

**IN THE HIGH COURT OF UGANDA AT KUMI**

**CRIMINAL SESSION CASE NO. 125 OF 2015**

**UGANDA V OTIM PATRICK DAVID EKANYA**

**BEFORE HON. LADY JUSTICE H. WOLAYO**

**5 JUDGMENT**

The accused person Otim Patrick David Ekanya is indicted with kidnapping or detaining with intent to murder c/s 243 (1) (a) and (b) of the Penal Code Act. It is alleged the accused person in mid-April 2014 at Odotuno village Kanyum sub county in Kumi district by fraud kidnapped or detained Agwang Joyce Mary with intent that she may be murdered or may be  
10 disposed of as to be put in danger of being murdered or with knowledge that she will probably be murdered.

Prosecution was led by Engena George RSA while Erabu Timothy appeared for the accused on state brief.

Assessors were Okwii Francis and Asege Rose.

15 The state had a duty to prove beyond reasonable doubt two key ingredients. 1. That accused person by force or fraud detained Agwang Joyce with intention she may be murdered or had knowledge this would happen.

**Whether the accused detained Agwang Joyce by force or fraud with intention she may be murdered.**

20 To prove this ingredient, the state relied on six prosecution witnesses. According to PW 4 Acham Betty, Agwang Joyce was her sister Achom's daughter and therefore her niece. It was her evidence between February 2014 and April 2014, Agwang lived with her at her village in Osokoit along with Acham's husband Ogwal Simon Peter and children Ocoite John Michael, Agwang Harriet and Akurut Mary Goretti.

25 Acham described Agwang as a young woman who had a child although she Acham did not know the father of the child.

Acham testified that the reason Agwang lived with her during that period was for her to attend Abukor primary school which was nearby. That Agwang was staying with her to enable her access education was confirmed by PW2 Okiria Stevens, father of Agwang. Okiria's evidence is when Agwang separated with the accused after a dispute, she initially  
5 returned home to nurse her mother Achom and then went to live with Acham from February 2014 to March 2014. It was Okiria's evidence Agwang was 19 years old at the time.

It was Acham's evidence that one day in April 2014, Agwang on her return from school, informed Acham she her husband had reported to her that their child was sick and that therefore she, Agwang, was going to the husband's home to advise him to take the child to a  
10 place called 'university'.

According to Acham, at 5.am next morning, she picked her husband's bicycle and asked her son Ocoite Michael PW5 to accompany Agwang to her destination which was Agwang's husband's place but which Acham was not sure about. It was Acham's evidence that she has never seen Agwang again since that day.

15 Acham's evidence is on the day she left, she wore a skirt with flowers , wrapped a lessu over the blouse and wore open shoes.

Acham identified these items in court.

It was the prosecution case Acham's mother who is a sister to Acham asked her to let Agwang go home after exams to assist the mother and it was at this moment it dawned on  
20 Acham that Agwang had never reached home.

That Agwang left Acham's home in April 2014 for her husband's home is corroborated by the testimony of Ocoite Michael. Although this 13 year old did not know the name of the place he took and left Agwang, he positively identified the accused as Ekanya and as the person with him he left her. Describing Agwang as his cousin sister, he testified that in 2014,  
25 he left his home with Agwang at 5 a.m and arrived at the husband's place at 7 a.m. It was Ocoite's testimony the two found accused at home and he welcomed them. After exchanging greetings, Ocoite bid good bye to his sister Agwang and rode back home to return the bicycle to his father.

Ocoite testified that Agwang was dressed that day in a skirt with flowers and she had a lessu that belonged to his mother Acham. He confirmed he has never seen Agwang since then.

The description matched the items discovered by Det. Corporal Obal Samuel PW6 in 2016 when he and other police officers searched the homestead of the accused after being given  
5 information by one Bosco a brother to the accused.

It was Obal's evidence that on 5.4.2017, they dug up an open space in the cassava garden of the accused person and found an open shoe marked Pexh. 1 . They also searched an abandoned grass thatched house and found a brown skirt with flowers at the hem ( marked Pexh. 2) blue lessu with black patterns ( a piece of cloth of wrapping round a woman's  
10 body ) marked Pexh. 3.

It is these same items that were described and identified by Acham PW4 and Ocoite PW5 as the clothes Agwang wore the last time they saw her, which happened to be the day Ocoite left her with the accused in his home.

In their defense, DW3 Asiyo Lucy Phoebe the senior wife of accused suggested these clothes  
15 were hers and that they were picked when police came to their home to dig up some area when her husband was in custody. She claimed she was showed the clothes at the police station.

I disbelieve Asiyo's claim to the clothes exhibited in court because they were positively identified as Agwang's clothes by Acham PW4 and Ocoite PW4 who lived with Agwang  
20 shortly before she disappeared.

It was suggested by the defence in cross examination of the police officer that the evidence of discovery of these items was illegally obtained as Bosco was in their custody at the time.

While a statement obtained from a suspect is inadmissible if it is not under charge and caution, material evidence recovered as a result of that interaction at the police is admissible.  
25 **Section 29 of the Evidence Act** refers.

Other evidence which the defense sought to discredit is that of PW1 Okiror Emmanuel who was in prison with accused in 2016 on unrelated charges. It was the evidence of Okiror that while in prison, the two struck up a friendship and accused told him he had quarrelled with

his wife and her parents who then took her away. Okiror's evidence further is that accused told him he hit Agwang and buried her in the night at Omurang village Kanyum sub-county.

On his release from prison, he informed the mother of Agwang who in turn informed her husband Okiria PW2.

- 5 It was suggested by the defense in cross examination that the witness Okiror was a bought witness and therefore not credible.

Obviously, the fact that Okiror was in prison with the accused impacts on his credibility.

- Okiror's lack of credibility notwithstanding, upon receipt of this information, PW1 Okiria Steven, father of Agwang confirmed that Agwang was a wife to the accused after he paid  
10 three head of cattle. This was after impregnating her.

- It was Okiria's evidence that the two lived as husband and wife in Omurang until April 2014 when him and his wife Achom visited them to resolve a marital conflict only for the accused to injure Achom which made them return home with their daughter Agwang. It was Okiria's testimony the two lived separately from February 2014 to March 2014 during which time,  
15 Agwang lived with Acham PW4 in Abukol village until April 2014 when Agwang disappeared.

It was Okiria's evidence that subsequently, Acham came to inform him that Agwang had returned to her husband upon which Okiria visited the home of accused four times but he never found him at home. He also visited Acham's home but did not find her.

- 20 It was his evidence that he believed the accused was hiding his daughter until one day, he met the accused who attacked him for following his daughter and thereafter made a report at police in May 2014.

- It was suggested by the defense in cross examination of Okiria that it is Okiria who removed Agwang from her matrimonial home and that therefore Okiria should explain her  
25 whereabouts.

While it is true Okiria left with Agwang when he visited the daughter's matrimonial home and a fight erupted between Achom mother of Agwang and her in law the accused person, there is credible evidence by Acham PW4 that Agwang returned to the home of the accused in April 2014.

In his defence, the accused made a sworn statement in which he denied detaining Agwang and claimed she was taken away in 2014 by her parents after a marital dispute. It was his evidence he paid three head of cattle, three goats and 280,000/ as dowry for her. He also testified their child was taken that day by Agwang as he was only four months old, a fact confirmed by Okiria PW2 who was recalled by court to clarify on whereabouts of the child. Okiria's evidence is that when Agwang disappeared, he returned the child to the accused person. Yet DW3 Asiyo testified the child is with the Okirias.

### **Detaining by force or fraud**

It was the prosecution case the detention of Agwang was by fraud and here the state relied on the testimony of Acham to whom Agwang narrated the reason for her wanting to go to the home of accused person.

Agwang's statement to Acham is ordinarily in the category of hearsay evidence but which is admissible under the exceptions to hearsay rule in section 30(a) of the Evidence Act. That section prescribes that oral statements made by a person who is dead or cannot be found is relevant where the statement relates to the cause of his or her death in cases when the cause of that person's death comes into question even where that person was not in expectation of death. Although Agwang's alleged statement is not a dying declaration, it is unsafe to rely on it in the absence of corroborative evidence.

After getting confirmation from Okiria PW2 that the child (Okiror Amos) was returned to the home of accused after Agwang disappeared, it follows that the Agwang's statement to Acham as to the reason for returning to her husband's home has not been conclusively proved.

Whatever her reason for returning to the home of the accused in April 2014, it is evident from the testimonies of Acham PW4 and Ocoite PW4, Agwang was last seen in the company of the accused at his home in Omurang from where the clothes she wore when she was last seen by these two witnesses were recovered by Detective Obal.

The evidence of Acham who had temporary custody of Agwang that she later told her she was going to the home of her husband, the lessu and skirt she wore that day which items were recovered in the homestead of the accused person constitute circumstantial evidence pointing to the guilt of the accused in her disappearance.

While the evidence of Ocoite who knew the accused person prior to leaving Agwang in his company on the day she was last seen is direct evidence pointing to the guilt of the accused person.

From the day she returned to the home of accused, she hasn't been seen. By inference, she  
5 was forcibly detained with intent to murder.

The defense put up a spirited defense implicating the Okirias in the disappearance of their daughter claiming she was last in their custody when they took him away. In fact the accused in his defense admitted the Okirias returned his wife to school without consulting him, a fact which seems to have disturbed him and therefore a strong motive for the detention and  
10 eventual disposal of Agwang. While motive does not prove mens rea, it is a relevant fact in establishing guilt of an accused person.

The prosecution evidence positively identifies the accused as the last person to be seen with Agwang in spite of his denial and the denial of his wife DW3 Asiyo.

I am convinced beyond reasonable doubt that the accused by force detained Agwang with the  
15 intention to murder her.

#### **Whether she is presumed dead.**

Under section 243 ( 2 ) , if a person has not been heard of for six months or more after the kidnap or detention, the accused shall be presumed to have had an intention to murder her or placed her in a danger of being murdered.

20 This legal presumption was discussed by the Supreme Court in a recent case of *Nalongo Naziwa v Uganda, Criminal Appeal No. 35 of 2014* where the appellant was the last person left with a young baby and after she had persuaded the mother of the baby that she was there to get her a job only to disappear with the baby with whom she had been left briefly.

Counsel for the appellant in that case had argued that the legal presumption of guilt is  
25 inconsistent with the constitutional presumption of innocence but the Supreme Court held it is a rebuttable presumption and becomes a fact when the accused does not offer a plausible explanation for the whereabouts of the person kidnapped or detained.

That Agwang has not been seen since April 2014 when she was left at the home of accused and in his company, is evidence that she was murdered by the accused person and is therefore

presumed dead. The accused did not offer a plausible explanation for her disappearance but sought to pin it on her own parents, an attempt that was unsuccessful as the accused was placed as the last person to be in her company moreover at his own home. In all, I am in agreement with the two assessors the state has proved beyond reasonable doubt the offence  
5 indicted.

Accused person is convicted of detaining a person against his or her will with intent to murder c/s 243 (1) (a) and (b) of the Penal Code Act.

Before I take leave of this case, I want to direct the district probation officer Kumi to ascertain the whereabouts and safety of the child of the accused and Agwang, one Okiror  
10 Amos and make a report to the grade one magistrate, Kumi within two weeks from today.

**DATED AT KUMI THIS 1<sup>ST</sup> DAY OF MARCH 2018**

**HON. LADY JUSTICE H. WOLAYO**

15 **Mitigation:**

**State:** Agwang has never been seen, a beautiful young woman who would have a useful citizen of this country. Under the sentencing guidelines, there are aggravating factors the same should be addressed. Apart from the body never been seen and the deceased not being given a befitting burial, court should consider whether there was an attempt to conceal or  
20 destroy evidence is an aggravating factor. The convict was unhappy Agwang was returned to school which is very retrogressive. Impact of the crime on the relatives, they are traumatised. I pray for a maximum sentence.

**Erabu:** convict has spent four years on remand, he has seven children including Amos, they need emotional and financial support, and wrongs of the convict should not be suffered by the  
25 children as a result of convict's action. I pray for the appropriate sentence to enable him re - join his family.

**Accused:** I have seven children, three suffer from sickle cells, and I am a sickler I have been in prison for four years.

## **Sentence**

This is one of those cases which falls squarely in the sentencing guidelines for the death penalty. Agwang was a young girl who was just 19 years and had been given leave of life to return to school, a move that displeased the accused so much that he planned her

5 disappearance and has not been seen since. As submitted by the state, concealment of the remains of Agwang is an aggravating factor.

Agwang was very young compared to the accused who is obviously a grown well -built man. She was defenceless when confronted by the accused.

The conduct of the accused is one of a person who acted with the attitude that he had power  
10 and control over Agwang because he had paid cattle, goats and cash for her and therefore could do as he pleased. She ceased to be a human being in his eyes and became less human and therefore disposable.

Accused person is sentenced to death. He shall suffer death in the manner prescribed by law.

**LADY JUSTICE H. WOLAYO**

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