THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 113 OF 2019

(ARISING FROM MAKINDYE CRIMINAL CASE NO. 788 OF 2018.

SHEIK UMAR BADRU KALYANGO:::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

BEFORE: HON. MR. JUSTICE TADEO ASIIMWE

JUDGMENT

Introduction.

This appeal arises from judgement and orders of the learned Chief Magistrate of Mkindye, her worship Prosy Katushabe.

The appellant (convict) was charged with 22 counts of Maliciously Administering poison with intent to harm contrary to Sections 221 of the Penal Code Act, Cap. 120. The appellant was tried, convicted and sentenced to six (6) years and 7(seven) months imprisonment on each count to run Concurrently.

The appellant being dissatisfied with the whole judgment, conviction and sentence, he appealed to this court on the following grounds;

1. That the learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence adduced in court, a decision which occasioned a miscarriage of justice,
2. That the learned Trial Magistrate erred in law and fact when she convicted the appellant on circumstantial evidence.

3. That the learned trial magistrate erred in law and fact when she passed a harsh and Excessive Sentence against the appellant without putting in to consideration mitigating factors leading to a miscarriage of justice.

At the hearing, the appellant was represented by M/S KSMO Advocates while the respondent was represented by Nanziri Shalot a state attorney from ODPP. Both counsel filled written submissions which I shall consider in this judgement.

Duty of the first appellate Court.

It is settled law that the duty of the first appellate Court is to re-evaluate the evidence on record of both parties, subject it to fresh scrutiny and come to its own conclusion. **See Kifamunte Henry vs Uganda supreme Court Criminal Appeal NO. 10 of 1997**

Further court in **Pundya VR 1957) EA** stated that the appellate court cannot excuse its self from the fact f weighing conflicting evidence and drawing its own inference and conclusion, although it bears in mind that it has either seen nor heard the witnesses and should make due allowances.

In criminal cases, the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution

case and not because of any weaknesses in his defence, (See Ssekitoleko v. Uganda [1967] EA 531).

RESSOLUTION

GROUND 1: That the learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby occasioning a miscarriage of justice,

On ground one above, the appellants counsel submitted that the trial magistrate convicted the appellant on prosecution evidence which fell below the required standard of proof in criminal cases. He cited the case of **R VS CUNING HUM (1957)2 QB** and submitted that the ingredient of malice/intent to poison to be proved, the acts and omissions are done maliciously where harm is foreseen and requires an intention to that particular harm that was done or recklessness. That however in this case, the appellant and the complainants had a common intention of giving and receiving medicine and that the intent was to provide medicine and not to harm. That this was confirmed by pw1 and pw2 who confirmed that the appellant has been their friend and had been praying for them since 2017and that the trial magistrate was wrong to find this ingredient was proved beyond reasonable doubt.

He further argued that prosecution failed to prove that the substance that was administered was poison or any other destructive or noxious thing thus endangering the victim's life. That there was no medical report to rule out the type of poison if any. That only blood samples were taken and the vomit which would have been a crucial element of investigation was left out.

In reply the learned state attorney submitted that prosecution proved all the elements of the offence beyond reasonable doubt that the appellant committed the offence. That the complainants PW1 and PW2 knew the appellant as a friend who would pray for them and do spiritual cleansing

on them from time to time, they also stated that on the fateful day they ingested the poison ad or noxious substance on direction of the appellant. That it is also their evidence that immediately they had adverse reaction and informed the appellant who told them that it was expected. That both PW1 and PW had to seek medical attention and the condition of pw2 was severe and that upon examination by pw3 he classified the injury as dangerous harm.

Under section 221 of the penal code Act, prosecution was under to prove the following elements beyond reasonable doubt.

1. Maliciously with intent to injure

2. administered poison or other destructive or noxious thing

3. There by causing grievous harm

I have perused the lower court record and the judgement therein. it is clear and borne out of evidence on record that the parties knew each other well. The substance was voluntarily taken by the complainants who invited the appellant and the substance caused harm to the complainants.

The only question for court to answer is whether the administration of the said substance was maliciously done with intent to harm the complainants or not.

I shall therefore re- evaluate the evidence on record as regards the above question.

Maliciously with intent to injure

Malice was defined in the English case of **Bromage v. Prosser, 4 Barn. & C. 255.** where court stated that in its legal sense, *this word does not simply mean ill will against a person, but signifies a wrongful act done intentionally, without just cause or excuse. conscious violation of the law*

(or the prompting of the mind to commit it) which operates to the prejudice of another person.

Further, malice is defined as an evil intent or motive arising from spite or ill will; personal hatred or ill will; culpable ***recklessness*** *or a willful and wanton disregard of the rights and interests of the person see.* **McDonald v. Brown**

Black's Law Dictionary defines **recklessness** as "*Conduct whereby the actor does not desire harmful consequence but ... foresees the possibility and consciously takes the risk", or alternatively as "a state of mind in which a person does not care about the consequences of his or her actions.....Criminal law recognizes recklessness as one of four main classes of mental state constituting mens rea elements to establish liability, namely: Intention:* **intending the action**; **foreseeing the result; desiring the result:**

In this case it was the evidence of PW1 and PW2 the complainants that the appellant was their friend since 2017 and that he prayer with them and performed spiritual cleansing on them. That on the fateful day they invited the appellant for exorcism. That he had carried a drink with him in the bottle. That few moments after administering the drink the accused left their house and the two complainants began to vomit, had diarrhea and acute pains. That the appellant was informed and his response was that the reactions were expected.

My analysis of the evidence on the lower court record as highlighted above is that the complainants and the appellant consented to the exorcism process where the appellant was to provide medicine which he actually administered to them. The substance reacted and indeed the appellant responded that the reactions were expected. Ideally like any other medicine the appellant expected side effects. However, prosecution failed to prove that the appellants had foreseen that the expected reactions would result in to grievous harm and that he desired grievous harm to occur to the complainants. It was not enough to prove that the appellant had

foreseen reactions of the substance that was administered. There was need to connect the said reactions with the appellant's intention to harm the victims. The appellant cannot be said to have intended to harm the victims when he visited them to see how the complainants were fairing and continued attending to them. This conduct is not conduct of a guilty man.

The intention of the appellant was to provide medicine to the complainants who invited him for the same. Although prosecution led evidence to show that the treatment resulted in to grievous harm, prosecution failed to prove that the appellant intended or had foreseen such harm would occur.

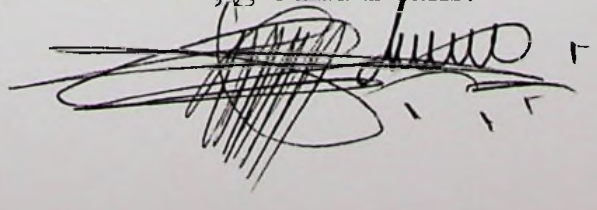
It is therefore the finding of this court that the learned trial magistrate erred in law and in fact when she found that prosecution had proved this element beyond reasonable doubt. In my view the appellant's acts were a kind recklessness which would attract damages if proved in a civil matter. After re-evaluation of the evidence on record, I am satisfied that that prosecution failed to prove the element of malice with intent to injure a person.

In criminal law, failure to prove one element of a criminal offence is enough to acquit an accused person. I shall therefore not proceed to re-evaluate evidence on the other elements of the offence.

Therefore, ground one of the appeal succeeds.

GROUND 2; <u>That the learned Trial Magistrate erred in law and fact when she convicted the appellant on circumstantial evidence</u>.

On this ground, counsel for the appellant faulted the trial magistrate o her reliance on circumstancial evidence. I find this argument not a correct position considering the direct evidence on record as per the evidence of pw1 and pw2 who game direct evidence. Therefore, ground 2 fails.

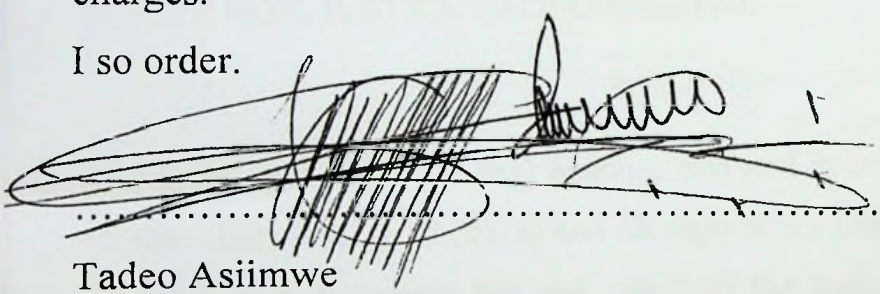


GROUND 3; That the learned trial magistrate erred in law and fact when she passed a harsh and Excessive Sentence against the appellant without putting in to consideration mitigating factors leading to a miscarriage of justice.

I find it not necessary to resolve the above ground since the outcome of ground one leads to an acquittal.

In conclusion, I find merit in this appeal, and consequently set a side conviction and sentence against the appellant in Makindye Criminal Case No788 of 2018. The appellant's conviction is hereby substituted with an acquittal. He should be set free immediately unless held on other lawful charges.

I so order.



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Tadeo Asiimwe

JUDGE

26/3/2021