

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT NAKAWA

CRIMINAL SESSION CASE NO. 180 OF 2011

UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTION

VERSUS

NAMUSISI MAIMUNA:::::::::::::::::::::::::::::::::::: ACCUSED

Before: HON. JUSTICE WILSON MASALU MUSENE

JUDGMENT

The Accused, Namusisi Maimuna was indicted with the offence of Kidnapping with intent to murder C/S 243 (a) and (b) of the Penal Code Act. The particulars were that the Accused on the 19th day of January, 2010 at Nkoowe village, Wakiso District, kidnapped one week's baby, a baby of Nambiro Prossy.

The Accused pleaded not guilty to the offence.

At the hearing, Prosecution called six witnesses to prove its case. The Accused on the other hand gave a sworn testimony in her defence and called no witnesses. The brief facts of the case were that on the 19th day of January, 2010 at about 11:00 a.m, the complainant who testified as PW1 left her one week old baby with her daughter Catherine while she went to dig. Upon her return she found the child missing whereby she raised an alarm which was answered by two women who told

the Complainant that they had seen a woman dressed in a black skirt and a white blouse holding something which looked like a baby.

The Complainant reported the matter at Wakiso Police Post where the search for the baby began. PW4 Corporal Nasiyo Beatrice testified that she began investigations on the matter whereby she went to the home of Namuyaba a sister to the accused where she was alleged to have been seen on the 19/01/2010.

Namuyaba led PW4 to Kalerwe where upon inquires from people around was referred to Nalongo (Namudu Rose) a friend to the accused who said the accused had left her with a baby girl for a few hours.

Namuyaba led PW4 together with PW3 Gorreti Namakula a sister to the Complainant to the house of Nyombi a native doctor where she was seen with a black suitcase with clothes and a mattress.

The suitcase was recovered at Nyombi's house containing the Accused's clothes, a baby shawl and a baby's panty which were identified by PW1 as belonging to her baby and were tendered in as exhibits by the Prosecution. A young boy had told PW4 that the accused said she had taken them meat but it was rotten. Accused was arrested and taken to Kakiri Police Station. The defence case was a denial.

DW1, Nanyombi Maimuna the accused denied having kidnapped the baby. She testified that she had been in Ngowe on the 18/01/2010 and not 19/01/2010 as stated by the Prosecution witnesses.

It is trite law that the burden of proving the guilt of the accused lies upon the Prosecution throughout the trial and **never shifts to the defence (see: Oketcho Richard Vs Uganda SCCA No. 26 of 1995).**

In the case of kidnapping with intent to murder as the present one, the burden is upon the Prosecution to prove all ingredients of the offence which are:-

- i. That there was a kidnap;
- ii. The kidnapping was accomplished by use of force;
- iii. That the kidnapping was against the victim's will;
- iv. That the perpetrators of the above offence were motivated by an intent to murder;
- v. The accused was the perpetrator.

As far as the first ingredient is concerned which is kidnapping of a person, Court will begin by defining the phrase 'Kidnapping of a person' which means 'wrongfully carrying off and holding a person' (see: **Collins English Dictionary & Thasaurus at page 629).**

In this case, to prove that there was a kidnap, the State relied on the evidence of the following witnesses; PW1, PW2, PW3, PW4, and PW6.

According to evidence of PW1, she testified having delivered a baby girl whom she had left on the 19/01/2010 at home and went to the garden. She discovered upon her return that the baby was missing, she made an alarm alerting the village mates and later reported to Police where investigations began but up to date the child has never been recovered.

Evidence by Prosecution witnesses PW2, PW3, PW4 and PW6 also confirmed the disappearance of the baby on the 19/01/2010 who was never recovered. The defence on the other hand does not deny disappearance of the child although it states that the circumstances under which the child disappeared were never clearly brought out in Court.

The fact that the baby was taken and held without the parent's consent indicates that this act was wrongfully amounting to a kidnap. From the foregoing, Court is satisfied on the evidence as a whole that the Prosecution has succeeded in proving beyond reasonable doubt that there was kidnapping of a person. I find and hold that the first ingredient has been proved beyond reasonable doubt.

The second ingredient is that the kidnapping was accomplished by use of force. According to Collins English Dictionary and Thesaurus the word "force" means 'the use of exertion against a person that resists.'

The Prosecution in its submission stated that the fact that the victim was a ten day old baby shows that she was defenceless and incapable of taking a decision on her own therefore was taken against the will.

Prosecution further relied on the evidence of PW1, the mother of the victim and PW2 the father of the victim who reported to Police about their missing child and have been desperately looking for their child who remains unseen but feared dead. The parents never at any time authorised to the taking of their child.

The defence case in respect of this ingredient was a denial in view of the foregoing circumstances, the fact that the victim was a ten day old baby shows that she was

defenceless and could not resist being taken away and also the lack of consent from the parents and the mother of the victim PW2 found her door wide open which she had left closed shows that the kidnapping was accomplished by use of force.

On the 3rd ingredient that the kidnapping was against the victim's will. This ingredient has somehow been discussed in the second ingredient.

Taking into consideration the fact that the victim was 10 days old at the time of the offence, it is obvious she could not have exercised her will one way or the other. Therefore what mattered most at that particular point was the will of the person who was taking care of the victim whether they consented to the taking of the child.

In light of the testimony of PW1 and PW2 the parents of the victim, they never consented to the taking of the child and upon discovering the fact that the baby was missing, they filed a report at Police. Therefore the Prosecution has proved this ingredient beyond reasonable doubt.

With regard to the fourth ingredient which is that the perpetrator of the offence was motivated by an intent to murder the victim.

Generally, determining what goes on in a person's mind at the time he or she commits an offence is not easy. However, the actions of the person before, at or after a commission of the offence help in determining the motive of the person.

First of all the Prosecution relied on evidence of PW1 and PW2 that they have never seen their child from the 19/01/2010 to date

Prosecution also relied on PW3's evidence who testified that when tracing the accused, they went to Mulago but found that the accused had shifted in the night and that she was seen strangling a baby and packing it in a polythene bag then in a black suit case.

She also testified that upon following up the search to Nyombi brother of the accused, they were told that the accused had arrived there with a black suit case and meat which she said had gone bad in a kavera. She threw it in the rubbish pit.

PW4 the Police Officer corroborated this evidence. She testified that when she recovered the accused's suit case, she opened it in front of the LC5 and other people in the area and found the accused's clothes, a baby shawl and baby's panty which had a foul smell.

In view of these circumstances therefore, the Court finds that the 4th ingredient has been proved by Prosecution beyond reasonable doubt.

Finally, in relation to the fifth ingredient that the Accused was the perpetrator, the Prosecution relied on evidence of PW1 who testified that she had seen the Accused on the 18/01/2010 visiting Namuyaba the sister where she spent the night and disappeared unceremoniously the following day. She also testified that she had known the accused before the incident as a sister to Namuyaba since she always came to visit her.

PW3 also testified that people in the village had told her that they had seen the Accused the previous day carrying a baby. She also stated that as she moved with the Police during the investigations, the neighbours of the Accused in Mulago told them that they had never seen the Accused pregnant but saw her with a baby.

PW4 corroborated PW3's evidence by testifying that during her investigations, she was led to the best friend of the Accused Nalongo who confirmed having seen the Accused with a baby girl and even left the baby with her for some hours before taking her on.

Upon further inquiries PW4 was led to Nyombi's house the brother to the accused where a suit case belonging to the Accused was discovered containing her clothes, shawl and a baby's panty which were tendered in Court as exhibits. The clothes also had a foul smell and PW4 was told by a boy that the Accused had taken for them meat but it was rotten and she threw it away in a rubbish pit.

The Accused in her testimony first of all admits to have been in Nkowe on the 18/01/2010 and also having gone to Bombo where her brother Nyombi stayed. She also admits that the things she took to her brother belonged to her.

In her defence she stated that she left Ngowe on 18/01/2010 and not 19/01/2010 when the offence was committed. She also does not deny allegations that she took her sister's seven month old baby although she says it was because the mother was mentally ill.

She also alleged that PW3 had a grudge with her sister and that the people of the village were tired of her sister because she abuses them. This Court finds such

defence as an afterthought aimed at confusing Court. The evidence adduced by the Prosecution

In **Kawoya Joseph Vs Uganda, S.C.C.A No. 50 of 1999,**

“The Appellant’s conviction on the three counts was based on the following pieces of circumstantial evidence. The first is that on 4th April 1995, the Appellant was seen in the company of others going towards the home of Paulo Kajubi at Kibonji village in Rakai District. The following day Paulo Kajubi and his wife Keina Nakafero were found dead in their home, and their household property was missing. The body of Kajubi which had sustained multiple cut wounds, was found inside the house. Nakafero’s body, which was bleeding from one ear, was found in their banana plantation. The second piece of evidence is that sometime after the incident the appellant took to the home of his sister, Matilda Nakabuye, at Busujju, Nakalama, in Mubende District, some household goods which were subsequently identified as part of what was stolen from the home of the deceased. The third piece of evidence is that on 7th May 1995 Kawooya was found in possession of an old bicycle which was also identified as late Kajubi’s property.”

Both the Prosecution and defence accept the fact that the Accused was present in Ngowe village on 18/01/2010 and although the Accused denies having spent the night, PW1 and PW3 testified that she had been seen in the village on the said day carrying a baby.

Further still, the Accused having been found in possession of the shawl and baby panty belonging to the victim corroborated evidence that she was seen with a baby

and yet had not been pregnant. In the Supreme Court case of **Bogere Charles Vs Uganda, Criminal Appeal No. 10 of 1998**, The Prosecution adduced evidence showing that the accused was at the scene of crime on the date it was committed. The Supreme Court confirmed the lower Court decision that the Accused had been properly placed at the scene of crime.

The Principles governing cases depending mainly on circumstantial evidence have been settled and applied in many cases including **Teper VR. [1952] 2 ALL E.R.447**. That was followed in **Simon Musoke V.R. [1958] EACA 715**. In that case of Simon Musoke, it was held that in a case depending exclusively on circumstantial evidence, Court must before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of no other reasonable hypothesis other than that of guilt.

As already state, in the present case, the Prosecution witnesses established that the Accused was in Ngowe village on 18/01/2010, which fact was not even denied by the accused. The other Prosecution evidence was that Accused was seen carrying a baby the following day of 19/01/2010. And the baby has never been seen. The finding of the baby shawl and panty in Accused's suit case which PW1, the mother identified as belonging to her lost baby were all clear manifestations of circumstantial evidence pinning the Accused with the commission of the crime in question.

The defence raised by the Accused that the village had a grudge with her sister does not in any way show how such a grudge would have led to the Accused being framed for a crime she did not commit.

Therefore, Court hereby finds that the Prosecution has rightly proved that the Accused was the perpetrator of the offence.

Having found and held that the Prosecution has proved all the ingredients of the offence beyond reasonable doubt, and as advised by the Assessors, I hereby convict the Accused Namusisi Maimuna of kidnapping with intent to commit murder C/S 243 (a) and (b) of the Penal Code Act.

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W. M. MUSENE
JUDGE

M/S SAMALI WAKOOLI:

There are no previous records of conviction. She is a first offender. The convict has been on remand for 3 years. The offence calls for a maximum penalty of death. I pray that Court considers that the child was only 10 days old. She had a full life ahead cut short in such a brutal manner. How one dies is very important. It would have been consoling for the relatives to have seen their dead and buried. The trauma of the parents is vivid. It is all within the convict's knowledge. The mother was breastfeeding and she will never recover from that trauma. The convict has not shown any sign of remorsefulness. She abused assessors and PW1 the mother of the victim. There is information that convict has threatened to kill the Prosecution witnesses. So I pray for a death penalty.

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W. M. MUSENE
JUDGE

MR. MOSES OKWALINGA IN MITIGATION:

I pray that Court considers the fact that she is only 33 years old. She has so many years in her life. She can reform. She is a first time offender. Despite the begging between her and Prosecution witnesses, she is remorseful. The convict is a mother of three children, with her last born of 5 years old. I pray Court considers that fact. I pray that Court does not issue a death sentence because it does not serve the purpose of reform. She will be wasted and the purpose of punishment will not have been served. So I pray for leniency and a short custodial sentence.

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W. M. MUSENE
JUDGE

Court: Sentence will be given out on Monday, 14/04/2014 at 10:00 a.m.

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W. M. MUSENE
JUDGE

SENTENCE AND REASONS:

The circumstances surrounding the commission of the offence in question all point to child sacrifice. Child sacrifice has become chronic in Uganda, and more particularly in the Central Region. It is an evil, outdated uncivilized, crude and barbaric practice which has to be eliminated from our society. As learned Counsel for State submitted life is a God given gift which should not be taken away by anybody in such a high handed manner. The child in question was only 10 days

old and had full life ahead, which was cut short by the convict. To make matters worse, the father and mother and other relatives of the child had no opportunity to bury their own. It would have indeed been more consoling. The other consideration is the submission by Counsel for the State that the convict has no remorse as she kept on abusing the Assessors and PW1, the mother of the victim and has threatened to kill Prosecution witnesses. All those circumstances are very aggravating factors which outweigh the mitigating factors raised by Mr. Moses Okwalinga in mitigation learned Counsel stated that convict is aged 33 years and so is in the prime of her life and has a chance to reform and change for the better. However, that is outweighed by the fact that the child kidnapped was only 10 days old, an innocent angel of God who was defenceless.

Counsel for the Convict submitted that she has 3 young children and is a first offender. All that is relevant to be considered by Court but which as I have already stated are outweighed by the aggravating factors. The evil practice of child sacrifice has to be eliminated from our society through harsh and deterrent sentences to serve as a general lesson to the Public. This Court will also take into account the period has been on remand. In the circumstances, while the convict will be spared the death penalty as prayed by learned Counsel Mr. Moses Okwalinga in mitigation, it is necessary to keep her out of the public for a fairly long time.

So instead of 28 years, I shall subtract the 3 years of remand and do hereby sentence convict to serve 25 years imprisonment.

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W. M. MUSENE

JUDGE

11/04/2014

Accused present

M/S Samali Wakooli for State.

Mr. Moses Okwalinga for Accused.

Assessors present.

Betty Lunkuse, Court Clerk Present.

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W. M. MUSENE

JUDGE

Court: Judgment read out in open Court.

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W. M. MUSENE

JUDGE

14/04/2014

Convict present.

Julius Tuhairwe for State present.

Counsel for Convict absent.

Betty Lunkuse, Court Clerk present.

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W. M. MUSENE

JUDGE

Court: Sentence and reasons read out in open Court.

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W. M. MUSENE

JUDGE