THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE.

CRIMINAL APPEAL NO. 2 OF 1992

(From Soroti original Criminal Case No. 259/91)

UGANDA :::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

ALI NANJI :::::::::::::::::::::::::::::::::::::: RESPONDENT.

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

J U D G M E N T.

In the Chief Magistrate's Court at Soroti, the Respondent/Accused was charged in the first count with Abduction of a girl under 18 years, contrary to section 120 (b) of the Penal Code Act.

The particulars of the offence are that on 13.9.91 at Agip area, Soroti Municipality in Soroti District, the respondent/accused unlawfully took Lela, daughter of Abdalah Jaffar, she being unmarried girl under the age of 18 years, out of the custody and protection against the will of her father having the lawful care and charge of her.

In the second count, the respondent/accused was charged with Malicious damage to property, contrary to section 315 (1) of the Penal Code Act.

In this count, the particulars are that on 13.9.91 at Agip area, Soroti Municipality in the Soroti District, the respondent/accused willfully and unlawfully damaged Window the property of Abdalah Jaffar.

At the end of a protracted trial in the case, the learned Chief Magistrate on 6.2.92 acquitted the respondent/accused. Now this appeal lies before this court on the following grounds:-

1. THAT, the trial in the 1st Count proceeded on a nullity as the respondent/accused's plea was not taken.
2. Because the learned Chief Magistrate erred both in law and fact when he held that the prosecution failed to prove the age of Lela.
3. Because the learned Chief Magistrate misdirected himself on the law of circumstantial evidence and therefore reached a wrong decision.
4. Because the decision appealed against has occasioned a miscarriage of justice.

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When hearing the appeal, the Senior Resident State Attorney for appellant declined to argue the 2nd ground of appeal as per Memorandum of Appeal and that is in respect of the 2nd Count on malicious damage to property.

In the first ground, therefore, the learned State Attorney for appellant argued that the respondent/accused first appeared in court on 1.10.91 but due to lack of jurisdiction, the learned trial Chief Magistrate did not take his plea. He was remanded in safe custody until 15.10.91.

On 8.10.91, however, the learned Chief Magistrate for reasons best known to him issued a Production Warrant for the respondent/accused to appear before Magistrate Grade 11 on 10.10.91. The respondent/accused appeared on that day on an amended charge sheet which was read to him but his plea was not taken on the 1st Count due to lack of jurisdiction by Magistrate Grade 11. Thereafter, the Magistrate Grade 11 entertained bail application and released the respondent/accused on bail. He adjourned the case to 24.10.91.

When the case came up on 24.10.91, a hearing date was fixed by the Chief Magistrate for 1.11.91. However, the prosecution on that date got an adjournment to 19.11.91 after getting leave to amend the 1st Count.

After the amendment, the prosecution began his case. The learned Chief Magistrate never took a plea on the amended 1st Count. It is the contention of the State that failure to take the plea on 1st Count as amended contravened section 122 (1) M.C.A. 1970 which is mandatory. In Auta Jenacida Vs. Uganda and Omara Salabatona Vs. Uganda (1979) HCB 210, trial on the 1st Count was therefore a nullity in the instant case.

In reply, the learned Counsel for the respondent conceded to the submission that the trial court did not take a plea from the respondent. He further conceded that Magistrate Grade 11 granted bail even in a charge where he had no jurisdiction. Therefore, he finally conceded that the trial in the 1st Count as amended was indeed a nullity.

It is the contention of the learned Counsel for the appellant that the prosecution had proved the issue of age. PW1 who is the father of the abducted girl, Lela, gave evidence to that effect. On matters of age, a parent is the best witness. The trial Magistrate relied on the fact that the prosecution did not produce a Birth Certificate while on record there is evidence that the birth certificate was looted and so could not be availed.

In the absence of any convincing reply from the learned Counsel for the respondent to the contrary, I'm inclined to agree with the submission. However, it is to be noted that age of any person is not only proved by a birth certificate. In the instant case, it was the father who testified as to age of Lela and in the absence of rigorous challenge to his evidence by way of cross-examination. I'm of the humble view that he was the best witness in the circumstances. His evidence should have been accepted.

As regards the 3rd ground based on circumstantial evidence, the Counsel for appellant submitted that Lela was found with the respondent in the house of one Sadiah. The identity card of the respondent dropped and was found near Lela's bedroom window. Circumstantial evidence was proved by the identity card of the abductor which was exhibited in court. Nonetheless, the trial Magistrate never considered that evidence in his judgment. The respondent/accused should have explained why his identity card was found at the home of PW1 near Lela's bed-room window. I do accept this line of argument and find that this ground of appeal also succeeds.

In conclusion, I'm inclined to agree that the decision arising from the circumstances of the case has occasioned a miscarriage of justice. It is therefore prudent that the trial in the 1st Count as amended be declared a nullity and I so order.

In the premises, a retrial is hereof ordered in the said 1st Count before another Magistrate of competent jurisdiction. But as regards the 2nd Count the learned State Attorney abandoned the argument and in that regard the respondent shall not be tried for the same offence. He was therefore rightly acquitted on that count.

S.G. ENGWAU

JUDGE

11.5.93

13.5.93: Both parties present.

Ms Betty Khiisa Senior Resident State Attorney for Appellant and Mr. Kakembo for respondent.

Judgment delivered in open Court.

S.G. ENGWAU

JUDGE

13.5.93.