

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

**CORAM: KATUREEBE, CJ; ARACH-AMOKO; OPIO-AWERI; MWONDHA;
TIBATEMWA-EKIRIKUBINZA; JJSC.**

CRIMINAL APPEAL NO. 35 OF 2014

NALONGO NAZIWA JOSEPHINE :::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::: RESPONDENT

JUDGMENT OF THE COURT

This is an appeal from the decision of the Court of Appeal which upheld the conviction of kidnap with intent to murder contrary to section 243 (1)(a) and (b) of the Penal Code Act and the sentence of 18 years imprisonment against the appellant.

A brief background of this case is that the appellant met one Nanyonga Masitula, the mother to the victim, in a church on the 26th of March 2006. The victim, a one Peter Sematimba, who was three months old at the time, was being carried by his said mother when the appellant approached her with intentions of getting to know her. After church, the appellant went to Nanyonga Masitula's home and offered her a job as a worker in her shop. The next day, the two ladies proceeded to a building known as Cooper Complex in Kampala.

The appellant told Masitula that she was going to find her husband who would show Masitula around the premises. The appellant offered to carry the baby as they proceeded to go look for her husband. She then disappeared with the baby, who has never been seen again to this day. Masitula reported the matter to police. One month after the disappearance of the victim, Masitula saw the appellant at a place where the former had gone for counselling. She reported to the nearby police and the appellant was arrested. The appellant was later charged with the offence of kidnap with intent to murder. The appellant denied the allegations.

At the trial in the High Court, prosecution proved its case and the trial Judge found the appellant guilty and convicted her with the offence of kidnap with intent to murder contrary to section 243(1)(a) and (2) of the Penal Code Act. The Court went ahead to sentence the appellant to 18 years imprisonment.

Dissatisfied with the outcome of the judgment and orders of the trial Judge, the appellant appealed to the Court of Appeal against both conviction and sentence. The appellant raised four grounds as follows:

- 1. That the learned trial judge erred in law and fact when he relied on the evidence of a single identifying witness to convict the appellant.**
- 2. That the learned trial judge erred in law and fact when he convicted the appellant basing only on circumstantial evidence which was weak to prove the case beyond reasonable doubt.**
- 3. That the trial judge erred in law and fact when he disregarded the defence of alibi as raised by the appellant.**
- 4. And in the alternative and without prejudice to the foregoing, the learned trial judge erred in law when he sentenced the appellant to 18 years imprisonment which is harsh and excessive.**

The appellant prayed that the appeal be allowed and the judgement and sentence be set aside.

During the hearing of the appeal before the Court of Appeal, counsel for the appellant abandoned the second and third grounds and sought leave to amend the fourth ground. That left ground 1 and the amended ground 4 which read as follows:

1. That the learned trial Judge erred in law and fact when he failed to evaluate the evidence on record thereby reaching a wrong conclusion.
2. That the learned trial Judge imposed an excessive sentence of 18 years on the appellant.

The learned justices of Appeal found no merit in both grounds of appeal, dismissed the appeal and confirmed the conviction and sentence.

Dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Supreme Court on the following grounds:

- 1. The legal presumption under section 243(2) of the Penal Code Act that where a person so kidnapped or detained is thereafter not seen or heard of within a period of six months or more, the accused shall be presumed to have had the intention and knowledge stipulated in subsection 243(1) (a) and (b) of the Penal Code Act is unconstitutional, illegal and draconian.**
- 2. A sentence or punishment handed to the accused based on such an illegal, unconstitutional or draconian legal presumption is illegal and should be set aside.**

The appellant prayed that this appeal be allowed, the conviction be quashed, and/ or in the alternative, the sentence be set aside and substituted with another according to the law.

Before we proceed to consider the grounds of appeal on merit, we note that the issues raised in the grounds of appeal before this court do not emanate from any of the proceedings in the lower courts. They raise entirely new and fresh grounds. The law is that the grounds being framed on a memorandum of appeal should emanate from the decision and proceedings of the lower court. This point was underscored in **Ms Fang Min v Belex Tours and Travel Limited SCCA No. 06 of 2013** where the Supreme Court held thus:

“... on appeal, matters that were not raised and decided on in the trial court cannot be brought up as fresh matters. The Court would be wrong to base its decision on such matters that were not raised as issues and determined by the trial Court.”

More particularly so, in a second appeal such as the instant one, an appellant is not at liberty to raise matters that were not raised and considered by the trial court and the first appellate court. Accordingly this appeal is incompetent and should be dismissed.

Be that it may, we think we should make comment on the pleadings and argument of counsel for the appellant in light of the peculiar circumstances of this case. This case arises out of a kidnap of a baby who has since not been seen again. This court cannot but be mindful of the many reported cases of little children. Indeed some of these cases have found their way to the courts of law. It is in this regard that we deem it necessary to comment on the issues and arguments raised by counsel.

On ground one, counsel for the appellant argued that Section 243(2) of the Penal Code Act has no legal or factual basis. He argued that the presumption is narrow in so far as proving intention is concerned and cannot be a basis of proving an accused person's specific intent. Counsel submitted that prosecution should prove its case as a matter of fact and not a presumption of law. Counsel prayed that the legal presumption be declared illegal, unconstitutional and draconian.

In reply, counsel for the respondent submitted that the evidence by the prosecution clearly showed that PW1 the mother of the child was, by fraud, permanently deprived of access to her son and that the said victim has not been found since the 26th March 2006 to date. Counsel for the respondent further submitted that section 243 (2) of the Penal Code Act is still the law and its constitutionality has never been challenged before the Constitutional Court which has the mandate to handle constitutional matters as a court of original jurisdiction. Counsel prayed to court to find no merit in the appellant's appeal.

It is true as submitted by counsel for the respondent that a challenge to the constitutionality of the legal presumption under section 243(2) of the Penal Code Act should have been brought before the constitutional court which has original jurisdiction in matters of constitutional interpretation. As such, the allegations regarding the constitutionality of the legal presumption are before the wrong forum and cannot be investigated and determined by this Court. Indeed had counsel for the appellant raised this matter in the Court of Appeal that Court may have seen fit to constitute a Constitutional Court to determine the point. But he did not do so.

This Court will, however, comment on whether the said legal presumption is illegal and/ or draconian in the context of the situation as outlined above. Presumptions are part of the law. Under the [law](#) of [evidence](#), a **presumption** of a particular fact can be made without the aid of proof in some situations. According to **Black's Law Dictionary, 9th Edition, at Page 1304**, a presumption is defined as **a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of proof or persuasion to the opposing party, who can then attempt to overcome the presumption.**

Under common law, the [presumption of death](#) was one of the recognised presumptions. Black's Law Dictionary defines the presumption of death as "*a presumption that arises on the unexpected disappearance and continued absence of a person for an expected period, commonly seven years*". Indeed under common law, a person who was absent for seven years without explanation and "gone to parts unknown" was presumed dead. However, the time period it takes for the presumption to arise has always been modified by statute. See **Prudential Insurance Comp. v. Moore, 197 Ind. 50, 149 N.E. 718 (Ind. 1925) (Indiana Supreme Court)**.

Under Article 28 (3) (a) of the Constitution, a person charged with a criminal offence is presumed innocent until proved guilty or until that person pleads guilty. The onus is on the prosecution to prove that the accused person committed the alleged offence; and the standard is proof beyond reasonable doubt.

The legal presumption under section 243(2) of the Penal Code Act, is that where a person so kidnapped or detained is thereafter not seen or heard of within a period of six months or more, the accused shall be presumed to have had the intention and knowledge stipulated in section 243 (1) (a) and (b) of the Penal Code Act, namely an intent that such person may be murdered or may be so disposed of as to be put in danger of being murdered; and knowledge that such person will probably be murdered.

According to the above provision, once the prosecution has proved to the required standard the fact that the accused kidnapped the victim, and there is no explanation as to the victim's whereabouts, then it is only legitimate that the accused is required to explain the victim's whereabouts. If the accused is unable to give such explanation, and the victim remains unseen or unheard of for a period of six months or more, then it is equally legitimate that the accused is deemed to have knowledge of what must have happened to the victim. It would further be legitimate to impute intent upon the accused person as to what must have occurred to the victim, that is to say, that the accused intended the natural consequences of what happened to the victim. In our view, that is the basis of this legal presumption and we find nothing illegal or draconian about it.

Counsel for the appellant in his submissions stated that this legal presumption has no legal or factual basis. He argued that the appellant could actually have had other relatively good reasons for kidnapping a person such as raising them as their own or providing a better

future. If at all that were true, then the victim would have been seen or his whereabouts would have been explained and, as such, the presumption would have been rebutted. That actually is the essence of presumptions and it is what makes them reasonable and lawful.

This raises the question: where a person is charged with kidnap with intention to murder, on who does the burden of rebutting the presumption of death fall? Counsel for the appellant appears to provide an answer by his argument that the appellant could have good reasons for kidnapping the child. If the appellant has such knowledge, then she has a duty to rebut the presumption of death. She implicitly admits the kidnapping but refuses to disclose the whereabouts of the kidnapped child. She should have shown with evidence that the child is not only alive but is being looked after better.

We recognise the all-important position of the Constitution with regard to the presumption of innocence of an accused person. Article 28 (3) (a) of the Constitution states:

“Every person who is charged with a criminal offence shall –

a) be presumed to be innocent until proved guilty or until that person has pleaded guilty.”

However, the law may require an accused person to prove certain facts within his peculiar knowledge. This would not be inconsistent with the presumption of innocence and the burden of the prosecution to prove a case beyond reasonable doubt. Article 28 (4) (a) states thus:

“Nothing done under the authority of any law shall be held to be inconsistent with –

a) clause (3) (a) of this article, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts.”

This provision has to be read together with Section 105 of the Evidence Act with regard to the burden of proving that the accused’s case is within exceptions and facts especially within the accused’s knowledge.

In our opinion, the prosecution duly proved beyond reasonable doubt that the accused kidnapped the child who has never been seen again. Reliance on section 243(2) of the Penal Code Act places no further burden on the prosecution to prove the intention of the accused when she committed the offence. By that provision, the accused is presumed to have had the desired intention and knowledge of the natural consequences of her act, unless she rebuts this by disclosing the whereabouts of the kidnapped child alive and well.

In the present case therefore, it is clear to us that there must be a presumption of intent on the part of the accused person that the victim would be murdered or so disposed of as to be put in danger of being murdered, or knowledge that the victim would probably be murdered. In law, presumptions take the place of facts if unrebutted. As such, there is nothing that would satisfy the Court that the said legal presumption is illegal or draconian. This would have disposed of the first ground. The above findings would also have disposed of the second ground with regard to sentence.

Before taking leave of this case, we must comment further on an aspect of appellant counsel's argument.

As already observed, there are many grieving parents whose children have been lost to kidnappers who may have used them in rituals. Therefore a case like this is of concern where an appellant, through counsel, appears to want to trivialise the matter by raising ingenious arguments at every stage, including arguments that have not been presented to the lower courts. It is even more trivializing of the issue for counsel to argue that this three months old child could have been taken to where he could be better looked after. Who told them that the victim was not being cared for well? Lawyers have a duty to the community. The fact remains that the child was kidnapped by the appellant and it has never been seen again. We think that counsel should also be mind full about the concerns of the community in which they live and not try to trivialize.

In conclusion, this appeal fails and is dismissed. Accordingly, the judgment and orders of the Court of Appeal are upheld and maintained.

Dated at Kampala this ...18th..... day ofJanuary...2018.

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Hon Bart M. Katureebe,
CHIEF JUSTICE

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Hon. Lady Justice Arach-Amoko
JUSTICE OF THE SUPREME COURT

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Hon. Justice Opio-Aweri
JUSTICE OF THE SUPREME COURT

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Hon. Lady Justice Faith Mwendha
JUSTICE OF THE SUPREME COURT

.....
Hon. Lady Justice Prof. Tibatemwa- Ekirikubinza
JUSTICE OF THE SUPREME COURT