# THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

## CRIMINAL APPEAL NO. 102 of 2009

*[An Appeal against the Judgment dated 16.04.09 of Mwangusya J., in High Court of Uganda at Kampala Criminal case No. 3 of 2007: Uganda vs Ssalongo Senoga Sentumbwe]*

Ssalongo Senoga Sentumbwe:::::::::::::::::::::::::::::::: APPELLANT

*VERSUS*

Uganda ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

**Coram:** Hon. Mr. Justice Remmy Kasule, JA

Hon. Mr. Justice Rubby Aweri Opio, JA

Hon. Mr. Justice Kenneth Kakuru, JA

# JUDGEMENT OF THE COURT

The appellant was tried and convicted in the High Court at Kampala by Eldad Mwangusya, J. (as he then was) of kidnapping with intent to murder contrary to **section 243 (1) (a)** of the **Penal Code Act** on 16.04.09 in **Criminal case No. 03 of 2007**.

Though there was an alternative indictment for the offence of child stealing contrary to **section 159 (a)** of the **Penal Code Act**, the trial court did not deal with this alternative indictment once it came to the conclusion that the substantive charge of kidnapping with intent to murder had been proved beyond reasonable doubt against the appellant.

The appellant was jointly charged with one Nakowooya Rashida who on taking a plea admitted the charge of kidnapping with intent to murder and upon her admission and conviction was sentenced by the same Court to a term of imprisonment of 16 years on 07.01.09. While still serving her sentence in prison, she testified as pw6 for the prosecution against the appellant.

The facts of this appeal, as can be ascertained from the record of the trial Court, are that on 07.08.06 at Bwaise, Lule Zone, Kampala District, a male child aged $2\frac{1}{2}$ years by the names of Musa Serwadda alias Muzei son of Kasujja Muhamud ($pw_3$) (father), Nakimera Mariam ($pw_4$) (mother) and a grandchild of Omugeye Amisi Jingo ($pw_1$) was taken away from his grandmother at Bwaise market and he disappeared. The public at Bwaise organized themselves to rescue the child by having someone with a loudspeaker going about the area announcing the disappearance of this child. The child was later recovered in the company of Rashida Nakawooya ($pw_6$) at a shrine belonging to the appellant. The matter was reported to the Police who arrested Rashida Nakawooya ($pw_6$) and the appellant for the kidnap of the child with intent to murder it.

Rashida Nakawooya then, according to her version of the evidence, decided to tell police and the court the entire truth of what had happened. On being taken to court, she admitted the charge of kidnapping with intent to murder, was convicted and sentenced to 16 years imprisonment. **on** being interrogated to tell Police and the Court the whole truth of what had happened. Hence on appearing before the High Court (Mwangusya J.) on 07.01.09 she admitted the said charge, was convicted and **sentenced.**

The appellant, on his part, denied the charge, was triedon being arraigned before the same Court denied the charge, was tried,

convicted and sentenced to also 16 years imprisonment. He lodged this appeal against the conviction and sentence.

The appeal is based on three grounds:-

1. **That the learned trial Judge erred in law and fact when he relied on the uncorroborated accomplice evidence of $pw_6$ to convict the appellant.**

2. **That the learned trial Judge erred in law and fact in the interpretation and application of the doctrine of "common intention" and thereby reached an erroneous decision to the prejudice of the appellant.**

3. **That (with leave of Court) the sentence of 16 years imprisonment is harsh and excessive on account of the obtaining circumstances.**

Appellant prays this Court to allow the appeal by acquitting him, or in the alternative, to have the sentence reduced, or in the further alternative, to have the conviction for the charge of kidnapping with the intent to murder to be substituted with a conviction for attempted child stealing and a reduced sentence be imposed.

At the hearing, Counsel Henry Kunya appeared for the appellant while Ms. Daisy Nabasitu, Senior State Attorney, appeared for the State.

In respect of the first ground, appellant's Counsel submitted that the accomplice evidence of $pw_6$ Rashida Nakawooya, was not corroborated and that since $pw_6$ acted on her own, independent of the appellant, when she kidnapped the child, the trial Judge was not justified in convicting the appellant on the basis of the evidence of $pw_6$.

For the State, Counsel Nabasitu, submitted that the trial Judge dealt with all the evidence of both the prosecution and the defence, and found that $Pw_6$'s evidence had been corroborated and that on the whole prosecution evidence had proved the charge against the appellant beyond reasonable doubt.

In resolving this ground of appeal (and the others), it is our duty as the first appellate Court to subject the evidence adduced at trial to a fresh re-appraisal and to determine whether or not the trial Judge reached the right conclusions, and if not, then to draw our own conclusions and inferences, bearing in mind however, that we did not have the opportunity to see the witnesses testify and thus be able to determine whether their demeanour was truthful or not: see: **Rule 30 of The Judicature (Court of Appeal Rules) Directions SI 13-10.** See also: **Bogere Moses vs Uganda, Criminal Appeal No. 1 of 1997 (SC) and Kifamunte Henry vs Uganda: Criminal Appeal No. 10 of 1997 (SC).**

In re-appraising the evidence, we are bearing in mind that in a criminal prosecution the burden to prove each and every one of the ingredients of the charge beyond reasonable doubt is upon the prosecution throughout the trial: **woolmington vs DPP 1935 AC 462.** See also **Mushikoma Watete alias Peter Wakhoka and 3 others vs Uganda: Criminal Appeal No. 10 of 200 (SC) [1998-200] HCB 7.**

The appellant stands charged of the offence of kidnapping with intent to murder contrary to **section 234(1) (a) of the Penal Code Act.** This offence in law comprises of two elements, first, is the prohibited conduct of kidnapping or taking away by force or fraud and second, is the specific intent to cause the victim to be murdered. Thus it is necessary for the prosecution, in order to prove this charge beyond reasonable doubt, to establish that at the time of the kidnapping there was a contemporaneous intent that the victim be murdered. This intent may be presumed from

the circumstances surrounding the kidnap. See **Criminal Appeal No. 12 of 1995: Mukombe Moses Bulo vs Uganda (SC) [1998-2000] HCB1.**

It is an admitted fact in this appeal that at the trial of the appellant, Rashida Nakawooya testified for the prosecution against the appellant as $pw_6$. Her evidence was one of an accomplice since she stated that she had kidnapped the child Musa Sserwadda alias Muzei at the request of and to take to the appellant at his shrine, so that the appellant as a witch doctor, could resolve the problem of her (Rashida Nakawooya) being mistreated by her stepmother after the death of her (Rashida Nakawooya) mother, which problem she had taken to the appellant for resolution.

A witness in a criminal trial is an accomplice if that witness participated as a principal or accessory in the commission of the offence which is the subject of the trial.

The law of evidence is that it is unsafe for a trial Court in a criminal trial to rely on accomplice evidence which is not corroborated to convict an accused of a criminal charge. When there is no corroboration of such evidence, the Court must warn itself and the assessors of the danger of relying on such uncorroborated evidence of an accomplice before any conviction is arrived at based upon such evidence. However, if after warning itself of such a danger, Court is satisfied that the evidence of an accomplice is reliable, the Court may rely on such evidence and convict the accused basing on such evidence: See: **Mushikoma Watete alias Peter Wakhoka and 3 Others vs Uganda.** (supra)

Where it is necessary to look for corroboration evidence, the Court must look for that independent testimony which affects the accused by connecting or tending to connect the said accused with the crime. Such evidence must implicate the accused by

confirming in some material aspect not only the fact that a crime was committed, but also that it is the accused who committed it. The corroboration may be direct evidence that the accused committed the crime. It can also be circumstantial connecting the accused to the crime. Evidence of an accomplice cannot corroborate evidence of another accomplice. Where an accomplice testifies against two accused persons being tried together, corroboration of the accomplice's evidence against one accused is not corroboration of such accomplice's evidence against the second accused: see **R V Baskerville [1916-1917] ALL ER 38** and **Canisio S/O Walwa V R [1956] 33EACA 84** which was cited with approval by the Supreme Court of Uganda in **Criminal Appeal No. 27 Of 1995: Mohammed Mukasa and Another Vs Uganda** (unreported).

The learned trial Judge in his judgment dealt in great detail with the evidence of Rashida Nakawooya, $pw_6$.

Nakawooya had visited the appellant at his (appellant) shrine to consult him about the problem she was having with her stepmother following the death of her mother. The appellant had demanded that Nakawooya takes to him a child at his shrine, as part of the process of solving the problem Nakawooya had taken to him.

Nakawooya then proceeded to look for a child to take to the appellant as the latter had demanded. She landed upon this male child aged $2\frac{1}{2}$ years by the names of Musa Sserwadda alias Muzei.

She picked the child who was found playing with other children and took the child to the appellant at his shrine.

The appellant on looking at the child found it to be a muslim and circumcised and he rejected the child. He demanded of Nakawooya to produce her own child who was not a muslim and was uncircumcised so that he (appellant) could use that one who

was uncircumcised to find a solution to the problem $pw_6$ had taken to him.

It is when she was standing outside the appellant's shrine with the child, that a suspecting lady member of the public who was passing by, raised an alarm asking why Nakawooya was with a child at the appellant's shrine. The appellant, seeing and hearing what was happening suddenly changed sides and he too started beating Nakawooya pretending that he was not the one who had sent her for the child. The appellant, to further protect himself, even called the Police, who came and took away Nakawooya, the child and the appellant.

The trial Judge also dealt in detail with the evidence of the appellant and his witnesses. Appellant stated that on 07.08.06 he was attending to his patients in the shrine when one of his patients Abbasi Kasozi ($Dw_2$), told him (appellant) that there was outside a woman suspected to have stolen a child. Appellant instructed that the woman be arrested and she was arrested. Appellant sent one Serubula Hamidu ($Dw_3$) to bring Police from Kalerwe.

The trial Judge in his Judgment warned himself and the assessors about the danger of acting on the evidence of Nakawooya Rashida, $pw_6$, an accomplice and the need to look for corroboration in case of evidence of an accomplice.

Having so warned himself the learned trial Judge found that $pw_6$, though an accomplice, was already a convict serving a heavy sentence of 16 years imprisonment and as such she had nothing to benefit from helping the prosecution. She ($pw_6$) had denied, under cross-examination, the suggestion that she was testifying against the appellant because she did not want to be imprisoned alone. She had insisted that she only wished to tell the truth. The learned trial Judge found that this witness, $pw_6$, had been credible and that her evidence had been corroborated by the fact that the

child the subject of the kidnap had been found at the shrine of the appellant.

The trial Judge eventually considered all the evidence that was before him of both the prosecution witnesses and that of the appellant and his witnesses. He rejected the version of $Dw_2$ that $pw_6$ wanted to sell the child at shs. 100,000= as unbelievable. The trial Judge accepted as credible the version of $pw_6$ that she had taken the child to the shrine on the instructions of the appellant and that the child was taken to be used by the appellant in his shrine in resolving a problem that pw6 had taken to the appellant to resolve and which had to do with $pw_6$'s stepmother mistreating her since the death of her ($pw_6$) mother.

We find that the learned trial Judge properly dealt with all the evidence that was before him, warned himself of the danger of acting on accomplice evidence, looked for and found corroboration of the evidence of $pw_6$, before he came to the conclusion that $pw_6$ was a credible witness.

Accordingly we find no merit in the first ground of appeal.

As to the second ground of appeal, the learned trial Judge having accepted the evidence of $pw_6$ as having been corroborated and credible, like we too do find, concluded that it is the appellant who demanded of $pw_6$ to take a child to him so as for him (appellant) to be able to solve the problem $pw_6$ had with her stepmother, after $pw_6$'s mother had died. It was also the appellant who had demanded that another child be taken to him after he had found out that the first child taken was a muslim and was circumcised. The only inference from this set of facts of evidence is that the victim child was being required for sacrificial purposes which would have meant its murder.

Thus all along, $pw_6$ and the appellant, were acting in concert in carrying out the kidnap of the child for the purposes of sacrificing it (the child).

This evidence clearly established a common intention between the appellant and $pw_6$ in terms of **section 20 of the Penal code Act.** The section provides that:

***"When two or more persons form a common intention to produce an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence".***

We agree with the learned trial Judge that the appellant's actions at the shrine were intended to hide his role in the commission of the crime after $pw_6$ had been discovered with the child at the said appellant's shrine. The appellant had already committed the crime by demanding for the child, receiving it from $pw_6$, and then demanding another child, after he found the first child to have been circumcised.

We thus find no merit in the second ground of appeal.

As to the third ground of appeal regarding the harshness of sentence, we note that $pw_6$ who pleaded guilty to the charge was sentenced to 16 years imprisonment. This is the same sentence that was imposed upon the appellant. The trial Judge took into account the period the appellant had spent on remand, that he was a first offender and had a large family to look after. He also considered that child kidnapping and child sacrifice by native doctors had to be stopped and this demanded for a very heavy punishment.

We find no reason to disturb the sentence imposed by the learned trial Judge upon the appellant. The third ground of appeal is thus also rejected.

Counsel for appellant submitted that the trial Judge ought to have considered the alternative charge of child stealing contrary to **section 159 (a) of the Penal Code Act.**

In his judgment the learned trial Judge rightly found, in our view, that there was no doubt that the child aged $2\frac{1}{2}$ years being taken to the shrine of the appellant under the circumstances brought out by the prosecution evidence which the trial Judge rightly believed to be credible proved beyond doubt that it was going to be murdered and as such the offence of kidnapping with intent to kill had been proved beyond reasonable doubt against the appellant.

We find no injustice having been caused to the appellant by the trial Judge failing to consider the said alternative count, although it would have been prudent to do so.

In conclusion, all the grounds of appeal having been disallowed, this appeal stands dismissed. The conviction of the appellant is upheld and he is to serve in full the sentence imposed upon him by the trial Judge.

Dated at Kampala this .....12th .....day of March, 2013.

Hon. Justice Remmy.K. Kasule
**JUSTICE OF APPEAL**

Hon. Justice Rubby Aweri Opio
**JUSTICE OF APPEAL**

Hon. Justice Kenneth Kakuru
**JUSTICE OF APPEAL**