

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

H.C.C. S. NO. 443 OF 2007

UGANDA ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

KALUNGI CONSTANCE ::::::::::::::::::::::::::::::::::::::: ACCUSED

Before: Hon. Mr. Justice E.S Lugayizi

JUDGMENT

**The Indictment
etc:**

The accused (**Kalungi Constance**) was indicted for kidnapping with intent to murder contrary to section 234 (1) (a) of the Penal Code Act (Cap.120). The particulars of the offence in the indictment read as follows:

“PARTICULARS OF OFFENCE

Kalungi Constance and another still at large on the 31st day of August 2004 at Bunamwaya in the Wakiso district forcibly took away Nicole Ankunda against her will with intent to murder the said Nicole Ankunda.”

On arraignment the accused denied the above offence; and therefore Court had to try her.

**The State’s
case:**

In its case against the accused the State called six witnesses namely, **Mr. Ssali Willy Tibaryebwa (PW1); Ms. Lekui Innocent (PW2); No. 31734 Detective Constable Icod Robert (PW3); Mrs. Jane Okuo Kajuga (PW4); Mr. Steven Okuni (PW5); and Detective Assistant Inspector of Police Kasangaki John (PW6).**

In very brief terms the above witnesses testified as follows:

Sometime in 2004 one Nice Gachire and the accused planned to snatch and take away Jane’s daughter **“Nicole Ankunda”** from Jane’s home at Bunamwaya. The accused was supposed to carry out the above mission alone, but she tried to do so and failed. This was because Jane’s maid (Innocent) was a very smart person. For that reason, Nice and the accused recruited Ssali (for a

handsome fee of shillings 1.5m/=) to help them to accomplish the mission. The mission was expected to end when Ssali and the accused delivered **Nicole** to Nice at a lodge in Kampala. Thereafter, Ssali would receive his pay. Ssali pretended that he would help in getting the job done. However, he quietly reported the matter to the Police and to Jane. In turn, the Police planned an ambush where they would catch the kidnappers. On 31st August 2004, in the afternoon hours, Ssali picked up the accused in a car. The two proceeded to Bunamwaya to carry out the above mission. After sometime, Ssali parked the car near a gate. He left the accused in the car and went inside Jane's house to collect **Nicole**. While inside the house Ssali requested Innocent to release **Nicole** to him. Innocent (whom the police and Jane had already tipped about the kidnap and the trap to catch the kidnappers) obliged. Ssali took the child to the car and placed her in the hands of the accused. He, then, drove off. The trio did not go far before a police vehicle intercepted them. The police arrested Ssali and the accused, took **Nicole** back to her home and handed her to Innocent. Thereafter, the police took Ssali and the accused to Katwe Police Station where the latter made a statement containing admissions.

The defence case:

The defence case was a denial of the State's case. In essence, the defence exclusively blamed Nice Gachire for what happened to **Nicole** on 31st August 2004.

Ingredients of the offence of kidnapping with intent to murder:

In order for the State to succeed in its case against the accused there ought to be evidence on record to prove beyond reasonable doubt each of the following ingredients of the offence of kidnapping with intent to murder.

- (a) that there was a kidnapping of a person on 31st August 2004;
- (b) that the kidnapping was accomplished by use of force;
- (c) that the kidnapping was against the victim's will;
- (d) that the perpetrators of the above offence were motivated by an intent to murder the victim; and
- (e) that the accused was one of the perpetrators of the above offence.

(See Miller v Minister of pension (1947) 2 ALL ER 372 at pages 373-374; and section 243 (1) (a) of the Penal Code Act (Cap. 120)). Indeed, failure to prove any of the above ingredients would amount to failure to prove the offence in the indictment.

Court will, below, take each of the above ingredients in turn and discuss them in the light of the evidence on record with a view to deciding whether the State proved its case against the accused.

The first ingredient -
(that there was a kidnapping
of a person on 31st August 2004):

With regard to the first ingredient Court will begin by defining the phrase “***kidnapping of a person***”. The phrase generally means “***wrongfully carrying off and holding a person***” (See **Collins English dictionary & Thesaurus at page 629**).

The State’s
case:

To prove that “***Nicole Ankunda***” was “***wrongfully carried off and held***” (i.e. “***kidnapped***”) on 31st August 2004, the State relied on the evidence of the following witnesses: **Mr Ssali Willy Tibaryebwa (PW1); Ms. Lekui Innocent (PW2); No.31734 Detective Constable Icood Robert (PW3); and Detective Assistant Inspector of Police Kasangaki John (PW5)**.

Briefly, the above witnesses testified as follows:

Against the background of a plot one Nice and another lady hatched to snatch and take away Jane’s daughter (***Nicole***) from Jane’s home at Bunamwaya, Ssali (whom Nice and that other lady had hired to help in carrying out the mission) drove to Jane’s home at Bunamwaya. This happened in the afternoon hours of 31st August 2004. Ssali was in the company of that other lady. He parked the car outside Jane’s gate; and left his companion in the car. He went into Jane’s house and asked Innocent (the maid) to hand over ***Nicole*** to him. Innocent (whom the police and Jane had already tipped about the kidnap and the trap to catch the kidnappers) obliged. Ssali took ***Nicole*** away; and handed her to the lady he left waiting in the car outside. Ssali, then, drove off as the above lady kept ***Nicole*** on her laps. Before going far a police vehicle intercepted the trio. The police arrested Ssali and the above lady. They returned Nicole to her home, but took Ssali and the above lady to Katwe Police Station where she made a statement admitting participation in the mission.

The defence
case:

The defence case was a denial of the State’s case above.

The decision of Court in
re: of the 1st ingredient:

Court observed the State witnesses as they testified. It had no doubt that they told Court the truth (i.e. that Ssali and a certain lady visited Jane’s home in the afternoon hours of 31st August 2004) and thereafter “***carried away and held***” ***Nicole***. The above acts were “***wrongful***” because they were the products of an illicit plot Nice and the above lady had hatched before 31st August 2004.

Notwithstanding the fact that Ssali appears to have participated in the above events, his evidence and the rest of the State's evidence (especially Jane and Icood's evidence) absolves him of any guilt. That evidence clearly shows that Ssali joined the above mission only as a good citizen; and his intention was to protect **Nicole** and to help the police to arrest the criminals (i.e. Nice and the above lady).

From the foregoing Court is satisfied that, on the evidence as a whole, the State succeeded in proving beyond reasonable doubt that there was “*a wrongful carrying off and holding of a person*” (i.e. “*a kidnapping of a person*”) on 31st August 2004.

The second ingredient -
(that the kidnapping was
accomplished by use of force):

With regard to the second ingredient, according to ***Collins English Dictionary & Thesaurus*** the word “***force***” means “***the use of exertion against a person that resists***”.

The State's
case:

Under this ingredient the State relied on the evidence of the same witnesses that it put up to prove the first ingredient.

The defence
case:

Again the defence case in respect of this ingredient was a denial of the State's case.

The decision of Court in
re: of the 2nd ingredient:

According to Innocent and Ssali, at the material time, Innocent handed **Nicole** to Ssali without let or hindrance; and shortly thereafter Ssali also peacefully handed **Nicole** to the lady he travelled with on the mission. Everything went smoothly and peacefully because prior to the event the police and Jane had talked to Innocent and instructed her to release **Nicole** to Ssali so that the police would soon after arrest the criminals.

In view of the foregoing, therefore, it is obvious that **Nicole's** kidnapping did not involve “***use of exertion against a person that resisted***”. In other words, “***the kidnapping was not accomplished by use of force***”. This means that the State failed to prove this ingredient.

The third ingredient -
(that the kidnapping
was against the victim's
will):

With regard to the third ingredient Court has this to say: Firstly because **Nicole** was a 2 year old child at the time of the offence, it is obvious she could not have exercised her will one way or the other at that time. Therefore, what mattered most, at that particular point in time, was the will of the person who was taking care of **Nicole**. In other words, the State had to prove that at the time **Nicole** was kidnapped Innocent did not freely exercise her mind to release her. The question to answer therefore, is whether the State proved so?

The decision of Court in re of the 3rd ingredient:

In the light of Innocent and Ssali's testimony to the effect that Innocent freely released **Nicole** when Ssali requested her to do so on 31st August 2004, it is very clear that the State failed to prove this ingredient too.

The fourth ingredient -
(that the perpetrators of the above offence were motivated by an intent to murder the victim):

With regard to the fourth ingredient Court has this to say: Generally, it is not an easy matter to determine what goes on in a person's mind at the time he or she commits a given offence. However, what a person might say or do just before or at or just after he or she has committed a given offence could help a lot in determining what was going on in his or her mind at the material time (i.e. motive).

The State's case:

The State relied on the evidence of the following witnesses in a bid to prove that the perpetrators of the above offence were motivated by an intent to murder the victim (*i.e. Nicole*): **Mr. Ssali Willy Tibaryebwa (PW1); Ms. Lekui Innocent (PW2); No. 31734 Detective Constable Icood Robert (PW3); Mrs. Jane Okuo Kajuga (PW4); and Mr. Okuni Stephen (PW5).**

The gist of the above witnesses' testimony was as follows:

On 31st August 2004 a certain lady kidnapped **Nicole**. She was taking **Nicole** to a lodge in Kampala to be murdered when the police intercepted her. The State contended that the specific evidence it had on record that pointed to an intent to murder **Nicole** was as follows:

1. The lady who persuaded Ssali to join the kidnap mission revealed to Ssali that the **"mission was deadly, but well paying."**
2. The above lady further disclosed to Ssali that earlier on she had tried to poison Nicole, but she failed.

3. Innocent recounted that before 31st August 2004 a certain lady visited Jane's home at Bunamwaya. The above lady gave **Nicole** a drink called "**Splash**", but **Nicole** refused the drink. After sometime, the said lady again handed **Nicole** the same drink. However, she quickly withdrew it from **Nicole** saying it was bad.

4. On 31/8/2004 as Ssali and the above lady proceeded to Bunamwaya for the mission, she revealed to him that she was carrying "**Chlorophorm**" with her. She, then, explained that she would apply the above chemical to put **Nicole** to sleep if **Nicole** proved difficult to handle.

5. Okuni (a Government analyst) confirmed that the contents of a tin, found underneath the seat of the car where the above lady sat during the mission, were "**Elthychloride**", a chemical that would put a person to sleep when applied.

6. Jane pointed out that in August 2004 Nice was facing 2 counts at Buganda Road Magistrate's Court for incitement to murder (i.e. one count – in respect of Jane; and another one – in respect of Jane's second daughter (**not Nicole**).)

The defence case:

The defence case was a denial of the State's case. The defence insisted that the above pieces of evidence did not necessarily point to an intent to murder **Nicole**.

The decision of Court in re of the 4th ingredient

Firstly, Court wishes to explain why it directed the assessors to disregard Okuni's findings relating to "**Exhibit P1B**". It did so, mainly because it was not sure whether "**Exhibit P1B**" (i.e. the tin whose contents Okuni examined) was the same tin Icood recovered from the car Ssali and the above lady used on the mission.

For example, Court could not readily find answers (on the court record) to these questions: (a) who kept "**Exhibit P1B**" at Katwe Police Station after Icood handed it in; and (b) subsequently, who took the said exhibit to the Government Chemist?

From the foregoing, it is apparent that there is a gap in the movement of "**Exhibit P1B**". Consequently, Court had no choice, but to direct the assessors to ignore Okuni's evidence relating to "**Exhibit P1B**". In essence, the direction amounted to telling the assessors to ignore Okuni's evidence in toto.

After disregarding Okuni's evidence, it follows that Ssali's evidence to the effect that the lady he travelled with on the mission carried "**Chlorophorm**", cannot stand. It is unverified.

Consequently the above state of affairs leaves Court with only the State's evidence in

paragraphs 1, 2, 3, and 6 above to examine and determine whether such evidence could lead to the conclusion that the perpetrators of the above offence were motivated by an intent to murder **Nicole**.

Court will, below, examine the evidence in the above paragraphs in the order in which it occurs.

*(a) The State's evidence
in paragraph 1:*

As far as the above evidence is concerned Court has this to say: In the course of giving the said evidence, Ssali conceded that the lady she travelled with on the mission did not explain to him what she meant by saying that "**the mission was deadly ...**".

Indeed, with such admission on record Court may safely infer that when Ssali heard the above phrase he immediately jumped to the conclusion that the purpose of the mission was to kidnap **Nicole** and murder her. Interestingly, Ssali did not give a thought to the idea that the above words could also have meant that the mission was deadly to the perpetrators, if caught!

From the foregoing, it is obvious that there is uncertainty or doubt concerning the meaning of the phrase under consideration. In those circumstances Court has no choice, but to resolve the benefit of doubt in favour of the defence.

*(b) The State's evidence
in paragraph 2:*

Again Court is not sure that "**Splash**" (i.e. the drink the lady in question gave to **Nicole** on her first visit to Jane's home before 31st August 2004) contained poison. For no expert analysed the drink to verify the allegation. Even assuming that the drink was poisonous, Innocent's testimony in paragraph 3 (to the effect that the lady in question offered the drink to **Nicole** a second time and then immediately withdrew it from her) would contradict the alleged intention to murder **Nicole**.

*(c) The State's evidence
in paragraph 3:*

Please see Court's conclusion in paragraph 2.

*(d) The State's evidence
in paragraph 6:*

The State's evidence in paragraph 6 was insufficient to prove Jane's allegation. Documentary evidence confirming the existence of the criminal case at Buganda Road Magistrates Court ought to have accompanied the above evidence. In any case, Jane's evidence did not indicate the final out come of the criminal case at Buganda Road

Magistrates Court. Even assuming that the outcome of the above case was unfavourable to Nice, it would seem far fetched to use the results of such case to the prejudice of an accused person in another case (i.e. this case)!

Conclusion:

All in all, Court is unwilling to rely on the State's evidence in paragraphs 1, 2, 3 and 6 to impute on the lady (who went with Ssali on the kidnap mission on 31st August 2004) an intention to murder **Nicole**. That means that the State failed to prove that the perpetrators of the above offence were motivated by an intent to murder **Nicole**.

The fifth ingredient -
(that the accused was
one of the perpetrators
of the above offence):

The State's
case:

With regard to the fifth ingredient the State relied on the evidence of the following witnesses in a bid to prove its case against the accused: **Mr. Ssali Willy Tibaryebwa (PW1); Ms. Lekui Innocent (PW2); No. 31734 Detective constable Icood Robert (PW3) and Mr. Kasangaki John (PW5).**

Briefly, the above witnesses testified as follows:

Sometime in August 2004 Nice and the accused hatched a plot to kidnap **Nicole**. They eventually recruited Ssali to help them to fulfil the mission. Ssali pretended that he would help, but he quietly informed the police about the plot. In the afternoon hours of 31st August 2004 Ssali drove the accused to Jane's home at Bunamwaya. Ssali, then, picked up **Nicole** (Jane's daughter); and handed her to the accused as was agreed among them (i.e. Nice, the accused and Ssali). Ssali drove off with the accused, who at the time, was holding **Nicole**. They were heading for Kampala where they had agreed to hand over **Nicole** to Nice in a lodge. However, before going far a police vehicle intercepted them. The police arrested Ssali and the accused. Subsequently, the accused made a statement containing an admission to the effect that she participated in the above mission.

The defence
case:

The defence case was a denial of the State's case. The accused insisted that she went to Bunamwaya on 31st August 2004 simply to help Nice. Nice had deceived her that **Nicole** was her child; and that Mr. Kajuga (Nice's man friend) had unreasonably taken the child away without Nice's consent.

The decision of
Court in re: of

the 5th ingredient:

After considering the above evidence, as a whole, Court believes that the State witnesses (especially Ssali) were truthful witnesses; and that their story to the effect that the accused participated in plotting the kidnap and in actually kidnapping *Nicole* represents the truth. Even the Police statement the accused voluntarily made (*i.e. Exh. P2*) confirms her participation in the above crime. Indeed, the accused person's defence that contradicted her police statement (*Exh. P2*) was an afterthought she crafted in a bid to save her skin; and it is hereby rejected.

**The sum
total of the
above:**

The sum total of the above is this: Out of the 5 ingredients of the offence of kidnapping with intent to murder, the State only succeeded in proving 2 of them (i.e. the 1st and 5th ingredients). The State failed to prove the rest of the ingredients (i.e. the 2nd, the 3rd and 4th ingredients). This means that the State failed to prove the offence in the indictment. Consequently, in agreement with the assessors (though for different reasons) the accused must be acquitted of the offence in the indictment; and it is so ordered.

However, a reflection over the evidence relating to the 1st and 5th ingredients (i.e. where the State succeeded in proving its case against the accused) shows that the accused is guilty of the offence in section 244 of the Penal Code Act (Cap. 120). That offence (*i.e. kidnapping with intent to cause a person to be secretly and wrongfully confined*) is a minor cognate offence of the offence in the indictment; and Court may convict the accused of it. (**See section 87 of the Trial on Indictment Act (Cap. 23)**). Consequently, in agreement with the assessors (though again for different reasons) Court hereby convicts the accused of the offence in section 244 of the Penal Code Act (Cap. 120).

E. S. Lugayizi (J)
17/12/2007

Read before: At 2.59 p.m.
Accused
Mr. Odit for the State
Mr. Maranga for the accused
(on State brief)
Ms. P. Nsaire c/clerk

E. S. Lugayizi (J)
17/12/2007