THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NUMBER 0088 OF 2009

(Appeal from a conviction and sentence by His Lordship Justice Eldad Mwangusya in High Court Criminal case No. 06 of 2008 given at the High Court at Kampala on the 1st day of April 2009)

NALONGO NAZIWA

JOSEPHINE::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA::RESP

ONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA
HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGEMENT OF THE COURT

The High Court at Kampala tried and convicted the appellant with the offence of kidnap with the intent to murder contrary to **Section 243 (1) (a)** and **(2)** of the **Penal Code Act Cap 120** on the 1st of April 2009 . The learned trial Judge sentenced her to 18

years imprisonment. This appeal is against both the conviction and sentence.

The facts of the case briefly are as follows: On the 26th of March 2006, the complainant (PW1) went for prayers at “Christian life Center” with her three months old baby, Peter Sematimba. There, she sat next to one Nakyeyune Ruth and the appellant. At 3:00 PM on the same day, Nakyeyune Ruth and the appellant visited PW1 at her home. The appellant intimated at that time that she needed a worker at a shop in Bombo and the purpose of the meeting was to discuss the possibility of PW1 working for the appellant. The meeting concluded and the appellant promised to return later that day. The appellant returned to PW1’s home later that day at 5:00pm where the two women agreed to meet at the church. They met again later at the church and proceeded to a building PW1 called “Cooper Complex”. At this time, the appellant was carrying the infant Peter Sematimba and disappeared with the infant after asking the mother PW1 to sit and wait for her on a chair in the building.

On the 24th day of April 2006, one month after the disappearance of her baby, the complainant saw the appellant at a place called Nakeere where she had gone for counseling. She alerted the local authorities and the appellant was arrested and later charged with the offence of kidnap with the intent to murder. The trial Judge convicted her of the offence and sentenced her to 18 years imprisonment, hence this appeal.

The Memorandum of Appeal sets out the following grounds:

> ***"1. The learned trial Judge erred in Law and fact when he failed to evaluate evidence on record thereby reaching a wrong conclusion.***
>
> ***2. The learned trial Judge erred in law and fact when he convicted the appellant based only on circumstantial evidence when its weak to prove the case beyond reasonable doubt.***
>
> ***3. The trial judge erred in law and fact when he disregarded the defence of alibi as raised by the appellant.***
>
> ***4. And in the alternative and without prejudice to the foregoing the learned judge erred***

in law when he sentenced the appellant to 18 years imprisonment."

At the hearing of the Appeal, Ms Nakamatte Esther appeared for the Appellant, and Ms Margaret Nakigudde Principal State Attorney appeared for the Respondent.

When the Appeal was called for hearing, learned counsel for the appellant, abandoned the second and third grounds of the appeal. Counsel also sought and obtained the Courts leave to amend the fourth ground to read as follows;

> ***"That the trial Judge imposed an excessive sentence of 18 years on the appellant".***

The two grounds of appeal therefore are as follows:

1. ***The Learned Trial Judge erred in law and fact when he failed to evaluate evidence on record thereby reaching a wrong conclusion.***
2. ***The trial Judge imposed an excessive sentence of 18 years on the appellant.***

In respect to the first ground of the appeal, learned counsel for the appellant argued that the learned trial Judge failed to properly evaluate the evidence before him when he based the conviction of the appellant on the identification of one witness. She argued that the witness did not know the appellant prior to the day they met at her home. She pointed out that a period of about one month had passed between the first meeting of the appellant and PW1 on the 26th of March 2006, and the next meeting on the 24th of April 2006 when PW1 identified the appellant. Counsel argued that this was too long a period of time for PW1 to accurately remember the appellant. She urged the Court to consider that PW1 may have been suffering from the trauma of having lost her child and therefore could not provide reliable evidence that could be solely relied upon.

The appellant's counsel also submitted that PW1's testimony identifying the appellant needed corroboration from Nakyeyune Ruth who had introduced the appellant to PW1. She argued that the prosecution's failure to call such an important witness should have raised an inference against the prosecution's case and relied

on the case of **Oketcho v Uganda; Supreme Court Criminal Appeal No 26 of 1995**.

In her submission in reply, learned counsel for the respondent, in respect to the first ground of appeal, said that the learned trial Judge had considered that PW1 had met with the appellant on four separate occasions all of which were on the same day. She also submitted that in light of the fact that the appellant and PW1 had met on the said four different occasions, a period of one month is not so long a period as to render PW1's evidence identifying the appellant as the perpetrator of the crime unreliable, and that the trial judge was right in finding the evidence of PW1 identifying the appellant credible and reliable. She reiterated that the Learned trial Judge had warned himself of convicting the appellant on the basis of the testimony of one witness as shown on page 5 of the Judgment, but that taking all the circumstances into consideration, he rightly choose to believe the sole evidence of PW1.

In respect to the second ground of Appeal, counsel for the appellant submitted that the sentence was too harsh and excessive, and that it was not clear whether the learned trial judge had taken the period spent by the appellant on remand into consideration at sentencing. She cited **Byarihe Vincent v Uganda: Criminal Appeal No 53 of 1996 (COA)** for the proposition that it is not enough for a trial judge during sentencing to merely say that they have considered the time that the appellant has spent on remand. She pointed out that the sentencing guidelines require that the trial Judge actually computes the time spent on remand.

Counsel for the appellant then prayed that this Court allows the appeal, that the conviction be quashed and the sentence be set aside. In the alternative, she prayed that this Court reduces the sentence imposed by the trial Judge.

On the second ground of appeal, learned counsel for the respondent submitted that the sentence imposed upon the appellant by the learned trial judge was not harsh taking into account that the Penal code Act provides for a maximum

sentence of death for the offence of kidnap with intent to murder. Furthermore, Part I of the 3rd Schedule of the Sentencing guidelines, provides that the starting point for sentencing for Kidnap with the intent to murder is 30 years imprisonment.

Learned counsel for the respondent also submitted that at page 35 of the record of proceedings, it is clear that the trial Judge did in fact consider the time that the appellant spent on remand during sentencing. She prayed that this Court dismisses the Appeal and sustains the Judgment and sentence of the trial Judge.

We have carefully considered the arguments for both Counsel, and we have also carefully perused the proceedings and Judgment of the Court below.

Rule 30 of the **Judicature (Court of Appeal Rules) Directions** provides as follows:

> **(1) On any appeal from a decision of the High Court acting in exercise of its original jurisdiction, the court may;**
>
> > **(a) Reappraise the evidence and draw inferences of fact.**

It is the duty of the first appellate court to re-evaluate all the evidence on record and make its own findings of fact on the issues while giving allowance for the fact that it had not seen the witnesses as they testified, before it can decide on whether the decision of the trial court can be supported - **Pandya v R [1957] E.A 336; Kifamunte Henry v Uganda: Supreme Court Criminal Appeal No 10 of 1997.**

The duty of the first appellate court was also reiterated by the Supreme Court in Fr. **Narsensio Begumisa & 3 others v Eric Tibebaga; Supreme Court Civil Appeal No 17 of 2002**. The Court held as follows;

> ***"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the court of appeal its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."***

The law relating to a conviction based on the evidence of a single identifying witness was considered by this Court in the case of

Okwang Peter v Uganda; Court of Appeal Criminal Appeal No.104 of 1999, where it was held as follows:

> ***"Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."***

(See also; **Roria v Republic (1967) E.A. 583: Abdala Bin Wendo & Another vs R (1953) 20 E.A.C.A. 166: John Katuramu v Uganda: Supreme Court Criminal Appeal No 2 of 1998**)

The Court in **Tumusiime Isaac v Uganda; Court of Appeal Criminal Appeal No. 213 of 2002** laid out some of the factors which court considers in deciding whether the conditions under

which the identification was made are conducive for positive identification without the possibility of error or mistake. They include;

"1) whether the accused was known to the witness at the time of the offence,

2) the conditions of lighting,

3) the distance between the accused and the witness at the time of identification and;

4) the length of time the witness took to observe the accused."

The facts show that PW1 met the appellant four times on the 26th day of March 2006; first, at church where one Nakyeyune Ruth, PW1 and the appellant sat together. Then PW1 met the appellant at her home in the presence of one Nakyeyune Ruth. PW1 and the appellant agreed to meet again. At about 5:00 p.m. the appellant and PW1 met again at PW1's home where the two agreed to meet at the church. Later, they indeed met at the church. PW1 and the appellant then proceeded to a building called "Cooper Complex" together.

All these meetings happened on the same day, in broad day light when PW1 had all the time and opportunity to have a good look at the appellant and observe her physical features which she narrated to the court in her testimony.

One month later, PW1 saw the appellant at a place called Nakeere, promptly identified her to the local authorities, whereupon the appellant was arrested.

At page 5 of the Judgment, the trial Judge said the following:

> ***"The remaining question to determine is whether the prosecution evidence points to the accused as the person who took away the baby. The determination of this question is entirely dependent on whether or not the complainants' evidence is to be believed. In this respect it should be noted that on the day in question the complainant saw accused on four different occasions***."

The learned trial Judge goes on further to say:-

"It is my view that there was ample interaction between the two ladies to enable the complainant identify the accused without hesitation when she saw her when she had gone to a place for counseling. Her testimony as to identity of the accused person was not challenged during the cross examination and this testimony proves beyond reasonable doubt that the accused was the person who fraudulently took away the baby who is now presumed dead".

We find that the learned trial Judge correctly evaluated the evidence of PW1 and found her evidence to be credible. The Learned Judge had the opportunity to observe her demeanor at trial and found her truthful. He cautiously weighed her evidence and rightly determined to convict the appellant based on her evidence.

This court finds no reason on the record to hold otherwise. Furthermore, there were no conditions that would diminish correct identification or hindering PW1's ability to identify the appellant as outlined in **Tumusiime's case** (supra).

We do not accept Counsel for the appellant's argument that the period of about one month between the meetings on the 26th day of March 2006 and later on the 24th of April 2006, would have diminished PW1's memory of the appellant.

We also do not accept the appellant counsel's argument that PW1 was suffering from trauma and would not remember the appellant. In fact the conditions favored correct identification. The four times that PW1 met with the appellant on the 26th of March 2006, she was under no stress or trauma. It is at this time that she identified the appellant. On the 24th of April 2006, she only remembered what she already knew.

Counsel for the appellant has also argued that the trial Judge erred because he did not draw a negative inference from the fact that the prosecution failed to call Nakyeyune Ruth as a witness to collaborate PW1's identification evidence.

In **Oketcho Richard v Uganda: Supreme Court Criminal Appeal No 26 of 1995**, the Supreme Court, quoting the decision in **Bukenya and Others v Uganda 1972 EA 549**, reiterated the

duty of the Prosecution to adduce sufficient evidence in Court, and explained as follows:-

> ***"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.***
>
> ***Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have tended to be adverse to the prosecution case."***

In **Oketcho's case** (supra), the accused was convicted of Defilement c/s 123 of the penal code. The prosecution failed to produce the medical doctor who had examined the complainant.

Furthermore, the medical report did not conclusively prove sexual intercourse. The Supreme Court drew a negative inference from the prosecutions failure to produce the medical doctor as a witness and reversed the appellant's conviction.

The instant case is distinguishable from the **Oketcho case** (supra). In the **Oketcho** case the missing evidence was to prove a vital ingredient of the offense of defilement. In the instant case, Nakyeyune Ruth's evidence would have served as corroboration of PW1's evidence. However, as stated above, PW1's testimony identifying the appellant was credible evidence that required no corroboration. We find that the learned trial Judge did not err by not drawing a negative inference from the prosecution's failure to produce Nakyeyune Ruth as a witness. This ground therefore fails.

The second ground of appeal is against sentence. Counsel for the appellant argues that the learned trial judge imposed an excessive sentence and did not take the period the appellant had spent on remand into account at sentencing. The sum total of counsel for the appellant's argument was directed to the issue of remand rather than to the issue of excessive sentencing.

The law on sentencing is that for an appeal against sentence to succeed, the sentence must be illegal or manifestly excessive or inadequate -**Jackson Zita v Uganda; Supreme Court Criminal Appeal No 19 0f 1995.**

In **Ogalo s/o Owoura v Regina: Criminal Appeal No. 175 of 1954**, the East African Court of Appeal held as follows;

> ***"The Principles upon which an appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James vs- R [1950] 18 E.A.C.A. 114 it is evident that the Judge has acted upon some wrong principle, or overlooked some material factor. To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."***

According to **Section 243** of the **Penal Code Act Cap 120**, the maximum sentence for the offence of kidnapping with the intent to murder, is death.

The facts show that the prosecution established that the appellant took a three-month-old baby named Peter Sematimba from her mother under false pretenses. That baby has never been seen again and is presumed dead. The prosecution proved beyond reasonable doubt that the appellant had committed a heinous crime and the law requires that she is appropriately punished.

The learned trial judge determined that eighteen years was an appropriate sentence for the appellant and we find no reason to interfere with that sentence.

Both counsel for the appellant and the respondent have made reference to the sentencing guidelines on the issue of sentencing and consideration of the period spent on remand. **The Constitution (Sentencing guidelines for Courts of judicature) (Practice) Directions 2013** came into force on the 26th day of April 2013. The Directions therefore were not binding on the learned trial Judge who sentenced the appellant on the 1st

day of April 2009. They are therefore not applicable in this particular case. Most importantly, the guidelines do not take away the discretion of the court in sentencing a convicted offender. They are simply guidelines.

The Constitution of Uganda in ***Article 23 (8)*** provides that;-

> ***"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."***

Counsel for the appellant seemed to suggest that a trial Judge must perform some sort of arithmetic during sentencing to demonstrate that the period spent on remand has been deducted from the sentence. We do not agree. All the court is required to do is take the remand period into account during sentencing.

In **Bukenya Joseph v Uganda Supreme Court Criminal Appeal No 17 of 2010**, the Supreme Court held as follows:

> ***"It does not mean that taking the remand period into account should be done mathematically***

such as subtracting that period from the sentence that Court would give. But it must be considered and

that consideration must be noted in the judgment"

The Supreme Court also held in **Kizito Senkula v Uganda Supreme Court Criminal Appeal No 24 of 2001** that :

"taking into account does not not mean an arithmetic exercise"

In the instant case, on page 35 of the court record, Court stated as follows;-

"Court will take into account the period convict has spent on remand and the fact that she is a first offender"

We are satisfied that the learned trial Judge complied with the standards set by the Supreme Court in the **Bukenya** and **Kizito Senkula** cases (supra), and that he clearly took into account the period that the appellant had spent on remand during sentencing.

For the foregoing reasons, the appeal therefore fails. We accordingly dismiss the appeal and confirm the conviction and sentence of eighteen years passed on the appellant.

Dated at **Kampala** this 10th day of April **2014**.

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HON. REMMY KASULE
JUSTICE OF APPEAL

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HON. KENNETH KAKURU
JUSTICE OF APPEAL

.....
HON. GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL