THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HELD AT KAMPALA

CRIMINAL APPEAL NO. 69 OF 2018

NAMUSOKE ANNET KIRABO ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal From Decision Of Learned Justice Stephen Mubiru Of High Court At Kampala In Criminal Session Case No. 461 of 2017 Delivered On 13th July 2018)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Muzamiru Mutangula Kibeedi, JA

Hon. Lady Justice Irene Mulyagonja, JA

JUDGMENT OF THE COURT

This is a first appeal arising from the Judgment of the High Court at Kampala, in Criminal Case No. 421 of 2018 dated 13th July 2018 in which Hon. Mubiru J convicted the appellant of the offence of kidnap with intent to procure a Ransom contrary to Section 243(1) (c) of the Penal Code Act.

The learned trial Judge sentenced the appellant to 11 years and 9 months imprisonment.

The appellant was the second accused (A2) at the trial Court. The first accused (A1) pleaded guilty to the same offence and was convicted accordingly .The appellant pleaded not guilty and was convicted after a full trial.

It was the prosecution's case at the trial that on the 24th March 2017 at Kampala Parents School where the appellant worked as a teacher, the appellant together with

A1 took away and detained a minor aged 3 years who was in her care with intent to procure a ransom from her parents. The appellant denied the charges the Court believed the prosecution and convicted her. Being dissatisfied with the Judgment of High Court she now appeals against both conviction and sentence on the following grounds.

i) *The Learned trial Judge erred in law when he convicted the appellant on the basis of weak, unreliable and unsatisfactory circumstantial evidence thereby occasioning a miscarriage of justice.*

ii) *The Learned trial Judge erred in law and fact when he found that the appellant participated in the kidnap of the victim/thereby occasioning a miscarriage of justice.*

iii) *The Learned trial Judge erred in law and fact when he rejected the evidence of the defence thereby occasioning a miscarriage of justice.*

At the hearing of this appeal *Mr. Andrew Ssebugwawo* learned Counsel appeared for the appellant on state brief while, the appellant was in attendance *via* video link to Luzira upper Prison. The respondent was represented by *Ms. Fatina Nakefero.*

Upon the direction of the Court in view of the COVID 19 pandemic the parties had already filed written submissions on record. It is on the basis of the written submissions that this Judgment has been prepared.

The Appellant's case

The appellant in her written submissions proceeded on the basis of the memorandum of appeal dated 24th September 2020. We note, however, that, there are two earlier memoranda of appeal. The first one is dated 26th October 2018 and the other 8th October 2019. Nothing was said of the two. No leave was sought to amend or file a supplementary memorandum of appeal.

We can only conclude that the appellant abandoned the first two. Any procedure error as to the filing of the last memorandum of appeal is hereby regularized under Rule (2) (2) of the Rules of this Court.

Counsel submitted on grounds (i), (ii) and (iii) together, the thrust of which is that the learned trial Judge erred when he found that the appellant had participated in the commission of the offence.

It is the appellant's case that, none of the witnesses called by the prosecution implicated her in the commission of the offence. On the contrary it was submitted that the appellant co-operated with the parents of the victim and the Police. She described the kidnapper A1 and narrated what had transpired at school. This information Counsel submitted assisted in the arrest of the kidnapper and the rescuing of the victim. Further that she played no role in the kidnap whatsoever, and she did not know where the victim was taken or found.

It is the appellant's case that the rest of the evidence on record against her is hearsay.

It was contended that the appellant did not convince the victim to go with the kidnaper and DW2 not DW3 implicated her in anyway. The kidnapper A1 who testified after her conviction as DW4 clearly stated that she acted alone and had not been assisted by the appellant. In her testimony she said she only implicated the appellant during Police interrogation, as she had been tortured by the Police.

Counsel further submitted that, without prejudice to the above the only possible criminal offence that could support or be supported by the facts of this case against the appellant is there is 'failure to prevent a felony' as the appellant was the person in charge of the victim when she was kidnapped.

In respect of sentence , it was submitted that it was harsh and manifestly excessive in the circumstances of this case.

The principle offender who pleaded guilty was sentenced to 5 years in prison while the appellant who was found to have committed a lesser offence was sentenced to 11 years and 9 months. Further that the victim was not hurt. She was found well and returned to her parents. No ransom was paid and the kidnapper was arrested, admitted the offence convicted and sentenced.

In view of the above circumstances Counsel submitted that the sentence imposed on the appellant was harsh and manifestly excessive in the circumstances and asked Court to set it aside on that account and substitute it with a lesser and more appropriate sentence.

Resolution

This being a first appeal this Court has a duty to re-evaluate all the evidence adduced at the trial and make its own inferences on all questions of law and fact. See: *Henry Kifamunte Vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997), Bogere Moses versus Uganda (Supreme Court Criminal Appeal No. 1 of 1997) and Rule 30(1)* of the Rules of this Court.

We shall proceed to do so.

At the trial the appellant had been charged together with Namubiru Phiona (A1) and she was A2.

A1 admitted the offence and was convicted on her own plea of guilt. Following a plea bargain she was sentenced to 5 years imprisonment.

The appellant denied the charge and was tried and convicted after a full trial.

This appeal thereafter concerns only the aspect of the appellant's participation in the commission of the offence. The rest of the ingredients of the offence are not in issue. The prosecution called 5 witnesses and the defence called 4 witnesses in addition to the appellant herself.

Mugole PW1 was the medical officer who examined the appellant and found her to be of normal mental status with no injuries on her body. PW2 is the doctor who examined the victim and found that she was 3 years and 9 months and had prior to the examination been hurt and had rush on her body.PW5 was the father of the victim. He testified that he knew the appellant well as a teacher at Kampala Parents where his children including the victim went to school. He also stated that the appellant was at one time their neighbour at their place of residence in Muyenga, Bukasa Zone and they used to interact and knew her name from his children.

On 14th when she was told that the victim was missing he rushed to school and talked to the principal. The principal of the school then called the child's teachers 3 of them who included the appellant. They were called back to school. Whereas, one teacher was able to come from mattuga, 16 miles from Kampala a journey that takes about 40 minutes, that it took the appellant three hours to come to school.

The appellant informed PW3 that his child had been picked from school by her aunt. She said it was a Sudanese woman dressed like a Muslim. The appellant told the father of the victim the women had taken her for a birthday party.

During the search at school that night that appellant went alone to one of the classes that were dark, as it had already become late and started talking on phone. The school security guards found her there. Later the victim was traced, found and rescued from A1 who admitted to the offence.

PW4 a Police officer, who investigated the case, testified that she went to Kampala Parents School and interviewed a number of people. She also observed the scene from where the victim was taken . She established that there was no party at school that day and the victim's brother held no party that day. Further that the class room from which the party was said to have been held one could have been able to tell that there was a party from the building which the appellant, the victim and the kidnapper A1 was at the material time.

The parent had not written to the school seeking permission for the kid to hold a party. This witness told Court that A1 had confessed to the Police that she had been able to kidnap the victim because she received assistance from a teacher at that school.

PW5, the Uncle to the victim who used to drive her and her siblings to school testified that the appellant was a class teacher and was well known to the family as she was also the neighbour at home. On a number of occasions PW4 would drive the appellant to school with the kids.

Further that school parties for kids would only be organised with the permission of the school principal. This was not the case this time as there was no party for any of the siblings of the appellant at school. This witness testified that the appellant knew the victims well, better than the other teachers at her school. She had her parents' phone contacts and that of the witness. She had called him on phone before. She would call him in the morning to find out whether he had already left home presumably with kids school.

The victim's mother also testified that the school knew the appellant, as she was not her daughter PW3 teacher and her neighbour at that home. They would meet whenever she took children to school and often spoke to her.

On that day her daughter went missing she was reluctant to talk to the mother. The appellant was strongly inquiring from the mother whether it was her who had picked her. We find this strange in that the mother who was looking for the lost child could not have been the one who had been picked her. The appellant switched off her phone or at least it was not available.

This witness denied having sent any one to pick up her child and clearly stated that none of her children had a birth party at school. This witness also stated that the appellant had records on her phone, that of victim's father and driver .

In her defence the appellate denied having committed the offence. Stating that on 14th March 2017 she reported at 11:40am at school as she had come to see her daughter.

That day A1 Nambiru Phiona whose name she came to know after they had both been arrived to her school.

She asked to take the victim for a birthday party in another class. The party was for the victim's sibling in P.2.

She says nothing else about the victim except that she left school at 5pm that day and went home. In cross examination she admitted having recorded no other

information about the birthday party. She was not given a cake. The victim 's bag was still in her class. The victim did not return to her class. She denied having talked to A1 a day earlier or having declined to receive calls from the victim's mother. She admitted knowing the mother of the victim and also that she would at times take a lift in the family car to school. Further that she always talked to Sudanese parents at school, but most did not speak English well and had a different accent. Some required interpreters. However A1, who claimed to be an Aunt to the victim spoke good English.

DW5 a teacher at the same school and a class teacher to the victim said she did not know the child was missing until 5 Pm. She called the appellant but the appellant did not pick her phone. When the appellant came to school she said the victim had been picked by her aunt to attend a birthday party at school. This witness who was the victim's class teacher was not aware of any party at school. The appellant did not tell her until about 5 PM. The appellant did not tell her about the stranger who had come for Poni. Teacher would share such information about pupil's leaving their classes to attend parties.

A1 stated in her defence of the appellant as DW4 that she had implicated the appellant because she was tortured at the Police. There is no evidence of this at all of torture at the Police statement as exhibit P.4 appear to have been voluntarily and there is no medical or other evidence pointing to the torture of this witnesses who pleaded guilty to the offence, and was sentenced to 5 years imprisonment following a plea bargain agreement. This witness in the testimony stated as follows:-

> *"I was convicted for the kidnap of a child with intent to procure a ransom. The child was Poni Faith. I do not remember the day I kidnapped her but it was last year. I kidnapped her from Kampala Parents School. It was during lunch time, around midday approaching 1.00 pm.*
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> *I had been to the school the previous day. I had met the child with the sister on that day who was in P.7. I greeted the sister and through the conversation I got to know her name which was also marked on her uniform. It was marked Poni Faith. After two days I went back to the school. I met many parents taking children home. I had a bottle of soda*

"Fanta". It was midday approaching 1.00 pm. I found her eating food. She was seated at the veranda eating food. The accused came out of the classroom. I told her I have a soda for Poni and I am the auntie to the child. She welcomed me and told me that Poni was having lunch. She asked me where I was taking her. I told her that I was taking her for a birthday party since I had noticed that there was a birth day party going on in class room. It was on a different block in the primary section. I saw a cake and kids dressed up. I feared the accused would notice something. A parent came and she was distracted. I took advantage of that distraction to take the child away."

We are satisfied that the evidence adduced at the trial was sufficient to sustain conviction against the appellant.

That DW3 (A1) could not have committed the offence without the assistance of the appellant. DW3's evidence is that of an accomplice, and must therefore be treated with caution. We have cautioned our selves before relying on it. However, that is other independent evidence to corroborate it. That is the conduct of the appellant. She appears to have deliberately come late to school and left early on the material day. They handed over the victim to the kidnapper at school. It allowed the kid to have enough time with the kidnapper in order to gain her confidence.

The kidnapper faced the child with a soda, in her presence yet she had just taken her break meal and was going for a party. A child being taken to party would not be immediately before.

She did not ascertain whether or not there was indeed a party for siblings at school just a blink away. She did not inquire from the parents of the kid or her driver and uncle whose telephone contact she had as to who the stranger was. The kid left her bag in class and the appellant did not find out why by 5 PM the bag was still in class. She did not ascertain why the kid had not come back from the party.

She asked the mother whether indeed it was not her who had picked the kid. She was not answering her calls.

We are satisfied that the inculpatory facts are impleasurable of explanation on any other hypothesis other than the guilt of the appellant.

We are satisfied that the learned trial Judge properly evaluated the evidence and came to the correct conclusion that the prosecution had proved its case against the appellant beyond reasonable doubt.

We have found no reason to interfere with his decision we hereby dismiss grounds (i), (ii) and (ii) of appeal and we uphold the conviction.

In respect of the alternative ground of sentence it was submitted for the appellant that the sentence was manifestly harsh and excessive. The offence carries a maximum sentence of death. We have not found that a sentence of 11 years and 9 months is manifestly harsh and excessive.

The appellant was the key player in the kidnap of this victim. She was in a fiduciary relationship with her as her teacher and confidant. She was employed by the school to look after and protect the children.

She was a neighbour of her parents who trusted her. Yet she just placed her in the hands of an unknown person and put her in danger of being killed or harmed just for money.

The fact that A1 (DW2) was sentenced to lesser term of imprisonment is irreverent. A1 was a kidnaper. The appellant was a 'teacher'. A1 pleaded guilty and bargained for a lesser sentence. The appellant did not. The crime was committed by A1 only because she obtained the assistance and corroboration of the appellant. We have found no merit in this ground of appeal, which we hereby dismiss it.

This appeal therefore fails on all grounds and is hereby dismissed.

The conviction is hereby upheld and the sentence confirmed.

Dated at **Kampala** this.....29th.....day of .....July..... 2021.

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Kenneth Kakuru
JUSTICE OF APPEAL

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Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

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Irene Mulyagonja
20 **JUSTICE OF APPEAL**

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