

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
CRIMINAL SESSIONS CASE No. 0461 OF 2017

UGANDA **PROSECUTOR**

5 **VERSUS**

1. **NAMUBIRU PHIONA** }
2. **NAMUSOKE ANNET KIRABO** } **ACCUSED**

Before Hon. Justice Stephen Mubiru

10 **JUDGMENT**

The first accused having pleaded guilty to the indictment, convicted and sentenced at the commencement of the trial, it is the second accused that remains indicted with one count of Kidnap with intent to procure a ransom c/s 243 (1) (c) of *The Penal Code Act*. It is alleged that
15 the accused and the other already convicted, on 14th March, 2017 at Kampala Parents School, Central Division in Kampala District took away and detained Faith Poni Emmanuel against her will with intent to procure a ransom or benefit for the liberation of Faith Poni Emmanuel from the danger of being murdered.

20 The prosecution case is that the victim Faith Poni Emmanuel, who at the material time was aged three and a half years, is the daughter of P.W.3 Emmanuel Daudi Jubara Tombe, the First Secretary at the Embassy of South Sudan in Uganda. On the morning of Tuesday 14th March, 2017, P.W.5 Sadam Khamis, the victim's uncle and private driver of the victim's father, drove the victim from home in Bukasa-Muyenga, and dropped her at Kampala Parents School in Bugolobi.

25 When he returned later at 5.00 pm as usual, he was informed by a teaching assistant, D.W.2 Nabirunmba Lubega Milly, that the girl was missing from class. A frantic search for her within the immediate vicinity of her class was futile. Her parents were informed and her father came to the school immediately. The victim's mother P.W.6 Amani Bashir called the class teacher A2 Namusoke Annet Kiraboo who did not offer any useful explanation. She too rushed to the school.

30 The School's principal too called the accused and summoned her back to school.

When they all assembled at the school, A2 Namusoke Annet Kirabo said she had earlier during the day while the pupils were having lunch, been approached by a dark-skinned, tall slender woman in South Sudanese attire who claimed to be the victim's aunt. The woman had asked her to take the victim away to attend a birthday party of the victim's elder brother in the Primary two
5 classroom. A search was made all over the school premises but the victim was nowhere to be seen.

The following day, the parents of the girl returned to the school and while there the Principal of the school told P.W.3 Emmanuel Daudi Jubara Tombe that she had been contacted on phone by a
10 person who asked her to avail her P.W.3's phone number, which she had done. Later images of the victim were sent to P.W.3's phone number. After the investigation was taken over by the police, the kidnapper demanded for shs. 18,000,000/= to be paid before the following Sunday 19th March, 2017 or else the victim would be no more. She also demanded for shs. 50,000/= to buy food for the victim which the police remitted to her. Following intensive phone tracking, the
15 victim was on Thursday 16th March, 2017 rescued from the custody of A1 Namubiru Phiona, at Bibbo, Bombo in Luwero District and re-united with her parents on 16th March, 2017. Further investigations implicated the accused. She was arrested and charged jointly with A1 Namubiru Phiona.

In her defence, the accused denied having participated in committing the offence. Her version is that she arrived at the school later than usual that day, at around 11.30 am to midday, having sought permission from the Principal the previous day to see her doctor. She entered the class as children were about to have lunch. D.W.2 Nabirumba Lubega Milly was on duty and was required to go out of class to check on the meals. She checked, came back and told them it was
25 ready. She took the children for lunch and supervised them. She was meant to be with D.W.3 Musoke Jane but she did not know where she was at the time and thus she supervised alone. A1 Namubiru Phiona came and asked for Poni Faith Emanuel. She asked her what had happened because Poni Faith Emanuel was not ordinarily picked at lunch time. A1 Namubiru Phiona replied that she was taking her for her brother's birthday in P.2. The accused told her to wait
30 because Poni was still having lunch. A1 sat and waited at the visitors' chairs beside the class on the veranda of the pre-primary block, for baby, middle and top class. Meanwhile the accused was

attending to other parents who were picking children and other children who were washing their hands inside the classroom. She was talking to Maama Kavuma the parent of Elizabeth Kavuma. In that process D.W.2 Nabirumba Lubega Milly came for the children from the classroom to go and rest. The accused went to have lunch after which she went to the Secretary to oversee the
5 reparation of the mid-term exams and homework.

At around 5.00 pm she went home. The Principal called her at around 5.00 pm to 5.30 pm and told her that Poni Faith Emanuel was not at the school and asked her where she could be. That is when she remembered that a woman had asked for her. She told her to task D.W.2 Nabirumba Lubega Milly who supervised those who took a nap. She too was not sure because the property
10 of Poni Faith Emanuel was still in the class. Musoke Jane too was not sure where the child was. The Principal summoned her back to the school and a search for the child began. When she arrived at the school, she described the lady who talked to her as tall, dark and had a scarf cross her shoulder the way Sudanese ladies dress. She participated in searching the swimming pool area with two other security guards. They later gathered in the Principal's office after failing to
15 find the child in the swimming pool area. She was taken to the police, at Kira Road Police Station to record a statement and that is where she was arrested from. Later she was transferred to CPS Kampala and then to court at City Hall with A1 Namubiru Phiona.

The prosecution has the burden of proving the case against the accused beyond reasonable doubt.
20 The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See *Ssekitoleko v. Uganda [1967] EA 531*). Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent,
25 (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*). For the accused to be convicted of Kidnap with intent to procure a ransom, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Unlawful taking of the victim.
2. The taking was by the use of force, fraud, or coercion.
- 30 3. Intention of gaining a ransom or reward.
4. The accused participated in commission of the act.

Firstly, prosecution is required to prove beyond reasonable doubt that the victim was unlawfully taken away. For this ingredient, there must be proof of the victim being removed, which in law is called asportation, against his or her will, from one location and taken to another location. Asportation of the individual is an essential element of the crime, and the movement must be more than something slight or inconsequential, a substantial distance from the vicinity where she was found. Kidnapping may also occur when an individual is not taken to a new location, but is instead confined against his or her will in a certain space. If the victim is restrained in a manner that restricts his or her freedom of movement, it may also be enough to constitute kidnapping. The taking is unlawful if, in case of a child, it is without the authority of the parent, guardian or other person in lawful custody of the child or other lawful justification, and for an adult, if it is without the consent of the person or other lawful justification.

In the instant case the allegation is that the victim was taken away from Kampala Parents School. According to P.W.5 Sadam Khamis, the victim's uncle and driver, that morning of 14th March, 2017 he dropped her at school and when he went to pick her at 5.00 pm later that day, she was not at school. The father of the victim P.W.3 Emmanuel Daudi Jubara Tombe, too testified that the victim was on the morning of 14th March, 2017 dropped at school and when the driver went to pick her at 5.00 pm that day, she was not at school. She was returned to him by the police on Thursday 17th March, 2017.

The victim's whereabouts during that time span were explained by P.W.4 D/AIP Mpatodera Jennifer, the investigating officer, who testified that the victim was rescued from Bibbo village in Bombo, while in the custody of A1 Namubiru Phiona. None of the teachers who had immediate supervision of the victim while at school the day she went missing, A2 Namusoke Annet Kirabo, D.W.2 Nabirunmba Lubega Milly and D.W.3 Musoke Jane, acknowledged having permitted anyone to take the child off the school premises. When A1 Namubiru Phiona testified as D.W.3, she admitted having taken the child away from the school premises that day, but she never offered any lawful justification for taking the child away. Counsel for the accused conceded to this ingredient in his final submissions. On basis of that evidence in agreement with the assessors, I find that it has been proved beyond reasonable doubt that on 14th March, 2017, Faith Poni Emmanuel was unlawfully taken away from Kampala Parents School.

The next ingredient requires proof that the taking was by the use of force, fraud, or coercion. Offenders often approach their victims using manipulative lures and strategies such as offering gifts, making threats and using weapons. For this ingredient, there must be proof of the physical taking or removal of victim from one place to another place against the victim's will or without the victim's consent, by the use of force, fraud, or coercion. The crime of kidnapping continues until the victim is freed, and a person who chooses to participate in the victim's confinement, after having learned that the victim has been kidnapped, may be held responsible for the offence of kidnapping. When the victim is a child without the legal capacity to give consent, proxy consent is given by a parent or person having parental responsibility over the child, save in emergency situations if the parents are unavailable. For this category of victims, offenders may also rely on their victim's fears, vulnerability and obedience to adult authority.

It was the testimony of the father of the victim P.W.3 Emmanuel Daudi Jubara Tombe, that on 16th March, 2017 when images of the victim were sent to him by the kidnapper, the victim had a running nose and tears on her face, an indication that she was in distress under custody of the kidnapper against her will. The parents, P.W.3 Emmanuel Daudi Jubara Tombe and mother P.W.6 Amani Bashir as well as her uncle P.W.5 Sadam Khamis denied having authorised anyone else to take the victim away from the school. None of the teachers who had immediate supervision of the victim while at school the day she went missing, A2 Namusoke Annet Kirabo, D.W.2 Nabirunmba Lubega Milly and D.W.3 Musoke Jane admitted having authorised the taking of the child. When A1 Namubiru Phiona testified as D.W.3, she stated that she took the child by pretending to be her aunt whereas not, while enticing her with a bottle of soda. This constitutes a fraudulent or deceitful act. Counsel for the accused conceded to this ingredient in his final submissions. On basis of that evidence in agreement with the assessors, I find that it has been proved beyond reasonable doubt that 14th March, 2017, Faith Poni Emmanuel was taken away from Kampala Parents School against her will, by deceit after offering her a bottle of soda.

The next ingredient requires proof that the abduction was motivated by an intention of gaining a ransom or reward. Intent relates to the condition of mind of the person who commits the act, his or her purpose in doing it. The law recognizes two types of intent, general intent and specific intent. The criminal intent element required for kidnapping is specific intent of purposely

committing the criminal act in order to receive a ransom, regardless of whether he or she actually went through with it. Specific intent is the intent to accomplish the precise act which the law prohibits. The prosecution is required to prove that the accused intentionally and not inadvertently or accidentally engaged in that action. A person acts "intentionally" with respect to
5 a result when his or her conscious objective is to cause such result. The offence of kidnapping is complete as soon as the person is taken away with the requisite guilty intention or knowledge. The intention for which a person is kidnapped must be gathered from the circumstances attending prior to, at the time of and subsequent to the commission of the offence. A kidnapping *per se* may not lead to any inference as for what purpose or with what intent he has been
10 kidnapped.

In the instant case when A1 Namubiru Phiona testified as D.W.3, she stated that she took the child intending to obtain a ransom of shs. 18,000,000/= from the victim's school. The victim's father P.W.3 Emmanuel Daudi Jubara Tombe, testified that on 15th March, 2017 the kidnapper
15 communicated that demand to the police thinking she was communicating to him, threatening that the victim would be no more if the money was not sent by Sunday. Later the kidnapper demanded for shs. 50,000/= to buy food for the victim and it was sent to her by the police by mobile money. Counsel for the accused conceded to this ingredient in his final submissions. On basis of that evidence in agreement with the assessors, I find that it has been proved beyond
20 reasonable doubt that Faith Poni Emmanuel was taken away from Kampala Parents School with an intention to procure a ransom for her liberation from the danger of being murdered.

Lastly it must be proved that the accused participated in the kidnap of the victim. There should be credible direct or circumstantial evidence implicating the accused as a perpetrator of the
25 offence. Under section 19 of *The Penal Code Act*, individual criminal responsibility can be incurred by being a direct perpetrator, joint perpetrator under a common concerted plan, accessory before the offence, by aiding or abetting, etc. The evidence implicating the accused must show that the factum of kidnapping as well as intent to procure a ransom were known to her either directly or at least by circumstantial evidence. In her defence, the accused denied any
30 participation. She admits having seen and talked to the kidnapper that day, but she denies having connived with her.

To refute the defence, the prosecution relies entirely on circumstantial evidence against the accused. It is in the nature of "evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial," (see *Taylor Weaver and Donovan v. R*, 21
5 *Cr App R 20 at 21*). However, each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible.

10 In a case depending exclusively upon circumstantial evidence, the court is concerned with probabilities, not with possibilities. Something is "probable" when it is verifiable and more likely to have happened than not, whereas something is "possible" where it could happen in similar situations, some form of acknowledgement that although it is not impossible, yet it is unlikely to have happened in the circumstances of the case. Just because something is possible does not
15 mean it is probable. There should be material upon which it can be found that there is such probability in favour of the explanation or hypothesis presented by the prosecution that the contrary one must be rejected. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the fact to be proved is so high that the contrary cannot reasonably be supposed. The burden
20 of proof lies upon the prosecution, and if the accused has been able by additional facts which he has adduced through cross-examination or his defence to bring the mind of the Court to a real state of doubt, the prosecution has failed to satisfy the burden of proof which lies upon it.

The court must find before deciding upon conviction that the exculpatory facts are incompatible
25 with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Simon*
30 *Musoke v. R* [1958] EA 715, *Mwangi v. Republic* [1983] KLR 327, *R v. Kipkering Arap Koske*

and another (16) EACA 135 and Sharma Kooky and another v. Uganda [2002] 2 EA 589 (SCU) 589 at 609). Circumstantial evidence must always be narrowly examined.

It is thus essential to inquire with the most scrupulous attention what other hypotheses there may be which may agree wholly or partially with the facts in evidence. The prosecution relies on circumstantial evidence woven together by a series of strands. I have categorized the strands of circumstantial evidence in this case into five batches and considered the explanations and hypotheses advanced by the accused to explain away the various incriminating elements in that prosecution circumstantial evidence.

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The first batch comprises occurrences laying a chain of contact between A1 and the accused, as follows; the accused and A1 were seen seated together and talking to each other on the school premises on two separate occasions, on two different days before the day of the kidnap; the accused admits having seen and talked to A1 on the day the child was kidnapped but denies having met her before; the accused admits being the person who last had direct supervision of the child and last contact with A1 before the child went missing.

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As regards the allegation that both were seen seated together and talking to each other on the school premises on two separate occasions on two different days before the day of the kidnap, the accused denied ever having met A1 before 14th March, 2017. Section 59 of *The Evidence Act*, requires that oral evidence must, in all cases whatever, be direct; that is to say if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it; if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner. If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

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A statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible (see *Myers v. DPP [1964] 2 All ER 881*, *Patel v. Comptroller of Customs [1965] 3 All ER 593*, *Magoti s/o Matofali*

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v. R (1953) EACA 232 and *Tenywa v. Uganda [1967] EA 102*). I find the evidence given by P.W.4 D/AIP Mpatodera Jennifer, the investigating officer regarding these claimed meetings is inadmissible as hearsay. I have not found any direct evidence on this point.

5 In her testimony, D.W.3 who doubled as A1, Namubiru Phiona, denied having met the accused before 14th March, 2017. However, in her statement to the police recorded on 18th March, 2017 (P. Ex. 4) she stated that she first went to the school on 6th March, 2017 to undertake a survey of its security systems. She returned to the school on Monday 13th March, 2017 and went to the nursery section where she met a teacher whom she asked to be directed to the office from where
10 she picked a brochure and returned to where the teacher was seated at around 6.00 pm, engaged her in a conversation and revealed to her that she planned to kidnap a child from the school for a ransom, since all pupils in the school came from wealthy families. The teacher replied she was free to do so provided she gave her a share of the proceeds. She made contact with the targeted kid and her elder sister. It is on the following day 13th March, 2017 that she kidnapped her.

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However in court, she denied having made that statement willingly, claiming that she was tortured and promised early release if she implicated one of the teachers in her plans, since in the view of the police, she could not have pulled off the plan without the aid of a teacher. According to section 40 (1) of *The Trial on Indictments Act*, every witness in a criminal case before the
20 High Court is to be examined upon oath. It follows that a statement recorded by the police during the investigation cannot be considered as substantive evidence, i.e., as evidence of facts stated therein as such statements are not made during trial, not given on oath, nor they are tested by cross-examination.

25 Nevertheless, according to section 154 (c) of *The Evidence Act*, the credit of a witness may be impeached by proof of former statements inconsistent with any part of his or her evidence which is liable to be contradicted. It follows therefore that although a witness' statement to the police is inadmissible as substantive evidence, it may be used to confront the witness with contradictions when such witness is examined regarding those contradictions. The prosecution also can, with
30 the permission of the Court, use such statements to contradict or confront hostile witnesses. A previous statement used to contradict a witness does not become substantive evidence but merely

serves the purpose of casting doubt on the veracity of the witness. Under no circumstances can such statements be used for the purpose of corroboration or as substantive evidence. The reason for the prohibition of the use of the statements made to the police during the course of the investigation for that purpose is that the police cannot be trusted for recording the statements
5 correctly as they are often taken down in a haphazard manner, in circumstances where omissions or inaccuracies are bound to occur. They are often not a verbatim record of what the witness says. They are a reflection of what the police officer understood the witness to be saying. It is for that reason that it is now well established that where a police statement is used to impeach the credibility of a witness and such statement is proved to be contradictory to his or her testimony,
10 the court will always prefer the witness' evidence which is tested by cross-examination (see *Chemonges Fred v. Uganda, S. C. Criminal Appeal No. 12 of 2001*).

I have considered the contents of that statement and found it to be inconsistent with her testimony in court. I find that the alleged torture of D.W.3 is unsubstantiated. Apart from the
15 bare claim of torture, the witness did not elaborate as to the nature of acts or omissions she deemed to be acts of torture. There is no evidence on basis of which to make a finding that she was subjected to violent treatment, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue statement to be made. As matters stand, the version given in court is starkly different from what she told the police and no convincing reason has been given to
20 explain this inconsistency. This unexplained inconsistency shakes her credit by injuring her character, thus casting doubt on her truthfulness.

Court though can rely on parts of the testimony of a witness which are truthful and reject the parts which are false. It may believe the evidence of a contradicting witness and reject the part
25 containing lies or, reject the whole evidence of such witness who may be telling lies, but act on the rest of the evidence, or accept reasonable explanation for the inconsistencies (see *Uganda v. Rutaro [1976] HCB 162; Uganda v. George W. Yiga [1977] HCB 217; Saggu v. Road Master Cycles (U) Ltd. [2002] I EA 258; Kiiza Besigye v. Museveni Y. K and Electoral Commission [2001 – 2005] 3 HCB 4*). I find this part of the evidence of D.W.3 to be untruthful and I
30 accordingly reject it. Her denial of having established contact with the accused before kidnap is untruthful. Nevertheless, the result is that the only available direct evidence of contact between

A1 Namubiru Phiona and the accused is provided by the admission made by the accused in her defence that she saw and talked to A1 on the day the child was kidnapped and that she was the person who last had direct supervision of the child before she went missing.

5 The second batch of circumstantial evidence comprises occurrences which constitute curious conduct on the part of the accused, as follows;- the accused noted that A1 was a stranger but did not demand for proper identification; knowing the victim to be only three and a half years old, she chose to rely on her identification of A1 as her auntie without seeking to verify that with the parents of the child or her uncle whose phone number she had; she advised A1 to wait to be
10 attended to later but never followed her up after she was done with her other responsibilities; A1 claimed to be taking the victim for a birthday party in the P.2 classroom, not too far from the nursery section, the existence of which she never bothered to verify; knowing that the victim had gone for a party she never bothered to ascertain that the victim had thereafter returned to class; she handed over the 22 or so children left, after the rest had been taken home by their parents, to
15 D.W.2 Nabirumba Lubega Milly in charge of the day care, without ascertaining that the victim was back from the party; she instead seemed to be so obsessed with receiving a piece of the cake from that party and adverted to that twice before she left for her home, without appearing to be equally concerned with the whereabouts of the victim; she left the victim's property in the classroom school at the end of the day without ascertaining that she was on the premises. Her
20 explanation for all these anomalies is that they were simply inadvertent occurrences.

The court reminds itself that for this element, there has to be *mens rea* in the form of intent and knowledge. Not being a direct perpetrator, the intent component requires the prosecution to prove that by that conduct, the accused intended to assist the direct perpetrator, A1 Namubiru
25 Phiona, in the commission of the offence. It is not required that the accused desired that the offence be successfully committed. As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the direct perpetrator intends to commit the crime, although she need not know precisely how it will be committed. For accessory liability, it is sufficient that she, armed with knowledge of the direct perpetrator's intention to
30 commit the crime, acts with the intention of assisting the direct perpetrator in its commission.

Based on the facts in this batch of circumstantial evidence, knowledge by the accused of A1's plan to abduct the victim may be inferred from the doctrine of willful blindness. Willful blindness applies to the accused's state of mind. It describes a situation where someone tries to escape criminal liability by intentionally overlooking the obvious. The doctrine of willful
5 blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. The doctrine serves to override attempts to self-immunize against criminal liability by deliberately refusing to acquire actual knowledge. A court may make the following inquiries when
10 considering the doctrine of willful blindness:- was the accused's suspicion triggered about a fact that would reveal a prohibited consequence or situation? Was the accused's suspicion about the prohibited consequence or situation probable or at least likely to occur? Did the accused inquire about the suspicion? If the accused inquired about the suspicion did the accused have any remaining suspicion after the inquiry? If the accused had any remaining suspicions after the inquiry, did the accused make further inquiries? Where willful blindness is established, the
15 knowledge imputed is the equivalent of actual, subjective knowledge.

For example in *R v. Souter (D.N.) (1998), 216 A.R. 292 (CA)*, the appellant, was charged with one count of fraud and 59 counts of possession of stolen property. For many years, the appellant was in the business of wholesaling used cars. The convictions pertained to a number of cars he
20 obtained for resale from one Vallieres, who resided in Montreal. Subsequent to the disposition of the cars by the appellant, police investigation revealed many of them to have been stolen. The issue at trial was whether the appellant knew, while the cars were in his possession, that they were stolen, knowledge being an essential element of the offence of possession of stolen property. The evidence established that the accused had notice of "problems" with several
25 vehicles purchased from Vallieres. For example, a Ford Aerostar had a Vehicle Identification Number (VIN) that, according to Ford, belonged to an Aerostar that had been written off due to water damage after falling off a bridge. However, there was no water damage to the vehicle Vallieres had provided. The trial court found that the accused had actual knowledge that all of the vehicles being purchased from Vallieres were stolen, alternatively that knowledge could be
30 imputed to the accused on the basis of recklessness or willful blindness.

On appeal, it was argued that the learned trial judge erred in law in concluding that "recklessness" on the part of the appellant could satisfy the *mens rea* required for the offences for which the appellant was convicted, and that the learned trial judge erred in his application of the doctrine of "willful blindness" to the *mens rea* required for the offences for which the appellant was convicted. The Court of Appeal (Alberta) decided that willful blindness is sufficient *mens rea* for an offence that requires knowledge;

It is well established in criminal law that willful blindness will also fulfill a *mens rea* requirement. If the [accused] becomes aware of the need to make further inquiries about the nature of the [item]... yet deliberately chooses to ignore these indications and does not make any further inquiries, then the [accused] can be none the less charged for "knowingly" selling obscene materials.....Deliberately choosing not to know something when given reason to believe further inquiry is necessary can satisfy the mental element of the offence....A finding of willful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"

The test for willful blindness is not an objective one. It is not enough that the accused ought to have suspected the fact in question. Rather, the accused must be proven to have suspected a fact and to have refrained from seeking confirmation or denial of it. In that case the appellant was proven to have been aware of inconsistencies with the subject vehicles. Given the appellant's experience with automobiles, it would not have been unreasonable to conclude that the appellant knew that the two subject vehicles had been stolen.

This batch of circumstantial evidence reveals that the accused's suspicion was aroused to the extent of seeking some perfunctory form of confirmation of the identity of A1 from the victim, before asking her to wait at the bench. She was unable to explain why later she never sought A1 out to permit her access to the victim, or why she never took any steps to ascertain that a party was indeed being hosted in the primary two classroom, or that indeed the victim was at that party. Where the prosecution relies on willful blindness and the evidence shows that some inquiry was made on the part of the accused, the question is then whether the prosecution has proved beyond a reasonable doubt that despite that inquiry the accused remained suspicious and refrained from making any further inquiry because she preferred to remain ignorant of the truth.

This batch of circumstantial evidence further reveals that the accused suspected or realized the probability that safety of victim was exposed to the danger posed by a stranger but she refrained from obtaining the final confirmation. When circumstances call for an inquiry, it must be reasonable and meaningful. I find that considering the nature of inquiries the accused allegedly
5 made, they were tantamount to no inquiries at all. With actual suspicion aroused, she deliberately refrained from making inquiries because she did not want her suspicions confirmed. Willful blindness would lose all meaning if an accused in the position of a teacher, to whom the care and temporary custody of a toddler is entrusted, suspicious that the safety of the toddler is at stake, was absolved of guilt merely by receiving a negative answer on inquiring of the toddler, whether
10 she knew the stranger or not. Willful blindness is tantamount to finding that she intended to deny knowledge of the fact, because she wanted in the event to be able to deny knowledge and thus to cheat the administration of justice by that denial.

The third batch of circumstantial evidence comprises occurrences which suggest a design rather
15 than happenstance; the accused was the victim's class teacher and A1 by coincidence talked to a girl from her class; the accused was a neighbor to the parents of the victim and knew the father to be a diplomat and it is by coincidence that A1 targeted the diplomat's daughter; AI considered all children in the school to be from well to do families and it is by coincidence that she ended up zeroing on a child from a family the accused knew reasonably well; there were over sixty pupils
20 in the class and it is by coincidence that A1 targeted the one the accused knew at more or less a personal level since she used to be offered lifts by the victim's uncle as he dropped the victim at school; she realised that A1 was a stranger seeking to talk to the victim and offer her a drink and it is by coincidence that she never took any precautions; of all three teachers charged with the supervision of the class that day, it is only A1 that the accused implicated during the police
25 investigations.

When occurrences of this nature, with no apparent causal connection surprisingly intersect, court must determine the probability of their occurring by chance before concluding that they reflect a design rather than happenstance. Coincidences appear in all parts of our daily lives. Some are
30 quite mysterious, others are best understood by probability, many are the result of our own actions. If combinations of events occur in a pattern, then we can use that pattern to determine

the likelihood of the events recurring, when and where these events might take place, and also the chances of similar events happening in the future. This reminds me of the saying "once is chance, twice is coincidence, third time is a pattern" (or "once is a fluke, twice is a trend, three times is a habit," or "once is happenstance, twice is coincidence, three times is enemy action," the latter of which is taken from Ian Fleming's novel "*Goldfinger*.")

Those sayings underline the fact that the more the number or the higher the frequency of coincidences, the higher the probability that they did not occur by chance but rather by design. This is the easiest way to distinguish between pure happenstance and potentially synchronistic signs. It is a rational process of searching for repetition, evaluating patterns and judging them against chance. Having done so, I detect a pattern in these series of coincidences with a regularity and where there is regularity the probability is high that the occurrences have a causal basis. I find that this is not serendipity; a type of coincidence that occurs when a person is in the wrong place at the wrong time. While the occurrences are disconnected in time, they do connect in the final outcome. They are a series of deliberate occurrences out of design rather than happenstance, that place the accused in a place of strategic pre-disposition toward and correlation to the planned abduction of that child. This may be evidence showing that the accused had the motive, opportunity, preparation and knowledge of the plan and that the kidnap was not the result of mistake or accident.

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The fourth batch of circumstantial evidence comprises suspicious behavior of the accused before and following the incident, which include the fact that; she was talking about cake during lunch; she repeated it after lunch and yet she showed no concern for the whereabouts of the child; the mother of the victim called the accused but she does not remember what she told her; failure to pick her calls thereafter; disinterest in the situation of the victim and in obtaining details of her abduction. The mother of the victim, P.W.6 Amani Bashir testified that upon learning that Poni was not at school, she called the accused to make further inquires but the accused only wondered whether she had picked her then ended the call and when P.W.6 called her back again, she was not picking her calls prompting her to rush to the school. In her defence, the accused denied having failed to pick any calls. Her version is that she continued to pick all calls made to her by

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P.W.6 and other people until her battery ran out. She could not remember though what P.W.6 said over the phone but could only remember hearing her sob.

I have considered this batch of circumstantial evidence and found it may relate more to the character of the accused than provide concrete evidence of a guilty mind, since the word “character” includes both reputation and disposition. Although this batch of circumstantial evidence may lend itself to interpretation as conduct unexpected of a person in the position of a class teacher whose pupil is reported missing, it may carry the least weight considered in light of the other batches of circumstantial evidence. The conduct reflects on the accused as being, cold hearted, insensitive and devoid of compassion for the victim and her parents in such a stressful situation but I do not find this to be peculiar to her. Both D.W.2 Nabirumba Lubega Milly and D.W.3 Musoke Jane did not fare any better during their testimony. It was shocking that persons of such disposition are charged with the care of toddlers. None of them exhibited any motherly compassion towards the plight of the victim, even from the witness stand. However, according to section 52 of *The Evidence Act*, subject to a limited number of specified exceptions, the fact that an accused person has a bad character is irrelevant in criminal proceedings. The fact that the character of the accused is such as to render probable or improbable the conduct imputed to her is irrelevant. This is not a case in which the bad character of the accused is a fact in issue. "The business of the court is to try the case, and not the man; and a very bad man may have a very righteous cause" (see *Thompson v. Church, (1791) 1 Root 312*). I have thus decided to disregard this batch of circumstantial evidence.

Direct evidence of intent (for example, an admission from the accused such as that by A1 Namubiru Phiona) is very rare. In the vast majority of cases, prosecution must attempt to prove intent by inference through circumstantial evidence. Proving intent is usually a matter of piecing together different tidbits of evidence. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested, quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of

them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto. Existence of a conspiracy may be a matter of inference deduced from criminal acts done in pursuance of a common criminal purpose.

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Despite the denial by A1 of the absence of a conspiracy or collusion between her and the accused, the circumstantial evidence adduced by the prosecution has established that there was contact between A1 Namubiru Phiona and the accused on the day the child was kidnapped and that the accused was the person who last had direct supervision of the child before she went
10 missing. The conduct of the accused during and around that time constituted willful blindness tantamount to a finding that she intended to deny knowledge of the intentions of A1, because she wanted in the event to be able to deny knowledge and thus to cheat the administration of justice by that denial. Other relevant attendant circumstances armed the accused with above average knowledge of the situation and circumstances of the victim and her parents such as would be
15 helpful to a person desirous of kidnapping a child for a ransom, thus placing the accused in a position of strategic pre-disposition toward and correlation to the planned abduction of that child.

Against that strong circumstantial evidence, the accused advanced hypotheses of inadvertent oversight and mere coincidence. Although inadvertence and oversight is not impossible, it is
20 unlikely to have occurred in the circumstances of this case. The probability of either is low enough so as to not bear mention in a rational, reasonable argument. The hypotheses advanced by the accused being improbable, the degree of probability attained in favour of the explanation by the prosecution has produced moral certainty, to the exclusion of every reasonable doubt, such that the contrary hypotheses must be rejected. The circumstances exclude every exculpatory
25 hypothesis leaving only one rational conclusion to be drawn, of the guilt of the accused.

In her position as class teacher and in her right mind she could not have believed that A1 was an aunt to the victim, but she claims she did. She saw what she wanted to see, heard what she wanted to hear, believed what she wanted to believe. Despite my confidence in the ability of
30 people to blind themselves to reality, and even if the accused had not lied about other parts of her testimony, as will be illustrated later in this judgment, I am hard-pressed to credit the honesty of

her belief. Considered alongside the series of circumstances whose probability of having occurred by happenstance is so remote, the explanation advanced by the accused does not inspire confidence. Victims of an intended procurement of a ransom tend not to be chosen at random.

5 I have considered that this was not a blitz attack on the victim by a stranger, by way of a sudden or surprise physical attack on the victim. This was not a spur of the moment attack where an offender sees a victim and takes the opportunity there and then to grab and take her away. Instead, the *modus operandi* revealed by A1 Namubiru Phiona when she testified as D.W.3 was that of a stranger confidence building / con-attack, which is characterised by an elaborate plan
10 set up by the abductor. This form of assault is more psychological than a physical assault. Initially, the abductor has to gain confidence of the targeted child. This trust is used to manipulate the victim into psychological and physical vulnerability. As time progresses, the victim then sees changes in the abductor's behaviour from a nice friendly person to an aggressor, but by then it is too late. The *modus operandi* used in the this case is consistent with either
15 multiple contacts between A1 Namubiru Phiona and the victim prior to the abduction, or a conspiracy between her and another more acquainted to the child to gain confidence of the targeted child. It is inconsistent with the claim by A1 that she met the victim only once before the kidnap and that she operated alone. The rapid manner by which A1 gained the confidence of the targeted child is suggestive of acquaintance abduction, which typically involves an abductor
20 who is an acquaintance of the child, as opposed to stranger abduction.

Existence of a conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. Where an accused, with knowledge of another's intention to see a continuing offence through to its completion, does (or omits to do) something, with the
25 intention of aiding or abetting the commission of the ongoing offence, liability is established. A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator. The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. Every conspirator is legally responsible for an act of a co-conspirator that follows as one of the
30 probable and natural consequences of the object of the conspiracy.

Moreover, there is the fifth batch of circumstantial evidence which comprises the following unexplained contradictions in the defence, suggestive of fabrication and conspiracy;- the accused claimed A1 had a scarf across the shoulder while A1 said it was only covering her head; the accused claimed A1 was carrying a birthday cake in a box yet A1 said it was in a polythene bag and relatively small; the accused said the cake was branded "Hot-Loaf" yet A1 stated that neither the polythene bag nor the cake had any branding; the accused said she saw the box containing the cake beside A1 at the bench where she sat while A1 stated that there was no such box; the accused admitted that having interacted before with a number of South Sudanese parents in the school she could recognise the accent of women from that nation when they spoke English, and that to the contrary A1 spoke fluent English with no such detectable accent, yet she believed A1 to be an auntie to the victim.

Grave contradictions or inconsistencies unless satisfactorily explained, will usually though not necessarily, result into the rejection of that particular evidence (see *Alfred Tajar v. Uganda*, EACA Cr. Appeal No.167 of 1969, *Uganda v. F. Ssembatya and another* [1974] HCB 278, *Sarapio Tinkamalirwe v. Uganda*, S.C. Criminal Appeal No. 27 of 1989, *Twinomugisha Alex and two others v. Uganda*, S. C. Criminal Appeal No. 35 of 2002 and *Uganda v. Abdallah Nassur* [1982] HCB). Where inconsistencies, whether major or minor, point to deliberate untruthfulness and go to the root of the defence case, they justify rejection of the defence as a fabrication.

Whereas lies told by an accused person may not form the basis of her conviction, deliberate lies told by an accused can provide useful corroboration of the prosecution case (see *Twehamye Abdul v. Uganda*, C. A. Criminal Appeal No.49 of 1999; *Kutegana Stephen v. Uganda* C. A. Criminal Appeal No. 60 of 1999 and *Siras Kiiza alias Tumuramy and another v. Uganda*, C. A. Criminal Appeal No. 130 of 2003). Lies are inconsistent with innocence. Proved lies can be used to corroborate prosecution evidence (See *Juma Ramadhan v. Republic* Cr. App. No. 1 of 1973 (unreported)). I find that the untruthful version narrated by the accused in her defence, corroborates the otherwise strong circumstantial evidence against her. An innocent person would have no reason to fabricate such a story.

I find the inculpatory facts in this case incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. They irresistibly point to the guilt of the accused and there are no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence has produced moral certainty, to the exclusion of every reasonable doubt, that the accused participated in the commission of this offence. For those reasons, the accused is accordingly found guilty and is hereby convicted of the offence of Kidnap with intent to procure a ransom c/s 243 (1) (c) of *The Penal Code Act*.

10 Dated at Kampala this 13th day of July, 2018.

.....
Stephen Mubiru
Judge.
13th July, 2018.

Later.

15 4.23 pm

Attendance

Court is assembled as before.

SENTENCE AND REASONS FOR SENTENCE

20 The convict was found guilty of the offence of Kidnap with intent to procure a ransom c/s 243 (1) (c) of *The Penal Code Act* after a full trial. In her submissions on sentencing, the learned State Attorney Ms. Florence Kataike, prayed for a deterrent sentence on grounds that; the age of the victim in this case is very low, three and half years which affected her so much that she even asked the State Attorney whether she was a good auntie. The convict was a teacher for five years. She should not have behaved in such a manner. She was 33 years at the time of her arrest. She was old enough to know the right thing. The maximum penalty is death as the law stipulates, but the prosecution does not seek the maximum. Considering the circumstances, she prayed for a very deterrent sentence to send a signal to people in that category. The case has set a precedent why a teacher would behave in this manner. The convict was first charged in court on 28th March, 2017 when the charges were explained to her. She was committed for trial on 17th July, 2017 and was granted bail after three months and eighteen days. She is still on bail. There is no previous record of her being a serial offender and so she can be treated as a first offender. The parents were traumatised when the offence was committed.

In mitigation of sentence, the Learned defence counsel Mr. Warren Byamukama sought a lenient sentence on grounds that; the convict is a first offender. The court should give her a lenient sentence which will enable her come out and continue with her duties as a teacher. In her *allocutus*, the convict said on that day she was not fine, she was sick. She never connived with
5 A1 and considers her conviction to be the outcome of a job hazard.

According to section 243 of *The Penal Code Act*, the maximum penalty for the offence is death. However, this punishment is by sentencing convention reserved for the most egregious forms of
10 perpetration of the offence such as where it was nearly lethal or other extremely grave consequences, for example, maltreatment to a life threatening degree (e.g., by denial of food or medical care) would constitute life threatening bodily injury. Since in this case death was not a very likely or probable consequence of the act, I have discounted the death sentence.

When imposing a custodial sentence on a person convicted of the offence of Aggravated Kidnap
15 with intent to procure a ransom c/s 243 (1) (c) of *The Penal Code Act*, *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* stipulate under Item 5 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule, that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors.

20 Although the manner in which this offence was committed did not create a life threatening situation, in the sense that death was not a very likely immediate consequence of the act such as would have justified the death penalty, they are sufficiently grave to warrant a deterrent custodial sentence. The conditions of aggravation are mainly the very tender age of the victim and the fact
25 that the kidnapping or abduction was accompanied by the administration of a threat of causing death or hurt on the one hand and greed as the underlying purpose of the kidnapping or abduction on the other.

I have considered previous decisions such as *Uganda v. Namusisi Maimuna, H.C Criminal*
30 *Session Case No. 180 of 2011*, where a 33 year old convict for the offence of Kidnap with intent to murder C/s 243 (a) and (b) of *The Penal Code Act*, who had been on remand for three years,

was sentenced to 25 years imprisonment. She had kidnapped a ten day old baby, motivated by an intent to murder the victim. Similarly in *Ssalongo Senoga Sentumbwe v. Uganda, C. A. Criminal Appeal No. 102 of 2009*, an appeal against a sentence of sixteen years' imprisonment was dismissed following a conviction for the offence of Kidnap with intent to murder C/s 243 (a) and (b) of *The Penal Code Act*. He had kidnapped a two year old boy, motivated by an intent to murder the victim by ritual sacrifice. In *Nuulu Asumani Kibuuka v. Uganda, C. A. Criminal Appeal No. 23 of 2000* the Court of appeal upheld a sentence of twenty years' imprisonment meted against the appellant for the offence of Kidnap with intent to murder C/s 243 (a) (by then section 241 (a) of *The Penal Code Act*. The victim was aged about 6 months at the time he was kidnapped as a cover up for an incestuous relationship, and was never seen alive again. Lastly, in *Rwalinda John v. Uganda, S. C. Criminal Appeal No. 3 of 2015* the Supreme Court upheld a sentence of life imprisonment meted against the appellant, a sixty seven year old man and first offender who had spent one year and three months on remand, for the offence of Kidnap with intent that the victim may be murdered or disposed of as to be put in danger of being murdered, C/s 243 (a) (by then section 241) of *The Penal Code Act*. The victim's body was found mutilated, the neck had been cut open, the lower jaw and tongue were missing and found that the killing was characteristic of ritual killing by witch doctors.

Although the cases I have drawn comparison with relate to Kidnap with intent to murder, they are not so far removed from Kidnap with intent to demand a ransom. I therefore consider that this is a case where a sentence in the range of twenty to twenty five years' imprisonment would be justified in light of the aggravating factors highlighted above. However, since the convict is a first offender, I have from this perspective adopted a starting point of 18 years' imprisonment.

The seriousness of this offence is mitigated by the factors stated in mitigation by her counsel and her own *allocutus*, most particularly her youthful age. The severity of the sentence she deserves has been tempered by those mitigating factors and is reduced from the period of eighteen years, proposed after taking into account the aggravating factors, now to a term of imprisonment of twelve years.

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It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take into account the period spent on remand while sentencing a convict. Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, requires the court to “deduct” the period spent on remand from the sentence considered
5 appropriate, after all factors have been taken into account. This requires a mathematical deduction by way of set-off. From the earlier proposed term of twelve years’ imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been charged on 28th March, 2017 and thereafter kept on remand for three months before she was granted bail, I hereby take into account and set off three months as the period the convict has
10 already spent on remand. I therefore sentence the convict to a term of imprisonment of eleven (11) years and nine (9) months, to be served starting today.

The convict is advised that she has a right of appeal against both conviction and sentence, within a period of fourteen days.

15 Dated at Kampala this 13th day of July, 2018.

.....
Stephen Mubiru
Judge.
13th July, 2018.

22nd June, 2018.

20 11.25 am

Attendance

Mr. Kato Ssonko, Court Clerk.

Ms. Florence Kataike, State Attorney, for the Prosecution.

Mr. Ochieng Evans, Counsel for A1

25 Mr. Warren Byamukama, Counsel for A2 on private brief is present.

Both accused are in court.

Court: the following sentencing order is signed and the sentence pronounced in open court in the presence of the above mentioned.

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.....
Stephen Mubiru
Judge
28th June, 2018.

SENTENCE AND REASONS FOR SENTENCE

When this case came up on 22nd June, 2018, for plea, the two accused were jointly indicted with one count of Kidnap with intent to procure a ransom C/s 243 (1) (c) of *The Penal Code Act*. It was alleged that on 14th March, 2017 the two accused while at Kampala Parents School in the Central Division, Kampala District took away and detained Faith Poni Emmanuel against her will with intent to procure a ransom or benefit for the liberation of Faith Poni Emmanuel from the danger of being murdered. They both pleaded not guilty and hearing of the case was fixed to commence on 28th June, 2018. When the case came up today for commencement of the hearing, the learned State Attorney prosecuting the case, Ms. Florence Kataike, indicated that she had four witnesses present but A1 had chosen to enter into a plea bargain with the state.

The court then invited the State Attorney to introduce the plea agreement and obtained confirmation of this fact from defence counsel on private brief, Mr. Ochieng Evans. The court then went ahead to ascertain that the accused had full understanding of what a guilty plea means and its consequences, the voluntariness of the accused's consent to the bargain and appreciation of its implication in terms of waiver of the constitutional rights specified in the first section of the plea agreement. The Court being satisfied that there was a factual basis for the plea, and having made the finding that the accused made a knowing, voluntary, and intelligent plea bargain, and after she had executed a confirmation of the agreement, went ahead to receive the agreement to form part of the record. The accused was then allowed to take plea whereupon a plea of guilty was entered.

The court then invited the learned State Attorney to narrate the factual basis for the guilty plea, whereupon she narrated the following facts; A1 together with another on 14th March, 2017 removed a girl aged three and a half years Poni Emmanuel Faith. She was a pupil at Kampala parents school in Kampala District. She removed her from school and disappeared. She gained access to the girl through another. She was not employed in that school nor was she related to the victim. She disappeared with a girl to a place later established to be Bombo. When the driver Saddam Khamis who had dropped her together with other siblings at school in the morning returned to pick her up later, he was told the victim was not at school. The Principal was notified and the parents too. A search was mounted and the father reported the matter to Kira Road Police

Station and investigations began through phone tracking and the victim was recovered from the custody of A1 in Bibbo Bombo. Before the victim was rescued, she had communicated with the father of the victim Jubura Tombe. Photos of the victim were sent to the father of the victim by mobile phone line No. 075271191. The father was engaged in a conversation on that line. He
5 was told to send shs. 18,000,000/= or else Poni would be no more. He panicked and implored the police force. They began to track the number and established that it belonged to A1 at that time and that is how they managed to get to Bombo and found Poni Faith Emmanuel aged three and a half at the time. They arrested A1 and she was interrogated at police where she admitted having picked the girl from Kampala Parents and stated that she wanted a ransom from the parents. The
10 victim was handed over to the parents and the accused together with another were charged with Kidnap with intent to procure a ransom C/s 243 (1) (c). She was arrested on 16th March, 2017, charged on 28th March, 2017 remanded and remanded for three months and nineteen days. She was granted bail and is still on bail.

15 Upon ascertaining from the accused that the facts as stated were correct, she was convicted on her own plea of guilty for the offence of Kidnap with intent to procure a ransom C/s 243 (1) (c) of *The Penal Code Act*. In justification of the sentence of six (6) years' imprisonment proposed in the plea agreement, the learned State Attorney adopted the aggravating factors outlined in the plea agreement, which are that; the victim was aged only three and a half years, the offence
20 carries a maximum punishment of death, the victim was traumatised by the experience and such offences are rampant in the country.

Learned defence counsel too adopted the mitigating factors outlined in the plea agreement, which briefly are that; the accused is a first offender at the age of 24 years who has readily pleaded
25 guilty and is capable of reforming. The victim was not severely harmed or hurt and the accused did not receive the ransom she had demanded for. She also suffers from Bipolar Affective Disorder since the year 2006 and is this mentally unstable. In her *allocutus*, the convict said sorry to the parents of the victim and to court. She indicated that she was suffering from depression at the time as a result of Bipolar Disorder.

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I have reviewed the proposed sentence of six years' imprisonment in light of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* which prescribe a base point of 35 years' imprisonment which can be raised on account of the aggravating factors or lowered on basis of the mitigating factors. These guidelines though have to be applied taking
5 into account past precedents of Court, decisions where the facts have a resemblance to the case under trial. A Judge can in some circumstances depart from the sentencing guidelines but is under a duty to explain reasons for doing so.

I have considered previous decisions such as *Uganda v. Namusisi Maimuna, H.C Criminal*
10 *Session Case No. 180 of 2011*, where a 33 year old convict for the offence of Kidnap with intent to murder C/s 243 (a) and (b) of *The Penal Code Act*, who had been on remand for three years, was sentenced to 25 years imprisonment. She had kidnapped a ten day old baby, motivated by an intent to murder the victim. Similarly in *Ssalongo Senoga Sentumbwe v. Uganda, C. A. Criminal Appeal No. 102 of 2009*, an appeal against a sentence of sixteen years' imprisonment was
15 dismissed following a conviction for the offence of Kidnap with intent to murder C/s 243 (a) and (b) of *The Penal Code Act*. He had kidnapped a two year old boy, motivated by an intent to murder the victim by ritual sacrifice. In *Nuulu Asumani Kibuuka v. Uganda, C. A. Criminal Appeal No. 23 of 2000* the Court of appeal upheld a sentence of twenty years' imprisonment meted against the appellant for the offence of Kidnap with intent to murder C/s 243 (a) (by then
20 section 241 (a) of *The Penal Code Act*. The victim was aged about 6 months at the time he was kidnapped as a cover up for an incestuous relationship, and was never seen alive again. Lastly, in *Rwalinda John v. Uganda, S. C. Criminal Appeal No. 3 of 2015* the Supreme Court upheld a sentence of life imprisonment meted against the appellant, a sixty seven year old man and first offender who had spent one year and three months on remand, for the offence of Kidnap with
25 intent that the victim may be murdered or disposed of as to be put in danger of being murdered, C/s 243 (a) (by then section 241) of *The Penal Code Act*. The victim's body was found mutilated, the neck had been cut open, the lower jaw and tongue were missing and found that the killing was characteristic of ritual killing by witch doctors.

30 Although the cases I have drawn comparison with relate to Kidnap with intent to murder, they are not so far removed from Kidnap with intent to demand a ransom. I therefore consider that

this is a case where a sentence of over twenty years' imprisonment would be justified in light of the aggravating factors highlighted in the plea agreement. From this perspective, I have adopted a starting point of 18 years' imprisonment in light of the fact that A1 is a first offender. She as well is by sentencing convention entitled to a one third discount in light of her early plea of guilty reducing it to 12 years. From her mitigation, especially her age and her mental condition at the time, a further reduction by four years would be justified, leaving eight years which is the sentence that would have been appropriate. I note that there is not such a wide disparity between this final outcome and the sentence proposed in the plea agreement.

10 Having considered the sentencing guidelines and the current sentencing practice in relation to offences of this nature, I hereby accept the submitted plea agreement entered into by the accused, his counsel, and the State Attorney. It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take into account the period spent on remand while sentencing an accused. Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature)* 15 *(Practice) Directions, 2013*, requires the court to “deduct” the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This requires a mathematical deduction by way of set-off. From the earlier term of six (six) years’ imprisonment proposed in the plea agreement, the convict having been in custody for three months before her release on bail, I hereby take into account and set off the three months as the period the accused 20 had already spent on remand. I therefore sentence A1 Namubiru Phiona to five (5) years and nine (9) months’ imprisonment, to be served starting today.

Having been convicted and sentenced on her own plea of guilty, the convict is advised that she has a right of appeal against the legality and severity of this sentence, within a period of fourteen 25 days.

Dated at Kampala this 28th day of June, 2018

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Stephen Mubiru
Judge,
28th June, 2018.

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