**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable
Criminal Appeal No. 21 of 2015

In the matter between

**UGANDA** **APPELLANT**

**And**

**1. OKECH EUGENE }**
**2. OMONY RENATO } RESPONDENTS**

**Heard: 12 February 2019**

**Delivered: 28 February 2019**

**Summary: appeal from acquittal for the offence of Doing Grievous Harm.**

---

**JUDGMENT**

---

**STEPHEN MUBIRU, J.**

Introduction:

[1] The two respondents were jointly charged with the offence of Doing grievous harm C/s 219 of *The Penal Code Act*. It was alleged that on 2nd November, 2014 at Paibwor West village in Kitgum District they unlawfully did grievous harm to a one Opwonya Willy. The prosecution case was that on the morning of 2nd November, 2014 a meeting was convened by P.W.2 Ochan Robinson at the home of P.W.6 Langul Jerodina to find solution to an alleged affair between the son of A1 Okech Eugene and the daughter of the complainant, a one Angom Molly. Tempers flared before the meeting could begin and a quarrel broke out

between the wife of A1 Okech Eugene and the complainant. Both respondents joined in and assaulted the complainant inflicting on him serious bodily injury.

The appellant's evidence in the court below:

[2] P.W.1 Opwonya Willy testified that on 2nd November, 2014 at around 8.30 am he had just left the home of one Onyango where he had been called to mediate in a marital dispute, and had returned home when A1 Okech Eugene hit him with a stone on the face and he fell down. A2 Omony Renato joined in beating and kicking him as he lay on the ground. P.W.2 Ochan Robinson testified that a meeting which had been convened by A1 Okech Eugene that morning, aborted. People instead gathered at the home of this witness. A fight broke out, A1 Okech Eugene boxed the complainant. A1 Okech Eugene picked a piece of broken brick and hit the complainant on the chest with it. A2 Omony Renato joined in beating and kicking him.

[3] P.W.3 Onyango Walter, a son of the complainant, testified that he too had gone to attend that meeting which aborted. In anger the wife of A1 picked a stick and threatened the complainant with it. She followed him up to his home. A fight broke out and the two accused joined in. A1 Okech Eugene and A2 Omony Renato boxed the complainant. The complainant sustained injuries on the jaw and leg. P.W.4 Okongo Simon Knox, a Senior Clinical Officer at Kitgum Government Hospital, examined P.W.1 Opwonya Willy and filled in P.F3 (exhibit P.E.1) on 13th November, 2014. He found that the complainant, P.W.1 Opwonya Willy, sustained fractures on the mandibles. Both cheeks were swollen. X-ray examination was done at Lacor Hospital and the injury was classified as grievous harm. The complainant was unable o pen the jaw and to eat. He formed the opinion that the injury was caused by a blunt object.

[4] P.W.5 Okumu Michael, testified that the complainant arrived to attend a meeting that had been convened. A quarrel broke out and the wife of A1 Okech Eugene picked a stick and began beating the complainant. A1 Okech Eugene stopped his

wife from fighting but A2 Omony Renato joined the beating and the complainant fled to the police bleeding. P.W.6 Achola Betty, wife of the complainant, stated that both A1 Okech Eugene and A2 Omony Renato beat the complainant while at the meeting and he bled. A1 Okech Eugene boxed him on the legs and A2 Omony Renato used a stick. The complainant bled. P.W.7 Langul Jerodina testified that it is the wife of A1 Okech Eugene who started the fight. A1 Okech Eugene joined in and boxed the complainant on the head causing him to fall down. He began stamping on him as he lay on the ground and the complainant began bleeding. A2 Omony Renato participated in beating the complainant.

The respondents' evidence in the court below:

[5] The first respondent Okech Eugene testified as D.W.1 in his defence and stated that a meeting was convened on the morning of 2nd November, 2014 to find a solution to an alleged affair between the son of A1 Okech Eugene and the daughter in law of the complainant. The complainant snubbed the meeting and attempted to ride past the venue. This annoyed the wife of A1 Okech Eugene who went out to beat him but A1 Okech Eugene restrained her. When the complainant tried to fight back by hitting A2 Omony Renato, he missed, lost his balance and fell onto his motorcycle. The complainant did not sustain any injury.

[6] On his part the second respondent Omony Renato testified as D.W.2 and stated that a meeting was convened on the morning of 2nd November, 2014 to find a solution to an alleged affair between the son of A1 Okech Eugene and the daughter in law of the complainant. The complainant snubbed the meeting insisting that it is him who should have convened it. He rode past the venue to the home of his son. This annoyed the wife of A1 Okech Eugene who went after him to force him to attend the meeting. A scuffle broke out during which the complainant aimed to hit Okun but missed and hit Alobo the wife of A1 Okech Eugene who intervened to stop her from fighting. A2 Omony Renato joined in to restrain her as well. The complainant boxed A2 Omony Renato on the neck and

also attempted to kick him but missed. He slid and fell backwards onto his motorcycle. He got up and rode away. The complainant did not sustain any injuries.

[7] D.W.3 Adokorach Janeth testified that when the complainant snubbed the meeting, P.W.2 Ochan Robinson went to call him but he refused to come. Alobo Rose the wife of A1 Okech Eugene was angered and raised an alarm and began attacking the complainant as the complainant moved backwards. Paul Okun the son of A1 Okech Eugene went to restrain his mother. The complainant began fighting him. A1 Okech Eugene intervened to stop the fight. The complainant began to fight A2 Omony Renato. The complainant slid and fell backwards onto his motorcycle. He picked his motorcycle and rode away. D.W.4 Agnes Achola testified that when the complainant snubbed the meeting, P.W.2 Ochan Robinson went to call him but he refused to come. Alobo Rose the wife of A1 Okech Eugene was angered and went to call the complainant. Paul Okun the son of A1 Okech Eugene went to restrain his mother. The complainant slapped Paul Okun. A2 Omony Renato intervened to stop the complainant from slapping Alobo Rose. The complainant began to fight A2 Omony Renato. The complainant slid and fell backwards onto his motorcycle. He picked his motorcycle and rode away.

[8] D.W.5 Omona Simon testified that the complainant snubbed the meeting and went to his son's home. Alobo Rose the wife of A1 Okech Eugene picked a stick and began quarrelling with the complainant. A2 Omony Renato intervened to stop them from fighting. The complainant began to fight A2 Omony Renato. The complainant attempted to kick A2 Omony Renato but slid and fell backwards onto his motorcycle. He picked his motorcycle and rode away. D.W.6 Oloya Patrick testified that the complainant snubbed the meeting and went to his son's home. Alobo Rose the wife of A1 Okech Eugene followed the complainant. A2 Omony Renato intervened to stop them from fighting. The complainant began to fight A2 Omony Renato. The complainant moved backwards, stumbled onto his

motorcycle and fell down. He picked his motorcycle and rode away. He did not sustain any injury.

Judgment of the court below:

[9] In his judgment, the trial Magistrate found that the prosecution had to prove that; (i) excessive force was used by the accused against the victim and; (2) the force directed at the victim was the direct cause of the injuries sustained by the victim. All defence witnesses were consistent that the complainant did not sustain any injuries. The prosecution witnesses were not consistent as to which part of the complainant's boys was injured some saying it was the leg and others the head. Medical evidence shows that the injuries sustained by the complaint were internal. The complainant fell on his motorcycle, got up and rode away. The respondents cannot be responsible for his injuries. The prosecution had failed to prove its case and therefore both accused were acquitted of the charge.

The grounds of appeal:

[10] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate misdirected himself by failing to apply the principles of law relating to corroboration of evidence.
2. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence as a whole leading to the acquittal of the respondents.

Arguments of Counsel for the appellant:

[11] In his submissions, the learned Senior Resident State Attorney Mr. Omia Patrick argued that there was evidence from the respondents that Alobo Rose the wife of A1 Okech Eugene followed the complainant to his son's home intending to fight him. This is consistent with the prosecution evidence that the accused

attacked him there. The trial magistrate failed to identify the proper ingredients of the offence and as a result misdirected himself in the evaluation of the evidence. Alobo Rose the wife of A1 Okech Eugene initiated the attack before both A1 Okech Eugene and A2 Omony Renato joined in. They were all attempting to force the complainant to attend a meeting he was reluctant to and they assaulted him in anger. As a result of the assault, medical evidence showed that he sustained a fracture of the jaw that prevented him from opening his mouth or eating. The injury was classified as grievous harm. Had the trial magistrate properly directed himself he would have convicted both respondents. He prayed that the appeal be allowed, the decision quashed and instead both respondents be convicted as charged. The respondents did not present any submissions.

Duties of a first appellate court:

[12] 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 essential elements of the offence:

[13] Firstly, the trial Magistrate misdirected himself regarding the ingredients of the offence. For the respondents to be convicted of the offence of Doing grievous harm C/s 219 of *The Penal Code Act*, 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.

Whether he victim sustained grievous harm:

[14] Concerning 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.

[15] The differences between "bodily harm" and "grievous harm" therefore are; (1) in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent (2) a mental injury may amount to grievous harm but not to bodily harm (3) in order to amount to bodily harm, the physical injury must "interfere with" health, whereas in the case of grievous harm, the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health.

[16] Both definitions require an impact on "health" yet that word is not defined by the Act. In *Tranby [1991] 52 A Crim R 228*, the Court of Criminal Appeal (Queensland) had occasion to consider the meaning of the word "health" as it appears in the definition of "grievous bodily harm" contained in section1of *The Criminal Code* (with similar wording to section 2 (f) of *The Penal code Act*). The facts were that the appellant bit the complainant's left ear, severing a substantial portion of the lobe. He was convicted of doing grievous bodily harm. The severance did not affect the complainant's capacity to hear, and the only residual effect was a permanent cosmetic disability. The question arose as to whether that injury should be regarded as an injury to health, there being no question that the injury was not permanent. By a majority it was held that such an injury was not an injury to health.

[17] The question of whether or not the injury amounts to "bodily harm" is one of degree, which can only be decided by reference to the facts in each case. In determining this question, it is necessary to focus on the injury and its immediate consequences. Therefore, to show that the grievous harm occurred, the prosecution will rely the victim's testimony or medical records, or the testimony of doctors, or some combination thereof. The ordinary sense of the term health focuses on the functioning of the body, which of course may often be impaired by disease or illness but also by deliberately inflicted injury. An injury that has no consequence upon the functioning of the body does not involve impairment of "health."

[18] The fact that the victim has been left with only a cosmetic disability is irrelevant if the immediate consequences of the injury interfered temporarily with his or her health. It is relevant also to consider the nature of any treatment received and whether any part of the body was unable to perform its functions fully, either as a result of pain or otherwise and there may well be other relevant matters.

[19] For example, in *Pollyanna Nungari Wayne v. Michael Gerard Boldiston, (1992) 108 FLR 252; (1992) 85 NTR 8*, the victim sought medical treatment, and a number of stitches were inserted to stem the flow of blood. The victim was also given painkillers, and she was in a distressed condition whilst at the hospital. She felt a lot of pain, and was dizzy for a week, her ability to chew food properly was interfered with for about a week, her ability to move her eyes was temporarily interfered with by pain, and her ability to speak normally was also temporarily affected. In these circumstances the Supreme Court of the Northern Territory of Australia found that the assault did interfere with her health and therefore did result in bodily harm within the meaning of that expression in the Code. the appellant reached over the counter at the complainant's place of work and slashed her across the face with the broken glass, in retaliation for the complainant having hit her in the face with a stone three days before.

[20] In the instant case, it was the testimony of P.W.4 Okongo Simon Knox, a Senior Clinical Officer at Kitgum Government Hospital, that upon undertaking a medical examination of the complainant P.W.1 Opwonya Willy on 13th November, 2014, he found that the complainant, P.W.1 Opwonya Willy, sustained fractures on the mandibles. Both cheeks were swollen. X-ray examination was done at Lacor Hospital and the injury was classified as grievous harm. The complainant was unable o pen the jaw and to eat. These finding were all reflected in exhibit P.E.1 by which the injury was classified as "grievous harm." This evidence was not impeached in cross-examination nor controverted by the defence. Considering that as a result of the injury for some time the complainant could not open his jaw and could not eat, the injury did interfere with his health and therefore did result in grievous bodily harm within the meaning of section 2 (f) of *The Penal code Act*.

Whether that harm was unlawfully caused:

[21] 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. The prosecution case is that it was caused by an act of aggression. Exhibiting aggressive, threatening behaviour toward another or expressing a threat to cause physical harm, resulting in the complainant harbouring reasonable fear for his or her physical safety, is an unlawful or wrongful act of assault. Threat of harm generally involves a perception of injury. Assault and battery usually occur together. Causing real physical harm to someone else with intent of causing physical harm without his or her consent, is also an unlawful or wrongful act. Physical contact with the body of the victim graduates the crime of assault into one of battery.

[22] The evidence must therefore show a volitional 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. Justifications would include consent of the victim and self defence, defence of others, or defence of property. To prove self-defence, the accused must show the assault was reasonably necessary to protect the accused against equal or greater bodily harm that would have been inflicted by the victim.

[23] There are two versions to the incident. According to the prosecution witnesses, it is the respondents who in anger attacked the complainant in his home or that of his son for refusing to attend a meeting they had convened. The respondents inflicted the injuries on the complainant by battering him. The respondents do not deny the occurrence of an altercation in those circumstances but their version is that they only intervened to restrain Alobo Rose the wife of A1 Okech Eugene from assaulting the complainant with a stick. The complainant attempted to assault one of them by kicking, missed and fell backwards onto his motorcycle and did not sustain any injury.

[24] What is not in doubt from the two versions is that there was an expression of aggressive conduct, although each of the parties attributes such conduct to the other. Exhibiting aggressive, threatening behaviour toward another or expressing a threat to cause physical harm resulting in the complainant harbouring reasonable fear for his or her physical safety is an unlawful or wrongful act. Threat of harm generally involves a perception of injury. Causing real physical harm to someone else with intent of causing physical harm without his or her consent, is also an unlawful or wrongful act. Assault and battery usually occur together. Physical contact with the body of the victim graduates the crime of assault into one of battery.

[25] I find that based on the fact that the complainant sustained an injury and the respondent's version fails to account for it, the prosecution version was the more plausible version. This is because the altercation occurred at the home of the complainant or that of his son and not that of the respondents where the meeting had been convened. The respondents were the aggressors and were motivated by anger as the complainant had snubbed a meeting they had convened. In any event, if that were to be a true version, it would not exonerate the respondent. It is his aggression that would have indirectly caused the injury sustained by the complainant. It is trite that if the accused engages in aggressive behaviour, and the complainant in trying to escape from the accused as a consequence of that aggression suffers injuries, then the accused may be guilty.

[26] A charge laid upon the basis that a person has sustained injuries while trying to escape from assault by the accused requires proof: (1) that the victim immediately before he or she sustained the injuries was in fear of being hurt physically; (2) that his fear was such that it caused him or her to try to escape; (3) that whilst he or she was trying to escape, and because he or she was trying to escape, he or she sustained the injuries; (4) that his or her fear of being hurt there and then was reasonable and was caused by the conduct of the accused; (5) that the accused's conduct which caused the fear was unlawful; and (6) that

his or her conduct was such as any sober and reasonable person would recognise as likely to subject the victim to at least the risk of some harm resulting from it, albeit not serious harm, and it is unnecessary to prove the accused's knowledge that his conduct was unlawful (see *Reg v. Mackie (1973) 57 Cr App R 453 R v. Dalby [1982] 1 WLR 621; [1982] 1 All ER 916; [1982] Crim LR 439; (1982) 74 Cr App R 348 at page 352; R v. Russell & Russell (1987) 85 Cr App R 388; [1987] Crim LR 494; Kong Cheuk Kwan v. R (1986) 82 Cr App R 18; R v. Lane & Lane (1986) 82 Cr App R 5; [1985] Crim LR 89; R v. Dawson, Nolan & Walmsley (1985) 81 Cr App R 150; R v. Mitchell [1983] QB 741; [1983] 1 WLR 676; [1983] 2 All ER 427; (1983) 76 Cr App R 293 & R v. Pagett (1983) 76 Cr App R 279 at page 292* and *Director of Public Prosecutions v. Daley [1979] 2 WLR 239*).

[27] The nature of the threat is of importance in considering both the foreseeability of harm to the victim from the threat and the question whether the victim's conduct was proportionate to the threat, that is to say that it was within the ambit of reasonableness and not so daft as to make it his own voluntary act which amounted to a *novus actus interveniens* and consequently broke the chain of causation. For example in *R v. Williams & Davis [1992] Crim LR 198; [1992] 1 WLR 380; [1992] 2 All ER 183*, the accused picked up a hitchhiker on the way to a festival. The hitchhiker jumped out of the car when it was travelling at 30 mph, hit his head and died. The prosecution alleged that the defendants were in the course of robbing him when he jumped out and thus their actions amounted to constructive manslaughter. the court found that the victim's act was not within the range of reasonable responses available to the victim in the circumstances. This required consideration of the victim's psychological state and any particular characteristics of the victim and an acknowledgement that the stress of the situation or event may lead to the victim acting without thought. In this case however there was not enough evidence that the acts of the accused had led to the victim's reaction being within the range of reasonable responses available to him.

[28] On the other hand, in *Director of Public Prosecutions v. Daley, [1980] AC 237* the accused had an argument with the deceased, who ran from them, tripped on a concrete ramp and fell. He died a few days later. The accused had thrown stones at him while he was running from them. The prosecution alleged that he died as result of being hit by the stones and charged the accused with murder. It was suggested that the deceased died as a result of his fall onto the ramp. It was held that although there was no sufficient evidence that his death was the result of injuries received by being hit by stones, there were only two ways in which the deceased could have received the injuries which caused his death, that is, either by being hit by stones thrown at him by the accused or by his fall over the concrete ramp. Since the court was not satisfied that the deceased's death was caused by being hit by stones, the only probable and reasonable conclusion was that he died as a result of the injuries he received when he fell onto the concrete ramp as he was running away from the accused. There was sufficient evidence that this was a case of "manslaughter by flight" and accordingly the conviction of the accused for manslaughter were upheld.

[29] In the instant case, since the respondents did not state that the complainant sustained the injury by falling backwards onto his motorcycle, the only probable and reasonable conclusion was that it was caused by being hit with blunt object as the complainant testified and as corroborated by P.W.2 Ochan Robinson who testified that A1 Okech Eugene picked a piece of broken brick and hit the complainant with it. Although he stated that the complainant was hit on the chest, this was a minor contradiction more likely to be a result of lapse of memory. P.W.3 Onyango Walter, testified that he too A1 Okech Eugene and A2 Omony Renato boxed the complainant. The complainant sustained injuries on the jaw and leg. P.W.5 Okumu Michael, testified that the complainant fled to the police bleeding as a result of that altercation. P.W.6 Achola Betty, wife of the complainant, stated that the complainant bled as a result of the assault. P.W.7 Langul Jerodina testified that it is the wife of A1 Okech Eugene who started the fight. A1 Okech Eugene joined in and boxed the complainant on the head

causing him to fall down. He began stamping on him as he lay on the ground and the complainant began to bleed. Had the trial court properly directed itself, it would inevitably have come to that conclusion that the prosecution proved beyond reasonable doubt that the injury sustained by the complainant was caused unlawfully.

Whether any of the respondents caused or participated in causing the grievous harm.

[30] Lastly, there had to be evidence proving beyond reasonable doubt that each of the respondents caused or participated in causing the grievous harm sustained by the complainant. There should be credible direct or circumstantial evidence placing each of the respondents at the scene of the crime as an active participant in the commission of the offence. In the instant case the respondents admitted being at the scene and that there was an altercation between them and the complainant. Their version only being that they simply intervened to restrain Alobo Rose the wife of A1 Okech Eugene and it is the complainant who attempted to assault them, but instead in the process, fell down backwards onto his motorcycle.

[31] The defence of self defence is provided under Section 15 of *The Penal Code Act*. Under that section, the principles of English law apply to the defence of self defence. Under English law there is a broad distinction made where questions of self defence arise. If a person against whom a forcible and violent felony is being attempted repels force by force and in so doing harms the attacker the harm is justifiable, provided there was a reasonable necessity for the harm or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker was really serious. It would appear that in such a case there is no duty in law to retreat, though no doubt questions of opportunity of avoidance of disengagement would be relevant to the question of reasonable necessity for causing the harm. In other cases of self defence where no violent felony is attempted a person is entitled to use

reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise break off the fight or avoid the assault, he may use such force, including deadly force, as is reasonable in the circumstances.

[32] It is recognised that though a person threatened need not take to his or her heels and run in a dramatic way, but he or she must demonstrate that he or she is prepared to temporise and disengage and perhaps to make some physical withdrawal and this is necessary as a feature of the justification of self defence (see *Selemani v. Republic [1963] EA 442* and *R. v. Julien [1969] 2 ALL.E.R. 856*). The question whether a person acted in self defence or not is one of fact and each case must be considered and judged on its facts and surrounding circumstances as a whole. In either case if the force used is excessive, but if the other elements of self defence are present there may be a conviction for a minor and cognate offence.

[33] In cases where the evidence discloses a possible defence of self-defence, the onus remains upon the prosecution to establish that the accused is guilty of the crime and the onus never shifts to the accused person to establish this defence anymore than it is for him or her to establish provocation or any other defence apart from that of insanity (see *Oloo S/o Gai v. R. [1969] EA 86* and *Chan Kau v. R. [1955] 2 WLR 192*). An accused person raising this defence is not expected to prove, beyond reasonable doubt, the facts alleged to constitute the defence. Once some evidence is adduced as to make the defence available to the accused, it is up to the prosecution to disprove it. The defence succeeds if it raises some reasonable doubt in the mind of the court as to whether there is a right of self defence.

[34] Lawful self-defence exists when; (1) the accused reasonably believes that he or she is in imminent danger of an attack which causes reasonable apprehension of death or grievous hurt; (2) the accused reasonably believes that the immediate

use of force is necessary to defend against that danger, and (3) the accused uses no more force than is reasonably necessary to defend against that danger. In no case does it justify the inflicting of more harm than it is necessary to inflict for the purpose of defence. It is accepted proposition of law that a person cannot avail himself or herself of the plea of self-defence when he or she was himself or herself the aggressor and wilfully brought on hint without legal excuse, the necessity of inflicting harm.

[35] The respondents' version having been rejected as incredible for not being supported by the evidence on record, the prosecution disproved their defence. The respondents were the aggressors and could not therefore avail themselves of this defence. The trial court therefore should have found that the prosecution had proved beyond reasonable doubt that the respondents were the aggressors and not the complainant. According to section 20 of *The Penal Code Act*, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence (see *Uganda v. Sebaganda and s/o Miruho [1977] HCB 8*; *R v. Salmon [1880] 6 Q.B 79* and *Nanyonjo Harriet and another v. Uganda, S.C. Criminal Appeal No.24 of 2002*).

[36] In order to render the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. An unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault (see *No.441 P.C. Ismail Kisegerwa and No.8674 P.C. Bukombe v. Uganda [1979] 81*). According to P.W.1 Opwonya Willy it is A1 Okech Eugene who hit him with a stone on the face and he fell down. A2 Omony Renato joined

in beating and kicking him as he lay on the ground. P.W.2 Ochan Robinson testified that A1 Okech Eugene picked a piece of broken brick and hit the complainant on the chest with it. A2 Omony Renato joined in beating and kicking him. P.W.3 Onyango Walter, testified that when in anger the wife of A1 picked a stick, threatened the complainant with it and followed him up to his home, a fight broke out in which the two accused joined. They both boxed the complainant. P.W.6 Achola Betty testified that both A1 Okech Eugene and A2 Omony Renato beat the complainant. A1 Okech Eugene boxed him on the legs and A2 Omony Renato used a stick. P.W.7 Langul Jerodina testified that it is the wife of A1 Okech Eugene who started the fight. A1 Okech Eugene joined in and boxed the complainant on the head causing him to fall down. He began stamping on him as he lay on the ground and the complainant began to bleed. A2 Omony Renato participated in beating the complainant.

[37] It is only P.W.5 Okumu Michael, whose testimony attempts to absolve A1 Okech Eugene when he stated that after the wife of A1 Okech Eugene picked a stick and began beating the complainant, A1 Okech Eugene stopped his wife from fighting but A2 Omony Renato joined the beating. A court may rely on parts of the testimony of a witness which are truthful and reject the parts which are false. It may believe the evidence of a contradicting witness and reject the part containing lies or, reject the whole evidence of such witness who may be telling lies, but act on the rest of the evidence, or accept reasonable explanation for the inconsistencies (see *Uganda v. Rutaro [1976] HCB 162; Uganda v. George W. Yiga [1977] HCB 217*; *Saggu v. Road Master Cycles (U) Ltd. [2002] I EA 258; Kiiza Besigye v. Museveni Y. K and Electoral Commission [2001 – 2005] 3 HCB 4*). I find this part of the evidence of P.W.5 to be untruthful as it is against the weight of the evidence adduced by the accounts of all other eyewitnesses and I therefore reject it and find that both respondents participate in the assault and shared a common intention.

Order :

[38] Had the trial magistrate properly directed himself he would have convicted both respondents. For that reason the appeal is allowed. The decision of the trial court is quashed. Instead each of the respondents is found guilty and is accordingly convicted of the offence of Doing grievous harm C/s 219 of *The Penal Code Act*.

_____

Stephen Mubiru
Resident Judge, Gulu

SENTENCE AND REASONS FOR THE SENTENCE

[39] The first respondent Okech Eugene was found guilty and convicted of the offence of Doing grievous harm c/s 219 of *The Penal Code Act*. In his submissions regarding the appropriate sentence, the learned Senior Resident State attorney has prayed for a deterrent sentence on the following grounds; the offence is rampant. The respondents violently and savagely attacked the complainant who had not provoked tem. He was attacked form the home of one of his sons away from the venue of the meeting. That shows hoe the respondents were ready to harm the complainant. The complainant sustained serious injuries for which he underwent an operation at Lacor Hospital. He is also supposed to undergo a second operation from Kumi by a specialist. He still has pain to-date and he lost three teeth. He can hardly eat anything hard. The offence carries a maximum of seven years' imprisonment. The convict together with the other on the rum were on remand for only one day on 5th November,. 2015 and were granted bail on 6th November, 2015 upon issuance of a production warrant. They were on bail throughout the trial. There is no significant period of remand to be taken into account. At his age he should have been the one showing a good example to the community where he lives by living an exemplary life. He is an aggressive person. He prayed that the court sentences him to five years' imprisonment and orders him to compensate the complainant a substantial amount of money for he had been undergoing treatment and has an

operation to undergo. He lost business as a result of the offence. He was ill and he could not go about his business and his children dropped out of school for some time.

[40] In mitigation, counsel for the respondent has sought lenience on grounds that; the first respondent is 58 years old. He is a sole bread winner of 8 children, all in school. He takes care of his wife who is diabetic. He is a first offender. The convict and the complainant are first cousins hence blood relatives. They have been living very well in the community since the offence. The sentence should be to help them heal and to reconcile, not to tear then apart. The five million suggested will hamper the education of his children and will bring more conflict in the family. There have been several meetings to help them reconcile and the last one was with the State Attorney. They agreed that ten million shillings is paid to the complainant for the injuries. Much as the offence is rampant the circumstances that led to the offence should be taken into consideration. It followed an attempt to solve a bigger issue. He should be cautioned and order him to pay shs. 10,000,000/= in compensation.

[41] In his *allocutus*, the respondent has stated that he is 58 years old. He is God fearing and respects the law. He is the L.C.1 Chairperson of his area. He kindly requested that court to consider that they were attempting a settlement and he begged for forgiveness. He has children at the university, one in a technical institute, one at senior six, two at ordinary level, two in p.5 and p6. He has animals to take care of. He is a peasant and bread winner. He prayed for lenience and order of compensation in the sum of shs. 3,000,000/= He was not in the discussions that proposed shs. 10,000,000/= and he cannot afford it.

[42] In his victim impact statement, the complainant has stated that he is62 years old. Because of the injury that he suffered up to now he is unwell. He suggested to his brother to offer financial assistance for the operation but he has not responded. He was told it will costs about shs. 3,800,000/= which is required in

Kumi. He has not done that because of lack financial capacity. In 2015 his children were unable to go to school and up to now they cannot study well. He cannot lay bricks as he was doing before. He is not well. They tried to settle the matter from home. He was part of the discussion that proposed shs. 10,000,000/= as compensation.

[43] The offence of Doing grievous harm c/s 219 of *The Penal Code Act* is a felony attracting a maximum punishment of seven years' imprisonment. The court is guided by the sentencing practice as seen in previous decisions such as *Isale Paul and another v. Uganda, H. C. Criminal Appeal No. 0022 of 2013* where in a judgment delivered on 27th August 2014, sentences that had been imposed by the trial court of payment of fines of shs. 3,000,000/= and in default, two years and six months' imprisonment plus the payment of compensation of shs. 1,000,000/= for the offence of Causing Grievous Bodily Harm C/s 219 of *The Penal Code Act,* were set aside and substituted with one imposing a fine of shs. 300,000/= and in default, two years and six months' imprisonment and shs. 100,000/= as compensation.

[44] In that case, the first appellant stabbed the complainant in the abdomen and shoulder with a sharp object later identified as a pair of scissors. In *Baganda Bernard v. Uganda, H. C. Criminal Appeal No. 0001 of 2016* a sentence of two years' imprisonment and compensation of shs. 1,500,000/= to the Complainant for the medical expenses incurred for the offence of Causing Grievous Bodily Harm C/s 219 of *The Penal Code Act* were upheld. In that case the appellant assaulted the complainant with an iron bar which occasioned grievous harm and loss of consciousness. In *Shimanya Geoffrey v. Uganda, H. C. Criminal Appeal No. 0009 of 2015* a sentence of a fine of shs. 3,700,000/= or twenty four months' imprisonment in default, plus an order that out of the said fine three million shillings was to go to the victim as compensation for the offence of Causing Grievous Bodily Harm C/s 219 of *The Penal Code Act,* was upheld. In that case the appellant inflicted a cut on the head and mouth of the victim leading to loss of

consciousness. Medical evidence showed that the victim sustained a cut would at the back of the head.

[45] In the instant case, the offence was committed within the context of a family dispute over inappropriate relationships. The first respondent chose to take the law into his own hands, thereby inflicting severe bodily injury on the complainant that resulted in an injury that still requires surgery. The court takes a serious view of the nature of the injury as a head injury occasioned by mighty force that could easily have resulted in death, had the blow landed on a more sensitive part of the head. According to section 110 of *The Trial on Indictments Act*, the discretion to impose the sentence of a fine is exercised where the relevant penal provision renders the offence punishable with a fine or a period of imprisonment or alternatively imprisonment as well as a fine. Section 219 of *The Penal Code Act* does not provide for the option of a fine as part of the possible sentence.

[46] I am however cognisant of the judicial practice of imposing fines in respect of first offenders instead of custodial sentences, by virtue of section 108 (2) of *The Trial on Indictments Act* which permits a sentencing court to impose a fine in addition to or instead of imprisonment. Although the respondent is a first offender, the offence he committed deserves a deterrent sentence considering the level of violence involved and the rampant incidents of violence of this nature. I have considered the fact that the victim still suffers pain, several years after the injury was inflicted and is yet to undergo surgery. This and the fact that a deadly weapon was used, are factors that place the case into the category of one of substantial gravity.

[47] Those circumstances of substantial gravity are mitigated by the fact that the respondent is a first offender who stands to be punished for a single offence and who has no other offences to be taken into consideration. He has also expressed remorse and does not seem to have had a history of violence. The offence seems to have been the product of a sudden fit of rage. In the circumstances I

am disposed to think that a deterrent but primarily reformative sentence will be sufficient. It is for that reason that imposition of a hefty fine, should prima facie be adequate. It is on that basis that I sentence the respondent to a fine of shs. 3,000,000/= (three million shillings) or to serve four (4) years' imprisonment in default.

[48] Section 126 of *The Trial on Indictments Act* confers discretion upon a trial court, in addition to any other lawful punishment, to order the convicted person to pay another person such compensation as the court deems fair and reasonable, where it appears from the evidence that, that other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit.

[49] This power to award compensation is intended to reassure victims of crime that they are not forgotten in the criminal justice system. Criminal justice increasingly looks hollow if justice is not done to the direct victim of the crime. In some cases, the victims lack the resources to institute civil proceedings after the criminal case has ended. The idea behind directing the convict to pay compensation to the complainant is to afford immediate relief so as to alleviate the complainant's grievance. It is a measure of responding appropriately to crime as well as reconciling the victim with the offence.

[50] There are obvious advantages of allowing one court to deal with the criminal and civil liability of damage caused by the offence such as; avoiding unnecessary litigation, by allowing one court to deal with both criminal and civil liability and thus secure just treatment for both the accused and the victim of the offence and saving the victim of the offence time and costs of recovering compensation or damages in a subsequent civil suit. It provides the victim with a speedy and inexpensive manner of recovering reparation. It requires no more of the victim

than a request for the order. It can also be an effective means of rehabilitating the accused because this order quickly makes the accused directly responsible for making restitution to the victim. The practical efficacy and immediacy of the order helps to preserve the confidence of society in the criminal justice system.

[51] Section 126 of *The Trial on Indictments Act* is designed to accord civil justice to the victim within the criminal trial. By this provision, criminal prosecutions constitute a single proceeding, in which the criminal / civil line becomes blurred. For that reason, invoking this provision should be undertaken after careful consideration of whether or not there is no real danger of causing injustice in the criminal proceedings, since the discretion to award compensation must be exercised judiciously. A Prosecutor who desires the court to make such award needs to lead evidence relating to proof of the injury resulting out of the criminal act, and provide material to court during the prosecution case on basis of which the assessment of compensation will be made.

[52] While the court has discretion to order compensation under this provision for damage caused by the offence, it must satisfy itself not only that the offender is civilly liable, but that if a civil suit were instituted against him, he would pay substantial compensation. This means in practice that the court has to decide whether the criminal punishment is enough, or whether there is a need for compensating the victim who has suffered injury, in addition to criminal punishment which may be imposed on the convict. The victim claiming compensation must, however, establish that he or she has suffered some personal loss, pecuniary or otherwise, as a result of the offence, for which payment of compensation is essential, such as would be recoverable in a civil suit. Whether a victim who has suffered injury as a result of the commission of an offence would recover compensation in a civil suit depends very much on the nature of damage caused by the offence. Sometimes criminal proceedings may be a sufficient remedy.

[53] From the procedural perspective, the power to order compensation under section 126 of *The Trial on Indictments Act* is subject to the basic rules of a fair hearing. In order to afford an accused ample and fair opportunity to meet the claim for compensation, during the prosecution case, the court should hear prosecution evidence regarding this aspect as part of its case generally against the accused. That way the accused will have been given ample opportunity to reply or respond to evidence relevant thereto, and at the defence stage, to adduce such evidence as he or she may deem necessary, for rebutting the claim for compensation, or the assessment thereof. If this is done during and as part of the trial of the criminal liability of the accused, the court will at the same time have heard the evidence relating to proof of the damage resulting out of the criminal act and relevant to the assessment of compensation such that upon conviction of the accused, it will be in position at the same time to determine, assess and order compensation.

[54] In the instant case, I find that there is sufficient material before the court showing that the complainant sustained material physical injury damage as a consequence of the offence committed for which substantial compensation is recoverable in a civil suit. Whereas the power to impose fines is limited, section 126 of *The Trial on Indictments Act* does not impose any such limitation. Just like the power to award general damages in civil proceedings, the power to award compensation appears to be at large but that jurisdiction cannot be exercised at the whims and caprice of a trial court.

[55] There is nothing though like a power without any limits or constraints. That is so even when a court may be vested with wide discretionary power, for even discretion has to be exercised only along well-recognised and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity. Although I do not read the section as requiring exact measurement such as is expected in proof of special damages in a civil suit, since the provision is clearly not intended to be in substitution for the civil remedy, the court should be

slow to make an assessment and award of substantial amounts as compensation without clear evidence of a definite amount by admission or other proof, otherwise it risks descending into purely civil consequences of the facts that constitute a crime. Section 126 of *The Trial on Indictments Act* is not to be used *in terrorem* as a substitute for or reinforcement for civil proceedings.

[56] It is true that on account of its discretionary nature the sentencing process is traditionally permitted to proceed largely on the basis of information rather than on the basis of evidence. But the special nature of orders for compensation requires that they be made only on the basis of evidence by admission or otherwise. The section does not spell out any procedure for resolving a dispute as to quantum; its process is, *ex facie*, summary but I do not think that it precludes an inquiry by the court to establish the appropriate amount of compensation, so long as this can be done expeditiously and without turning the sentencing proceedings into the equivalent of a civil trial. The Court should is mindful of the fact that had the complainant been forced to undertake a civil suit to recover the sum, he would have been forced to prove his loss in a stricter manner and the fact that prospect of obtaining in a summary way from the court in exercise of its criminal jurisdiction an order of compensation equivalent to a judgment in a civil suit is an open invitation to resort to the criminal process mainly for the purpose of obtaining the civil remedy, especially in cases of crime against the person committed by persons against whom a civil condemnation is likely to be of some practical value.

[57] For that matter, an award of compensation must be reasonable. What is reasonable will depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the loss suffered the justness of claim by the victim, the ability of accused to pay and other relevant circumstances. This requires an inquiry, albeit summary in nature, to determine the paying capacity of the offender, unless of course the facts as emerging in the course of the trial are so clear that the court

considers it unnecessary to do so. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that the first and the most effective check against any arbitrary exercise of discretion is the well-recognised legal principle that orders can be made only after proper evaluation.

[58] The criteria which a court must consider in determining whether an order of compensation should be made in addition to another sentence passed have been set out by the Supreme Court of Canada in *R. v. Zelensky, [1978] 2 S.C.R. 940*. There Laskin C.J. stated at p. 961:

> The Court's power to make a concurrent order for compensation as part of the sentencing process is discretionary. I am of the view that in exercising that discretion the Court should have regard to whether the aggrieved person is invoking s. 653 (*in pari materia* with section 197 of *The Magistrates Courts Act*) to emphasize the sanctions against the offender as well as to benefit himself. A relevant consideration would be whether civil proceedings have been taken and, if so, whether they are being pursued. There are other factors that enter into the exercise of the discretion, such as the means of the offender, and whether the criminal court will be involved in a long process of assessment of the loss, although I do not read s. 653 as requiring exact measurement.

[59] Laskin C.J. further observed that a compensation order should only be made when the amount can be readily ascertained, and only when the accused does not have an interest in seeing that civil proceedings are brought against him in order that he might have the benefit of discovery procedures and the production of documents.

[60] Obviously, though, neither the production of documents nor the examination for discovery will be of much, if any, significance if the amount owing to the victims is fixed and acknowledged. “Where the amount lost by the victims of the appellant's

criminal conduct is admitted it would not be sensible to require them to incur the additional expense of undertaking civil proceedings to establish their loss, nor do I believe that it would assist in the appellant's rehabilitation to permit him to put his victims to this additional trouble and expense" (aptly stated by Martin J.A. in *R. v. Scherer (1984), 16 C.C.C. (3d) 30, at p. 38*). A victim of crime in a situation where the amount involved is readily ascertained and acknowledged by the accused should not be forced to undertake the often slow, tedious and expensive civil proceedings against the very person who is responsible for the injury. In such situations, it would be unreasonable to deny the practical necessity for an immediate disposition as to reparation by the criminal court which is properly seized of the question as an incident of the adjudication over the criminal accusation.

[61] Section 126 of *The Trial on Indictments Act* confer discretion upon a trial court, to order "such compensation as the court deems fair and reasonable." This requires that as long as the damage is financially assessable, the amount ordered should be proportional to the damage caused by the wrongful act. An important consequence of the principle of proportionality is that orders of compensation should not be punitive in nature. The amount determined by court should exclusively be aimed at remedying the damage caused through the wrongful act, and not conceived as an exemplary measure. The aim should be to redress only direct damage and loss resulting from the illegal act, leaving out those damages and losses which are too indirect or remote.

[62] The court therefore takes a compensatory approach based on the principle of *restitutio in integrum*. The amount assessed by court should be exclusively aimed at remedying the damage caused through the wrongful act, but not as an exemplary measure. The aim should be ordering payment of a sum corresponding to the value which restitution in kind would bear, taking into account the ability of the accused to pay the compensation awarded. Unlike a civil court which when awarding general damages is bound to wipe out the legal

and material consequences of the wrongful act by re-establishing the situation that would exist if that act had not been committed, irrespective of the defendant's ability to pay, a criminal court is required to take into account the ability of the convict to pay the compensation ordered, but remembering that such ability should not be the controlling factor in every case. A criminal court will therefore order compensation intended to re-establish the situation that would exist if that act had not been committed, to the extent of the convict's ability to pay.

[63] An order of compensation in a criminal trial is not necessarily full reparation for the damage occasioned. The criminal court may order partial restitution if it appears the damage caused is more than the convict will be able to pay. The requirement to consider the convict's ability to pay though does not necessarily require the court to order partial restitution. The court may, for example, order an indigent convict to pay a substantial sum in restitution after reviewing the convict's employment status, expenses, liabilities, and living situation.

[64] For that reason, the court is not only required to assess the damage caused to the extent that it is financially assessable, but also to inquire into the paying capacity of the offender, unless the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. In determining whether to order compensation under section 126 of *The Trial on Indictments Act*, the sentencing court should consider; (a) the amount of the loss sustained by the victim as a result of the offense; and (b) the financial resources of the convict, financial needs and earning ability of the convict and the convict's dependents, and such other factors as the court deems appropriate, bearing in mind the consideration in *United States v. Mounts, 793 F.2d 125* at page 128 where the court observed that "while a [convict's] ability to pay is a consideration in the determination of restitution . . . indigency is not a bar to an order of restitution."

[65] In *United States v. Mounts, 793 F.2d 125*, this was an appeal from an order of restitution entered by the district court following the appellant's guilty plea on one count of a fourteen-count indictment. The appellant claimed on appeal that the district court erred in ordering restitution for the victim's losses associated with thirteen counts of the indictment for which he did not plead guilty. The district court had found by a preponderance of evidence from the arraignment and sentencing proceedings, that the complainant was a victim who had sustained losses as a result of the appellant's criminal actions. With regard to count fourteen, to which the appellant pleaded guilty, the court found that the complainant had sustained a loss of US $ 273, representing the cost of reinstating Monroe's lapsed life insurance policy. With regard to counts one through thirteen, the court found that Monroe had sustained a loss totaling US $ 4,186, representing the total amount of the thirteen forged checks. The court ordered the appellant to pay restitution in the total amount of $4,459, “or such lesser amount as shall be determined in the civil lawsuit now pending in the Wyandotte County District Court.” On appeal, the court observed that such orders are intended to “restore the victim to his or her prior state of well-being' to the highest degree possible.” The court relied on that compensatory purpose in rejecting a restrictive interpretation of the term "offense" that would exclude losses caused by criminal acts which were not alleged in the indictment and for which the appellant was not convicted, and stated;

> In determining the amount of loss to a victim for purposes of awarding restitution …….., a district court is not limited either by the amount specified in the indictment or the specific transactions alleged in the indictment. Taking into consideration the evidence adduced at trial and the evidence presented in the sentencing phase of the case, a district court may order a defendant to pay restitution to any victim for the amount of loss sustained "as a result of the offense.”…… the amount of restitution, however, must be definite and limited by the amount actually lost by the victims. The court must be able positively to identify each victim to whom restitution is due

> and, in addition, the defendant must be given the opportunity to refute the amount ordered. Finally, the amount of restitution ordered must be judicially established…… If "offense" is not restricted to the specific acts for which conviction was had or for which the defendant pleaded guilty, the fact that such acts are contained in the indictment and the defendant did not plead guilty to them does not automatically preclude them from becoming the basis of restitution….. an order of restitution [may be made] for losses incurred by the victim as a consequence of the defendant's criminal acts other than those for which a guilty plea was entered, when there is a significant connection between those other criminal acts and the crime for which a guilty plea was entered….. We therefore hold that when there is evidence that the defendant committed other criminal acts that had a significant connection to the act for which conviction was had or for which a guilty plea was entered, a sentencing judge may order restitution for losses resulting from such acts if the Government can prove both that the defendant caused such losses, and the amount of such losses, by a preponderance of the evidence.

[66] In his victim impact statement, the complainant has indicated that over shs. 3,800,000/= is required for a surgical operation. I have taken that sum to be reasonable compensation the complainant since it was not controverted. I find that the first respondent did not participate in the discussions leading to the sum proposed by defence counsel. The respondent is therefore instead ordered to compensate the complainant, in the sum of shs. 3,000,000/= Full indemnity may be pursued in a civil court.

[67] The first respondent is advised that he has a right of appeal against both conviction and sentence within fourteen days.

[68] The warrant of arrest issued in respect of the second respondent is extended. It is now returnable on 1st April, 2019 at 9.00 am.

_____

Stephen Mubiru

Resident Judge, Gulu

Appearances:

For the appellant : Mr. Omia Patrick, Senior Resident State Attorney.

For the 1st respondent : Ms. Kunihira Rosemary.