THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL DIVISION
CRIMINAL APPEAL NO.140 OF 2022
(ARISING FROM NAKAWA CHIEF MAGISTRATES COURT CRIMINAL CASE NO.271 OF 2019)

1. **OKUMU BENEDICTO OUNDO**
2. **OKUMU JUDAH**
3. **OGUTU EMMANUEL----------APPEALLANTS**

VERSUS

UGANDA----------RESPONDENT

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

The appellant's being aggrieved and dissatisfied by the decision of Grade One Magistrate Akello Irene delivered at Nakawa Chief Magistrates court appealed to this court on the following grounds;

1. ***That the learned trial magistrate erred in law and in fact when she failed to properly evaluate the evidence thus arriving at wrong decision thereby occasioning a miscarriage of justice.***
2. ***That the learned trial magistrate erred in law and in fact when she failed to uphold the appellant's unchallenged evidence thus arriving at a wrong decision thereby occasioning a miscarriage of justice.***
3. ***That the learned trial magistrate erred in law and in fact when she convicted the appellant's basing on accusations which were***

not proved thus arriving at a wrong decision thereby occasioning a miscarriage of justice.

4. ***That the learned trial magistrate erred in law when she imposed a harsh, severe and illegal sentence in the circumstances of the case thus occasioning a miscarriage of justice.***
5. ***That the learned trial magistrate erred in law when he did not consider or deduct the period the appellant spent on remand and other mitigating factors while sentencing the appellant's thus occasioning a miscarriage of justice.***

The appellant's prayed for the appeal to be allowed, conviction and sentence set aside and the appellant's be released

Representation

Counsel Sselwanga Geofrey was for the appellant's while the respondents were represented by Mr. Edwin Amanya State Attorney

The parties were directed to file their written submissions however it's only the appellant's submissions that are on record. I will never the less proceed to determine this appeal

Duty of the first appellate court

As submitted by counsel for the appellant's, the duty of this court as the first appellate court is to reevaluate the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and reappraisal before coming to its own conclusion

This court must also make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh all the evidence and draw its own inference and conclusions: ***See: Lovinsa Nankya V Nsibambi [1980] HCB 81***

I will jointly resolve grounds 1,2, and 3 because they revolve around whether the learned trial magistrate properly evaluated the evidence on record in reaching her decision

The appellants were charged with the offence of doing grievous harm contrary to section 219 of the Penal Code

The section provides that;

"Any person who unlawfully does grievous harm to another commits a felony and is liable to imprisonment for seven years."

The prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. ***The victim sustained grievous harm.***

2. The harm was caused unlawfully.

3. The accused caused or participated in causing the grievous harm.

With regard to the first element, bodily "harm" means any bodily hurt, disease or disorder whether permanent or temporary. The nature of grievous harm is defined by section 2 (f) of The Penal Code Act as any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely so to injure health, or which

extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense. The prosecution called PW5 Kalungi Sam Christina the medical officer who tendered in medical evidence that indicated that PW1 the victim had multiple swellings on the left arm, multiple abrasions on the forehead, back and right foot and the injuries were classified as grievous harm. The victim also testified that he was beaten and left unconscious

I find that this element was proved by the prosecution beyond reasonable doubt.

The second element required proof that the injury sustained by the complaint was caused unlawfully. This requires proof of an intentional wrongful act against another without legal justification or excuse and may be as a result of motives such as anger, hatred or revenge. Exhibiting aggressive, threatening behavior towards another or expressing a threat to cause physical harm, resulting in the complainant harboring reasonable fear for his or her physical safety, is an unlawful or wrongful act of assault.

The evidence must therefore show an intentional act, done for the purpose of causing or threatening harmful or offensive contact with another person or under circumstances that make such contact substantially certain to occur, and that such contact occurred in fact. **See: Uganda v Okech and Anor Criminal Appeal No. 21 of 2015 High Court at Gulu.**

PW1 testified that A1 called A2 and A3, A2 held him by the neck and A3 pulled his clothes, he also told court that A1 came with sticks and beat him all over the body and was left unconscious

PW3 also testified that she saw PW1 being beaten by A, A2, A3 and the he PW1 was bleeding from the nose

The version of the defense was that they were acting in self-defense however the nature of injuries sustained by PW1 suggest otherwise, the evidence suggests a well-orchestrated plan by the appellants to cause harm to PW1, the fact that they held the victim as he was beaten by his own father suggests that they had always harbored this intention owing to their family differences. The appellant's failed to adduce evidence to show that the assault they occasioned on PW1 was reasonably necessary to protect the accused against equal or greater bodily harm that would have been inflicted on them by him. I find that based on the fact that the complainant sustained an injury and the appellant's version fails to account for it, the prosecution version was the more plausible version. This element was thus proved.

Lastly, they had to be evidence proving beyond reasonable doubt that each of the appellant's caused or participated in causing the grievous harm sustained by the complainant. There should be credible direct or circumstantial evidence placing each of the appellants at the scene of the crime as some active participants in the commission of the offence

It is worth noting that the complainant is a son to A1, and a brother to both A2 and A3 meaning that they are very familiar with each other, so there is no doubt as to mistaken identity.

PW1 the complainant positively identified A1 his father as the one who beat him, A2 was holding him by the neck and A3 was pulling his clothes. He also added that A2 and A3 also beat him up

The evidence of PW2, PW3 was also the effect that they saw the appellant's beating PW1. This testimony was not controverted by the defense as A1 claimed he was acting in self-defense while A2 and A3 stated that they did not how the fight started. The question whether a person acted in self-defense or not is one of fact and each case must be considered and judged on its facts and surrounding circumstances as a whole

An accused person raising this defense is not expected to prove, beyond reasonable doubt, the facts alleged to constitute the defense. Once some evidence is adduced as to make the defense available to the accused, it is up to the prosecution to disprove it. The defense succeeds if it raises some reasonable doubt in the mind of the court as to whether there is a right of self-defense.

Similarly, it is an accepted proposition of law that a person cannot avail himself or herself of the plea of self-defense when he or she was himself or herself the aggressor and willfully brought on hint without legal excuse, the necessity of inflicting harm. **See: Uganda v Okech and Anor Criminal Appeal No. 21 of 2015 High Court at Gulu.**

The prosecution adduced evidence to the effect that A2 and A3 were holding PW1 as A1 was beating and that it was indeed A1 who brought the sticks, A1 cannot therefore raise this defense because he brought himself as the aggressor and inflicted harm on the victim. The appellants

were the aggressors and cannot therefore avail themselves this defense in light of the prosecution evidence.

The evidence on record therefore squarely places all the appellants as active participants as they were known to both the victim and other prosecution witnesses who gave direct evidence as to having witnessed the events. It is therefore my finding that the learned trial magistrate properly evaluated the evidence on record in finding that the prosecution had proved its case against the appellant's beyond reasonable doubt.

Ground 1,2,3 therefore fail

I will similarly resolve ground 4 and 5 jointly as they deal with the issue of sentence

An appellate court is not to interfere with the 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 ignores to consider an important matter or circumstance which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle **See: Kyalimpa Edward v Uganda SC Criminal Appeal No.10 of 1995.**

The court would also be justified in interfering with the sentence if it was convinced that there was an irregularity in the trial court's proceedings which directly led to the imposition of the impugned sentence which if not corrected will occasion prejudice to the appellant.

Counsel for the appellant's submitted that the learned trial magistrate did not consider the mitigating factors in arriving at the two-year sentence imposed on the appellant's. He argues that the trial court did not give any basis as to the sentence except that the appellants did not appear remorseful a fact which was not valid since the appellant's were not called upon to say anything in alloctus. It was his submission that the alloctus was improperly done

Allocutus is an opportunity granted by the law to an accused to be heard after conviction but before sentencing, one can confidently refer to it as a kind of right. Indeed, the right to fair hearing governs the whole process of criminal trial including the opportunity to make allocutus after conviction and before sentencing. The court must therefore take all necessary aggravating and mitigating evidence or information in respect of each convict that may guide it in deciding the nature and extent of sentence to pass on the convict in each particular case, even though the convicts were charged and tried together.

In the instant case I have perused the record, the alloctus process was not properly done, the learned trial magistrate did not accord the appellant's an opportunity to say something in mitigation but only considered the prosecutions submission, although failure do so does not invalidate the sentencing it denies accused person an opportunity to express remorse, apologize, and say other things beneficial to the public especially those affected by the crime or potential victims.

In light of the this, I shall consider the mitigating factors on appeal which include the fact that the complainant and the appellants are family members who should be given an opportunity to reconcile their differences, A1 who is their father is of advanced age and is sick. Although the maximum sentence for the offence is 7 years' imprisonment the sentence of 2 years imposed by the learned trial magistrate is a bit harsh in light of these circumstances

I shall instead substitute the sentences accordingly.

A1 due to his peculiar mitigating factors is sentenced to 6 months' imprisonment A2 and A3 are sentenced to 1-year imprisonment. The period of remand shall also be deducted from this sentence.

The compensation order for medical bills as ordered by the trial court is maintained.

I so order.

JUDGE.

13/03/2023