THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

CRIMINAL APPEAL No. 17 of 2020

1. **MWASE FRED**
2. **KASIBANTE JAMES**
3. **SSENTAMU JONATHAN::::::::::::::::::::::::APPELLANTS**

VERSUS

UGANDA ::RESPONDENT

JUDGMENT

BEFORE HON. JUSTICE TADEO ASIIMWE

Introduction:

The respondents were charged with the offence of Doing grievous harm C/s 219 of The Penal Code Act.

It was alleged that Mwase Fred, Kasibante James, SSentule Johnathan and Bisimwa Moses on the 16th day of April 2016 at Nsambya Kirombe Makindye Division in the Kampala District Unlawfully did Grievous harm in Rugasira Andrew.

The trial magistrate found the Appellants guilty, convicted and sentenced them for the offence of Doing grievous harm C/s 219 of The Penal Code Act.

Being dissatisfied and aggrieved by that decision, the appellant appealed to this court on the following grounds, namely;

1. That the learned trial magistrate erred in Law and in fact when she convicted the appellants for doing grievous harm.

2. The learned trial Magistrate erred in law and fact when she held that the appellants had been properly identified by the complainant at the scene of crime.
3. The learned trial Magistrate erred in law and fact when she failed to evaluate the appellants evidence in respect of their defence of alibi as against the prosecution's evidence of their participation in the crime.
4. The learned trial Magistrate erred in law and fact when she ignored all the inconsistences in the prosecution evidence thereby coming to a wrong conclusion.

Duties of a first appellate court:

[13] 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).

The appellants were represented by counsel Wetaka Andrew while the respondent was represented by Nanziri Charlot.

Both counsel made written submissions on record which I shall consider in this judgement.

Although 4 grounds of appeal were framed in the memorandum of appeal, all relate to evaluation of evidence of the participation of the accused persons in the commission of the crime. I shall therefore resolve all the grounds of the offence together.

In his submissions, counsel for the appellant submitted that the evidence led in the lower court as to the participation of the accused persons in the commission of the offence was insufficient and contradictory. He further testified that the circumstances of identification were difficult as the incident took place at 4:00pm in the night by a number of attackers and that the victim could have been mistaken, a fact that the trial magistrate ignored.

In reply, the learned state attorney submitted that the trial magistrate properly evaluated the evidence on record and came to a logical conclusion. That the victim PW1 and PW5 properly identified the attackers with use of light and that the inconsistencies in their evidence were minor and attributed to lapse of time.

For court to convict an accused person of any offence, there must be cogent direct or circumstantial evidence pointing to the participation of an accused person as an active participant in the commission of the offence.

In this appeal. prosecution relied on evidence of PW1 AND PW5 eye witnesses to prove their case in the lower court.

PW1 the victim on page 6 of the lower court record testified that on the 16/04/2016, at 4|:00 am at he moved home he was attacked by group of

10 persons who assaulted him. That he identified A1, MWASE FRED who cut his finger and neck with a Panga, A2 had a stick, A3 manhandled him and A4 speared him at a veranda. However, in cross examination at page 17 of the lower court record, he contradicted himself and stated that he was attacked by 5 people. He confirmed that he made an additional statement wherein he stated that among the persons who cut him were Nansubuga Jane and that it is waiswa that cut him on the finger. He also confirmed that he did not tell police who had cut off his finger or who had speared him.

Both his statements dated 16/04/16 and 11/6/16 were exhibited as DE1. In the statement dated 16th april,2016 pw1 stated that he was attacked by a group of persons who beat him with sticks and assaulted him with knives. That they decided to take him to police. In the statement made on the 11/o6/16 he stated that among the persons who assaulted him was jane and Dononzio. In both statements he did not mention any of the accused persons as one who had assaulted him. The only explanation to these contradictions is that the incident took place at night and the victim having been attacked was too frightened to identify his attackers.

Further PW5 testified that on the fate full night as he was riding to pick one passenger, he saw a group of young men including the accused persons assaulting the victim. That the accused persons took the victim to the police ad were arrested. He however stated that he was not the first to get to the scene and that he found people already gathered and that there were about 30 persons at the scene. This is contrary to the testimony of pw1.he further testified that he drove away and made a statement 4 months later. Besides contradicting the evidence of pw1, the conduct of pw5 is questionable. First he finds 30 persons at the scene assaulted a man he knew as his customer and was able to witness all events before and after his arrival. Second, he watches an assault and decides to just drive away and think about recording a statement 4 months after the incident.

PW3, the investigating officer testified that he was allocated a file where suspects were in custody and victim in hospital. And that when he interviewed the victim, he stated that he was attacked by a group of unknown persons. He further testified that he does not know how the suspects were arrested. That he interviewed some witnesses who said they heard the complainant but did not know who assaulted him. That the complainant called him 4 months later and told him that they had gotten to know who had exactly assaulted him. His testimony is consistent with the 1st statement of the victim DE1 where he did not mention the persons who assaulted him.

PW4 stated that the accused told him that the accused persons who brought him to police had assaulted him and that 2 day later he stated that he had been assaulted by Dononzio and a one Jane and recorded an additional statement.

The totally of prosecution's evidence was full of contradictions and based on mere suspicion. There is doubt as to who assaulted the victim. It is not logical that 30 or 10 persons can assault you and the 5 or 3 brave ones take you to police. Caution must be taken to differentiate between rescuers that could be falsely accused instead of the mob. The fact that the victim from time to time changed his statements on who exactly assaulted him is quite questionable. It points to uncertainty and there is no explanation for it on record.

It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored **(see Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002 and Uganda v. Abdallah Nassur [1982] HCB).** The gravity of the contradiction will

depend on the centrality of the matter it relates to in the determination of the key issues in the case.

What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case.

In the instant case, pw1 and pw5 heavily contradicted each other on the scene of crime and the number of persons at the scene of crime. Whereas pw1 stated that the scene of crime was a veranda and that the persons at the scene were about 10, pw5 stated that where about 30 persons at the scene of crime and that the scene of crime was the road side.

Further pw1's testimony was contradictory when he stated that A1 Mwase Fred attacked him first and cut his finger and in cross examination stated that it is a one waiswa that cut his finger. He also contradicted himself on the weapon used to assault him. He testified that the accused persons were armed with pangas, spears and sticks while in cross examination he went on to state that instead the accused persons had only a spear. These inconsistencies affect the quality of identification of the participants of the crime. Although the principles set in the case of **Abdalla Nabulere and Other v Uganda (Cr.App.No.9 Of 1978)** as cited by the appellant are only applicable in cases of a single identifying witness unlike in this case, it is very important to rule out proper identification in every case especially one which happens in the nights. Evidence of both eye witnesses was contradictory on the events of the scene of crime and the scene of crime which affects the quality of identification and creates doubt

in the mind of court as to the participation of the accused. I therefore find the inconsistencies major and the trial magistrate could not have ignored them as they go to the root of the matter.

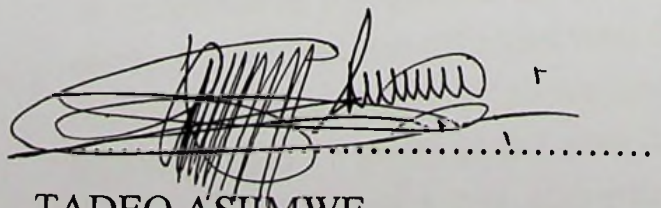
On the other hand, the accused person A1 testified that on the fateful night he heard an alarm. That when he got out he found his neighbors A2, A3 and their mother (woman councilor) outside and that he was told by the mother of the co-accused to help the victim who had been beaten by the mob to take him to police. That when they reached police they were arrested. His evidence was corroborated by evidence of DW2, DW3 and DW4.

This evidence is consistent with the evidence of PW4, a police officer who confirmed that when he interviewed some witnesses, he was told that the accused persons had responded to the alarm and took the victim to police. The same evidence was no rebutted by police.

The testimony of the defence was much more believable than that of prosecution which was largely an afterthought and contradictory.

I therefore find that the trial magistrate did not properly evaluate the evidence on record hence occasioning a miscarriage of justice. All the grounds of this appeal succeed, this appeal is allowed and the appellants are hereby found not guilty of the offence of Doing grievous harm C/s 219 of the Penal Code Act.

Conviction and sentence of the accused are hereby set aside.



TADEO ASIIMWE

JUDGE

23/03/2022