

The background to these charges is that Swaira Nakaye, a five month old baby was the daughter of Chelimo Susan. They lived in Kiwologoma Village located in Kiwologoma village in Kira found in Wakiso district.

On the morning of the 27th of January 2018, Chelimo left her daughter at home with other children and went to pick mosquito nets which were being distributed. On her return she found that her daughter was missing. She was told that the child had been taken by one Nantongo Prossy.

Natongo is a grandchild of Chelimo's neighbour called Nabbanja whose son is Sentongo Lawrence (A1). Nantongo would sometimes help out looking after the baby. That Sentongo spent a lot of time at his mother's home and Chelimo knew him well.

That Nantongo was directed by her uncle, Sentongo Lawrence, the 1st accused, to take the baby to Wabikokoma village where Sentongo had a home. The child was handed over to A2, Namuganza Deziranta who is Sentongo's wife and another person. The two and others administered herbs and placed the child on a spear killing her. They then dumped the baby in a guava plantation next to the home of Akello Franca, the grandmother of Nantongo Prossy.

Meanwhile Chelimo had been looking for the baby and had traced her way to Wabikokoma up to the home of the accused persons. She inquired from Namuganza Deziranta about the whereabouts of the bay but was told she had not been seen there. Chelimo was directed to home of Nantongo's parents but still failed to find the baby.

The next morning she received a phone call that the body of the baby had been discovered in a guava plantation in Wabikokoma. These accused persons together with Nantongo Prossy were arrested and charged with these offences. Eventually Nantongo was used as a witness.

The accused persons denied the charges.

In his defence, A 1, Sentongo Lawrence, stated that Nantongo Prossy was his brother, Senkanjako's daughter, and her mother was called Betty Akoth. Sekanjako and Akoth

are separated. That he has a very bitter relationship with Akoth because he has always insisted that her children should go to school which she resists. That because he was the one always at the forefront of reporting the matter to the authorities, and of returning the children to school when she got them out, Akoth hates him.

That on the 27th of January 2018 he was at home in Wabikokoma. That he went to his garden at about 8.00 am and retired at midday. It was while he was in the garden that he received a call that Nantongo had disappeared with a baby. That he then went and reported the matter first to the chairman and then to the Police.

It is Sentongo's case that it was Nantongo's mother who told Nantongo to give false testimony about A1. That even when the mother of the child came looking for her, he was at home.

Namuganza Deziranta is A2 and denies the charges. She states that on the 27th of January 2018 she was at home with her husband A1. He had earlier gone to the garden that morning but returned home at about midday. He informed her that Nantongo had disappeared with child. That A1 left home at 3.00 pm to go and report the matter to the Police.

At about 5.00 pm later that same day, the child's mother came searching for her baby. Together, they all went to the home Akello Franca, Nantongo's grandmother but were not well received. They were told Nantongo had not been to the home.

The next morning the body of the baby was found in the plantation at Akello Franca's home. The police came and took pictures of the body. Nantongo had been hidden by her grandmother in the house which was locked with a padlock. The lock was broken and Nantongo removed. Later A1 and A2 together with Akello Franca and Akoth Betty were arrested. While in detention, Akello Franca told A2 that she had finally succeeded in targeting her A2's family, something she had longed to do for many years.

Eventually they were all transferred to Kira Police. Akello Franca and Akoth were eventually released while the others were produced before Kira Court. That Nantongo told A2 that it was her mother who told her to tell lies about A1 and A2.

In criminal cases the burden of proof lies throughout on the prosecution (see **Okethi Okale V R 1965 E.A 555**). That burden will not shift to the accused person except in certain statutory cases not applicable here. The prosecution must prove each essential element of the offence to a standard beyond a reasonable doubt.

The first count both accused persons are charged with is murder contrary to sections 188 and 189 of **the Penal Code Act**. The elements for this offence are:

- i. Death of a human being**
- ii. Which was caused unlawfully**
- iii. With malice aforethought.**
- iv. Participation of the accused persons**

Determination

i. Death of a human being

One Swaira Nakaye was a child age 5 months. Her mother is Chelimo Susan, PW 3. She stated that her baby is dead. All defence and prosecution witnesses state the baby was dead. A2, PW 1, PW 2, PW 3 testified that they saw the dead body.

This Court has a Post Mortem report on record together with photographs of the deceased baby child marked as PE 1 and PE 4 respectively.

It is the finding that Swiara Nakaye is dead and the first element is proved.

ii. Which was caused unlawfully

It was held in the case of **Gusambizi s/o Wesonga & others V R (1948) 15 EACA 63** that a homicide unless accidental, will always be unlawful except if it is committed in circumstances which make it excusable.

A homicide is the killing of one human being by another. Here the death of Swaira was neither accidental nor lawful. I will return to this element after evaluating the evidence on the next ingredient.

iii. With malice aforethought

The law provides for malice aforethought in S.191 of **The Penal Code Act** where it is stated that malice aforethought is inferred from evidence showing a positive intention to cause death.

The superior courts have guided that malice aforethought is not easily proved by direct evidence but can be inferred from the type of weapon used; the nature of the injuries inflicted; the part of the body affected; and the conduct of the attacker (see **Amisi Katalikawe & 2 ors V Ug S.C.C.A 17/94** unreported).

In this case the evidence shows that herbs were administered to the deceased. The mother of the baby said it had six cuts. Three on either side of the neck. The baby had been alive and well by the time it was taken to Wabikokoma. The circumstances show that it was the herbs given and the cuts that are responsible for causing death. The body of the baby was dumped in a garden. In all there it appears this was a homicide, and there was a positive intention to cause the death of the baby.

This court finds that the 2nd and 3rd element of the offence have been established.

iv. Participation of the accused persons

Both accused persons have denied the commission of this offence.

With regard to A1, Sentongo Lawrence, he told the court of the long standing grudge between him and the mother the PW 1, Nantongo Prossy. That one Akoth Betty is Nantongo's mother. She was the estranged wife of the Sekanjako, a brother of the accused person. Betty Akoth was said to be opposed to her children going to school and it was A1 who spearheaded the family's efforts to return Sekanjako's children to school.

This court will therefore carefully evaluate the evidence on record mindful that any evidence of proved grudge may be a motive to give false evidence and taint the prosecution case with deliberate untruths. It therefore lowers the probative value of the testimony received.

It should also be noted that both accused persons set up an alibi. By setting up an alibi, they did not assume any duty of proving it. The onus remained on the Prosecution to prove to the required standard that the accused was at the scene of crime. (See: **Moses Bogere and Anor Vs Uganda S.C.C.A No. 001 of 1997**).

In this case Sentongo, A 1, told Court that he spent the whole of the 27th of January 2018 at his home in Wabikokoma.

On the other hand, the prosecution relies on PW 1 – Nantongo Prossy who was between 14 and 15 years of age in 2018 when this offence was committed. She stated that A1 was her uncle – a brother of her father. As she testified Nantongo struck me as an unsophisticated person. She appeared frightened throughout her testimony. It was her evidence that on the 27th of January 2018 she was in Kiwologoma at her grandmother - Nabbanjja's home. Kiwologoma is in Wakiso district. On that date the mother of Swaira Nakaye had gone to get mosquito nets. Ordinarily, Nantongo used to look after the baby and was paid 5,000/- for it.

She added that on that day A1 gave her money as transport and told her to take the deceased baby Swaira to Wabikokoma. Both A1 and PW 1 come from Wabikokoma which is Mukono district.

That she got a taxi to Nagalama. That she took the child to Sentongo's home and handed her to Namuganza. That the string with the child's waist beads was removed by Sentongo and wrapped around the neck of the witness. This evidence largely tallies with what PW 1 put in her statement to D/Cpl Kayongo, PW 2, who took the first information after the report of death and is the officer who carried out inquiries.

PW 1 went on to state that there was another person present, Kabuusu's wife who works in a shrine. This woman got herbs which were brown in colour and rubbed or rolled them in her hands before administering them to the baby. The baby was then put on a spear and she died. That they attempted to hand back the baby to PW 1 but when she realised the baby was dead she got scared and run away. At some point Sentongo started running

after the PW1 who ran and hid at her mother's home. That the body of the baby was dumped in the guava plantation near the home of PW 1's grandmother.

This court notes that on occasion the evidence of the witness appeared disjointed. Counsel for the defence submitted that the witness was contradictory and her evidence should be rejected as lies. I agree with the submission of Counsel that gross or major inconsistencies should lead to evidence being rejected.

The particular contradictions pointed out are whether Nantongo travelled alone in the taxi to Naggalama or was with Sentongo. Whether the baby was taken to Nantongo's home or to Sentongo's home.

In terms of inconsistencies, the deciding factor in law is whether they were such major contradictions as to indicate that the appellant deliberately told lies to the court (see **Shokatali Abdulla Dhalla vs Sadrudin Meralli Supreme Court Civil Appeal No. 32 of 1994**)

On the whole, I did not get the impression that PW 1 was deliberately telling this court lies. In my view she was traumatised by the events. She was only 14 years at the time this offence was committed. It is also pertinent that she was testifying after 4 years and lapse of time may account for some discrepancy. The contradictions pointed out do not go to the root of this matter which is who instructed PW 1 to take the baby to Wabikokoma and who killed the baby? That is, who participated in the homicide?

I have also considered the evidence of grudge stated to be the motive behind the charges preferred. In support of this, A1 called DW2, Sekanjako Vincent who he said was the father of Prossy. This witness was obviously an imposter and a liar. He was hesitant, evasive and inaudible throughout his testimony. He did not know the first name of PW 1 who was supposed to be his daughter. He could not state the name of Nantongo's mother (his estranged wife) or the year they separated. He did not know where Sentongo stays. He stated Nantongo had dropped out of school but could not say when. In all I reject DW 2 as a liar.

However the grudge was said to be between the mother of PW 1 and DW 1. Upon review of the evidence on record, I did not see any circumstances showing that the evidence of PW 1 was fabricated or untruthful or motivated by grudge. The question whether she was told what to say in Court was put to her and she denied. I believed her.

In sum it is my conclusion that A1 instructed PW 1 to take the deceased baby to Wabikokoma and there the child was taken to his house and killed. He therefore participated in killing Swaira Nakaye.

In the case of A 2 it was her evidence that she did not participate in the commission of these crimes. That there was a bitter grudge between her family and Akello Franca the grandmother of the PW 1. That she was home with her husband who received the news of the disappearance of Nantongo with a baby while he was out in the field cultivating. That when the mother of the baby came to her home at around 5.00 pm she helped to try to trace for Nantongo. That when she was later arrested and detained with Akello Franca, this Franca told her that she was the one who had arranged for all their arrest.

The submission on behalf of A2 is that PW 1 stated that she does not know A2. That A2 is not mentioned anywhere as having participated in the offence and lastly the body of the child was found in the guava plantation of Akello Franca. A2 is therefore innocent.

I have contrasted this with the prosecution evidence. For example every time Nantongo was asked if she knew Namuganza or A2 she would first of all glance at A2 before she said 'No'. Namuganza on the other hand knew Nantongo well and testified extensively about her. They also spent several days in detention together. They are also inlaws from the same village and live close to each other. A 1 states that A 2 is his wife and that he was an Uncle of PW1. It was therefore not true that PW 1 did not know A2.

It is also true that PW 1 stated that when she got to Wabikokoma, she handed the baby to Namuganza, the wife of Sentongo in their home. This was before Kabuusu killed the child. The people in house when the child was killed were Sentongo, Namuganza, Mrs Kabuusu and her siblings.

This evidence is corroborated by the testimony of the investigating officer, PW 2, who obtained a statement from Nantongo immediately after the incident. This former statement of the witness is relevant under Section 156 of **the Evidence Act**,

In order to corroborate the testimony of a witness, any former statement made by the witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Nantongo told PW 2 that her uncle gave her money to take the baby to Wabikokoma. There the child was taken from her by Namuganza and taken to the bedroom of Sentongo. At night Sentongo chased Nantongo out of the room and next morning Nantongo saw the child dead in the guava garden.

It is therefore not true that Nantongo did not mention Namuganza in her testimony. When all the evidence is evaluated I do not see anything implying a trumped up charge or evidence fabricated by PW 1 against Namuganza. The prosecution evidence was not discredited or watered down in any way to show motivation by grudge.

This court find that A2 just like A 1 participated in the commission of the offence of murder.

The second Count was Aggravated Trafficking in Persons

The elements in this offence are:

- a. The victim was a child
- b. Who was moved or transported from one place to another
- c. By means of abduction or deception
- d. For the purpose of exploitation
- e. Participation of the accused person

Determination

a. The victim was a child

The child here was five months of age. The mother stated the age of the child. From resolution of the element on death of a human being above, I found that the deceased was a child aged 5 months old.

b. Who was moved or transported from one place to another

The child here was moved from her home in Kiwologoma to Wabikokoma. The mother of the child testified that when she found the child missing when she returned from the collection of mosquito nets. She then tried to trace for her by moving to Kiwologoma to Gayaza and then to Naggalama and Wabikokoma. All in vain. The body of the child was found in Wabikokoma. PW 1 stated she transported the child on her Uncle's instructions.

The above evidence proves the victim was moved or transported.

c. By means of abduction or deception

Abduction is defined by the 9th Edition of **Black's Law Dictionary** as the act of leading someone away by force or fraudulent persuasion. The plain literal definition of abduction according to the Merriam Webster online dictionary includes to seize and take away (a person).

In this case it has been shown that the child was taken away from home without the consent of the mother. I find that the element of abduction or transfer of the child is proved.

d. For the purpose of exploitation

Exploitation is defined in Section 2 of **the Prevention of Trafficking in Persons Act**. It includes the use of the victim for human sacrifice, witchcraft or rituals. PW 1 stated that one Mrs Kabusu who works in a shrine took the child from her and rubbed herbs in her hands. She then administered the herbs on the child before she place the child on a spear and killed her. The body was found next day in a guava plantation. The mother of the baby also stated that there were six cuts on the neck of the child. Three on each side.

The description of the means by which the child met its death fits the definition of exploitation. I find that this element has also been proved.

e. Participation of the accused persons

I have already determined that both accused persons were involved in the commission of this offence.

Both assessors have advised this Court to find the accused persons guilty on both counts.

In the result, and in agreement with the assessors, I find both Sentongo Lawrence and Namuganza Deziranta guilty of the offences of:

1. Murder contrary to Sections 188 and 189 of the **Penal Code Act.**
2. Aggravated Trafficking in Persons contrary to Section 3 (1) (a) and 4 (a) (j) of the **Prevention of Trafficking in Person Act, 2009**

and hereby convict both of them.

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Michael Elubu

Judge

1.5.2022