THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 0240 OF 2020

(Appeal from the Judgment of Lady Justice H. Wolayo delivered on the 1st of March 2018, in Criminal Session Case No. 125 of 2015 High Court of Uganda, Kumi)

OTIM PATRICK DAVID EKANYA :::::::::::::::::::::: APPELLANT

VERSUS

UGANDA ::RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA
HON. JUSTICE CHRISTOPHER GASHIRABAKE, JA
HON. JUSTICE OSCAR KIHIKA, JA

JUDGMENT OF COURT

Introduction

The Appellants were indicted and convicted of the offence of detaining or kidnapping with intent to murder contrary to Section 243(1) (1) and (b) of the Penal Code Act and sentenced to suffer death.

Background

In March 2014, one Acom Hellen, took her daughter, the victim, to stay at the home of her aunt, Acan Angella Betty at Osopotoit village

in Mukongoro SubCounty Kumi District, from where the victim would travel to Kabukol Primary school to study. The aunt stayed with the victim until sometime in mid-April 2014 or thereabout, when the victim requested for permission from her above named aunt to go to the Appellant's home at Odotuno Village, Kanyum Sub-County, Kumi District to inform him about the condition of their child, a sickler. The victim was escorted by her cousin, Ochoite Michael, to the Appellant's home for the said purpose. While at the Appellant's home, the victim introduced the Appellant as her husband to Ochoite Michael. Ochoite Michael left the Victim at the Appellant's home.

Sometime in May 2014, the victim's mother visited Acan Angella Betty's home for the purpose of seeing the victim. However, she didn't find the victim at the said home for the victim had never returned from the time she left to visit the Appellant in April 2014. The efforts to trace the victim by her family members were futile.

The Appellant was subsequently arrested, charged and convicted of the offence of Kidnap with intent to murder and sentenced to death. The Appellant being dissatisfied with the decision of the trial court filed this appeal on the following grounds;

1. The Learned Trial Judge erred in law and fact in finding that there was sufficient evidence to sustain a conviction of detaining with intent to murder.
2. The Learned Trial Judge erred in law and fact when she failed to properly evaluate the evidence and convicted the appellant based on evidence which was insufficient to prove the offense.

3. The Learned Trial Judge erred in law and fact in admitting the confession evidence of PW1 Okiror Emmnuel.
4. The Learned Trial Judge erred in law and fact when he failed to exercise his discretion judiciously and thereby imposing a death sentence which was manifestly a harsh sentence in the circumstance of the case.

Representation

When this appeal came up for hearing, Ms. Kanyago Agnes and Mr. Nanguru Eddie appeared for the Appellant while Ms. Samali Wakooli appeared for the Respondent. Both parties filed written submissions which were adopted at the hearing.

Duty of a 1st Appellate court

This being a first appeal, the duty of a first appellate court is to re-evaluate the evidence, weigh conflicting evidence and reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses testify. (See **Pandya v R [1957] EA p.336 and Kifamunte v Uganda Supreme Court, Criminal Appeal No. 10 of 1997.** In the latter case, the Supreme Court held that;

> *"We agree that on a first appeal, from a conviction by a Judge the Appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own*

mind not disregarding the judgment appealed from but carefully weighing and considering it."

We have kept these principles in mind in resolving this appeal.

Grounds 1 and 2

Appellant's submissions

Counsel submitted that the prosecution produced evidence which failed to prove that the Appellant, by force or fraud, kidnapped the victim with intent to murder, which is the first ingredient of the offence of kidnap with intent to murder. The only prosecution evidence available was the fact that the said Agwang Joyce, was last seen at the home of the Appellant. Counsel argued that the testimonies of PW4 and PW5 pointed to the fact that the victim returned to the home of the Appellant voluntarily.

Counsel argued that the presumption in Section 243(b) of the Penal Code Act only applies if the prosecution has already proven, beyond reasonable doubt, that the Appellant kidnapped, took away, abducted or detained the victim. Counsel relied on the decision in **Nalongo Naziwa Vs Uganda, Criminal Appeal No. 35 of 2014** in which the Supreme Court restated the principle in **Section 243(b)** of the **Penal Code Act** and held that once the prosecution has proved to the required standard the fact that the accused kidnaped the victim and there is no explanation of the victim's whereabouts, then its only legitimate that the accused is required to explain the victim's whereabouts.

Counsel submitted that in this case, there was no evidence that the victim was detained against her will or that such detention was by force or fraud.

Counsel submitted that the clothes recovered at the Appellant's house belonged to the Appellant's wife and not to the deceased. That the search was conducted in 2016 April, two years after the alleged murder and yet the clothing and shoes had not been concealed. Counsel argued that it is not probable that the Appellant could have killed the deceased, buried her body and left her clothing lying around where they could be readily discovered. Counsel argued that the prosecution witnesses were all known to each other and there was no evidence from an independent source.

Respondent's submissions

Counsel submitted that ground one of the Appellant's Memorandum of Appeal contravenes Rule 66 (2) of the Judicature (Court of Appeal Rules) Directions. Counsel argued that the ground violates the rules of framing grounds of appeal as it is not specific on what point of law or fact that is in contention. Counsel relied on the decision in **Mugerwa John Vs Uganda Criminal Appeal No. 0375 of 2020** for the proposition that an appellant cannot throw grounds of appeal at court and expect court to wade through them looking for where the learned trial Judge went wrong.

Counsel argued that the Appellant's counsel seems to be blaming court for relying on circumstantial evidence, which the law allows

court to rely on. Counsel prayed that ground one be struck out for being incurably defective.

In the alternative, counsel submitted that the prosecution evidence was that the victim was long separated from the Appellant and only returned to the Appellant's home to take care of her sick child and was never seen again. Counsel submitted that court considered all the circumstances surrounding the disappearance of the deceased and the fact that the Appellant was the last person seen with the deceased. Counsel relied on the decision in **Jagenda John Vs Uganda Criminal, Appeal No. 001 of 2011** for the proposition that the 'last seen doctrine' creates a rebuttable presumption to the effect that the person last seen with the deceased person bears full responsibility for his or her death. Counsel argued that the Appellant was the last person seen with the deceased alive and since her body has never been seen, the Appellant ought to explain her whereabouts.

Further, that the Appellant revealed to PW1 what had happened to the deceased and following that information to the police, a search was carried out and exhibits recovered, which included the clothes the deceased was wearing the day she went to the Appellant's home.

Consideration of grounds 1 and 2

Grounds one and two fault the learned trial Judge for having convicted him without sufficient evidence proving the offence of kidnapping with intent to murder.

To prove kidnapping with intent to murder, the prosecution had to prove the following ingredients of the offence beyond reasonable doubt;

1. There was taking away of a person.
2. The taking away was accomplished by force or fraud.
3. The taking away was against the victim's will.
4. That the perpetrators of the offence were motivated by an intent to murder the victim.
5. That the accused persons were the perpetrators of the offence.

The prosecution produced six witnesses to prove the offence of kidnap with intent to murder as against the Appellant. The deceased's aunt testified as PW4. She testified that the deceased came to live with her between February and April 2014 to enable her attend a primary school that was nearby. PW2, the deceased's father testified that the deceased separated with the Appellant after a dispute and she went to stay with PW4 to further her education. PW4 testified that one day in April 2014, the deceased returned from school and informed her that the Appellant had informed the deceased that their child was sick and the deceased had to go and advise the Appellant on where to take the child. PW4 testified further that at 5am the next morning, she got her husband's bicycle and asked her son, PW5, to accompany the deceased to the Appellant's home. The deceased was never seen again. PW4 testified that the

deceased went to the Appellant's home dressed in a skirt with flowers, wrapped with a *lesu* around her waist, with a blouse and open shoes.

PW2 testified that in 2014, he left his home with Agwang (the deceased) at 5 a.m and arrived at her husband's place at 7 a.m. It was PW2's testimony that the two found the Appellant at home and he welcomed them. After exchanging greetings, PW2 bid good bye to his sister Agwang and rode back home to return the bicycle to his father.

PW6, Det. Corporal Obal Samuel carried out a search at the home of the Appellant in 2016 after being given information by one Bosco, a brother to the Appellant. It was Obal's evidence that on 5/4/2017, they dug up an open space in the cassava garden of the Appellant and found an open shoe marked P. Exh.I. They also searched an abandoned grass thatched house and found a brown skirt with flowers at the hem and a blue lesu. It is these same items that were described and identified by PW4 and PW5 as the clothes Agwang wore the last time they saw her, which happened to be the day PW5 left her with the Appellant in his home.

The prosecution also relied on the evidence of PW1, Okiror Emmanuel, who happened to be in prison at the same time with the Appellant on unrelated charges. PW1 testified that while in prison, the two struck up a friendship and the Appellant told him he had quarreled with his wife and her parents who then took her away. PW1 testified further that the Appellant told him he hit Agwang and buried

her in the night at Omurang village. On his release from prison, he informed the mother of Agwang who in turn informed her husband.

In his defense, the Appellant made a sworn statement in which he denied detaining Agwang and claimed she was taken away in 2014 by her parents after a marital dispute. However, PW4 testified that when the deceased was taken away from the Appellant after the dispute, she went to live with her and it was from her home that the deceased went back to the Appellant escorted by PW2.

This was a case based largely on circumstantial evidence and as such, the Court must establish that the inculpatory facts are incompatible with the innocence of the Appellant, and incapable of explanation upon any other hypothesis than that of guilt; and further, that there are no co-existing circumstances that would negative the inference of guilt. See the cases of **Simon Musoke vs. R. [1975] E.A. 715;** and **Kooky Sharma & Palinder Kumar vs. Uganda; S.C. Crim. Appeal No. 44 of 2000.**

In **Byaruhanga Fodori vs. Uganda, S.C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12** at p. 14, the Supreme Court of Uganda held that:-

> *"It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.*

The Court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See ***S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480****)."*

In the case of **Tindigwihura Mbahe vs. Uganda, S.C. Crim. Appeal No. 9 of 1987**, Court held that circumstantial evidence must be treated with caution, and narrowly examined, because evidence of this kind can easily be fabricated. Therefore, before drawing an inference of the accused's guilt from circumstantial evidence, there is compelling need to ensure that there are no other co-existing circumstances which would weaken or altogether destroy that inference.

In the present case, the evidence of PW2 and PW4 was to the effect that the deceased went to the home of the Appellant in a floral skirt, a lesu and a blouse and that is where she was last seen. The clothes were recovered from the home of the Appellant by PW6 who testified that he was stationed at Abim police station when the search was carried out. He testified that he together with ASP Nyowa Yasin and other police officers went to the Appellants home and dug up the spot where it was suspected that the victim had been buried. As they dug, PW6 decided to check the unused pit latrine which was nearby and found a greenish slipper. When he removed the slipper, Okiria the complainant who was present with his wife, PW4, identified the slipper as one that was used by Joyce. They then entered an old grass

thatched house and found old clothes. There were two skirts, one was torn blue, another one was greenish with flowers at the hem. There was also a lesu bluish in color with some reddish colors and bra. PW6 recovered the items, Okiria identified a skirt and lesu as belonging to Agwang.

The description given by PW5 matched the items discovered by Det. Corporal Obal Samuel, PW6, in 2016 when he and other police officers searched the homestead of the Appellant. It is these same items that were described and identified by PW4 and PW5 as the clothes Agwang wore the last time they saw her. The evidence of PW5 who knew the accused person prior to leaving Agwang in his company on the day she was last seen was held by the learned trial Judge to be direct evidence pointing to the guilt of the Appellant. We also note that the deceased has never been seen again since that day and agree with the finding of the trial Judge that by inference, the deceased was forcibly detained with intent to murder.

Under **section 243 (2)** of the **Penal Code Act**, if a person has not been heard of for six months or more after the kidnap or detention, the accused shall be presumed to have had an intention to murder her or placed her in danger of being murdered.

The Supreme Court in **Nalongo Naziwa v Uganda, Criminal Appeal No. 35 of 2014** extensively discussed the principles for consideration in cases of kidnap with intent to murder where the deceased was last seen with the accused person. The Supreme Court held as follows;

"The legal presumption under section 243(2) of the Penal Code Act, is that where a person so kidnapped or detained is thereafter not seen or heard of within a period of six months or more, the accused shall be presumed to have had the intention and knowledge stipulated in section 243 (1) (a) and (b) of the Penal Code Act, namely an intent that such person may be murdered or may be so disposed of as to be put in danger of being murdered; and knowledge that such person will probably be murdered.

According to the above provision, once the prosecution has proved to the required standard the fact that the accused kidnapped the victim, and there is no explanation as to the victim's whereabouts, then it is only legitimate that the accused is required to explain the victim's whereabouts. If the accused is unable to give such explanation, and the victim remains unseen or unheard of for a period of six months or more, then it is equally legitimate that the accused is deemed to have knowledge of what must have happened to the victim. <u>It would further be legitimate to impute intent upon the accused person as to what must have occurred to the victim, that is to say, that the accused intended the natural consequences of what happened to the victim.</u> In our view, that is the basis of this legal presumption and we find nothing illegal or draconian about it. (Emphasis added)

Applying the above excerpt to the present case, it is our considered view that the learned trial Judge rightly found the Appellant guilty of kidnapping Agwang with intent to murder.

Ground 3

Appellant's submissions

Counsel submitted that the confession by PW1, was not a reliable one considering the fact that it was made while PW1 was remanded in prison in relation with a charge of attempted murder. Counsel argued that cell confession evidence must be treated with caution and in this case, there was no corroborating evidence. Further, that PW1 did not report the evidence to police immediately after his release but only reported after getting into contact with other prosecution witnesses.

Consideration of ground 3

The evidence of PW1 was that while in prison, the two struck up a friendship and the Appellant told him he had quarreled with his wife and her parents who then took her away. PW1 testified further that the Appellant told him he hit Agwang and buried her in the night at Omurang village. On his release from prison, he informed the mother of Agwang who in turn informed her husband. This was reported to the police which led to a search at the Appellant's home and discovery of the clothes that were identified by PW4 and PW5 as the ones the accused was wearing the day she was last seen at the home of the Appellant.

We agree with the Appellant's counsel that such evidence is one to be treated with great caution. We however note that the learned trial Judge cautioned herself on the admissibility of the evidence of PW1. The learned trial Judge had this to say;

> *"It was suggested by the defense in cross examination that the witness Okiror was a bought witness and therefore not credible. Obviously, the fact that Okiror was in prison with the accused impacts on his credibility."*

PW1's credibility notwithstanding, the learned trial Judge went on to rely on other corroborating evidence to convict the Appellant, which evidence we have re-evaluated in resolving grounds 1 and 2 above. We therefore find no reason to fault the learned trial Judge's admission of PW1's confession. Ground 3 also accordingly fails.

Ground 4

Ground 4 faults the learned trial Judge for passing a death sentence on the Appellant, which according to counsel, is manifestly harsh and excessive in the circumstances of the case. Counsel relied on the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013** which state under Section 17 that the court may only pass a death sentence in exceptional circumstances in the rarest of rare cases.

Consideration of Ground 4

For this Court, as a first appellate court, to interfere with the sentence of a trial Court it must be shown that any one or more of the factors below exist:

1. The sentence is illegal.
2. The sentence is harsh or manifestly excessive.
3. There has been failure to exercise discretion.
4. There was failure to take into account a material factor.
5. An error in principle was made.

See: **Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014; Kyalimpa Edward Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995; Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal No. 16 of 2000;** and **Kiwalabye Bernad Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

Further, the court may not interfere with the sentence imposed by a trial Court simply because it would have imposed a different sentence had it been the trial Court. See: **Ogalo S/O Owoura Vs Republic [1954] 24 EA CA 270.**

We shall bear in mind the above principles while resolving this appeal. It is the appellant's claim that the sentence passed by the trial court is manifestly harsh and excessive in the circumstances of the case.

The sentencing order of the trial court stated as follows;

"This is one of those cases which falls squarely in the sentencing guidelines for the death penalty. Agwang was a young girl who was just 19 years and had been given lease of life to return to school, a move that displeased the accused so much that he planned her disappearance and has not been seen since. As submitted by the state, concealment of the remains of Agwang is an aggravating factor. Agwang was very young compared to the accused who is obviously a grown well - built man. She was defenseless when confronted by the accused. The conduct of the accused is one of a person who acted with the attitude that he had power and control over Agwang because he had paid cattle goats and cash for her and therefore could do as he pleased. She ceased to be a human being in his eyes and became less human and therefore disposable. Accused person is sentenced to death. He shall suffer death in the manner prescribed by law"

From the above excerpt, it is evident that the trial Judge's sentencing order only considered the aggravating factors in arriving at the sentence of death. However, we have also noted that the Appellant was not a first offender and the only mitigating factor would be the fact that he had seven children. We must however note that the offence of kidnap is rampant and as such attracts a deterrent sentence. In addition, the body was never seen and the deceased was not given a befitting burial. She was a 19 years old young girl that had been given an opportunity to go back to school despite having a baby.

It is our considered view that the learned trial Judge considered the circumstances surrounding the commission of the offence and passed an appropriate sentence of death to the Appellant. Such offenders should be kept out of the community to avoid a repetition of these offences.

We find no reason to interfere with the sentence imposed by the learned trial Judge and as such, ground 4 accordingly fails.

All the grounds having failed, this appeal stands dismissed.

The conviction and sentence are hereby upheld.

We So Order.

Delivered and dated this ..... day of ..... 2024.

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CHEBORION BARISHAKI

Justice of Appeal

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CHRISTOPHER GASHIRABAKE

Justice of Appeal

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OSCAR JOHN KIHIKA

Justice of Appeal

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