IN THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 67 OF 2012

SENKUNGU LUTAYA……APPELLANT

VERSUS

UGANDA……RESPONDENT

(Appeal from the decision of the High Court of Uganda holden at Nakawa before Her Lordship the Hon. Lady Justice Faith E.K Mwondha J, dated the 27th day of March 2012 in Criminal Appeal No. 41 of 2011)

CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, DCJ

HON. MR. JUSTICE ELDAD MWANGUSYA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

This appeal emanates from the decision of the High Court of Uganda at Nakawa, in High Court Criminal Appeal No. 41 of 2011 dated 27th March 2012 before The Hon. Lady Justice Faith Mwondha J (as she then was).

The appellant had been charged with the offence causing grievous bodily harm contrary to Section 219 of the Penal Code Act at the Chief Magistrate's Court Nakawa. The trial Magistrate acquitted him of the offence. The Director of Public Prosecutions appealed against the acquittal to the High Court, which reversed the decision of the trial Magistrate and convicted the appellant.

The appellate Judge sentenced him to a fine of shs. 500,000/= and also ordered him to pay to the complainant compensation of shs. 10,000,000/= in default of which he was to serve a 3 year sentence in prison. The appellant being dissatisfied with the decision filed this appeal.

At the hearing of this appeal **Mr. Henry Kunya** learned counsel appeared for the appellant on state brief while **Mr. Kulu Idumba John Boniface,** learned Principal State Attorney, appeared for the respondent. The appellant was in court.

Mr. Kunya sought and was granted leave to amend the memorandum of appeal to bring it in conformity with Section 45(1) of the Criminal Procedure Code Act (Capm116). This being a second appeal, it is restricted only to issues of law. The amended memorandum of appeal stipulates as follows;-

1. ***THAT the learned Appellate Judge erred in law when she found that the Appellant had been properly identified, whereas not.***

2. ***THAT the learned Appellate Judge erred in law when she engaged in speculation to the prejudice of the Appellant.***

3. ***THAT the learned Appellate Judge erred in law when she failed to adequately re - evaluate the evidence adduced at the trial and hence reached an erroneous decision.***

4. ***THAT the learned Appellate Judge erred in law when she issued an order for compensation in the sum of Ug.shs 10.000.000/=.***

Mr. Kunya argued grounds 1 and 3 together first then ground 2 and lastly ground 4.

He submitted on ground one that the appellant had not been positively identified as the assailant as had been erroneously found by the appellate Judge. He faulted the learned trial Judge for having found that the issue of identification was irrelevant in this case. Counsel contended that identification is always an issue in any given offence. That it is a crucial ingredient that must always be proved. That the appellate Judge erred when she found that the appellant had committed the offence of assault, having earlier held that identification was irrelevant.

Counsel contended that there was no evidence as to the duration of the time it took the witnesses to identify the appellant. That the conditions for identification were not favourable as the offence was committed between 4:30 and 5:30 am when it was still dark. He contended that the source of light was unknown as no evidence had been adduced in this regard. That the appellant was stated to have been identified at a distance of 20-30 metres by PW2, which distance, counsel contended, was unfavorable for positive identification taking into account the fact that it was still dark. He submitted that the prosecution evidence of PW3 was

contradictory as to the exact place the complainant was assaulted from and as to who actually assaulted him.

He submitted that all these facts put together point to the fact that the appellant had not been positively identified as the assailant. Counsel contended that the appellate Judge had failed in her duty to properly evaluate the evidence at the trial and had therefore arrived at an erroneous decision. He invited Court to allow this ground.

On **ground 2**, counsel submitted that the learned appellate Judge engaged in a lot of speculation and conjecture in her Judgment resulting into an erroneous decision. He pointed out that there was no evidence to support the finding of the appellate Judge that the appellant was in the habit of fighting and that he had gone to the market just to fight. That she erred when she concluded that the medical evidence pointed to the guilt of the appellant.

On **ground 4,** counsel submitted that there was no basis upon which the appellate Judge based to order the appellant to pay shs. 10,000,000/= as compensation to the complainant. He cited Section 197 (1) of the Magistrates Court Act in support of his arguments. He submitted that under Section 180 of the Magistrates Courts Act the maximum period a person may be sentenced to prison for defaulting to pay a fine of any amount exceeding shs. 100,000/= is 12 months. That the learned appellate Judge therefore erred when she sentenced the appellant to 3 years imprisonment in default of a fine of shs. 500,000/=.

He asked the court to allow the appeal and to quash the conviction and set aside the sentence.

Counsel for the respondent opposed the appeal.

He submitted that the learned appellate Judge had properly reappraised the evidence and found that the appellant had been positively identified as the assailant. That the factors favouring correct identification were all present. He contended that it was common knowledge that by 5:30-6:30 am in Kampala it is already dawn. That as such the appellate Judge had correctly held that there was sufficient sun light for the witnesses to positively identify the appellant.

As to the distance of 20-30 metres between the witnesses and the appellant, counsel submitted that it was close enough for positive identification. That PW2 stated that the complainant had been assaulted by the appellant who was well known to him and as such he must have properly identified him from that short distance.

On sentence, counsel conceded that there might have been some irregularities but these did not constitute a ground for setting it aside. That sentencing is a discretion of the trial Judge and an appellate court ought not to interfere with a sentence unless there are strong reasons to do so.

He prayed the court to dismiss the appeal.

Mr. Kunya in reply supported the decision of the Judge on sentence and retaliated his earlier submissions and prayers.

We have carefully listened to and considered the submissions of both counsel and have also perused the Court record. This being a second appeal, we are not required to re-evaluate the evidence unless we find that the first appellate Court had failed in its duty to do so. See; ***Rule 30(1)*** of Rules of this court. ***Bogere Moses versus Uganda (Supreme Court Criminal Appeal No. 1 of 1997)***, ***Henry Kifamunte Vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997).***

This appeal therefore is restricted to only issues of law as required by Section 45 (1) of the Criminal Procedure Code Act (CAP 116). It stipulates as follows;-

> ***"45 Seconds appeals.***
>
> ***(1) Either party to an appeal from a Magistrate's Court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of appeal on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law***."

Issue one which relates to the proper identification of the appellant appears to be in relation only to a question of fact. However, when it is read together with issue 3, it raises a

question of law. That question of law is, whether the learned appellate Judge properly re-evaluated the evidence in respect of the identification of the appellant in accordance with its duty in law as a first appellate Court. Failure to do so may therefore raise an issue of law on appeal.

It is contended under grounds 1 and 3 that the learned appellate Judge failed to properly re-evaluate the evidence and as such reached an erroneous conclusion that the appellant had unlawfully assaulted the complainant.

PW1, the complaint, in his examination in chief stated that on 18th May 2011 at 5:00 am while at his store No.7 at Nakawa market he was assaulted by the appellant. That he knew the appellant well. That the appellant was the Vice Chairman for Nakawa Market Traders and Vendors Association. That the appellant was in the company of about 10 others when they all assaulted him. That the appellant hit him on the head.

PW2 also stated that he is a vegetable vendor at Nakawa Market. That on the 14th May 2008 at 5:50 am he saw the appellant, one Kizito and Mirede, with sticks. That from a distance of 20-30 metres, he saw them go to the complainant's store where they proceeded to assault him. That he had moved to the complainant's store apparently to find out what was going on. That the complainant and his group had assaulted him too. That he had seen the appellant beat and kick the complainant.

All the witness including the appellant state that the incident took place on 18th May 2008 except for PW2 who stated that it had taken place on 14th May 2008. We find that this is a minor contradiction or error on record. The appellant testified as DW1. In his examination in chief he sated as follows;-

"On 18th May 2011 at 4:40 am, I was still at home sleeping, I received a phone call from Kato Daniel telling me that Police had told them that they had court order allowing them to take over management of the market. That police had other people, members from Ltd group*(SIC).* ***Kato called me as a leader we have been living closely with the other group of ltd and even RDC intervened. So on receiving the call I came to Nakawa Market and I arrived at about 5:20am. I found police men and businessmen selling food stuff so the businessmen were asking why they brought the court order at night. So I told police to first get out of the market as it was not proper opening the market. The market opened at 6: am. Police went out and we started talking, advising them to bring the court order during the day so that they can explain to businessmen want was taking place. While still at the gate talking to police, someone told me that some businessmen had attacked the complainant and that they are fighting. Where we were the complainant was in about 100 metres. So immediately I rushed to the complainant's store immediately I entered the market so many people came towards the gate running since there were many people, I did not recognize the complainant. But I was told it was the complainant who run out of the***

market and found police outside. People were running after him." *(Emphasis added)*

From the above evidence, it is not in dispute that the complainant and the appellant knew each other very well. They had worked together in the same market for a considerable period of time. The evidence of both the prosecution and the defence points to the fact that the incident took place after 5:50am. The appellant stated that "*the market was opened at 6 am*" showing from the facts, that the incident took place after 6 am since the fighting had begun after the market had been opened. From the narration of what took place by all the witnesses, we have no doubt that there was sufficient sunlight for them to have been able to see what they sated in the evidence. The evidence of the defence also points to this fact.

We therefore agree with the learned appellate Judge's finding that there was sufficient light conducive for proper identification of the appellant.

The appellant put himself at the scene of the crime, when he stated that *"immediately I rushed to the complainant's store".* This put him in close proximity with the complainant who says he was able to identify him. The question of the appellant not having been identified because of distance does not therefore arise.

We agree with the learned appellate Judge that the appellant was properly identified as the person who assaulted the complainant on 18th May 2008 at Nakawa Market and we hold so.

The speculation and conjecture pointed out by counsel for the appellant was immaterial, as there is sufficient evidence upon which the appellate Judge relied to come to the conclusion that she did.

Grounds 1, 2 and 3 therefore must fail. Accordingly the conviction is upheld.

As regards sentence, the learned appellate Judge stated as follows;-

> ***"Court;***
> ***The convict is a first offender, but he inflicted permanent injury on the victim he beat with no reason at all but simply because he was vice Chair person of a rivaling group. I am compelled to pass a reformatory sentence. He appears repentant.***
>
> ***Taking all the above into account he is sentenced to Ushs. 500,000/= (Uganda Shillings Five Hundred Thousand only) and compensation of 10,000,000/= to the victim complainant within 30days from today and in default he will serve 3 years imprisonment.***
>
> ***Right of appeal explained."***

The learned appellate Judge cannot be faulted for having imposed upon the appellant a sentence of a fine of shs. 500,000/=. However, it is contended for the appellant that the law requires a

court to set out its reasons before making an order for compensation. That in this case the Judge did not give any reasons to justify the order and as such the sentence was illegal in respect of compensation.

The court's power to order compensation for material loss or injury is set out in Section 197 of Magistrates Courts Act. Subsection 1, which is relevant to this case, stipulates as follows:-

> ***"197 Order for compensation for material loss or personal injury.***
>
> ***(1) When any accused person is convicted by a magistrate's court of any offence and it appears from the evidence that some 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, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable."***

It appears to us clearly that from the law set out above court is required to act judiciously before making an order for compensation. In this case the Court is required to determine with sound reasons and evidence that the personal injury inflicted upon the complainant was compensatable through a civil Suit.

The Court, in our view, would then determine the compensation being guided by what the complainant would have positively recovered by the way of a civil suit taking into account the means of the convict. The learned appellate Judge also did not state how she arrived at the amount she awarded. She gave no reasons for the order for compensation. We find that the order for compensation of shs. 10,000,000/= was unjustified and had no basis. We accordingly set it aside.

The learned appellate Judge sentenced the appellant to a fine of shs. 500,000/= or 3 years imprisonment is default thereof. Section 180 of the Magistrates Courts Act stipulates that where a court imposes a fine that exceeds shs.100,000/= the maximum term of imprisonment that a person can serve in default of paying the fine is 12 months.

The learned trial Judge therefore erred when she imposed a sentence of 3 years imprisonment in default of a fine of shs. 500,000/= in disregard of the above provision of the law.

That sentence is therefore to that extent illegal and we hereby set it aside.

We substitute it with a sentence of a fine of shs. 500,000/= or 12 months imprisonment in default thereof.

We so order.

Dated at Kampala this **25th** day of **June** 2015.

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HON. S.B.K. KAVUMA
DEPUTY CHIEF JUSTICE

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HON. ELDAD MWANGUSYA

JUSTICE OF APPEAL

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HON. KENNETH KAKURU
JUSTICE OF APPEAL