

**Kitara v Uganda (Criminal
Appeal No. 0014 of 2013) [2013]
UGHCCRD 65 (22 October 2013)**
[2013] UGHCCRD 65

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The appeal is premised on two grounds that is to say:-

1. That the learned Trial Magistrate erred in law and fact when he relied on the evidence of the secretary for defence who had conspired with the respondent to sell off the Appellant's land other than the witnesses who responded to the scene.
2. That the learned Trial Magistrate erred in fact and law when he failed to adequately consider and evaluate the evidence at the scene.

The appellant was represented by M/S Guma & Co. Advocates while Ms. Bigabwa Anna, State Attorney appeared for the respondent. Both parties filed written submissions at the urging of Court.

Counsel for the appellant argued both grounds concurrently and I will also consider them in similar manner.

The main thrust or emphasis of the appellant's attack on the decision of the trial magistrate is basically threefold, namely:-

1. That it was highly improbable the complainant could have been hit on the face and on the right ear whereas she was bowing down.
2. That there was insufficient evidence to prove actual bodily harm on the complainant in view of the inadequacies in the medical report of Dr. Abiriga (PW3).
3. That the trial magistrate ought to have rejected the evidence of PW1 (Nyakooja Norah) and that of PW2 (Habib Abdullah) for they had conspired to illegally sell the appellant's land, thus they fabricated the case of assault against the appellant.

Learned counsel for the appellant argued that the trial magistrate did not properly evaluate the evidence and invited court to come to a different finding, quash the conviction and set aside the sentence.

In the written reply, Ms. Bigabwa Anna for the respondent submitted that the trial court had carefully considered the evidence of both sides and arrived at a correct decision. On the allegation that the medical evidence did not sufficiently prove the complainant sustained harm, she pointed out that the examining doctor's categorization of the injuries as "harm" was quite clear and devoid of any ambiguity. It is trite, that it is the duty of the first appellate court to re-evaluate the evidence and draw its own conclusions, bearing in mind I did not have the opportunity to observe the witnesses on the stand.

To begin with, the contention by counsel for the appellant that it was not possible for the complainant to sustain the injuries on the face since she had bowed her head, was clearly a matter of evidence. The complainant was not challenged during cross examination with regard to her evidence that the appellant assaulted her with a hoe handle while she was in the said posture. In my view, the appellant by not challenging the said evidence of the complainant under cross examination, accepted the complainant's evidence that she was indeed in a bowed position at the

time of assault, unless her evidence can be found to be inherently incredible or palpably untrue.

The other contention or argument concerns the medical report of Dr. Abiriga (PW3). Counsel for the appellant argued that the said report (PF3) did not classify the injuries as actual bodily harm and the witness (PW3) did not explain whether there was a cut and how grave the injury was. In counsel's view, there was no other evidence to prove that the complainant suffered actual bodily harm.

I have had occasion to study the said PF3 which was received in evidence as PE1. The findings were that the complainant had a painful swelling to the right cheek and the right ear. Dr. Abiriga described the injuries as soft tissue injury which he classified as harm. Most importantly, Dr. Abiriga (PW3) gave evidence in open court and the accused did not cross examine him at all. In effect his findings were unchallenged and counsel cannot be heard to question the credibility of Dr. Abiriga's findings at this stage of the proceedings.

From the record, the complainant stated she was assaulted on the face and the right ear. This evidence is consistent with the parts of the head where Dr. Abiriga observed the injuries described in his report. On the available evidence I would therefore dismiss the appellant's attack on the medical report as lacking or devoid of merit.

The other issue raised by the appellant concerns the evidence of PW1 Nyakoojo and PW2 Abdullah which, in the submissions of his counsel was orchestrated or engineered by a conspiracy between the two witnesses to deprive the appellant of his land. While it appears from the record that the incident had its origins in a dispute over land, I have not come across evidence on record alluding or pointing to a conspiracy between the said witnesses to deprive the appellant of the stated land. According to Habib Abdullah PW2, he was invited by Nyangendo Nasitazia, the land owner to go and measure land for one Kasozi. The invitation to Abdullah and his role in the whole matter were premised on his position as an LC official.

Conspiracy can only be proved by evidence and is not a matter of conjecture or fanciful reasoning. I clearly see no merit in the appellant's allegation that the evidence of PW1 and PW2 was tainted with conspiracy to commit an unlawful act. The trial magistrate rightly accepted their evidence as being consistent and credible with regard to what transpired at the scene. I am therefore unable to interfere with the said finding.

The learned trial magistrate also considered the defence evidence. He observed that the said evidence lacked credibility owing to the contradictions therein. For instance, in his evidence in chief the appellant stated that he arrived at the scene and found the complainant PW1 selling off his family land. Also present were the defence secretary (PW2) and his stepfather (DW2) and others. But in cross examination the appellant stated that PW1 Nyakoojo & PW2 Habib had left the scene by the time he arrived. Another contradiction is to be found in the evidence of Abiria Gershon (DW2), the appellant's stepfather. According to him the appellant had left the scene by the time the police arrived. The appellant however told court he found the police at the scene.

Commenting on the said contradictions, the trial magistrates, on pg. 3 of his judgment, stated that the defence appeared to be unreliable especially when the witnesses contradicted each other with regard whether the accused was at the scene or not. Again, I am unable to find fault with the said finding in view of the contradictions highlighted above. In a nutshell, both grounds of this appeal fail.

As for sentence, quite surprisingly, no ground was framed on the same and nor did counsel for the appellant submit on the said matter in his written submissions. To my understanding, this means the appellant was satisfied with the sentence and I am therefore obliged to make no comment on the appropriateness of the same.

For the reasons above stated, this appeal fails and the same is accordingly dismissed. Consequently, I uphold the conviction of the appellant and confirm the sentence. Appeal dismissed.

SIGNED

BYABAKAMA MUGENYI SIMON

RESIDENT JUDGE

22ND OCTOBER 2013

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