THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATES COURT OF PALLISA AT PALLISA

CRIMINAL CASE NO CO 090/ 2023

UGANDA :: PROSECUTION

VS

NALEBA WILSON :: ACCUSED

Before: His Worship Kyembe Karim ESQ

Learned Magistrate G.I

JUDGMENT

Introduction.

By charge sheet dated 19th/03/ 2023, and sanctioned on 28th/03/ 2023, the Accused was charged with one count of DOING GRIEVIOUS HARM Contrary to, **Section 219** Cap 128 Laws of Uganda, Red volumes, 2023 revised edition.

Brief background.

It was the prosecution's allegation that the accused, on the 8th day of March, 2023 at Kagugo Central Village in Pallisa District unlawfully assaulted a one, Kududu Emmanuel thereby causing actual bodily harm.

When the charges were read to the Accused, he denied the Charges and a plea of NOT GUILTY was accordingly entered.

By denying the Charges, the accused placed in issue all and every essential ingredient of the offence with which he is being charged.

The prosecution bears the burden to prove the ingredients beyond reasonable doubts as laid out in the case of **Miller VS Minister Of Pensions (1947)2 ALLER ER AT 372**.

The burden does not shift to the accused and the accused is only convicted on the strength of the prosecution evidence and not the weakness of the Accused's defence as laid out in **Sekitoleko VS Uganda (1967) EA at 531**.

Bearing the above principles in mind, I am also aware and I have cautioned myself that the accused has no obligation to prove his innocence.

In attempt to prove the charge, the prosecution first called the said **Kududu Emmanuel** who testified as **Pw1.**

Pw1 testified that he knows the accused who is his biological brother by virtue of sharing the same father. That it was around 12:00 pm on the said 8th March, 2023 when the accused went and removed the boundery marks of Pw1's land.that Pw1 first reported the matters to the local area leadership who advised them to resolve their issues amicably but when Pw1 and a one, Zablon went to replant the boundary marks, the accused came and started boxing Pw1. That he first boxed Pw1 from the back and when Pw1 thought things had ended, the accused, now grabbed him by the neck, threw him down and started strungling him. Pw1 could not fight back, since the accused was stronger than him. Pw1's friends who were at the scene tried to help him but the accused threatened them and Pw1's wife who was also nearby started screaming raising alarm calling for help.

Pw1 testified further that the accused proceeded to hit him with his knees on his stomach while also strangling him until a one, Ochomo and Kaliba together with others came in response to the alarm and they pulled the accused away from Pw1. At that time, Pw1 could not walk and he was assisted to a clinic for treatment which also recommended that Pw1 be referred to Mbale General Hospital whereof he was told he had a blood clot in the kidneys and intestines and recommended to undergo a CT scan and so far, he has expended about 3,000,000/= on medication and is required to continue

Pw2-Pande Robert and Pw3 – Kalibansenge Emmanuel as the persons who responded to the alarm re-echoed the testimony as to how they found the accused sited on Pw1's stomach while chocking him by the throat.

Pw4- Wofubo Simeon was the medical personnel who attended to Pw1 while at hospital. He first told court his qualifications and experience as a medical officer. He told court that when Pw1 was brought to hospital, he filled out the **PF3** and signed the same This was admitted as prosecution exhibit **PEX1**. That when he examined Pw1, he found him with pain on the right side of the chest, had pain in breathing, denied having any chronic disease and he had never been operated upon. That he was resuscitated and given some drugs to stop the bleeding and placed on a catheter.

Pw4 further told court that they also conducted an ultra sound scan on Pw1's stomach and discovered that the spleen had an injury and he had blood collected within the abdomen, at which point, he was booked for surgery, which was duly conducted on the 13th March, 2023. A blood transfusion was conducted prior to surgery and at that time, Pw1's

stomach had become swollen and pains become so severe because of the cumulative effect of the blood.

Pw4 further told court that upon operation on Pw1's stomach, they found that the intestines were perforated (swollen).

That upon those findings, having discovered the spleen damaged, yet it is a major organ to support life, he concluded that the injury amounted to dangerous harm.

That during the medical operation, they drained 730ml of blood *(nearly a litre)* from Pw1's stomach.

No. 46270 Detective Corporal Chekakwecha Betty testified as the 5th prosecution witness and her evidence was taken down as PW5.

Pw5 was not the original investigating officer on the case but upon being re-assigned the file, she revisited the crime scene, took picture and drew a sketch plan which were collectively admitted in Court as **PEX2.**

In **University Of Ceylon VS Fernando (1960), WLR 233** Court observed that the opportunity to cross examine the adversary witness is a fundamental one but where that opportunity is extended and the party does not take it up, does not amount to denial of that opportunity.

In this case, the Accused duly exploited the Opportunity.

Having heard all the evidence from the prosecution this court, on the 19th November, 2024 ruled that a prima facie case had been established, hence the accused placed to his defence.

All the three modes of defence were explained to the accused. That is;

1. Give evidence on Oath, whereby he will be subjected to cross examination by the prosecution.
2. Give evidence not on Oath whereby the accused will not be subject to cross examination.
3. Elect to keep silent.

The Accused opted to give evidence on Oath and his testimony was taken down as **Dw1- Naleba Wilson.**

He testified that on the said day, him, together with his brother a oen, Robert Pande came and picked him and and told him to go with the complainant/Pw1 to go and clear a garden. That upon reaching there a disagreement ensued about the boundaries of their respective pieces of land. That they asked him whether he wants to fight before embarking on uprooting the boundery marks and also beating Dw1 who persuaded the rest not to veer off the purpose for which they had gone to the garden.

That one random woman came by and admonished them for wanting to fight but Pw1 continued uttering words; ***"I want that one to kill me,"*** and when the quarrel exercerbated, Dw1 left the rest of them uprooting the cassava and bondery marks. That after 3 days, at around 4:00am Saturday morning, a police officer in company of the local council broke into his door, upon which the Lc1 chairman called him out and on coming out, he was placed on handcuffs upto police and subsequently arraigned in court.

THE LAW, AND ANALYSIS OF THE EVIDENCE

According to Section 2 of the Evidence Act Cap 8 "evidence" denotes

the means by which any alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved and includes testimonies by accused persons, admissions, judicial notice, presumptions of law and ocular observation by the court in its judicial capacity.

Section 1 of the Penal Code Act cap 128 defines

"harm" *to mean any bodily hurt, disease or disorder whether permanent or temporary;*

Under **Section 219 of the Penal Code Act** cap 128, any person who commits an assault occasioning actual bodily harm commits a misdemeanor and is liable to imprisonment for five years.

Section 1 of the Penal Code Act cap 128 defines

"grievous harm" *means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;*

Ingredients

1. The victim sustained grievous harm.
2. The harm was caused unlawfully.
3. The accused caused or participated in causing the grievous harm

Before I delve into the evaluation of evidence, I am also mindful that it is trite that when a person is charged with an offence and facts are proved

which reduce it to a minor cognate offence; s/he may be convicted of a minor offence although s/he was not charged with it.

Related to the offence with which the accused is being charged in this case, is a minor but cognate offence of assault occasioning actual bodily harm contrary to then **Section 227** of the penal code Act Cap 120, now **Section 219** of the penal code Act Cap 128, Laws of Uganda, Red volumes, 2024 revised edition; Any person who commits an assault occasioning actual bodily harm commits a misdemeanor and is liable to imprisonment for five years.

I have first examined the two related offences, because they are oftentimes interchanged and confused with each other, whereas the evidence might tend to prove the other and one is a misdemeanor while the other is a felony, while also, one offence attracts a more severer sentence than the other.

In **Funo & Ors. vs. Uganda; H.C. Crim. Appeals Nos. 62 – 69 of 1967; [1967] E.A. 632** Sir UDO UDOMA, C.J. in a nutshell discussed that:

> *an accused can be convicted of a lesser charge if the evidence adduced supports the conviction. In that case, the learned C.J. had instead convicted the accused of the minor cognate offence of theft, instead of that of robbery.*

In the instant case before me, prosecution charged the accused with the offence of doing grievous harm contrary to the then, **Section 219** of the Penal Code Act Cap 120, and now **Section 202**, Cap 128 Laws of Uganda, Red volumes, 2023 revised edition.

Ingredient 1: **The victim sustained grievous harm.**

The general presumption is that every harm is unlawful unless there is evidence that the accused needed to defend himself.

The first element required proof that the injury sustained by the complaint was caused unlawfully and amounted in law as grievous in accordance with the definition set out, formally in **Section 2,** now **Section 1 of PCA** already stated above. This requires proof of an intentional wrongful act against another without legal justification.

In **Uganda v Okech and Anor Criminal Appeal No. 21 of 2015 High Court at Gulu,** it was stated that the evidence must show not only an intention but also an act, done resulting into harm that can legally be categorized as grievous in fact.

In **Uganda v Okech and Anor Criminal Appeal No. 21 of 2015 High Court at Gulu,** it was stated that the evidence must show not only an intention but also an act, done resulting into harm that can legally be categorized as *"grievous harm."* As distinguished from *"bodily harm"*.

Pw1 *testified that:*

> *"…the accused first boxed me from the back and when I thought things had ended, the accused, now grabbed me by the neck, threw me down and started strangling me. I could not fight back, since the accused was stronger than me. My friends who were at the scene*

tried to help me but the accused threatened them and my wife who was also nearby started screaming raising alarm calling for help…"

Pw1 also testified further that:

"…the accused proceeded to hit me with his knees on my stomach while also strangling me until a one, Ochomo and Kaliba together with others came in response to the alarm and they pulled the accused away from me…."

Pw4- the medical personnel told court that:

"…when I examined Pw1, I found him with pain on the right side of the chest, had pain in breathing, denied having any chronic disease and he had never been operated upon. He was then resuscitated and given some drugs to stop the bleeding and placed on a catheter…"

Pw4 further told court that:

"…we also conducted an ultra sound scan on Pw1's stomach and discovered that the spleen had an injury and he had blood collected within the abdomen, at which point, he was booked for surgery, which was duly conducted on the 13th March, 2023. A blood transfusion was conducted prior to surgery and at that time, Pw1's stomach had become swollen and pains become so severe because of the cumulative effect of the blood."

"…upon operation on Pw1's stomach, we found that the intestines were perforated (swollen) and it is upon those findings and having discovered the spleen damaged, yet it is a major organ to support life, that I concluded that the injury amounted to dangerous harm…"

"…during the medical operation, we drained 730ml of blood (nearly a litre) from Pw1's stomach…"

In his defence, the accused denied assaulting Pw1 or causng him harm. Testifying as **Dw1** he told court tha*t:*

"…upon reaching the gardens, a disagreement ensued about the boundaries of our respective pieces of land. They asked me whether I want to fight and before long, the said friends embarked on uprooting the boundary marks and also beating me even when I continued persuading the rest not to veer off the purpose for which we had gone to the garden…"

"…one random woman came by and admonished us for wanting to fight but Pw1 continued uttering words; ***"I want that one to kill me,"*** *and when the quarrel exacerbated, I left the rest of them uprooting the cassava and the boundary marks. …"*

I listened to evidence of Pw1, Pw2, Pw3 and Dw1 and I am satisfied that there was an encounter between the accused and the complainant on the said 8th day of March, 2023.

I listened to evidence of Pw1, Pw2 and Dw1 and I am satisfied that there was an encounter between the accused and the complainant (Pw1). As to whether that encounter resulted into grievous harm, that is another issue that the prosecution ought to prove beyond reasonable doubts.

I have examined the evidence of both Pw1 and specifically, Pw4. While the witnesses classified the injuries as grievous harm, I am hesitant to

agree with them. The medical testimony led by Pw4 showed a damaged spleen and internal bleeding and swollen intestines resulting into a medical procedure to rectify the same. I have not seen testimony to suggest that the damage amounted to a permanent maim.

As I mentioned from the onset, it is the prosecution's duty to prove its case beyond reasonable doubts.

This court, by ocular observation saw some injuries around the abdominal area of the complainant as corroborated by testimony of Pw1 and Pw2. The same looked like a scar resulting from a cut by a sharp object, of which, Pw4 told court that the same was done as a medical procedure to relieve the internal bleeding and swelling of the intestines**.**

The visible injuries were those inflicted by the medical team as testified by Pw4 in attempt to relieve the complaint from pain and potential death.

As to whether whoever occasioned those injuries had the necessary *mensrea,* none of the medical personnel was on trial but, Pw4 told court that;

> *"…we also conducted an ultra sound scan on Pw1's stomach and discovered that the spleen had an injury and he had blood collected within the abdomen, at which point, he was booked for surgery, which was duly conducted…."*
>
> *"…Pw1's stomach had become swollen and pains become so severe because of the cumulative effect of the blood…"*

There is no doubt left in my mind that whoever caused the above stated injuries at a very sensitive part of the body,-the abdomen, spleen and

intestines did the same with a criminal intent. I find no other explanation other than that of a criminal intent to inflict injuries upon the complainant.

While the position of injury indeed could have posed life threatening risks, certainly the complainant was not permanently maimed from the ocular observation of court as to amount to a grievous harm.

In the humble view of this court, the injuries suffered point to *"bodily harm"* as opposed to *"grievous harm"*.

In **Lomodo Francis V Uganda Criminal Appeal 13 of 2013 Arising From Kaabong -Kotido Criminal Case no. 38 Of 2013 HON. LADY JUSTICE HENRIETTA WOLAYO** found that the injuries suffered by the complainant did not fit the description of grievous harm and instead found assault occasioning bodily harm.

This court is equally inclined to find that the injuries proved by the prosecution did not meet the minimum threshold to be categorized as grievous harm.

This ingredient was proven to the satisfaction of court to the extent of establishing an assault occasioning bodily harm.

<u>Ingredient 3:</u> The accused caused or participated in the assault resulting into bodily harm.

This court is confronted with two versions of what transpired on that day. That is;

a) That the complainant was assaulted by the accused.
b) That the accused walked away when the quarrels exacerbated and he is not the one who assaulted the complainant or caused him the injuries.

Like I mentioned from the outset, it is not the accused's duty to prove his defence. All he has to do is assert facts connoting that defence and it is the prosecution's duty to discredit that defence.

In the end, it all comes back down to court as to which version was believable to it on the standard of *"beyond reasonable doubts"* as distinguished from that of *"balance of probabilities"* relied upon in civil cases.

In **D.R Pandya –vs- R (1957) E.A 336 at 338** it was held;

> *"…it is now settled principle that when a question arises as to which witness to be believed, rather than another, the question turns on the general circumstances, the manner and demeanor/conduct of the witnesses before, during and after the fact, including the demeanor at trial"* (EMPHASIS ADDED)

This court, by ocular observation took note of the demeanor of all the witnesses and the prosecution witnesses, especially, Pw1, who appeared truthful and his testimony quite passionate and convincing.

On the other hand, the accused in his testimony as Dw1, while admitting to being present at the crime scene, he denied assaulting the complainant.

From the testimony of Pw1, Pw2 and Dw1, it appears that it is the disputed land boundaries that resulted into the fracas and subsequent injuries to the complainant. While the accused told court that he walked away from the crime scene, he also told court that it is him who was instead assaulted by the complainant's friends.

Court wonders how this happened, if indeed, it was true that he walked away.

But prosecution evidence shows that upon alarm, some people came to rescue the complainant from the accused. Could those acts be the ones being called an assault against him? That seems to be so!!

This court is not satisfied with how, in a twist of events, it is him (accused) who got assaulted yet he claims to have walked away.

The accused's defence from what I gathered from his testimony was a general denial. Like I mentioned it at the outset, an accused who sets up a defence does not have a duty to prove it, but it's the duty of the prosecution to disprove it as held in ***Vicent Rwamaro v. Uganda [1988-90] HCB 70.***

While the prosecution's own evidence seems to allude to potential provocation arising out of the disputed land boundaries, the accused did not raise that defence. He raised a defence of general denial, and from my evaluation above, this court is not satisfied with the same. It is hereby rejected.

It is an accepted proposition of law that a person cannot avail himself or herself of the plea of self-defense when he or she was himself or herself

the aggressor and willfully brought on him, without legal excuse, the necessity of inflicting harm as stated in **Uganda v Okech and Anor Criminal Appeal No. 21 of 2015 High Court at Gulu**.

I cite the above case, mostly because, the accused in his defence, testifying as Dw1, he told court that he wlked away when the exchanges increased. But at the same time, he told court that he was assaulted by Pw1's friends (Pw2 & Pw3). In their testimony, they told court that they came to rescue Pw1 from the assaults meted out upon him by the accused. From that testimony, I am satisfied that the accused was present at the crime scene.

Even if it is true that the accused was assaulted in the process, I am inclined to disagree that this would take away the criminal liability for his acts, yet, he is the one who brought himself into proximity of that danger in the course of consummating his own offence.

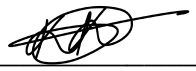
For those reasons, I find that prosecution proved ingredient 1,2 & 3 beyond reasonable doubts.

Having found as I have, I make the following orders.

1. In accordance with the principles laid down in **Funo & Ors. vs. Uganda, supra,** the accused is hereby CONVICTED of a lesser charge of assault occasioning actual bodily harm contrary to then **Section 236** of the penal code Act Cap 120, now **Section 219** of the penal code Act Cap 128, Laws of Uganda, Red volumes, 2024 revised edition.
2. The accused, now convict will remain on remand until sentencing.
3. Sentencing will be done after hearing prosecution on aggravation and the convict on mitigation.

I so order.

Dated at PALLISA this _____6th_____ day of _____MAY_____ 2025.



HW KYEMBE KARIM ESQ.

Magistrate G.I