THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
CRIMINAL APPEAL NO. 23 OF 2013
(Arising from Mak/1768 OF 2011)

KAWOOYA RONNY.....APPELLANT

VERSUS

UGANDA…….....RESPONDENT

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

REPRESENTATION:

Mr. Robert Karigyendea of counsel for the Appellant

Ms. Carolyn Nabaasa PSA for State

Ms. Jackie Busingye – Court clerk

JUDGMENT:

The Appellant, Kawooya Ronny, was charged and convicted of assault occasioning actual bodily harm contrary to section 236 of the Penal Code Act. He was sentenced to 4 years imprisonment. He has now appealed against the decision on the following grounds:

1. The learned Trial Magistrate erred in law and fact when she failed to inquire and ascertain the mental condition of the accused before the trial started yet it had been brought to her attention that the accused was of unsound mind.
2. The learned Trial Magistrate erred in law and in fact when she allowed the trial to proceed in the absence of the accused person thereby denying the accused a chance to cross examine one of the witnesses.

3. The learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion that the appellant was guilty.

The first ground is to the effect that the learned Trial Magistrate failed to inquire and ascertain the mental condition of the accused before proceeding with the trial. An accused person has a right to a fair trial, he must be able to understand and follow the proceedings. See Article 28 of the Constitution.

Section 113 of the Magistrate Court Act provides:

> ***"(1) When in the course of a trial or preliminary proceedings a Magistrate's Court has reasons to believe that the accused is of unsound mind and consequently incapable of making his or her defence, it shall inquire into the fact of that unsoundness.***
>
> ***(2) If the Court is of opinion that the accused is of unsound mind and consequently incapable of making his or her defence, it shall postpone further proceedings in the case."***

Section 116 of the same Act states:-

> ***"When the accused appears to be of sound mind at the time of preliminary proceedings, the court, notwithstanding that it is alleged that at the time when the act was committed, in respect of which the accused person is charged, or she was by reason of unsoundness of mind incapable of knowing the nature of the act or that it was wrong or contrary to law, shall proceed with proceedings and shall commit the accused for trial."***

The lower Courts record shows that when the case first came up for hearing on 27th March 2012 the defence counsel informed court that the accused had been examined by a Psychiatrist Consultant at Butabika Hospital Dr. Julius Muron and found to have had a mental illness since 2009. Counsel drew court's attention to a Medical Report on the file dated 23rd March 2012. The Report was addressed to the Chief Magistrate, Makindye Chief Magistrate's Court. It stated:

> ***"Re: <u>Psychiatry Report of Kawooya Ronny (IP No. 2163/11)</u>***
>
> ***We have treated this gentlemen for mental illness since 2009 and he was last admitted at Butabika Hospital in June 2011. He has a severe form of mental illness called psychosis that grossly affects his behaviors with irritability and violence being some of the symptoms.***
>
> ***The illness had been controlled on treatment but he later stopped treatment.***
>
> ***This letter is to confirm that Mr. Kawooya has a mental illness and that he stopped getting treatment since October 2011"***

On that date hearing was adjourned and when the file came up on 22nd May 2012 the accused was unrepresented and the State Prosecutor addressed Court:-

> ***"I have noticed and observed the letter that was addressed to Court from Butabika Hospital which states the accused person has been mad one time, but it does not show that on 30th November, 2011, when he committed this crime, he was insane and incapable of understanding when he was committing this offence"***

Secondly, no evidence has been led to this court, that when this matter is going to be heard, the accused person cannot understand because of that problem. It is my humble submission that the provisions of Section 113 to 117 of the MCA, do not apply in respect of this accused person and we submit that this court should proceed and hear this case.

…….

In the alternative, if the accused purports that he is not able to understand what is taking place in Court, I do pray that he is remanded under section 118 of the MCA till such a time when he is able to understand the proceedings. ……..”

Hearing was adjourned. On 27th July 2012 the case came up for hearing. Again the Accused was unrepresented. Court proceeded to hear evidence of three prosecution witnesses.

On 24th October 2012 the Accused was absent and his father who was one of the sureties reported that the Accused had disappeared from home for three days. The State Prosecutor stated:

“…….if the accused was on medication, then he should be taken back to Butabika for medication”

He applied for the fourth witness to give evidence which was granted. On 6th November, 2012 the Accused appeared in Court on a Warrant of Arrest and was remanded. On 6th December 2012 the Accused was unrepresented, further hearing proceeded with the evidence of the fifth witness.

On 18th December 2012 Mr. Kibirango Peter appeared for the Accused and addressed Court:

"The accused is insane, he suffers from the disease of the mind. This fact was brought to the attention of this court way back in March this year. I have a report from Butabika hospital. In the circumstances, I pray that the proceedings be postponed to enable court to enquire into the soundness of the accused's mind pursuant to section 113(1) &(2) MCA.----------"

Court ruled that the accused be taken to Butabika hospital for mental examination and treatment. On 1st March 2013 the State Prosecutor addressed Court thus:

"……Upon perusal of the said communication from prisons, we find that the court may not proceed on grounds the accused is mentally not stable, we pray that, since he is not mentally sound, he should be taken to mental institution for treatment and not to go back to the community in that state.

Court ruled:

"Upon listening to the submissions of the state and perusal of the report from Luzira indicating that the accused person is not of sound mind, I find it proper to stay proceedings against the accused person and refer him to Butabika Mental Hospital for examination and treatment."

The Report from Murchison Bay hospital dated 4th January 2012, by Dr. Julius Muron, Consultant, Psychiatrist, Butabika Hospital concluded:

"Mr. Kawooya has had cannabis related pyschosis for which he has had treatment both at Butabika hospital and also in Luzira Remand

Prison. He is currently on medications and limited counseling while in prison. Although he has improved, he still needs further treatment and rehabilitating preferably in a drug rehabilitation centre."

On 28th March 2013, the State Prosecutor addressed Court thus:

"Basing on the document filed in court from prisons, it is stated that accused has ever had a mental illness and was treated. This was in the month of June 2011. In October 2011, he stopped medication and it is assumed that when he stopped medication he was ok. The case in court took place on 30/11/2011 and the accused person by the time of arrest and charge he was mentally stable. It is our humble prayer that he is put to his defence, since he has not brought Court any document to prove his mental status and was mentally stable when he committed the offence."

The Accused stated:

"I am in a bad health. I pray for bond so that I get treatment while I am outside jail. I am not ready to proceed with my defence."

Court ruled:

"Upon insisting that the accused is of sound mind, the accused tells court that he is ready to give his defence. Let the accused give his defence."

In her judgment the learned Trial Magistrate stated:

"From the medical report the accused person was on treatment from May to September 2011. The offence was committed on the 30/11/201. Long after treatment and recovery. It is therefore my finding that the accused person was of sound mind when he committed the offence the defence of insanity was overruled and the accused person was required to give his defence after court found that he had a case to answer. The accused opted for silence."

Mr. Karigyenda for the Appellant submitted that under section 113(1) of the MCA the onus is on the court to inquire into the fact of the Accused person's unsoundness and that it is mandatory for the court to conduct the inquiry before proceeding with the trial. He contended that in the circumstances of this case court to have proceeded with the hearing before conducting the required inquiry was failure of Court's duty. Ms. Nabaasa the Principle State Attorney, conceded to the irregularity.

The Accused person opted to keep silent. He never raised a defence of insanity. What was raised and of relevancy was the accused person's mental status as at the trial – whether he was capable of understanding the nature of the offence against him and able to understand and follow the proceeding thereby capable of making his defence. The lower court record shows that on 1st March 2013 the learned Trial Magistrate found that the accused was of sound mind, she stayed proceedings and referred the Accused to Butabika Mental Hospital for examination and treatment. The resultant report indicated that the accused had Cannabis related psychosis for which he had had treatment and was on medications and counseling. That though he had

improved he still needed further treatment and rehabilitation. The report did not state that he was capable of understanding and follow Court proceedings. The learned Trial Magistrate proceeded to hear the prosecution evidence and proceeded to put the accused person on his defence without making an independent finding on whether the accused was mentally sound and capable of making his defence. Her finding in the judgment clearly shows that if insanity had been raised as a defence it would have been relevant as at the time of commission of the offence. Yet of relevancy was the Accused mental status as at the hearing of the case and his ability to understand and follow the proceedings. Accordingly ground one of the appeal succeeds.

The second ground is to the effect that the trial magistrate allowed the trial to proceed in the absence of the accused. The learned Principal State Attorney conceded that this was another procedural error. Article 28 of the Constitution provides:

3) Every person who is charged with a criminal offence shall-

> ***(d) be permitted to appear before the Court in person or, at that person's own expense by a lawyer of his or her choice;***
>
> ***(g) be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court."***

On 24th October 2012 the Accused and his counsel were absent. His father, one of the sureties, informed court that for three days he had disappeared from home. The Accuse'd mental condition had already been brought to the attention of court, and also appreciated by the State Prosecutor, but court proceeded to hear evidence of the fourth prosecution witness, Dr. Baringa Tadeo, a Police Surgeon who had examined the complainant. The accused

was denied the right to attend court and the right to cross-examine this witness. Court thereby denied the accused a right to a fair hearing.

With the above irregularities conviction based on evidence obtained in the above irregular circumstances cannot be allowed to stand. Accordingly the appeal succeeds, the conviction quashed and sentence set aside.

The learned Principal State Attorney prayed that a retrial be ordered so that the right procedure is followed. Under section 34(2)(a) of the Criminal Procedure Code Act the appellant Court on any appeal may ***"reverse the finding and sentence and acquit or discharge the appellant, or order him or her to be tried or retried by a court of competent jurisdiction".*** The appellant was sentenced on 6th April 2013 and has since been in prison and before then from 6th November 2012 had been on remand. Considering that period of incarceration and the irregularities at the trial I am unable to order a retrial.

The Appellant is accordingly discharged and set free.

LAMECK N. MUKASA

JUDGE

1/08/2013