THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 6,7.8.9/95

FROM KAMULI CRIMINAL CASE NO.MJ. 45

1. WAISWA RICHARD
2. FULUMYA SAMUEL ALIAS FULUTU
3. SOSANI KAKEDE
4. BAKAALI ZEDEKIYA :::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

UGANDA::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::;::::::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

This judgment is an appeal against conviction and sentence imposed upon the 4 appellants my Magistrate Grade I sitting at Kamuli court. The first and second appellants (A1 and A2) were charged with the offence of assault occasioning actual bodily harm c/s 288 of the Penal Code Act in count 1, they were in addition charge with the other 2 appellants (A3 and A4) for similar offence in the second count. They pleaded not guilty and they were tried by the learned Grade I Magistrate who found the first 2 appellants guilty on both counts and she convicted them accordingly, she however cautioned them for the 1st count but sentenced them along with the 2 appellants to 2 months imprisonment in count 2 they all appealed against both sentence and conviction.

They gave 4 grounds in support of their appeal which are as follows:-

1. That the learned trial Magistrate erred in law and fact when she held that (if at all they were assaulted), the appellants had assaulted the complainants.

2. The learned trial magistrate erred when she failed to believe the defence story given the contradictory evidence of the prosecution witnesses.

3. The learned trial magistrate erred to find and hold that an offence of assault occasioning actual bodily harm and has been proved.

4. alternatively and without prejudice to the foregoing, given the facts of the case as a whole, and the fact that the appellants were first offender and on cautioning them on the first count, the custodial sentence of 2 months imprisonment imposed on the appellants for the same type of offence is not only excessive but is justifiable in the circumstance.

On the 1st ground of appeal Mr. Tuyiringire who appeared for all the appellants argued that the learned trial magistrate was wrong in holding that the appellants ever assaulted the complainants. It was his contention that the appellants did not assault anybody and it there was any assault that assault was carried out by Isabirye and Mutasa who went to affect arrest on PW1 and PW3 who had resisted the arrest. It was also his view the PW2 had exonerated A4 who should not have been convicted at all in count 2.

On his part Mr. Okwanga who appeared for the respondent maintained that the appellants had in fact assaulted the 2 complainants and their evidence was supported by that of Clinical Officer (PW7) who examined the 2 complainants. He also argued that the complainants had common intention and therefore the finding of the trial Magistrate on common intention should be upheld.

Upon considering the evidence on record I find it difficult to agree with Mr. Tuyiringire's argument that the 2 complainants were never assaulted at all. These things happened during the morning hours (at about 7.30amm) in a broad day light and apparently the complainants and the appellants were not strangers to each other so the argument that the complainants might have been assaulted by some other people other than the appellants cannot be sustained. The complainants in their testimony and evidence of PW4 clearly show that the complainants were assaulted by the appellants.

There are however 2 matters which must be attended to. The 1st is the issue of A1, it is admitted by all the witnesses for prosecution that this appellant was only giving orders to A2, A3. And A4 but he himself did not physically assault any of the complainants. The learned trial magistrate dealt with this issue At great length and she came to the conclusion that although this particular accuse did not physically beat the complainant he had a common intention with the other 3appellants to unlawfully assault the complainant and she found him

guilty on that ground, basing her decision on the case of: Uganda v Byamukama (1981) HCB page 15 at 18 and provisions of section 22 of the Penal Code Act. Considering the conduct of A1 as described by PW1, PW2, PW3, and PW4 IT cannot be said that this appellant was a mere onlooker it seems he was actually in charge of the whole operation. I find that the learned trail magistrate correctly applied the decision in Byamukama's case and the provisions of section 22 of the penal code3 act to the present case in respect of A1; he certainly had a common intension with the other appellants to unlawfully assault the 2 complainants. A1's intention may be easily inferred from his conduct and there was no need to prove express agreement from his conduct and there was no need to prove express agreement between him and his co-accused: R. v Tabulayenka s/o Kiirya & ors (1943) 10 EACA 51.

The second matter concerns the position of A4, I quite agree with the view taken BY Mr. Tuyirigire that PW2 in his testimony did not mention ever having been assaulted by A4 so it was difficult to see why he should have been found guilty on count 2. I find that the 1st ground of this appeal cannot succeed in respect of A1, A2, and A3 but it succeeds with regard to A4 whom PW2 did not point out as one of these who beat him.

As for the 2nd ground of the appeal, the learned counsel for the appellants argued that there were no major contradictions in the case as presented by the prosecution. He said the 2 major contradictions were that while PW1 said that they managed to escape from the attackers, PW2 said they were just released by the appellants on hearing sound of a vehicle and PW3 said they just run away on hearing the sound of a vehicle. The 2nd contradiction was with regard to the injuries sustained but PW1 and PW2. According to him these people claimed to have been examined on 28/2/94 but according to the medical report the date was 1/3/94 and according to the clinical officer who examined them the complainants had no visible injuries. Mr. Okwanga submitted that there were no contradictions and if at all they were minor contradictions he relied on the cases of Dusmani Sabuni v Uganda (1981) HCB and Alfred Tajar v Uganda EACA Criminal Appeal No. 169/69. He prayed that the alleged contradictions should be ignored.

The 1st contradiction pointed out by Mr. Tuyiringire to me does not amount to a contradiction at all because PW1, PW2 and. PW3 say they went away after the sound of a vehicle had been heard the mere fact that one of them says-that they run away, another one says they were released, then the other one says that they escaped does not mean there was a contradiction it

is a question of misnomer. These witnesses were talking about one thing namely that at one stage they moved away, but they expressed their departure in different ways.

With regard to the question of what the medical man said and what complainants themselves stated there, were the exhibits (medical reports) which showed that the complainants had traumatic chest pain which the clinical officer described as harm this- does not contradict what the complainant told the court about having had some pain in their chests. As for the differences in dates the same medical forms indicate that the request to have the complainants examined was made on 28/2/94 although the clinical officer does indicate that he dated the forms the next day which was 1/3/94, to me this difference is quite minor and does not go to the root of the case. The position being what it is I am inclined to agree with Mr. Okwanga's contention that there were no contradictions at all and if there were any they were minor and did not go to the root of the prosecution case. In these circumstances I find that the 2nd ground of appeal cannot be maintained.

I now turn to the 3rd ground of appeal Mr. Tuyiringire argued this ground of appeal at great length; it was his view that the person who examined the complainants was not qualified to do so because it was not known as to whether a clinical officer was the same as a medical Assistant. It was also his argument that in the absence of medical evidence the accused/ appellant ought to have been convicted on common assault but not assault occasioning actual bodily harm. He relied on the case of Felister Kavuma & 2 ors v Uganda (1972 1 ULR in particular at page 9. While I agree with Mr. Tuyiringire's contention that the phrase Clinical officer is not Mbale where he trained for a Diploma in medicine and that he had worked for five years I am inclined to believe that his title might be equivalent to that of Medical Assistant and therefore qualified to examine the victims' in simple case of assault like the present one. I find that the learned trial magistrate was quite in order to base her finding on the evidence of PW7 who examined the two complainants in view of the case quoted to the court by the learned counsel for the appellants. The argument of the learned counsel for the appellants that PW7 was not qua1iied to examine the complainant cannot be upheld. As regards to the learned counsel's request that these people should only be considered for common assault, I feel the circumstances of this case do not qualify it to he placed under section 227 of the Penal Code Act. The finding of the learned trial magistrate that the accused had committed the offence of assault occasioning actual bodily harm was correctly arrived at apart from A4.

The 4th and last ground of appeal deals with the issue of sentence. The learned counsel for the appellant complained quite bitterly that there were mitigating factors which the learned trial magistrate did not take into account when imposing a custodial sentence and especially as the appellants were first offenders. According to him the appellants should have been given the option of paying a fine. The learned counsel for the appellant relied on the decision in the case of: Uganda v Ali Katumba: Criminal Revision No. 118/1974. On his part Mr. Okwanga argued that the sentence meted upon the appellants was a proper one and the case of Katumba quoted in court by the learned counsel for the appellants was distinguishable from the present one in that the present offence is a felony while the offence committed in Katumba's case was a misdemeanor. He was also of the view that the sentence of 2 months was very lenient considering the fact that the offence of assault occasioning actual bodily harm carries a sentence of 5 years imprisonment.

The learned trial magistrate when sentencing the appellants stated that she had given the offenders a lenient sentence because they were 1st offenders so it is not true to say, the learned counsel for the appellant says that the learned trial magistrate did not take into account mitigating factors which were pointed to her by the appellants. Although it is good sentencing policy for our courts to give an accused person an option to pay a fine or to go to prison whore the law permits, it is however not illegal when the trial court exercises its discretion and sentences the accused to a custodial sentence without any option in a case like the present one. In the present case I feel the learned trial magistrate was not harsh when she decided to sentence the accused to a custodial punishment of 2 months, nor can it be said that she did not exercise her discretion properly. According to her the appellants had committed a dirty offence for which they were to be punished. I agree with Mr. Okwanga when he says that a sentence of 2 months is very lenient considering the fact that the maximum sentence for this sort offence is 5 years imprisonment. I find no merit in this 4th ground of appeal.

In all those circumstances the appeal is dismissed in respect to the 1st, 2nd, and 3rd appellants but it is allowed in respect of the 4th appellant Zedekiya Bakaali. It is accordingly ordered that the conviction in respect of the 4th appellant be quashed and sentence be set aside. The fourth appellant is accordingly to be released from prison forth with unless he is being held thee foe some other lawful purposes.

C.M. KATO
JUDGE

31/3/95