THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.28 OF 2000

(ORIGINAL KIBOGA CRIMINAL CASE NO.74 OF 2000)

NKEZA KALOLI:: ACCUSED

VERSUS

UGANDA .:: **PROSECUTION**

BEFORE: THE HONOURABLE MR. AG. JUSTICE PAUL K. MUGAMBA

JUDGMENT:

The appellant, Nkeza Kaloli, was charged together with one Rwamunono Robert, a juvenile. The charge brought against the two was that of assault occasioning actual bodily harm, contrary to section 228 of the Penal Code Act. For the purposes of this appeal, the appellant was convicted as charged and sentenced to two years' imprisonment. He appeals against conviction and sentence.

All in all the appellant set out six grounds of appeal and these were as follows:

1. The trial magistrate erred in law and in fact in his interpretation and application of the well-established law and principles regarding identification.

2. The learned trial Magistrate erred in law and in fact in the assessment, interpretation and application of the law on contradictions and inconsistencies.

3. The learned trial Magistrate erred in law and in fact when he considered the contradictions and inconsistencies made by the defence only.

4. The learned trial Magistrate erred in law and in fact when he ruled that there was a prima facie case against the defendant whereas not.

5. The trial Magistrate erred in law and in fact in accessing the whole evidence the matter and consequently reached a wrong decision thereof.

6. The trial Magistrate erred in law and in fact in passing a severe sentence when there was no sufficient evidence against the appellant.

In his submission, Mr. Muhimbura, counsel for the appellant said that the appellant had not been positively identified since he was unknown in the village and since the alleged incident took place at night when conditions for identification were not favourable. Counsel further argued that there was no corroboration that the person produced in court was the one who had been arrested on the night in issue. The prosecution called five witnesses. PW1, PW2 and PW3 all testified to having seen the appellant that night at PW1's house. Conditions for identification were also ideal given that there was moonlight outside and a candle in the house as PW2 had occasion to testify during cross-examination by the appellant herein. I am also satisfied that given the length of time the accused was under observation by the witnesses, the distance, and the light there was quality identification and reduced danger of mistaken identity. (See **Abudala Nabulere and others vs. Uganda [1979]** HCB 77). To this could be added the fact that the appellant and others were arrested soon after in the vicinity of the home of PW1. What is more, the appellant does not deny, in his defence, that he was in the house of PW1 or that the fight did take place. I do not agree that the fact that the arresting officer did not testify in any way vitiates identification.

The appellant also sought to gain capital in contradictions and inconsistencies apparent in evidence. These relate to the occasion of the visit such as whether the door to the house was voluntarily opened for the intruder or otherwise and whether the fight resulted from Appellant's demand for change for money he had already paid or not. These inconsistencies are minor given the fact that both prosecutor and accused are agreed that an altercation did indeed take place and that injury resulted to PW1. See **Uganda vs. Dusman Sabuni [1981]**

HCB 1 and **Uganda vs. Adurufu Bikamikire & Anor** [1972] HCB 144.

In a case of assault occasioning actual bodily harm three elements are necessary as the learned trial magistrate properly found. These are that there is an assault, that the assault is unlawful and that there is actual bodily harm. In his judgment the learned magistrate had this to record in his judgment:

> "…on the third ingredient the fact of actual bodily harm. PW1 was examined and medical ex. report classified the injury to amount to harm. This report was admitted in court by consent of both parties, there was thus no need to call the Doctor to attend court to give evidence viva voce as was held in the case of **Uganda vs. Selusiyo Mperwa** [974] HCB 19. This court has also taken cognisance of the holding 'n the case of **AG vs. Baranga and Another EACA** Civil Appeal No. 49/75 [1976] HCB 45 where it was held that where a medical report is admitted by consent it only dispenses with proving the report but does not amount to admission of its content. I still find that the third ingredient was proved by the prosecution beyond reasonable doubt."

I do not accept the authorities quoted as persuasive in the least. There were two accused persons in court at the trial. The relevant record for 29th March 2000 reads in part.

> "PWl ……
> ……
> The following day I went to police and made a statement those who were assaulted were given PF 3 for medical check up.
> This is the form that was given to me from police.
>
> PROSS: I wish tender the Police form 3 as exhibit PW1.

ACC: No objection.

COURT: Police form 3 is admitted in evidence and marked P 1/2000."

I find much amiss. First, there were two accused persons in court on that day. It is not clear which one of the two accused had no objection to e tendering of the Police Form 3. As it is, there is no way of telling that the accused (appellant) at any time consented to the tendering of the form as court came to hold. I do not find that he did consent. Secondly, the Police Form 3 which was exhibited is a photocopy and not the original. No explanation is available as to why this should be so. There is every reason why the author of the medical report should have attended court in order to explain away the doubts that attended to the document so curiously admitted in evidence. In the result I cannot help but agree with counsel for the appellant that Police Form 3 was wrongly admitted in evidence and that it does not, contrary to the finding of the learned trial Magistrate, import the element of 'harm' in the assault.

For the reasons I have given above this appeal must succeed partially. The conviction is hereby quashed and the sentence set aside. I substitute conviction for common assault C/S 227 of the Penal Code and a sentence of 10 months imprisonment inclusive of the period already served.

Paul K.Mugamba **Ag.**
Judge.

5th December 2000
Mr. Paul Muhimbura for the appellant