

Kidnapper

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

CRIMINAL SESSION CASE NO. 270/91.

UGANDA .....PROSECUTOR

VERSUS:

ROBERT ISIBIRA .....ACCUSED

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

J U D G M E N T :

The accused, is indicted for Kidnapping with intent to murder contrary to section 235 of the Penal Code Act. In the particulars of offence, it is alleged that Isibira Robert and others still at large, on the 30th day of October, 1987 at Kobuin village in Kumi District 5 forcefully took away Oculuma Martin against his will with intent to murder the said Oculuma Martin.

The prosecution case briefly is that PW1 is the brother of the victim, Martin Oculuma. Before the incident, cattle rustlers had intensified their activities which forced people of Kobuin Parish including himself to take refuge at Ngora Catholic Mission. On the 10 day of the incident, he saw people running from the direction of St. Aloysius T.T.C., and he took cover at the fence of the Church. As it was day time, he clearly saw the accused in the company of 7 others all armed with guns. The victim was leading the way with his hands tied backwards without shirt and shoes. He was being followed by the 15 accused and his armed group. He only recognised the accused who had served as a local askari at Ngora Sub-County. The group was going towards Okoboi Primary School. He followed them and hid himself at a distance of about 30 yards from the house of one B. Imalingat where the victim got a bicycle and handed to the accused. All the 20 8 people within the accused's group had bicycles, so one Emiliano Emokol was ordered by the accused to push the extra bicycle. The group took away the victim to unknown place but E. Emokol was released later the same day. The witness has not seen the victim to date. The accused was a rebel who surrendered to the authority 25 in 1988. When the witness saw the accused at Ngora St. Joseph's Church in 1989, he reported him to the authority.

Evidence of PW2 is that on 30.10.87 he was at St. Aloysius T.T.C. At around 11 a.m. he went to Ngora Demonstration School to drink some "ajono" (malwa) at the home of PW3. Then came the accused in company of 7 other rebels all armed with guns and dressed in combat uniforms similar to those of N.R.A. He too recognised the accused only who was their local askari at Ngora Sub-County before joining rebels. Immediately, the accused told his group that the victim, Martin Oculuma, was the person they were looking for. He saw the accused untie a pig and gave the rope to his colleagues who tied the victim "three piece." He heard the accused ask M. Oculuma for a bicycle and the answer was that the bicycle was at Okoboi Primary School. The victim was made to run fast being followed by the accused and his group to get the said bicycle. He did not follow them and since that day, he has not seen Martin Oculuma again. PW3 gave similar story but saw the accused remove a shirt and shoes from the victim.

On 30.10.87, PW4 who is a class-mate of the accused was at Okoboi Primary School. He saw him with 7 other people all armed with guns except the accused. The group asked for Martin Oculuma and went away. After about 30 minutes, the group came back to the Primary School this time with the victim whose hands were tied without a shirt on and even shoes. The victim led them into a house where he used to stay. Whatever transpired therein, the witness did not see except that they came out with a bicycle. E. Emokol was ordered to push the bicycle and the group following the victim took the Church road. Later E. Emokol was allowed to return. The witness has also never seen M. Oculuma since then to date.

In his defence, the accused stated that on 30.10.87 he was arrested by 3 rebels at Ngora cattle market where he had gone to collect market dues. He was a local askari at Ngora Sub-County since 1980. The reasons for his arrest were that he used to collect market dues for the Government and also that allegedly he used to buy stolen cattle. He was taken before the rebel leader one Sam Okiria at Oteteen-Apama village where he was given 20 strokes of the cane. Thereafter the said rebel leader ordered 6 rebels 3 of whom were armed with guns to escort him to Odwarat village to look for one Odaet. He admits that they reached Okoboi Primary School purposely to look for the said Odaet whom they did not find at home.

On their way to Okoboi Primary School, he was walking on foot but the 6 rebels were on bicycles. Then the group removed by force a bicycle from a certain man they met on the way and gave him to ride. After failing to get the said Odaet at Okoboi Primary School, the group went to look for him at St. Aloysius Demonstration Primary School. The group besieged the school but the accused who was being guarded by 2 rebels remained behind at a distance of about 150 metres. Later they joined the other 4 rebels only to find that the victim, Martin Oculuma, was already arrested. His shirt and shoes were removed and both hands tied behind. However, the accused denied tying the hands of the victim. He also denied telling the group of rebels that Martin Oculuma was the man they were looking for as stated by both PW2 and PW3.

From there the accused admits that they went back to Okoboi Primary School. He was made to follow the victim. He saw 2 rebels and the victim enter the house where the victim used to stay. They came out with a bicycle which E. Emokol was ordered to push. The group then took the Church road with the victim leading the way followed by the accused. After about 400 metres, E. Emokol was ordered to go away but the bicycle was given to the victim to ride. At that time the victim was allowed to put on his shirt. When the group reached the home of the rebel leader, Sam Okiria, the victim was ordered to lie down and was caned apparently for also collecting money from the market as he was the Sub-County Chief of the area. He left the victim at the home of Sam Okiria and whatever happened to him, the accused did not know. The accused was taken under escort of 3 armed rebels to Agirigiroi village at the home of another rebel leader by the name of Robert Amuriat where he was fined 1 bull, 3 sheep, 1 goat, 1 turkey and Shs 385/-. This fine was collected from the home of his sister one Tereza Akutui and after paying the fine he was released and went back to his home.

On 9.1.88 the accused says he was arrested by N.R.A., on the ground that he had not reported to their detach as an employee of the government. On 16.4.88 he was transferred to Serere Brigade and detained for 4 days, after which he was transferred to Mbale Military Barracks and then to Nabisojo in Luwera where he underwent politisation until 21.2.90 when he was discharged and given official letter.

He denied ever being a rebel and also denied the offence now before court and asserted that he was also under arrest by the rebels who also arrested the victim on the day in question.

The offence with which the accused now stands charged has the following ingredients which the prosecution must prove beyond reasonable doubt:-

- (i) THAT, the victim was seized or taken away against his will;
- (ii) THAT, force or fraud was used against the victim;
- (iii) THAT, there was intent to have the victim murdered or be exposed to the dangers of being murdered, and
- (iv) THAT, it was the accused who took the victim by force or fraud: Uganda Vs. Paddy Kalenzi, Criminal Session Case No. 61/87.

Having stated the elements of this offence, I shall now consider both (i) and (ii) above together. According to the evidence of the eye witnesses, the victim, Martin Oculuma, on 30.10.89 was at the home of PW3 who was selling "ajono" (malwa) on the material day. Both PW2 and PW3 were present when the accused in the company of 7 other rebels came to the scene on bicycles. All of them were armed with guns and dressed in army combat uniforms similar to those of the N.R.A. Both witnesses heard the accused identity the victim as the person they have been looking for. They saw the accused untie a pig in the vicinity and the rope was used in tying the victim "three piece." His shirt and shoes were removed. The accused asked for the bicycle of the victim who answered that the bicycle was at Okoboi Primary School. Immediately the victim was ordered to run being followed by the accused and his group forming a single file behind.

Evidence of PW1 is that on the material day, he saw people running away from St. Aloysius T.T.C. At the material time, cattle rustlers had intensified their activities in the area. He took cover under the Church fence where he clearly saw the victim, Martin Oculuma, his brother had his hands tied behind with no shirt or shoes on, being followed immediately by the accused and 7 other armed gunmen all dressed in combat uniforms.

He recognised his brother, the victim and the accused who was their Sub-County local askari before joining the rebels at the time. He followed them to Okoboi Primary School where he remained at a distance of about 150 metres away to see what was happening!

PW4 who was at Okoboi Primary school at the material time gave similar story. Both PW1 and PW4 saw the accused order the victim to enter the house where he was staying. The victim and the accused together with some rebels entered the house and later came out with the victim's bicycle. The accused then ordered the said E. Emokol to push the bicycle. All took Church road with the victim on the lead. The accused confirmed that the victim was taken to the rebel leader the said Sam Okiria where he was caned but whatever happened to him thereafter he (accused) did not know.

In view of all that, it is evident that the victim, Martin Oculuma was on 30.10.87 seized and taken away by force against his will. The next element for determination is the intent of the captors.

It is the submission of the learned State Counsel that evidence of both PW2 and PW3 tells how the accused arrived at the scene. He identified the victim, have him tied "three piece," shirt and shoes removed and made him run. PW1 and PW4 also saw him taken to unknown place together with his bicycle. The accused says the victim was taken to the rebel leader, Sam Okiria and never knew what happened to him. The court should take judicial notice that around the time stated, insecurity was rampant in the area and chiefs of whom the victim was one, were targets. By taking the victim to the said rebel leader was intended to kill the victim. All the prosecution witnesses have not seen the victim since then to date and therefore sections 235 (2) of the Penal Code Act applies in the instant case.

The defence submission, however, is that on the material day, people were running away and everyone was scared. In such circumstances, it was not possible for the prosecution witnesses to appreciate that the accused person was a prisoner. Both PW2 and PW3 say the accused was armed with a gun and dressed in an army uniform but PW4 says the accused was not armed and was dressed in civilian clothes.

It is further contended that if the accused was the commander of the group that day, he would not have the manual work of having the victim's bicycle as the second bicycle as per evidence of PW1 and PW4. In addition, PW4 testified that the accused was in the area all the time after the incident until his arrest. All this evidence shows that even if the accused was at the scene of crime, he was not there on his free will to kidnap Martin Oculuma. 5

The learned defence Counsel also submitted that under section 235 (2) of the Penal Code Act, if the victim is not seen for 6 months, he is presumed dead. However, the presumption can be rebutted: R. Vs Mohanlal Ramji Popat (1961) E.A. 263, in that there is no duty on the accused to prove what he says, it is enough for him to raise a probability on what he says and in that case the burden shifts to the prosecution to prove its case beyond reasonable doubt. In the instant case, the accused has testified that he was also a prisoner and he has established that probability not discharged by the prosecution by adducing evidence to exclude it. 10 15

Having heard both sides on this element of intent to murder, evidence of the eye witnesses, PW2 and PW3, as stated elsewhere in the judgment, is very clear. The accused identified the victim as the man they have been looking for. He untied a pig and the rope was used in tying the victim "three piece." Unlike him, the victim had his shirt and shoes removed and made to run on foot. The accused's bicycle had common features with those ridden by rebels of his group in that PW1 says that the bicycles did not have mudguards. In the premises, according to the evidence on record, the court is satisfied that the activities of the accused person were contrary to the activities of an arrested person on the material day. He was not a prisoner. Evidence shows that the accused was the commander of the group. The court takes judicial notice that rebels who never reported were arrested by N.R.A. Government officials were under no duty to report to the N.R.A. A claim by the accused that he did not report of his arrest due to a break down in law and security at the time does not hold water, especially as there was an N.R.A. detachment in the area. All in all, according to the evidence on record, the court is satisfied that the accused and his group had intent to murder or expose Martin Oculum to the dangers of being murdered. 20 25 30 35

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Nandaula

The last ingredient for determination is whether the accused was one of those people who took the victim by force against his will. All the prosecution witnesses confirm that the accused in the company of 7 other rebels took the victim by force against his will. The accused was not a prisoner on the day of the incident. The court is satisfied that the prosecution has proved its case beyond reasonable doubt. I am fortified by the gentlemen assessors in their opinions to find the accused guilty as charged. The accused is guilty of Kidnapping with intent to murder contrary to section 235 of the Penal Code Act and he is hereof convicted accordingly.

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S.G. ENGWAU

JUDGE

8.8.93.

10.8.93: Accused before court.  
Mr. Wandera for accused present.  
Nandaula for State.  
Judgment delivered in open Court.

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S.G. ENGWAU

JUDGE

10.8.93.

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S.G. ENGWAU

JUDGE

Nandaula: This offence carries maximum sentence of death. Circumstances under which the offence was committed were very grave in that the accused chose to join a group of rebels to terrorise people. Forced them to run away from their homes into hiding. Activities of the accused devastated villages and made people poorer and to date people still languish with poverty. 5

The way the deceased was taken away was very brutal, deprived of his dignity as chief and exposed to the danger of being murdered by rebels of whom the accused was a member. 10

Acts of the accused needs very severe sentence to teach him that what he did was wrong and also to deter others from doing similar activities. Pray for maximum sentence of death be imposed on the accused. In case that is not the choice of court refer to Uganda Vs. Paddy Kalenzi, Criminal Appeal No. 4/88 where the accused in that case also forcefully took a person while armed was sentenced to 18 years' imprisonment. 15  
The same happened in Kimeze & Anor Vs. Uganda, Criminal Appeal No. 3/79 and also in Kawere & Anor., Vs. Uganda, Criminal Appeal No. 15/84 and sentenced to 18 years' imprisonment. 20

S.G. ENGWAU

JUDGE

Wandera: Accused is aged 47 years. Married with 9 children. 25  
Lenient sentence be imposed on him. Has been on remand for 3 years and 3 months. He is first offender. Government failed to provide security at the material time. Cases quoted are different from the present case, they interpret the old section. Kalenzi's case refers to Government security personnel who misused the use of guns onto civilians. Not fit case for maximum sentence to be passed. 30  
Circumstances demand lenient sentence.

S.G. ENGWAU

JUDGE




Sentence: Circumstances under which the offence was committed were very brutal, inhuman in total disregard of the law of the country. Society must be protected against such rebels of the like of the accused. Court also has considered the mitigating factors for the accused. However, the court feels that a deterrent sentence is appropriate although law as to amnesty is also considered.

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Accused is sentenced to 9 years' imprisonment.



S.G. ENGWAU

JUDGE

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10.8.93.

SGE/eg