THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CRIMINAL APPEAL No. 0010 OF 2018

(Arising from Gulu Chief Magistrate's Court Criminal Case No. 0301 of 2018)

ACAYA WILSON …… APPELLANT

VERSUS

UGANDA …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

This is an appeal against conviction and sentence for the offence of Threatening violence, C/s 81 (a) of *The Penal Code Act*. The facts as found by the trial court are that on 11th February, 2018 the appellant confronted the complainant, Alfred Nyero, while on his way to the garden. The appellant grabbed an axe from a one Kinyera who happened to be nearby, and while shouting "I will kill you," approached the complainant up to a distance of three metres apart. His defence was that on that day it is the complainant who threatened to assault him when he asked boys who had been brought to his garden why they had come because they had no land there. The boys retreated and the complainant returned together with them carrying pangas threatening to kill him. He was simply framed by the complainant.

In his judgment, the learned trial Magistrate found that prior to the confrontation, there existed a dispute over land between the appellant and the complainant. On the fateful day, there was a confrontation between the complainant and the appellant. Prosecution witnesses who witnessed the confrontation implicated the appellant against whom they had no grudge. He found that the charge had been proved beyond reasonable doubt, convicted the appellant and sentenced him to one year's imprisonment. Although he filed a notice of appeal, he did not file a memorandum of

appeal. His advocate was allowed time to file his submissions but had not at the time of writing this judgment.

This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it"). An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

As regards the conviction of the appellant, his defence was denial. An accused who sets up a defence does not have a duty to prove it, but it's the duty of the prosecution to disprove it (see *Vicent Rwamaro v. Uganda [1988-90] HCB 70*). The prosecution set out to disprove his denial with the testimony of P.W.1 Alfred Nyero, P.W.2 Wacal Samuel and P.W.3 Opio Simon all of whom testified that they had seen the appellant at the scene and described his violent conduct.

The evidence of the three witnesses being in the nature of visual identification, the court had to determine whether or not these identifying witnesses were able to recognise the appellant. In circumstances of this nature, the court is required to first warn itself of the likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made

which is free of error or mistake (see *Abdalla Bin Wendo v. R (1953) 20 EACA 106*; *Roria v. R [1967] EA 583* and *Abdalla Nabulere and two others v. Uganda [1975] HCB 77*).

In doing so, the court considers; whether the witnesses were familiar with the offender, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the offender and the proximity of the witnesses to the offender at the time of observing him. As regards familiarity, the three identifying witnesses knew the appellant prior to the incident. In terms of proximity, the offender was relatively close to them as only a few metres separated them. In terms of light, the confrontation occurred at 5.00 pm, in broad day light and their vision was not impeded or obstructed. As regards duration, each took a reasonable period of time, long enough a period to aid correct identification. None of the witnesses was motivated by malice or grudge to implicate the appellant, since none was advanced in the appellant's defence. I find that he was properly recognised that that the prosecution evidence effectively disproved the appellant's defence.

Under section 81 (a) of *The Penal Code Act*, the offence is committed by any person who with intent to intimidate or annoy any person, threatens to injure, assault, shoot or kill any person, or to burn, break or injure any property. Mere words are not enough; it is constituted by utterances coupled with actions causing imminent threat of harm (see *Mugyenyi James v. Uganda [1974] H.C.B 83* and *Uganda v. Racham Daniel [1977] 52*). There must be a threat to assault coupled with intention to intimidate (see *Ofwono Benedicto v. Uganda [1977] H.C.B 210*). it must be shown that words were uttered or that at least there were gestures made that could clearly be interpreted as a threat (see *Uganda v. Onyabo Stephen and three others [1979]H.C.B39*).The intention to intimidate may be gathered from the utterances, conduct, and surrounding circumstances (see *Uganda v. No.39 PC Lochoro [1982] H.C.B. 80*). Raising an axe within three metres of another while uttering threats of death constitutes a crime. I find no merit in the appeal against conviction.

The appellant challenges the sentence too. The law is that an appellate Court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignore to

consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle (see *Kiwalabye Bernard v. Uganda, S. C. Criminal Appeal No. 143 of 2011*). Under section 81 of *The Penal Code Act*, the maximum punishment for the offence is four years' imprisonment. Under section 162 (1) (a) of *The Magistrates Courts Act*, a Chief Magistrate may pass any sentence authorised by law. The principle of proportionality requires that a sentence should not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence. I have considered the sentence imposed by the trial court. It is on the face of it a lawful sentence passed within the range of the court's sentencing powers as regulated by section 162 of *The Magistrates Courts Act*. It is not excessive in light of the facts of the case.

In sentencing the appellant, the trial magistrate took into account both the aggravating and mitigating factors submitted to him. As long as the trial court considered the proper factors and the sentence is within the statutory limits, the appellate court will not set it aside unless it is so excessive as to shock the public conscience. A sentence will be considered harsh and excessive if it has the tendency to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances of the case. Having found that the sentence imposed in the instant case is legal and is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people, I have not found any reason to interfere with it. It was a fitting penalty for the offence. In the final result, I do not find any merit in the appeal and it is accordingly dismissed.

Dated at Gulu this 25th day of October, 2018

Stephen Mubiru
Judge,

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