondents were charged with the offence of Doing Grievous Harm C/S 219 of the Penal Code Act and were acquitted. The Director of Public Prosecutions being dissatisfied with this decision lodged this appeal whose grounds as per the Amended Memorandum of appeal are:

1. That the learned trial Magistrate erred in law when he made a finding that the Appellants had not proved the charge of grievous harm against the Respondents and in the alternative not finding that a minor cognate charge of assault occasioning actual bodily harm had not been proved to the requisite standards.
2. That the learned trial Magistrate erred in law and fact when he decided in the judgment that the Respondents did not participate in the commission of the offence.
3. That the learned trial Magistrate erred in law when he found the Appellant had not proved its case against the Respondents beyond any reasonable doubt.

The Appellant is represented by Ojok Alex Michael, Regional Principal State Attorney – Fort Portal and Counsel Victor Busingye is for the Respondents.

First, it is trite law that the duty of a first Appellate Court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. **[See: Pandya versus R**

(1957) EA 336, Ruwala versus R (1957) EA 570, Bogere Moses versus Uganda Criminal Application No.1/97(SC), and Okethi Okale versus Republic (1965) EA 555].

Ground 1: That the learned trial Magistrate erred in law when he made a finding that the Appellants had not proved the charge of grievous harm against the Respondents and in the alternative not finding that a minor cognate charge of assault occasioning actual bodily harm had not been proved to the requisite standards.

The prosecution had a duty to prove ingredients of grievous harm found in **Section 2** of the penal code Act. 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.”

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

It is a cardinal principle of criminal law that the burden of proving the guilt of an accused person solely lies on the prosecution.

Section 101 (2), of the Evidence Act Cap. 6, provides that;

“When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

It is further provided under **Section 103** the Evidence Act that;

“The burden of proof as to any particular fact lies on that person who wishes the Court to believe its existence, unless it is provided by law that the proof of that fact lies on any particular person.”

The state for the Appellant submitted that PW1 a medical clinical Officer, told Court that he examined the victim and found her with abrasions, ulcers on the anus and the vulva, and vaginal discharge. That the said injuries were occasioned 4 days prior to the medical examination and were classified as grievous harm and suspected to have been caused by a hard substance or corrosive substance such as acid which has the capacity to burn. Further that the same witness told Court that the site of the injury and the open wounds with pus were a danger to the victim’s health. That in that regard there was a clear indication that grievous harm had been occasioned to the victim.

PW2 the victim also told Court that she was beaten by the 3 Respondents and tied with a rope around her neck and was poured on “Mafuta” whereof she lost consciousness.

Counsel for the Respondents on the other hand submitted that it is trite law that when the accused persons deny the charge against them, the burden rests upon the prosecution throughout the trial to prove all the ingredients of the offence against the accused.

Thus, it is a requirement by the law that the prosecution must prove its case because the accused has no duty to prove, his innocence (**Article 28** of the Constitution). (See: **Woolmington v D.P.P. [1935] AC 462. Uganda v Joseph Lote [1978] HCB 269**).

However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the Accused, it should be resolved in the favour of the Accused persons. Therefore, the Accused persons must not be convicted because they have put up a weak defence but rather that Prosecution case strongly incriminates them and that there is no other reasonable hypothesis than the fact that the Accused persons committed the alleged crime.

Counsel went on to submit that PW1 could not clearly tell court if it was grievous harm or not and also checked the victim 4 days after the incident and the said victim never told him about the previous medical attention she had received from Sarah's clinic.

That CW1 being the person that attended to the victim first told Court that the victim only smelled of paraffin and had no discharge from her genitals. That this piece of evidence was corroborated by DW4 and DW5 who, told Court that they saw the victim drink paraffin.

Further that the trial Magistrate in his wisdom indulged CW2 to make an independent examination of the victim who alleged that she had been passing abnormal vaginal discharge since the occurrence of the incident. A comprehensive report was submitted to Court and no discharge whatsoever was found.

Furthermore, that PW2 told Court that both her hands and legs were tied yet her witness PW3 told Court that he only found her legs tied and arms free. That in the circumstances PW2 was lying to Court.

Counsel also brought it to the attention of Court that it is DW1 who paid the entire victim's medical bills and that if at all DW1 wanted the victim dead he would not have bothered to clear her bills and ensured that she had sought medical attention. Therefore, the Respondents did not assault the victim nor was there any evidence led to that effect.

In my opinion it is always the duty of the Prosecution to prove its case beyond reasonable doubt as discussed in the case of **Woolmington vs. DPP**, Supra except in certain instances where the burden shifts to the Accused. In the instant case the prosecution did not prove its case beyond reasonable doubt. The victim's evidence was inconsistent with the evidence of the prosecution evidence.

It should be noted that the alleged night of the incident the victim sought medical attention where of notes were made and no indication was made as to the victim having sustained any injuries in her genitals or any discharged found. CW1 told Court that she did examine the victim's genitalia and she had blisters and some were discharging but then that observation was not included on the medical notes (Exhibit DE V) made on the day the victim was admitted at CW1's clinic which creates doubt as to the credibility of the witness.

Secondly, PW1 who examined the victim on PF3 told Court that the victim had not sought prior treatment before coming to him and had observed that the victim had ulcers on her

vulva, anus and buttocks but the same witness could not tell Court if this was a maim or not. PW1 classified the injuries as being grievous harm however was not able to classify them as a maim when on cross-examination.

Thirdly, an independent examination of the victim was made by CW2 however, according to his report there was no discharge found as was alleged by the victim who in her testimony told Court that her uterus was discharging pus. I am also left in awe as to how a uterus that is in the inner part of the body could have been affected by the so called corrosive substance that was poured on the victim and mark you which victim had her legs tied! This said corrosive substance also did not burn any other body parts but rather her genitals yet she was found in wet clothes when she went to CW1's clinic and the clothes smelled of paraffin. One wonders how the "acid" reached the genitals and by-passed the rest of the victims body.

I also find it extremely hard to believe that the victim was still releasing pus/vaginal discharge from the alleged incident. If indeed it were true why did the victim not bring any other medical evidence to prove the same to Court as she alleges that she still takes medicine for the same. Not to mention the confusion as to what exactly "mafuta" meant. In my understanding if at all acid was poured on PW2 as was stated by PW1 and from the known extent of damage/corrosive nature of acid I believe that CW2 would at least have found extensive scars and the said wet clothes as were told to Court by CW1 would have been burnt or at least torn and the same were never brought to Court as exhibits.

In the instant case I find that the prosecution evidence was full of inconsistencies and falsehoods that made the evidence unreliable and not credible whatsoever. I also find that the learned trial Magistrate did not err in law when he made a finding that the Appellants had not proved the charge of grievous harm against the Respondents and in the alternative not finding that a minor cognate charge of assault occasioning actual bodily harm had not been proved to the requisite standards. This ground fails.

Ground 2: That the learned trial Magistrate erred in law and fact when he decided in the judgment that the Respondents did not participate in the commission of the offence.

The state for the Appellant submitted that from the evidence on record it was not disputed that the Respondents were at the scene, what is contested is what transpired on that day/night of 26/6/2014.

That PW2's evidence on identification was credible and believable and placed all the Respondents at the scene of crime. That the victim was able to identify the assailants clearly considering the conditions such as light, familiarity with the Respondents, and there was also sufficient time to identify them. Therefore, there is no way the victim could have been mistaken.

Counsel for the Respondents submitted that DW1 is the one that went to the Police station and brought Police Officers at his home after the domestic violence erupted. It is upon reaching home that he found when the victim had drunk paraffin and headed to DW1's farm. The Respondents went to look for the victim and she was taken to the Clinic and DW1 also

took the initiative to send her beddings while she was admitted. That in the instant case the issue of identification does not arise and is therefore misplaced and out of context.

In my opinion the prosecution did not lead evidence to sufficiently prove that the Respondents did cause grievous harm to the victim. The evidence as adduced was very inconsistent as to what actually happened. The victim herself gave evidence that was tainted with lies and hard for anyone with common sense to believe. I therefore find that the learned trial Magistrate did not err in law and fact when he decided in the judgment that the Respondents did not participate in the commission of the offence. This ground fails.

Ground 3: That the learned trial Magistrate erred in law when he found the Appellant had not proved its case against the Respondents beyond any reasonable doubt.

The state cited the case of **Zungu Denis versus Uganda, Criminal Appeal No. 287/2003** as the authority for the proposition that it is trite law that the prosecution must prove the case against the accused beyond reasonable doubt. The same case has another holding that a conviction cannot legally be based upon the weakness of the defence but on the strength of the prosecution.

Further the state noted that the legal burden had been discharged by the prosecution to the requisite standards and prayed that the appeal be allowed.

Counsel for the Respondents on the other hand prayed that Court finds that the prosecution did not prove its case against the Respondents beyond any reasonable doubt and that the appeal be dismissed.

It is my considered opinion and from the foregoing I am inclined to find that the learned trial Magistrate did not err in law when he found the Appellant had not proved its case against the Respondents beyond any reasonable doubt. This ground too fails.

This appeal is therefore dismissed for failure on all grounds.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

30/03/17

Judgment read and delivered in open Court in the presence of;

1. Counsel Victor A. Businge for the Respondent.
2. James – Court Clerk
3. The respondent

In the absence of the State.

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OYUKO. ANTHONY OJOK

JUDGE

30/03/17