THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CR-SC-56 OF 2002

UGANDA……..…….PROSECUTOR

VERSUS

SULAIMAN KAROLI ……ACCUSED

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

The accused was originally indicted for the offence of kidnap with intent to murder contrary to section 235 (1) (a) of the Penal Code Act. When the matter came up for hearing, I pointed out to the Resident State Attorney that the summary of evidence did not bear out the offence charged. He filed an amended indictment in which the accused was indicted for Abduction with intent to confine a person in order to subject that person to harm contrary to section 237 of the Penal Code Act.

This offence is triable by the lower court, but for the fact that the matter was already before the High Court, and witnesses had already been summoned, I decided to hear it. But in any case, I am aware that the DPP is permitted to bring to the high court criminal charges against any person in respect of offences, which are triable in a lower court.

The particulars of the offence were that the accused during the night of 1/9/2001, at Bulumba village, in Pallisa district, he forcibly took away Aisha Ssali against her will with intent to cause harm to the said Aisha Ssali.

The accused denied the offence. Prosecution produced evidence of three witnesses in the attempt to prove the offence.

PW1 Aisha Ssali, the nine years old victim of the offence. She testified after a voire dire but not on oath. She told court that in the night of that fateful day, at about 9:00 pm, she went out of the house to urinate. She was in a pair of black knickers only. Her sister Farida Naula did not escort her outside because her child was crying, but since there was moonlight, it was felt safe for Aisha to go alone.

When Aisha got out of the house even before she could urinate, a person whom she identified as Sulaiman Kaloli, their neighbor grabbed her and put his hand on her mouth to stop her shouting and carried her into his house which was just across the road. He put her on a papyrus mat and warned her not to make any noise least he would kill her.

While his two wives sat watching, Sulaiman Kaloli, the accused herein commenced some rituals on her including a white hanky around her head. She became confused and later slept on that mat without any cover. The next morning, the accused put her on a bicycle and rode to some bush where he left her telling her to go to her home which was not far from there.

She was confused and did not know where she was. Later a herdsman rescued her, and informed her relatives who came and took her home. She was still in the black knickers only.

PW2 was the father of Aisha. He was informed of the disappearance of his daughter at about 3.00 pm. He was not in that home then but he returned immediately and swung into action searching for her. His frantic search did not yield any fruits but at about 5.00 pm, he was informed that his daughter had been found and she was back home. He went to the police and later took the girl for a medical checkup. He denied that there is any land dispute between him and his neighbour the accused.

PW3 was the sister of Aisha, Farida Naula. She testified that Aisha went out to urinate at night while she was wearing only black knickers, and never returned. She looked everywhere for her in vain. She sought help from neighbours who all started a manhunt for the girl in vain. It is noteworthy that she did not inquire from or seek the assistance of the accused in spite of the fact that he was one of the most immediate neighbours.

Later in the day, Aisha was found in a bush and brought back home still in her black knickers only. There was a crowd at home then but the neighbour, Sulaiman Kaloli the accused was not among them.

That was the prosecution case. At the close of the case for the prosecution, the defence submitted that the evidence adduced before court, particularly regarding the accused's participation was pitifully wanting, and the accused ought not to be put to his defence. A finding of not guilty ought to be returned, and the accused discharged.

For a submission of a no case to answer to be upheld, it must be shown that the prosecution evidence adduced before the court does not make out a *prima facie* case against the accused person. A prima facie case is not made out if an essential ingredient of the offence charged is not proved by the evidence, or if the evidence is so discredited in cross examination or is so manifestly unreliable that no reasonable tribunal properly directing its mind to the law and the evidence would convict the accused person on it. *Bhatt V Rep [1957]* E.A. 332.

In *Semambo and An. V. Uganda* Cr. App. No. 76 of 1998, (C. A.), the court held that, "a prima facie case means a case sufficient to call for an answer from the accused person. At that stage the prosecution evidence may be sufficient to establish a fact or facts in absence of evidence to the contrary, but is not conclusive. All the court has to decide at the close of the prosecution case is whether a case has been made out against the accused just sufficiently to require him or her to make his or her defence."

In the present case, the prosecution had to prove that there was first abduction, meaning that the victim was either forcibly compelled or through deceit induced to go from one place to another. Secondly, prosecution had to prove either the intention that the victim be subjected to, or be disposed of as to be put in danger of being subjected to, grievous harm or slavery or unnatural lust, or knowledge of the above. Lastly the prosecution had to prove the participation of the accused in the abduction.

The contention of the defence was that the participation of the accused was not proved. The prosecution evidence in this regard was from a single witness. This was PW1, the girl Aisha. This witness was a child of tender years. She testified after a voire dire. Her testimony was the

only evidence linking the accused with the crime. Sub section (3) of section 38 of the Trial on Indictments Decree provides that as follows,

(3) Where, in any proceedings any child of tender years called as a witness does not, in the opinion the court understand the nature of an oath, his evidence may be received though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

Provided that where evidence admitted under by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence in support thereof implicating him.'

The prosecution argued that by not coming to join the family just like the other neighbours did when the girl Aisha was brought back constituted the corroboration that the accused was the perpetrator of the abduction.

I do agree that an omission could amount to corroboration. But it must be an unlawful omission. Where a person does not owe a duty legal or otherwise not to act in a particular manner, or at all it cannot be said that by his omission, that that constitutes evidence of corroboration in an unlawful act. The accused was under no obligation to come to the home of the girl when she returned. In any event she was no longer missing. There could be a myriad of explanations why he did not appear then or at all. After all, he was by passed by the family when they were looking for the girl, like he was inconsequential.

In any event, to my mind, to make such an inference would be a roundabout way of shifting the burden of proof to the accused to explain his absence least he would be held liable. That is not acceptable as it is not lawful.

There was no evidence whatever to corroborate the evidence of Aisha Ssali regarding the participation of the accused in the offence. Evidence of corroboration means independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particulars not only the evidence that the crime has been committed,

but also that the accused committed it. See *Kibale Ishma vs. Uganda* Cr. App. No. 21 of 1998, (SC), (unreported).

The provisions of section 38 of the Trial on Indictments Decree which I have quoted above are clear and mandatory. A child of tender years has been defined to mean such child who is below the age of 14 years. See *Solomon Ouma Mgele V Republic* [1978] LRT 53. Aisha Ssali testified in court when she was 9 years old. Clearly Aisha Ssali was a child of tender years. Therefore in law, her evidence required corroboration before it could be acted upon to found a conviction. Such was wanting.

Lord Parker in *PRACTICE NOTE* [1962] 1 All. E.R. 448 laid out the principle that no prima facie case will be held to have been made out where the prosecution has failed to prove an essential part of the offence charged or where the evidence of the prosecution has been so discredited in cross examination or was so manifestly unreliable that no reasonable tribunal could act on it.

The test laid out in *Bhatt v. R. (Supra)* as to what amounts to a prima facie case, is that it must be one on which a reasonable tribunal properly directing its mind to the law and evidence could not convict if no defence was offered.

From what I have discussed above regarding the absence of the necessary corroboration of the evidence of the participation of the accused, applying the above test, I am satisfied that no reasonable tribunal properly directing its mind to the evidence and the law would convict the accused person if he were to elect to offer no evidence.

The submission of a no case to answer is accordingly upheld. The court hereby returns a finding of not guilty in respect of the accused for the offence of abduction with intent to confine a person in order to subject him to harm, contrary to section 237 of the Penal Code Act. He is accordingly discharged and is to be set free and at liberty forthwith unless he be otherwise lawfully held.

RUGADYA ATWOKI

JUDGE

6/03/2003.