THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CR-CN-0013-2007

(FROM MBALE CRIMINAL CASE NO.888/2008

REBECCA WAMBOKA…….APPELLANT

VERSUS

UGANDA……..……..……RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

This is an appeal from the judgment and orders of the Magistrate Grade I sitting at Mbale. The appellant, Rebecca Wamboka represented by Mr. Wegoye of M/s Wegoye & Co. was charged, tried and convicted of the offence of assault occasioning actual bodily harm c/s 236 of the Penal Code Act for allegedly assaulting one Adhambo Rose on 29th November 2006 at Uhuru Cell, Mbale Municipality. The appellant was aggrieved by the decision of the trial Magistrate whereby she was sentenced to 4 months imprisonment.

In the memorandum of appeal the appellant complains of 7 grounds of appeal to wit that:-

1. The learned trial Magistrate erred in law when he conducted the trial contrary to criminal procedure which was prejudicial to a fair trial.
2. The trial court erred in law and fact when it failed to give a proper evaluation of the evidence and arrived at an erroneous decision.
3. The learned Magistrate was biased against the accused.
4. The learned trial Magistrate erred in law and fact when he relied on extraneous matters in convicting the appellant.
5. The conviction is bad in law.
6. The trial before the lower court has occasioned a grave miscarriage of justice.
7. The trial Court erred in law and fact when it failed to find and hold that the prosecution failed to prove its case to the required standard.

The appellant prayed that the conviction be quashed and sentence be set aside.

I have studied the lower court's record. I have related the points raised by Mr. Wegoye learned counsel for the appellant to the record and judgment of the lower court.

I have considered the submission by Ms. Alpha Ogwang the learned resident State Attorney in support of the lower court's trial.

I have found that the trail Magistrate flauted all tenets of basic criminal procedure while conducting the trial of the appellant as rightly pointed out by learned counsel for the appellant.

For example at pages 5 and 7 of the typed proceedings of 16.2.2007 it is indicated that there was no prosecutor in court. Although the accused was present, her advocate Mr.Musiiho then was absent. The accused told court that her advocate was sick. Despite this the court assumed the role of prosecutor and judge and ordered as follows:

> "*Court: I am informed the doctor is present and ready to testify. Due to difficulty of obtaining expert witnesses to testify it is my order that the doctor shall testify and the accused shall be at liberty to cross-examine him or matter shall be adjourned for her advocate to cross-examine the expert witness*."

Indeed Dr. Twinomuhangi testified as PW.5. The record does not show that as promised by court, the accused was given opportunity to cross-examine the doctor.

Court then ordered this,

> "*Court: Cross-examination of expert to be conducted on 19.2.2007……typed proceedings to be availed to the advocate*."

What is peculiar about this part of the proceedings is that the trial magistrate was alone in court with his Clerk who informed him about the presence of the witness when prosecution was not present!

The record shows that before cross-examination was conducted, the medical report was admitted in evidence and was marked Exh.P.XI

The same scenario repeated on 19.2.2009. Apart from the Magistrate and his Clerk, defence counsel and prosecution were absent. The accused prayed for adjourned because her advocate was absent. She did not know why the advocate was absent. Court refused to adjourn and this time round pronounced itself as having taken over the prosecution role. At.P.7 the record reads,

> "*Court does not sit at the convenience of advocates. I take judicial notice of absenteeism from advocates has created backlog and delay (sic) in disposal of cases. As such since the Doctor PW.5 has turned up in court to be cross-examined, it is my view that all assistance and opportunity has been availed to the accused to cross-examine the expert witness. In addition, the perpetual absenteeism of prosecutor leaves me with no option but to order for the closure of the prosecution case hearing. I shall proceed to pronounce my ruling.*
>
> *Ruling: A prima facie case of doing grievous harm has been established against the accused. Accused shall defend herself and may call witnesses as provided under S.128 of MCA.*"

On 19th March 2007, the accused was absent. The prosecutor was absent. Accused's surety was present and reported the accused lost a sister. Defence case was adjourned to 21.3.2007.

Later on that day the record reads that:

> "*Court: Accused just sighted in town chatting away. The surety in the circumstances stated falsehoods to court criminal summons to issue for the surety. Warrant of arrest to issue for accused case comes up for defence hearing on 21.3.2007*."

In the absence of the prosecutor on 21.3.07 but in the presence of Mr. Musiiho for the accused, defence hearing commenced. At the end of the accused's testimony, the court cross-examined her! After that, the case was adjourned for the prosecution to conduct cross-examination. On this occasion, the accused's bail was cancelled in the following terms:

> "*I reiterate and maintain my order of 19.3.2007 cancelling accused's bail. She failed to turn up in court claiming she was away in Bulucheke attending to a sick sister yet at around 12 p.m I saw her in Mbale town chatting away. Her actions were an affront and abuse of the court bail conditions as granted to her. Accused shall be remanded until 28.3.2007 for further defence case hearing. Accused may apply for bail to the Chief Magistrate or High Court*."

On 28.3.2007 Mr. Wegoye who had taken over the conduct of the case told court that his instructions were to close the case and submit. Court refused! It quoted Article 126 (2) (e) of the Constitution and S.100 of the Magistrates Courts Act.

On another adjourned date Mr. Wegoye applied to have the case dismissed for absence of the prosecution under S.119 (1) MCA but court overruled him purportedly, “in the interest of justice.”

Despite protestations by the learned defence counsel that the case could not be reopened for cross-examination since the defence closed, he was overruled and a State Attorney presumably a lawyer went ahead to cross-examine the accused.

The case was then reserved for judgment and was decided as stated above hence this appeal.

By any standards, this trial was a traversity of justice and a blatant abuse of criminal procedure. It is the most bizarre trials I have come across in many years. It was like a Hollywood piece. What is revealed herein puts a question mark on the competence of the trial magistrate. It appears he had never read the MCA and the Constitution of this Country. I was equally surprised by the submission by the learned State Attorney that although the trial magistrate conducted the trial contrary to criminal procedure, it did not occasion a miscarriage of justice. That the pursuit of the trial magistrate was substantive justice. Further that the trial magistrate gave reasons for proceeding without a prosecutor or defence advocate. That the intention of court was to expedite trial and in any case whether those officers of the court were absent, the evidence would be the same. This was an opportunistic disposition of a lay presentation by a lawyer. There was no fair hearing accorded to the appellant by the lower court contrary to the law. According to Article 28 (1) of the Constitution in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy

and public hearing before an independence and impartial court or tribunal established by law.

Under Article 28 (3) (d) of the Constitution, every person who is charged with a criminal offence shall be permitted to appear before court in person or at that person's own expense, by a lawyer of his or her choice and under (g) shall be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court. It was a violation of the appellant's Constitutional rights when she was denied the assistance of a lawyer of her choice despite asking court to allow her do so. She sought adjournment so that her lawyer could be present to defend her but this was not allowed by the trial court.

It went ahead to compel her to stand trial in person when the doctor's evidence was received by court in the absence of the prosecutor. The court descended unprofessionally into the arena when the trial magistrate assumed the role of prosecutor as well as judge when he cross-examined the doctor in a court he presided over alone. It was improper to conduct a trial in the absence of prosecution and defence counsel and invite prosecution to cross-examine the witness when evidence was received in their absence.

Defence advocate has a right to listen to the evidence and observe the demeanour of witnesses in order to defend his or her client effectively. The procedure adopted by the trial magistrate in admitting the medical form in evidence as Exhibit PXI is unknown in criminal procedure. The appellant or her advocate did not test the

credibility of the doctor's evidence before it was admitted by court unilaterally which was an incurable procedural irregularity.

Another irregularity in the lower court's trial is when court on its own motion closed the prosecution case and never allowed the defence side to submit on the available evidence before it went ahead to rule that the accused had a case to answer. The decision that there is no case to answer should only be made by the judge/magistrate after the close of the prosecution case. A magistrate has no right to end the case prematurely. Unless the accused or his/her advocate does not wish to submit on a no case to answer, a ruling should ideally follow that submission.

Regarding the cancellation of the appellant's bail, court did so when it illegally introduced into the trial extraneous matters. There was no prompting by prosecution to have the appellant's bail cancelled and the surety had not abdicated his duty. When the appellant lost someone, the surety came to court and explained to court the reason for her absence.

Surprisingly, when the magistrate was loitering in town, he happened to see the appellant if he did so anyway. He came back to court and put on record what he saw in town and ordered the cancellation of the appellant's bail. This was unprofessional and judicial misconduct. Cancellation of bail can be ordered when *inter alia* the accused has breached the bail conditions or the surety has failed in his duty as surety. The violation of bail must be proved and prosecution should apply to forfeit the bail. See part IX of the Magistrate's Courts' Act. Invoking what the trial Magistrate saw outside the trial court was improper and an illegality

and caused a miscarriage of justice. By all standards that was an indicator that the lower court's trial was not a fair one. The court descended into the arena which is unfortunate.

For a Magistrate to continue with a trial in the absence of the prosecutor and defence advocate offends the principle that justice should not only be done but seen to be done. If courts are to be respected, Magistrates must be beyond reproach in their character and conduct of court business. Much of the working time of a Magistrate is taken up in pronouncing judgment on those who transgressed on the law. A magistrate can hardly do this fairly unless he also respects the law. This Magistrate did in a truculent and oppressive manner to the accused person merely because she was in the dock. Justice was not done to the appellant. She was not given a fair hearing and trial. This justifies the grounds of appeal in the memorandum of appeal. The trial was conducted contrary to criminal procedure.

In view of the flawed trial it is apparent that the trial Magistrate could not impartially evaluate the evidence adduced. All the complaints in the memorandum of appeal are upheld.

Consequently, I will allow this appeal. The conviction of the appellant is set aside. The sentence is hereby quashed.

I am unable to order a retrial because of the trauma suffered by the appellant and the injustice meted out on her by the lower court as well as the time spent by the appellant in the justice system.

The prosecution condoned and abated this injustice. They cannot fairly re-prosecutor the appellant.

Musota Stephen

JUDGE

9.12.2010

9.12.2010

Appellant absent.

Wegoye absent.

Namakoye Resident State Attorney.

Kimono Interpreter.

Resident State Attorney: We are ready to receive judgment.

Court: Judgment delivered.

Musota Stephen

JUDGE

9.12.2010