

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CRIMINAL SESSION CASE NO.0050 OF 2016**

**UGANDA**

**PROSECUTOR**

**VERSUS**

**1. AKELLO LIZ**

**2. OKELLO SAMUEL**

**3. OKELLO BEN MICHAEL**

**ACCUSED**

**4. ETONGA AARON**

**BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI**

**JUDGMENT**

The accused were charged with Kidnap with intent to murder contrary to section 243(1)(a) of the Penal Code Act. Particulars of the offence are that on the 9<sup>th</sup> September 2015, the accused at Kakajjo Zone, Kisenyi II Parish, Kampala District unlawfully took away Nsubuga Samuel, a male juvenile of three years against his guardian's will, with intent to murder him.

The Prosecution and Counsel for the accused agreed to admit in evidence the medical examination report relating to the victim. He was examined by Dr. Barungi on the 28<sup>th</sup> January 2016 and found to be four years old at the time. The victim had healing lacerations on the body, a cut wound measuring 1 centimeter wide on the back, a cut wound on the back of the head measuring 1.5 centimeters wide, a wound on the upper aspect of the right ear measuring 1 centimeter. All the wounds were caused by a sharp cutting object and were classified as 'harm' in the report.

Adoch Florence (PW2) is the mother of Nsubuga Samuel, the victim of the alleged kidnap. Her evidence was that she went to procure food items for her restaurant on the 9<sup>th</sup> September 2015 and found the victim missing. PW2 learnt from her employees that Akello Liz (A1) and Etonga Aaron (A4) had sat outside the restaurant with the victim. A1 had followed the victim as he played with his toy car. PW2 started searching for the victim and in the process met a one Mwanje who told her that he had seen A1 holding the victim's hand as they walked together. A1 however claimed to have seen the victim but claimed not to know where he had gone. A complaint was registered at the Police and A1 was arrested on the 10<sup>th</sup> September 2015.

PW2 narrated that A1 told Police that the victim was sold to a Sudanese woman and she named Okello Ben Michael (A3) as the one who had details about the transaction. PW2

further narrated that Okello Samuel (A2) approached her saying that the victim had been sold in Sudan for shillings 800,000/= .A2 thereafter relocated from the village and was arrested after one week from Kiseka Market. A3 was arrested after a month from Arua Park. The victim was recovered by Police from Awila, Apach district and returned to PW2 but in very poor health.

Akello Safina(PW3) stated that on the 9<sup>th</sup> September 2015 A1 approached her at her laundry with a request that she quickly cleans a dress she wanted to wear and she paid.A1 bought a bottle of juice for the victim and they moved to a one maama Sennonon's place from where they left to a place she did not know at 11.00am.A1 held a green polythene bag as they left with the victim.

Businge George William(PW4) is the village defence secretary of Kakajjo Zone where PW2 and A1 reside.On the 9<sup>th</sup> September 2015 he saw A1 walking with the victim.AI held a bottle of safi juice and the victim was eating a cake.PW4 also saw Etonga Aaron(A4)moving in front of them holding a polythene bag that contained a jacket.PW4 told Court that the victim always played near their home but he was not bothered about what he saw because A1 and the victim knew each other as neighbours.

PW2 approached PW4 at 4.00pm to report the disappearance of the victim and he told her what he had observed at 11,00am.They went to search for A1 but only found her the following day.Police was called to save her from lynching by the mob and she confessed involvement in the disappearance of the victim.It is alleged by PW4,that A1 told Police that the deal had been to share 800,000/= with A4,but he tricked her and disappeared with the victim.A1 is also said to have implicated A2 and A3 as people who had knowledge about the deal.

Detective Seargent Nakisige Ruth(PW5)investigated the case from Old Kampala Police station.She interviewed PW4 and leant that he had seen A1 and A4 moving with the victim.PW3 confirmed seeing A1 moving with the victim and a one Namono Santana told her that she heard A1 and A2 talking about stealing a child on the 8<sup>th</sup> September 2015.A2 was arrested and he told Police that he saw A1 moving with the victim on a motorcycle and that A3 witnessed the handing over of the victim. On arresting A3,he revealed that A4 had bought the victim from A1 for shillings 150,000/= and the boy was taken to Apach District for ritual sacrifice.A4 was arrested with the victim in Apach district and returned to PW2.

In her defence,Akello Liz(A1) denied knowing A2,A3 and A4.She told Court that she knew PW2 but not where she stayed.A1 confirmed that PW2 asked her about the victim on the 9<sup>th</sup> September 2015 but she did not know where he was. A1admitted that she knew PW3 as a neighbor in Kakajjo- Kisenyi and denied any collusion with any of the other accused persons to kidnap the victim.A1 denied that she was a sex worker at one of the Lodges in Kisenyi.

Okello Sam(A2) told Court that he knows A1 well since she used to buy beer and other groceries from him.A2 further said he used to see A1 and Okello Ben(A3) together and that Etonga(A4) had once stayed in the neighbourhood but left in August 2014.A2 claimed to

have spent the 9<sup>th</sup> September 2015 at Kisseka Market where he works as a motorcycle mechanic.

Okello Ben(A3) denied involvement in kidnapping the victim and told Court that he had relocated to Lira when the contract at the place he used to work with A4 expired.A4 told Court that he knew PW2 who came to the house he had stayed in on the 10<sup>th</sup> September 2015 asking him to direct her to where A4 had disappeared to after kidnapping the victim.Police arrested him on that day claiming they had been looking for him since the victim disappeared.A3 confirmed that he knows A1 and A2 whom he used to see at PW2's restaurant.

In the course of the Prosecution case,Etonga Aaron(A4) applied to change plea and pleaded guilty to the offence claiming he committed it alone without the involvement of the rest of the accused and was sentenced on his own plea of guilt. Counsel for the accused opted to use him as a witness and he appeared as DW4.He told Court that he knew PW2 and the victim whom he took to Apach District on his own.DW4 admitted knowing A2 and denied knowing A1.DW4 acknowledge the Police statements recorded from him and the letters he wrote to Court and the Director of Public Prosecutions exonerating the co-accused in the case. The documents were admitted in evidence as Prosecution exhibits.

### **Submissions by the Defence.**

Counsel for the accused submitted that Prosecution had failed to prove all the ingredients of the offence. She submitted that the victim was found before expiry of six month from the date of the alleged kidnap which defeated the presumption of the intention to have him murdered or disposed of as to be put in danger of being murdered. This is a requirement of the Law under section 243(2) of the Penal Code Act. It was further argued that no witness testified to seeing any of the accused taking away the victim and Prosecution evidence was attacked as lacking. Counsel suggested that only the victim could prove that he was deceived or forced into being taken but he was not called as a witness.

### **Submissions by the Prosecution.**

Prosecution argued that PW3 and PW4 saw A1 and A4(DW4) taking away the victim .It was further pointed out that upon arrest of A1,A2 and A3 disclosed the role played by A4 and the child was found with him. Counsel wondered how they could have known if they were not in collusion with A4.The denial in A1's defence that she did not know any of the accused was pointed out as a lie since they all claimed to know her. A4's strategy to exonerate the co-accused it was argued, was an effort to cover up his grandfather who directed and paid for the kidnap.

### **Summary of the Law.**

In criminal cases, the Prosecution bears the burden to prove the guilt of the accused .The standard of proof is beyond reasonable doubt.The accused is under no legal obligation to prove his or her innocence since the law presumes him or her innocent until he or she pleads guilty or is found guilty after trial.

It is also the position of the Law that where the accused person raises an alibi, he or she does not have a duty to justify it. The Prosecution is required to adduce evidence to place him or her at the scene of crime as the perpetrator of the offence charged.

For the Prosecution to secure a conviction on a charge of kidnapping with intent to murder, the ingredients required to be proved are;

- 1) That there was a taking away of a person
- 2) That it was done by force or fraud
- 3) That it was done against the victim's will
- 4) That the perpetrators of the offence were motivated by an intent to murder the victim.
- 5) That the accused persons were the perpetrators of the offence.

The Penal Code Act is silent on the definition of the term kidnapping. The Oxford Advanced Learners' Dictionary however defines the term kidnapping as "*taking somebody away by force and illegally.*"

Section 243(1) of the Act contrary to which the accused are indicted provides that "*Any person who by force or fraud kidnaps, abducts, takes away or detains any person against his or her will....*"

Akello Safina (PW3) told Court that she saw A1 going to an unknown place with the victim. Businge George William (PW4) confirmed that he saw A1, A4 and the victim going away to an unknown place. In his plea of guilt, A4 (DW4) confessed that he took away the victim without the consent of his mother. PW2's evidence was that the victim was found in Apach District after about four months. Prosecution evidence therefore sufficiently proved this ingredient of the offence to the required standard.

Prosecution is required to prove that the victim was taken away by force or fraud. The victim in this case was three years at the time the offence was allegedly committed. It has been established by case law that;

*"Where it is alleged that a child has been kidnapped, it is the absence of the consent of that child that is material. This is the case regardless of the age of the child. A child before 14 years is deemed not to have the understanding or intelligence to consent."*

**R VD [1984]AC 778 at 806; Uganda V Musimami Wilson Kiviri & Ors HC Crim. Case No.31/2011.**

The victim in this case was an infant incapable of giving consent. The use of force or fraud can however be inferred from the nature of evidence adduced by the Prosecution. PW3 told Court that she saw A1 buying the victim a bottle of juice. PW4 saw A1 holding a bottle of juice and the victim eating a cake as they playfully followed A4. In absence of contrary evidence, I find it safe to assume that the victim was fraudulently lured from the custody of

his parent. The same arguments in the opinion of this Court sufficiently cover the third ingredient of the offence as proved to the requisite standard by the Prosecution.

As to whether the perpetrators were motivated by the intent to murder the victim or put him in danger of being murdered, regard is to Section 243(2) of the Penal Code Act. It provides;

*“Where a person so kidnapped or detained is thereafter not seen or heard of within a period of six months or more, the accused person shall be presumed to have had the intention and knowledge stipulated in subsection (1)(a) and (b).*

The victim was allegedly kidnapped on the 9<sup>th</sup> September 2015 and returned to PW2 on or about the 28<sup>th</sup> January 2016. The period is less than the six months stipulated to indicate the intention to murder the victim. I find this ingredient of the offence not proved by the Prosecution.

Did the accused participate in the commission of the offence they are indicted for? All the accused denied participation in the alleged kidnap. (DW4) claimed to have taken the victim away to Apach without the involvement of the others. Determination as to whether A4 (DW4) was a witness of truth requires an evaluation of the back ground to his change of plea. On the 3<sup>rd</sup> March 2016, A4 (DW4) wrote to the Director of Public Prosecutions claiming he took away the victim with the connivance of PW2 who wanted to hide him away from the father. It was his grandfather Otule Peter who reported him to the Local leaders which triggered his arrest and recovery of the victim.

In a letter with similar contents and bearing the same date, A4 (DW4) names the victim's mother as Akello Sarah and not Adoch Florence. The handwritings in both letters are apparently different implying they or one of them was authored by a third party. In a Charge and Caution statement recorded on the 28<sup>th</sup> January 2016, A4 (DW4) stated that he was told by his grandfather Otule Peter to get him a male child from Kampala upon which he contacted A2 and A3 who involved A1 in the deal. On the 8<sup>th</sup> September 2015, A4 (DW4) came to Kampala with his grandfather and received the victim from A1 in the presence of A2 and A3.

Otule Peter paid them 150,000/= and on reaching Apach he went to an unknown place where he stayed with the victim for two weeks. In January 2016 the grandfather advised A4 to report that the victim as an abandoned child upon which he was arrested and the boy relocated to PW2 by Police. This assertion in the Charge and Caution statement lends credence to the evidence of PW2 to the effect that the victim told him that “Jjaja had mistreated him and that by the time Police went to arrest her, she had disappeared. Jjaja was a known witch doctor and it is to her place that Otule Peter took the victim.

A1 denied knowing any of the co-accused including A4 (DW4) in this case. How then could A4 have thought about involving her in the case when they did not know each other. A2 told Court that A1 and A3 were always together at PW2's restaurant, why then did A1 deny knowing A3? If A4 (DW4) acted alone as he told Court, how come that he involved PW2 as an accomplice in hiding the boy from the father? What then prompted PW2 to report to Police a few hours after the victim's disappearance?

I am inclined to believe the evidence of PW3 and PW4 who saw A1 and A4 with the victim as they moved away. PW3's evidence is corroborated by that of PW4 in that they both saw a bottle of juice and a polythene bag which A1 left the house with but PW4 saw with A4 as they moved with the victim. A4(DW4)'s attempt to exonerate the other accused is not based on truthful evidence and I dismiss it on that ground. A1, A2, A3 and himself were joint offenders in the prosecution of a common purpose and each of them is deemed to have committed the offence under section 20 of the Penal Code Act.

The victim was found before the expiry of six months which renders Section 243(1)(a) of the Penal Code Act not proved. The Prosecution evidence however satisfactorily meets the ingredients of the minor and cognate offence of Kidnapping from lawful guardianship under section 240 of the Act.

Section 87 of the Trial on Indictments Act provides;

*“When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it.”*

I find the accused guilty of kidnapping from lawful guardianship contrary to section 240 and 242 of the Penal Code Act. I convict them accordingly.

Moses Kazibwe Kawumi

Judge

20<sup>th</sup> February 2018.