REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA DISTRICT REGISTRY

HIGH COURT CRIMINAL APPEAL NO. MSK-00-CR-CV-0002 OF 1999
(Arising from Original Kalisizo Criminal Case No. 118 of 1998)

SAMUEL KASSUJA APPELLANT

VERSUS

UGANDA RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGEMENT

1. The appellant, Samuel Kassuja, was convicted by the Magistrate Grade One's Court at Kalisizo of assault occasioning actual bodily harm contrary to Section 228 of the Penal Code Act on the 5th January 1999. He was sentenced to six months imprisonment. He now appeals against both conviction and sentence. The state supports both the conviction and sentence of the court below.
2. The accused was initially charged of assault occasioning actual bodily harm contrary to Section 228 of the Penal Code Act. This was subsequently amended to two counts. Firstly, causing grievous harm contrary to Section 212 of the Penal Code Act. The particulars of the offence were that Kassuja Samuel on the 14th day of April 1998 at Nangoma village, in the Rakai District unlawfully did grievous harm to Nabayunga Florence. Secondly, threatening violence contrary to Section 76 (a) of the Penal Code Act. The particulars of the offence were that Kassuja Samuel on the 14th day of April, 1998 at Nangoma village in the Rakai District with intent to intimidate or annoy Nabayunga Florence, threatened to kill the said Nabayunga Florence.
3. The prosecution at the trial called six witnesses in support of its case. PW1 was John Kimera aged 31 years and a resident of Minziro Kiyebe in Rakai District. He testified that he knew the accused. The accused was the local council 111 Chairman. On the 14th April 1998, there was a candidates' meeting at Nangoma which ended at about 5.00 PM. After the meeting he

walked with the accused to a nearby shop where the accused bought him cigarettes. As the accused was paying money he saw one Flora and he "necktied" her while asking, "Why did you spoil my name?" PW1 immediately intervened and got hold of the accused's arm. He asked the accused to release Flora, which he did. Following an exchange of words, Flora moved out of the shop, saying that if anything happened to her, the accused would be responsible.

4. During cross-examination PW1 stated there were about seven people in the shop at the time of the incident. Politics was not the subject of discussion at the time of the incident.
5. PW2 was Rwecungura Joseph, a 44-year-old peasant of Nangoma village in Rakai District. He testified that he knew the accused. He was the Local Council 111 Chairman. He also knew the complainant who was a resident of their village. On the 14th April 1998 after 5.00pm he strolled into a shop, where he found the complainant among other people. Shortly afterwards the accused, in company of PW1, entered the same shop. The accused told the complainant, "You girl you are very bad, you said false things about me in Kasensero that I stole while in Dodoma Tanzania." The accused angrily approached the complainant and "necktied" her and attempted to hit her against the wall. PW1 seized his arm. PW2 also intervened and separated the accused from the complainant. PW2 denied in cross-examination that he had been hired to give false testimony.
6. PW3 was Seperiano Jjumba, a 63-year-old peasant of Nangoma Village. He was the owner of the shop where the fracas occurred. He was sited on the verandah of the shop on the material day and time. The complainant entered the shop and shortly afterwards the accused entered the shop too. He heard the accused say; "You said words against me that I stole in Dodoma." Confusion erupted and the witness entered the shop. He found PW1 and PW2 holding the accused. The complainant was saying, "he is killing me, he is strangling me." The witness ordered them to leave his shop.
7. PW4 was Dr. Watima John, a 35 year old medical doctor, attached to Kalisizo hospital. On the 19th April 1998 PW4 received a patient in the names of Nabayunga Florence. She complained of having been assaulted. He examined her and found fingernail marks around the neck with a closed injury on the neck muscles. She did not have any other open wound. The doctor formed the opinion that she had been the subject of an assault and attempted

strangling. He classified the injury as dangerous injury. He filled a police form 3, which was admitted as an exhibit.

8. In cross-examination PW4 stated that Nabayunga reported at the hospital complaining of some pain. From the witness's observation the injury occurred 2 days previously. This was revealed by the freshness of the wounds. He did not find it necessary to indicate the date the injuries were inflicted. The fingernail marks penetrated the surface of the skin.
9. PW5 was Sergeant Makoma Joseph, a police officer attached to Kyotera Police Post. He testified that on 19th April 1998 he was the officer in charge of Kyebe Police Post. On that day at about 1.00pm one Florence Nabayunga reported to the police post that the accused had strangled her. The witness examined her and found some marks of injury on the neck and her voice had been affected. He recorded the report and issued her with Police form 3 to proceed for medical examination at Kalisizo hospital. After examination she returned the form. The papers were forwarded to the District Police Commander for advice. Subsequently criminal summons was issued for service upon the accused.
10. PW6 was Nabayunga Florence, a 30-year-old resident of Nangoma village. On the 14thApril 1998 she attended a candidates' meeting. After the meeting she entered PW4's shop to buy some things. While in the shop the accused came and "necktied" the witness, saying, "You Musilu silu why did you say I stole while I was in Dodoma." As the accused tried to bang her against the wall PW1 and PW2 intervened. They held the accused. Another person, Muyunjo Charles also joined in holding the accused. PW6 then moved out of the shop, saying that the accused could not take her and that in case she died the accused would be responsible. On the 19th April 1998 she reported to the police post at Kyebe, as she was feeling unwell. She was issued with Police form 3 and she went for treatment. And that was the close of the case for the prosecution.
11. The defence called three witnesses. DW1 was the accused himself. He was the local council 111 chairman. During elections the complainant had supported the accused's rival. On the 14th April 1998 he was at Nangoma trading centre. After the candidates' meeting he went to a shop with one Kimera to buy him cigarettes He bought the cigarettes and gave them to him. He found the complainant saying, "Matters concerning politics you can abuse some one face to face but he does not become angry." The accused asked her, " my daughter Flora, when you moved about saying Kassuja sold bibanja of Tanzanians is that proper, even if you say

politics do not make one angry.' What actually are you doing?" The accused then requested her to stop spreading shameful rumours." She then left the shop. As she was leaving she said, "Whatever happens on me, then Kassuja will be responsible." He denied touching Nabayunga while she was in the shop or that he "necktied" her at all.

12. DW2 was Ssenyondo Yecoyadi Kakinda, 36-year-old security officer in charge of Kyebe Sub-County. On 14th April 1998 he attended a candidates' meeting at Nangoma. After it was finished, he entered a shop to buy a drink. There were several people in the shop. Nabayunga also came in. She was discussing politicians. Thereafter the accused entered with a young man. When he saw the complainant he told her, " If some one mentioned something grave, you get annoyed. As you said I sold the bibanja of Tanzanian and stole while in Dodoma. As you said I have a 'Mayembe' my daughter why don't you leave these things." Nabayunga replied that big people in Government knew her. The accused should not joke with her, as she knew Hon. Pinto. She moved out of the shop, saying, "We looked for you and now we have got you."
13. DW3 was Atanansi Mulindwa, a 30-year-old peasant and catechist of Nangoma village. On the material day and time he was at Nangoma. He moved into a shop where he found several people including the complainant. He found her talking politics. The accused also entered the shop. They exchanged words with the complainant after which the complainant left the shop. The accused never touched the complainant at all. That was the close of the case for the defence.
14. The learned trial Magistrate evaluated the evidence in the case and concluded that the first count of assault occasioning grievous harm had not been proved. He, however, found that the prosecution had proved a case of assault occasioning actual bodily harm contrary to Section 228 of the Penal Code Act. On the second count, the learned trial magistrate found it had not been proved. I shall set out his findings on count 2 in full.
15. "I have critically examined the words used by the accused as borne out from both the prosecution and the defence, and I have come to the conclusion that the gist of the confrontation was merely of an abusive nature, but not an intent to carry out any threat on the complainant. According to the evidence on record there was a long history of hatred brought about by the campaigns. When they met, the accused unwisely let off steam, in an attempt to bar the complainant from any further spread of the malicious rumours. Therefore, I do not

think it would be safe to convict the accused on count 11, in view of the fact that all elements were not clearly brought out. I would accordingly acquit him of count 11 but convict him on Count 1."

16. Ground No. 1 was to the effect that the learned trial magistrate erred in law and fact in that he based a conviction on Medical Evidence, which was contradictory and unreliable. Mr. John Matovu learned counsel for the appellant submitted that the injury found by the doctor could not amount to dangerous injury as he found. This evidence was further undermined by the doctor's claim that the wounds were fresh and only two days old, while he had stated that there was no open wound. And from other witnesses the injuries from the incident complained of would have to be five days old. Mr. Simon Khaukha, learned Resident Senior State Attorney appearing for the respondent, supported the finding of the trial court, that actual bodily harm and not grievous harm were proved.
17. PW4, the medical doctor, described the injuries, which I presume to be the finger nail marks around the neck, to have been two days old, from his observation. If this is accepted, then those injuries could not be the result of the incident that had occurred five days to the date he examined the complainant. They have to be the result of a later incident two days prior to the examination of the complainant. If fingernail marks had been inflicted five days previously I do not think they would show up as fresh marks, five days later.
18. Fingernail marks injuries are not necessarily borne out by the eye witness accounts of what occurred during the incident. And here we have some problem, as the trial magistrate's record uses a word or words that appear to be slang expression in vernacular! The accused "necktied" the complainant. The import of the words or phrase "neck tied" was not explained in the testimony of the witnesses. Neither did the court address itself to what this expression meant. As I understand this expression it means the holding of somebody by neck using whatever that person is wearing at that point. One may hold both ends of a shirt collar tightly around the neck, and that would be referred to as "necktied." If my understanding of this expression is the way the expression was used, then it may or may not result in fingernail marks being established in the neck region. A person being "necktied" would easily suggest that he or she was being strangled, though in actual fact it is not necessarily an attempt at strangling but a way of securing the person being held in a helpless manner.

19. I am inclined to view the medical evidence in this case as not supportive of the case for the prosecution against the appellant. For if the marks observed by the doctor were two days old, then they are not the marks inflicted in the incident complained of. It is not necessarily unreliable but it contradicts the prosecution case that grievous harm or actual bodily harm was inflicted on the complainant by the accused.
20. It is only PW5; the police officer that mentions that PW6's voice had been affected. Neither PW4 nor PW6 herself mention that her voice was affected by the injury. I think this was a conclusion of the police officer, which he was not qualified to make, not having witnessed the incident.
21. Grounds 2, 3 and 4 were argued together by Mr. John Matovu. I shall consider them together, after setting them out. "2. The learned trial Magistrate erred in law and fact in that he relied on the prosecution evidence which was full of major contradictions. 3. The learned trial Magistrate erred in law and fact in that he failed to consider the fact that the alleged offence took place at the height of political campaigns and chances of fabricating the charges were very high. 4. The learned trial Magistrate erred in law and fact in that he failed to weigh and evaluate the evidence so as to arrive at a just decision in the circumstances."
22. Mr. Matovu submitted that there were two versions of what occurred during the confrontation between the accused and the complainant. The prosecution witnesses gave one version and the defence witnesses another version. In any case even if one believed the prosecution story of what occurred, "necktying" would not amount to more than simple assault. The words allegedly uttered by the complainant and the appellant vary from witness to witness. The background to this conflict was in the political campaigns that were going on with the appellant and complainant belonging to different camps.
23. Mr. Khaukha supported the finding of the trial court. He submitted that the trial court had rightly found the appellant guilty of the minor offence of assault occasioning actual bodily harm instead of the two counts with which the appellant had been charged. He submitted that there were no contradictions in the case for the prosecution; save only in the words allegedly uttered by the appellant and the complainant. He dismissed the suggestion of a possible frame up.

24. I have considered the evidence adduced in this case. As noted earlier on, I am not satisfied that there is evidence supporting the infliction of bodily harm on the complainant by the accused. The only evidence pointing in this direction is that of the doctor, PW4. But as already observed above, it appears to refer to quite fresh injuries, two days old, and not to injuries sustained five days earlier, if the doctor is to be believed. In which case it is not supportive of the prosecution case against the appellant. There is no other evidence to suggest that the complainant suffered bodily harm at the hands of the appellant. Even if the prosecution witnesses are believed, there is no evidence to prove beyond reasonable doubt, that the appellant inflicted actual bodily harm on the complainant.
25. In respect to count 1 the learned trial magistrate found, "In the circumstances, it was established beyond doubt, on 14.4.98 accused attacked and necktied PWVI and attempted to strangle her." I am not able to find any evidence of an attempt at strangling the accused from the two eyewitnesses called by the prosecution. On the contrary, they stop at "necktying" and an attempt to bang the complainant against the wall, both of which were foiled by the intervention of PW1 and PW2. What the expression necktied really meant can not be gathered from the evidence on record. Apparently the complainant demonstrated to the trial court what occurred. This demonstration is not recorded or described by the trial court.
26. In dealing with the Count 11 the learned trial court summed up the incident in the following words. "……and I have come to the conclusion that the gist of the confrontation was merely of an abusive nature, but not an intent to carry out any threat on the complainant. According to the evidence on record there was a long history of hatred brought about by the campaigns. When they met the accused unwisely let off steam in an attempt to bar the complainant from any further spread of the malicious rumours. Therefore I do not think it would be safe to convict the accused on count 11, in view of the fact that all the elements were not clearly brought out."
27. The incident that gives rise to charges for count 1 and count 11 is one and the same. The learned trial court seems to accept the prosecution version in Count 1 and the defence version in Count 11! With respect to count 1 the trial court finds that there was an attempt at strangling the complainant. But in Count 11, which is threatening violence and the particulars are that the accused threatened to kill the complainant, the trial court finds that there was no intent to carry out any threat on the complainant. The appellant just let off steam unwisely!

How then could one find that there was attempted strangling? With respect, it appears to me that these two positions are inconsistent with the possibility that they could have arisen from the same incident.

28. I agree with Mr. Matovu, that if the prosecution evidence is believed, the appellant could not have committed a greater offence than simple assault, a misdemeanor, contrary to Section 227 of the Penal Code Act. It is clear from the prosecution evidence that the appellant acted in a manner that put the complainant in some apprehension for her safety, even if it was for just a fleeting moment. This would be more in line with the trial court's finding on count 11. PW1 was in the company of the appellant. There were friends. No reason has been suggested why he should have told lies to court against his friend, the appellant. The testimony of PW1 is supported by the testimony of PW2 and PW3 in material particulars.
29. The appellant denies that he touched the complainant. He further asserts that he never got angry with her. This latter assertion is somewhat surprising in light of what defence witnesses 11 and 111 state. The complainant is supposed to have been saying that abusing politicians does not make them annoyed, citing President Clinton. It is at this point when the appellant got on to the scene, raising his own dissatisfaction with the complainant's statements about him. An exchange occurred leading to the intervention of the returning officer who was at hand and directed the complainant to go away. If this had been a friendly banter there would have been no need for this order. In those circumstances, it is unlikely that the appellant kept his cool! It would appear that the defence version attempts to down play what occurred to extinguish any blame on the part of the appellant.
30. I am prepared to accept the prosecution version of what occurred on that evening. It is more cohesive than the defence version. The prosecution version amounts to no greater offence than common assault, contrary to Section 227 of the Penal Code Act. I would accordingly set aside the conviction for assault occasioning actual bodily harm contrary to Section 228 of the Penal Code Act, and substitute it with a conviction for assault under Section 227 of the Penal Code Act. It is so ordered.
31. The last ground of appeal was to the effect that the learned trial magistrate erred in law and fact in that he failed to give the appellant the option of a fine instead of a custodial sentence. It is unnecessary to consider this ground now that the conviction for which the sentence complained of has been set aside. None custodial punishments like caution, fines and others

should be the punishments of first choice ordinarily for misdemeanors , especially for first offenders. A fine would probably have been the appropriate sentencing option in this case. Unfortunately the appellant had served a period of imprisonment of about eight weeks before he was released on bail pending appeal. He has, in my view, already served a sentence that is higher than his offence would have attracted. In the result the justice of this case demands a sentence that allows the appellant to be released immediately. I so order.

Dated, Signed and Delivered at Masaka this 1st day of September 1999

FMS Egonda-Ntende
Judge