THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CRIMINAL DIVISION)

CRIMINAL APPEAL NO.13 OF 2022

ARISING FROM NABWERU CRIMINAL CASE NO.226 0F 2018

UGANDA----------APPEALLANT

VERSUS

BYARUHANGA SAMUEL----------RESPONDENT

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

Background

The respondent was charged with the offense of assault occasioning actual bodily harm contrary to section 236 of the Penal Code Act. The prosecution alleged that on the 9th day of December,2017 at around 10:30pm, while at West Zone in Nansana, the respondent unlawfully assaulted the complainant a one Gumisiriza Joseph Shaban.

At the hearing in the trial court, the prosecution led evidence of four witnesses while the defense led evidence of three witnesses. The matter was concluded and the respondent was acquitted.

The prosecution being dissatisfied with the decision appealed against the judgement of the learned trial magistrate on the following ground;

1. ***That the learned trial magistrate erred in law and fact when she wrongly analyzed the evidence and acquitted the accused person.***

I have considered the submissions of the parties in determining this appeal.

Consideration

This being a first appellate court, it has 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"

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused persons and the accused are only convicted on the strength of the prosecution case and not because of weaknesses in their defence. ***See: Ssekitoleko v. Uganda [1967] EA 531*****).**

The respondent herein was charged with assault occasioning actual bodily harm contrary to section 236 of the Penal Code Act.

That section provides,

"Any person who commits an assault occasioning actual bodily harm commits a misdemeanor and is liable to imprisonment for five years."

Assault may be defined as any act by which a person intentionally or recklessly causes another to suffer or apprehend immediate unlawful violence. Harm has also been defined under Section 2 of the Penal Code

Act to mean any bodily hurt, disease or disorder whether permanent or temporary.

To establish assault occasioning actual bodily harm the prosecution must prove each of the following ingredients beyond reasonable doubt:

1. That the accused committed a physical act (touching, striking or applying force to another);
2. The accused did so intentionally or recklessly;
3. The accused did so without lawful excuse; and
4. As a direct result of that physical act the victim suffered a physical injury.

It must also be discerned from the facts therefore that there is an intention to assault and the assault must indeed have taken place. Both elements of intention to assault and the actual assault must be proved.

PW2- Mulindwa Alawi a clinical officer adduced medical evidence to corroborate the evidence of the complainant that he sustained actual bodily harm or injury. This is not in doubt.

What therefore is in contention is whether the mensrea to assault existed at the time the assault took place or rather put it, was there an intention on the side of the respondent to assault the respondent. The presumption is that every harm is unlawful unless there is evidence that the accused needed to defend himself.

PW1 –Gumisiriza Shaban told court that the respondent is his father, that he was returning from a party in the neighborhood when he got punched on the mouth by his dad.

PW3's testimony gave a background as to what led to this incident. On page 13 of the record, PW3 Kijjambu William told court that it was his daughter's birthday party and they were playing music. That the respondent sent someone to ask them to reduce the volume of the music since he had guests at home but he the complainant declined to lower it after several requests. That it was after this that the respondent confronted the PW1 hence the brawl.

DW1 the respondent herein denied intentional punching the complainant, it was his testimony that they had grudges since he had asked the complainant to leave his premises. A notice to vacate was exhibited in court as proof of this.

In cross examination, DW1 further told court that as a family, they had an introduction ceremony in Matuuga, that when they returned they started praying to God thanking him for the successful event. That the complainant brought a woofer and started playing loud music. That they requested him to lower the volume since he was disrupting the prayers; it was the evidence of DW1 that the complainant was reluctant to heed to their request to lower the volume. It was his testimony that he got hold of the woofer and a scuffle ensued between them which resulted to his injuries, he added that they wrestled with the PW1 until he managed to get hold of the woofer. He categorically told court that he did not punch his son.

It is clearly evident from the record that there existed a deep seated grudges between the accused and the complainant which may not be exhaustively resolved by this appeal.

The learned trial magistrate rightly put it in judgement that;

'The law on grudges is that where there is evidence of grudges, the court must warn itself of the possibility that the witnesses may be fabricating evidence against the accused……"

He further noted in his evaluation of evidence that;

"I find that there overwhelming evidence of deep seated grudges between the complainant and the accused……..the complainant has had an unfortunate experience of receiving a letter instructing him to leave a piece of property, there is evidence that the rift between the parties is deep enough that the complainant did not attend the brother's introduction ceremony to which other family members had gone, in total the evidence of the accused sufficiently weakens the prosecution evidence……"

I agree with the above laid out reasoning particularly because in criminal proceedings where the requirement is beyond reasonable doubt, it is always difficult to see how the court can be certain enough to believe the word of the complainant over the word of the accused moreover where all the evidence points to an existing grudge.

The evidence from the defense that this was a brawl involving the accused and the complainant occasioned by the complaint's act of playing loud music in total disregard to an ongoing family meeting hosted by the respondent is more compelling. The complainant is not with clean hands as his conduct occasioned this whole incident. The version of the prosecution seems to point to the respondent intentionally going up to PW1 with no provocation and punching him which is not the case.

Furthermore, the evidence of DW2 and DW3 was consistent with the main testimony of DW1 wherein they told court that the respondent did not

assault the complainant but rather this was a scuffle. This line of defense presented by respondent was not dispelled by the prosecution evidence because the defense witnesses chronologically testified as to the cause of the scuffle between PW1 and the respondent. The prosecution failed to prove that the respondent intentionally went up to the complainant and punched him without just cause.

The respondent's suggestion that his prosecution could be as a result of their grudges must be inferred from the evidence on record, and the circumstances must lead a reasonable person to the conclusion that this is indeed the case.

This assertion is supported by the fact that the complainant was living on the respondent's premises; it had also been indicated to PW1 through notice to vacate that he had to leave the respondents premises. His actions of playing loud music well knowing that the respondent had guests was intended to spite the respondent. It can be therefore inferred from the evidence that when the respondent faced him up, PW1 turned violent hence the ensuing brawl. He cannot now turn around claim that he was assaulted yet he was the instigator of this whole incident. It appears to me from the evidence on record that this prosecution on the part of the complainant is intended wreak vengeance on the respondent.

He incited this whole incident with the respondent. There appears an ulterior motive on the part of the complainant to wreak vengeance on the accused because of their internal disputes. The learned trial magistrate cannot be faulted for relying on this evidence to find that the existence of a grudge between PW1 and the respondent thus greatly weakened the prosecution evidence.

In view of the foregoing, I find that the learned trial magistrate properly evaluated the evidence on record hence acquitting the respondent. The appeal is accordingly dismissed.

I so order

JUDGE

28/9/2022