

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION CASE NO.321 OF 2019

UGANDA-----PROSECUTION

VERSUS

1. KIRABO FAVOUR

2. SSERUWAGI MUSA-----ACCUSED

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

The accused persons were charged with the offence of Kidnapping with intent to procure a ransom contrary to section 243(1)(c) of the Penal Code Act.

It is alleged that the accused persons on the 28th January, 2018 at Ntebetebe Zone, Bweyogerere, Kira Municipality in Wakiso District with intent to procure a ransom or benefit for the liberation of Nabukenya Favour from the danger of being murdered kidnapped the said Nabukenya Favour.

Initially, there were four accused persons who were charged with this offence, however Nkoyoyo Eric who was A3 was convicted on his own plea of guilty.

The prosecution has the burden of proving the case against each of the accused persons beyond reasonable doubt. This burden does not shift to

the accused; the accused is only convicted on the strength of the prosecution case. **See: Ssekitoleko V Uganda [1967] EA 531**

For an accused person 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.
3. Intention of gaining a ransom or reward.
4. The accused participated in commission of the act. **See: Uganda v Namubiru & Anor Criminal Session 461 of 2017 High Court Criminal Division**

The prosecution called five witnesses while the defense only adduced the evidence of the accused persons

Unlawful taking of the victim

To prove that the victim was unlawfully taken, the prosecution called PW1 Kasozi Moses, the father to the victim testified that he received a phone call from his wife informing him that their daughter Nabukenya Favor was missing.

PW2, Namugabi Joyce also told court that the victim was taken from Fuelex fuel station where she had gone to play with one of her friends a child called Nicholas. It was also her evidence that she later reported the disappearance to Police.

The taking away must be against the will of the victim and in case of a child, it is without authority of the parent, guardian or other person in lawful custody of the child. This involuntariness is therefore the very essence of the crime of kidnapping. The minor was not in any position to consent to her taking and PW2 being the person who was taking care of her did not authorize her taking. I find that the prosecution proved this element beyond reasonable doubt.

The taking was by the use of force, fraud, or coercion.

The elements of coercion or deception are vital in proving the crime of kidnapping. The coercion may also be inferred from the fact that the victim did not consent to her taking. The fact that the victim may have initially consented to some conduct does not necessarily prevent the establishment of the lack of consent element if his or her mind changes. That is essential to note, similarly, if the victim initially consented but now wants to leave and is prohibited, that can be considered kidnapping.

In this case, it was the evidence of PW2 that at the time the child was taken, she had asked to go play with one of her friends. That the friend who was playing with Nabukenya Favor later informed her that she had been taken by a tall woman who had promised to buy her ice cream and sweets. It is with no doubt that the this offer for ice cream and sweets enticed the victim to go with her alleged kidnappers without knowing that she was being kidnapped. Considering that this a minor who was innocent, gullible she could therefore have been easily be taken advantage of. This deception played out perfectly on the mind of the minor moreover one

who was not in position to make decisions on her own. Where it is alleged that a child has been kidnapped, it is the absence of the consent of that child that is material. I therefore find that this ingredient was also proved beyond reasonable doubt.

Intention of gaining a ransom or reward

The purpose or motive behind kidnapping includes gaining a ransom or reward and as such the prosecution must prove that the motive of the accused persons is to gain a ransom or reward.

The prosecution called PW1 who told court that his wife received a phone call from someone who was asking for 60million shillings in order to return the child. PW2 also told court that while at the police station in Bweyogerere, she received a phone call from someone asking for 60million. She also testified that latter the kidnapper demanded for shs. 100,000/= to buy food for the victim. It was her evidence that the person threatened to kill the child if this money was not availed. This evidence points to the motive of gaining a ransom of 60million shillings.

The threats made to PW2 of the consequence of failure to avail this money in time to secure the release of the victim are therefore sufficient to prove this element. There is no requirement to prove that this money was indeed sent to the alleged kidnappers. I therefore find that the motive to gain a ransom or reward was proved beyond reasonable doubt.

The accused participated in commission of the act

Lastly it must be proved that the accused persons participated in the kidnap of the victim. There should be credible direct or circumstantial evidence implicating the accused as a perpetrator of the 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. See: **Uganda v Namubiru & Anor Criminal Session 461 of 2017 High Court Criminal Division**

In her defense, DW1 denied knowledge of the kidnap of the victim, she testified that on one evening Eric Nkoyoyo came with a child at her place. She told court that her then boyfriend was aware of this.

It was also her evidence that Eric Nkoyoyo informed her that the child was only staying for one night and later be taken to her grandmother's place. She admitted at the time the police stormed her place, the child was in her custody. All this evidence was recorded in the charge and caution statement recorded at police

On the part of DW2, it was his evidence that Eric Nkoyoyo told him that his wife had abandoned a child with him and needed a place to stay

He also testified that the time the victim was brought at his place; it was A2 who was at home and that when he returned he also found Eric at home.

What is clear from the defense testimony is that it is Eric Nkoyoyo who brought the victim to the home where A1 and A2 were staying. This is clear from the charge and caution statement recorded at police.

It also evident from the testimony of A1 and A2 that they had no idea that Eric Nkoyoyo had kidnapped the victim. There was no evidence to show that the telephone number that has consistently been calling to ask for the ransom belonged to either A1 or A2. A1 unknowingly took in the victim on the request of Eric Nkoyoyo. Her actions were honest in the sense there was no way she would know that victim had been kidnapped. It can be said that there was no motive on her part as indicated in her charge and caution statement. Similarly, A2 had no idea that the victim who brought to their place had been kidnapped.

Section 9 (1) of the Penal Code Act provides that;

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he or she believed to exist.

Erick Nkoyoyo took advantage of A1 and A2, misrepresented to them that the victim was his child was seeking refuge from their home. This evidence was not rebutted by the prosecution. A1 and A2 were therefore acting in an honest belief that the victim belonged to Eric Nkoyoyo and as such I don't find them culpable in terms of participation in the commission of this offence.

It is trite law that a conviction depends on the strength of the prosecution case and not upon the weakness of the defense. And it's that for the above reasons that I find that the prosecution has therefore failed to prove that A1 and A2 participated in the kidnap of the victim. They are accordingly acquitted and should be set free unless being held on other lawful charges.

I so order.

JUDGE

23/02/2023