THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: KATUREEBE; C.J; TUMWESIGYE; KISAAKYE; MWONDHA; TIBATEMWA; J.J.S.C.)

CRIMINAL APPEAL NO.03 OF 2014

BETWEEN

SALONGO SENOGA SENTUMBWE:::::::::::::: APPELLANT

AND

GANDA.....**RESPONDENT**

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[Appeal from the judgment of the Court of Appeal (Kasule, Opio-Aweri and Kakuru, JJA) dated 19th December, 2013 in Criminal Appeal No. 102 of 2009]

JUDGMENT OF COURT

Ssalongo Senoga Sentumbwe, the appellant, was tried and convicted in the High Court (Eldad Mwangusya, J, (as he then was) for the offence of kidnapping with intent to murder contrary to Section 243 (1) (a) of the Penal Code Act, and sentenced to 16 years imprisonment. His appeal to the Court of Appeal against both conviction and sentence was dismissed, hence this appeal.

Background

The appellant and one Rashidah Nakawooya (PW6) were jointly indicted for the offence of kidnap with intent to murder contrary to s. 243(1)(a) of the Penal Code Act. It was alleged by the prosecution that on 7th August, 2006, at Bwaise, Kawempe Division, in Kampala District a male child aged 2% years called Musa Serwadda alias Muzei, son of Nakimera Mariam (PW2) and Kasujja Muhammad (PW3), was taken away from his grandmother at Kawempe Market and disappeared. The child was later found with Rashidah Nakawooya (PW6) near a shrine belonging to the appellant. A crowd which gathered following an alarm wanted to lynch Rashidah Nakawooya but police came and rescued her.

Police arrested Rashidah Nakawooya and the appellant and later they were taken to court and indicted for two offences: kidnapping with intent to murder contrary to section 243(1)(a) of the Penal Code Act and child stealing contrary to Section l59(a) of the Penal Code Act. The prosecution later abandoned the offence of child stealing and pursued that of kidnapping with intent to murder against the two accused persons.

On 7th January 2009 Nakawooya pleaded guilty to the charge and on her own plea of guilty she was convicted and sentenced to a term of imprisonment of 16 years. The appellant pleaded not guilty to the charge. In the appellant's prosecution Nakawooya was produced by the prosecution as its key witness against the appellant.

Grounds of Appeal

The appellant's appeal is based on the following two grounds:

1. The learned Justices of the Court of Appeal erred in law and fact in failing to re-evaluate the evidence of the appellant and as a result came to a wrong conclusion.

2. The learned Justices of the Court of Appeal erred in law and fact in upholding an illegal, harsh and excessive sentence.

At the hearing, Mr. Emmanuel Muwonge of Katende, Sempebwa & Co. Advocates appeared for the appellant while Ms. Alice Komuhangi Khaukha, Senior Principal State Attorney, appeared for the respondent. Both counsel filed written submissions.

Counsel's submissions

On Ground one, learned counsel for the appellant argued that the learned Justices of Appeal wrongly relied on the evidence of Rashidah Nakawooya (PW6) which was unreliable. He argued that PW6's testimony was marred with bad faith that sought to implicate the appellant in the commission of the offence.

Counsel further argued that the prosecution failed to establish the appellant's intent to murder the victim in child sacrifice as is required under section 235(2) of the Penal Code Act. He cited the case of **Mukombe Moses Bulo vs. Uganda,** Criminal Appeal No. 12 of 1995, which lays down the principle that in a charge of kidnap

with intent to murder it is necessary for the prosecution to establish that at the time of kidnap there was a contemporaneous intent to murder the victim. The inference of the appellant's intent was only drawn from the fact that PW6 was found with the child near his shrine, but this alone does not mean that the appellant intended to participate in the commission of the offence.

Counsel argued further that the actions of the appellant at the scene were not consistent with the actions of a person who was complicit in the commission of the crime. That the appellant informed the people who had gathered around his shrine to call the police to arrest the perpetrators of the offence which a person involved in committing a crime cannot do.

On ground two, the appellant argued that the sentence of 16 years imprisonment confirmed by the learned Justices of Appeal was manifestly harsh considering that the child was safely rescued without any harm having been done to him. That the court should have taken into account other mitigating factors such as the fact that the appellant was a family man, a first offender and had spent two years on remand. Counsel submitted that the court's failure to consider the mitigating factors contravened Article 23(8) of the Constitution. He relied on the case of **Livingstone Kakooza vs. Uganda,** SCCA No. 17 of 1993 to support his argument.

On her part, learned counsel for the respondent, on ground one, argued that while the case of **Mukombe Moses Bulo vs. Uganda**

(supra) was relevant to the definition of the offence of kidnap with intent to murder, contemporaneous intent can be inferred from the evidence adduced.

Counsel further argued that evidence on record shows that PW6 had previously met with the appellant which meeting led to the kidnap of the child and subsequent delivery of the child to the appellant, and that, therefore, the trial court and the Court of Appeal were right to reject the appellant's defence that his conduct of calling the police to come to the scene was inconsistent with that of a person who had committed a crime.

On the issue of reliability of PW6's evidence, counsel argued that the Court of Appeal was right to rely on it because PW6 had been convicted on her own plea of guilty and had nothing to gain from implicating the appellant in the commission of the crime, and that there was corroboration of PW6's evidence from the fact that the appellant was present at his shrine at the time the child was found with PW6. Counsel cited the case of **R v. Baskerville,** (1916) 2 KB 658, for the proposition that the evidence of an accomplice must be confirmed by not only the circumstances of the crime but also the identity of the prisoner.

On ground two, counsel contended that the trial judge considered all the mitigating factors including the fact that the appellant was a first offender and that he was a bread winner for his family. It also considered the period he had spent on remand. She argued that the

sentence of 16 years imposed by the trial court was neither excessive nor illegal so the Court of Appeal could not interfere with the discretion of the trial judge.

Counsel further argued that Uganda as a state party to the United Nations Convention on the Rights of a Child is obliged to put in place mechanisms to protect the rights of children. Successfully trying perpetrators of such crime is one of these mechanisms, she contended.

Consideration of Ground one of Appeal

In ground one of appeal the appellant complains that the Court of Appeal failed to re-evaluate the evidence of the appellant and so came to a wrong conclusion that he was guilty of committing the offence.

As was held in the case of **Kifamunte Henry vs. Uganda**, SCCA No. 10 of 1997, this court as a second appellate court, has the duty to decide whether the first appellate court on approaching its task applied or failed to review the evidence of the case and to consider the materials before the trial judge.

In its re-evaluation of evidence the Court of Appeal went through the evidence as narrated by PW6 and stated:

"Nakawooya had visited the appellant at his (appellant) shrine to consult him about the problem she was having with her step mother following the death of her mother.

The appellant 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 *2712* years by the names of Musa Sserwada 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 Muslim and circumcised and rejected the child. He demanded of Nakawooya to produce her own child who was not Muslim and was uncircumcised so that the appellant could use that one who was uncircumcised to find a solution to the problem PW6 had taken to him.

... having warned himself the learned trial judge found that PW6 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 (PW6) had denied under cross examination the suggestion that she was testifying against the appellant because she did not want to be imprisoned alone. She insisted she only wished to tell the truth. The learned trial judge found that this witness, PW6, had been credible and

that her evidence was corroborated by the fact that the child the subject of the kidnap had been found at the shrine of the appellant.

... we find that the trial judge properly dealt with all the evidence that was before him, warned himself of the danger of acting on accomplice evidence of PW6, before he came to the conclusion that PW6 was a credible witness."

We wish to observe, however, that while the learned Justices of Appeal reproduced the evidence of PW6 as she narrated it to the trial court, they did not give equal re-evaluation and consideration of the defence evidence. The defence produced four witnesses apart from the appellant himself. About the defence evidence the learned Justices of Appeal only stated:

"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 Abbas Kasozi, (DW2), 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 (DW3) to bring police from Kalerwe...

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 DW2 that PW6 wanted to sell the child at shs. 100,000= as unbelievable. The trial judge accepted as credible the version of PW6 that she had taken the child to the shrine on the instructions of the appellant.

As far as the defence evidence was concerned we observe that what the learned Justices of Appeal did was merely to restate what the learned trial judge's evaluation and conclusion was and agree with it, instead of themselves carrying out the task of re-evaluating the evidence afresh.

In their judgment the learned Justices of Appeal properly reminded themselves of the duty of a first appellate court to re-evaluate evidence and to draw their own conclusion and inferences bearing in mind that they had not seen the witnesses testifying. They stated:

"It is our duty as a 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 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 Sl 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)."

Judging from above quotation it is clear that the learned Justices of Appeal fully appreciated what their task was in dealing with the appeal before them. For purposes of emphasis, however, we wish to restate what this court has laid down as the principle to be followed by first appellate courts when handling appeals.

In the case of Bogere Moses vs. Uganda(supra) cited by the learned Justices of Appeal this court stated:

> What causes concern to us about the judgment, however, is that it is not apparent that the Court of Appeal subjected the evidence as a whole to scrutiny that it ought to have done. And in particular it is not indicated anywhere in the judgment that the material issues raised in the appeal received the court's due consideration. While we would not attempt to prescribe any format in which a judgment of the Court of Appeal should be written, we think that where a material issue of objection is raised on appeal, the appellant is entitled to receive an adjudication on such issue from the appellate court even if the adjudication be handed out in summary form... In our recent decision in Kifamunte Henry vs. Uganda, we reiterated that it was the duty of the first appellate court to re-hear the case on appeal by considering all the

materials which were before the trial court and make up its own mind ... Needless to say that failure to evaluate the material evidence as a whole constitutes an error in law.

In **Dinkerrai Ramkrishan Pandya v. R**[1957] E.A. 336 the Court of Appeal for Eastern African relied on the case of **The Glannibanta** (2) (1857), 1 P.D. 283 where the Court of Appeal of England stated:

Now we feel, as strong as did the Lords of Privy Council in the case just referred to, the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on question of fact as on question of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.

What stands out clearly from the above cited authorities is that the Court of Appeal as a first appellate court has a duty to rehear the appeal by subjecting all the evidence on record to a fresh scrutiny

and to draw its own conclusion while making allowance for the fact that it has not had an opportunity to see and hear the witnesses if the question of which witness to believe turns on the witnesses' demeanour.

Reading carefully the judgment of the Court of Appeal in this case we are of the respectful view that while the Court of Appeal reminded itself of its legal duty it did not carry it out as the law requires it to do. The evidence on record shows two conflicting versions which the trial judge faced and had to resolve. One version was as told by Rashidah Nakawooya (PW6). Her story was that she had a problem with her step mother and went to the appellant whom she knew as a witch doctor to consult him about it, and that the appellant asked her to bring a child to him to enable him solve her problem. That when she brought him the child, the appellant rejected the child because the child was circumcised and so told her to bring him her (PW6's) own child instead. That it was when she was with the child near the appellant's shrine that the people including the appellant started beating her. That she was then arrested together with the appellant by the police and was later indicted for the offence in court.

The defence rejected PW6's version. In his testimony the appellant stated that he had never seen PW6 until the incident at his shrine that led to his arrest. The thread that runs through the defence evidence seems to suggest that PW6 had stolen the child and that she had taken him believing she could sell him to the appellant who

was known in the area as a witch doctor. Kasozi Abasi (DW2) stated in his testimony that when he saw PW6 with the child near the shrine and asked her what she wanted, PW6 told him that she had heard that witch doctors cut children and that that was why she had brought him (the child) knowing that she would get money to release her husband from police custody. That she told him that her husband had been arrested and was at CPS and that they had demanded shs. 100,000/= for his release. "The woman never entered the shrine. I found her standing outside the shrine," DW2 stated in his testimony. That when DW2 told the appellant after the appellant came out of his shrine what she had told him, the appellant said that the woman should be arrested and that the appellant immediately called for the police on his mobile phone and failing to get the police on phone sent a boda boda rider (PW3) to call them.

In his judgment the trial judge dismissed the version of stealing the child by PW6 in order to get money as unbelievable. It is, however, important to note that the story about PW6's stealing the child in order to sell him was not only alluded to by the defence witnesses but by the prosecution witnesses as well.

PW1, Omugeyi Amisi Jingo, a grandfather to the child and a well known person in the area stated thus in his testimony. "As I am prominent in the area by the time I went back to the market there was information that a child had been seen in a shrine with a woman who was trying to sell the child. I found that my son

Muhamud Kasujja had already left for the shrine. I rushed to the shrine where my grand child was allegedly being sold."

Another prosecution witness, PW5 No. 6131 SPC Seruwo Ben who answered the call to prevent the outbreak of violence and who arrested PW6 and the appellant stated in his testimony: "I asked her (PW6) who of the two children was hers. She told me the one aged 5 to 6 months was hers. The second one was aged about 11/2 years or 2 years. She told me she had stolen the child from his parents at Mbogo's place. I rang my boss again. I explained what I had gathered from the woman. My boss instructed me to take them to our station at Kireka. At that time it was known as V.C.C. U. I asked the woman where she was taking the child; she told me a man called Salonga Sentumbwe (the appellant) is one who sent her for the child. Salonga Sentumbwe was in the car. She told me Salongo Sentumbwe was going to give her money. Nakawooya told me that they had agreed on Shs. 1,000,000/= but he had paid her only 100,000/=. I talked to Salongo at the time. I asked Salongo if he had sent the woman for a child and he denied having sent the woman for a child."

The question which comes to mind, therefore, is which of the two versions one is to believe. In her testimony PW6 never mentioned that she had picked the child to sell him for money. Yet she told witnesses both for the prosecution and the defence that she had stolen the child to sell it for money. In our view, this casts doubt on her credibility and reliability.

PW6's testimony to court is not clear either about how many times she visited the shrine. This is what she stated: "On a date I do not remember I went to Salongo's place. I had gone to consult on a personal problem. The problem was that my mother had died and I went to him because I got problems with my step mother. When I had started narrating my problem he told me that I should bring him a child. He did not specify the age of the child. He took me to his shrine. I got the child as he was walking on the road. He was playing with other children. I carried the child up to the accused's shrine."

During her cross examination the story of how she met with the appellant seems to change. She stated: "This was my first time I had gone to the shrine. It was my initiative to go and consult at the shrine. I had made an appointment with him before I took the child. I used to see him and when I got my problems I went to him and we negotiated. I consulted him three times before I took the child which was on the fourth occasion." The question that comes to mind is: at which meeting did the appellant ask PW6 to bring him a child, was it at the first meeting, second meeting or third meeting? Her statement before she was cross examined indicates that as soon as she started narrating her problem to the appellant the appellant asked her to bring a child.

The appellant stated in his testimony that he had never seen PW6 until the incident which led to his arrest and prosecution. Kasozi Abasi (DW2) stated in his testimony that at the time the incident

happened PW6 had not entered the appellant's shrine because Kasozi himself had been there for a long time waiting to go into the shrine and see the appellant.

Babirye Naabumpenje (DW4) stated in her testimony: "The lady who had two children is called Nakawooya. I heard people passing saying they knew her and she is called Nakawooya. When she found me she asked me whether that was a shrine. I answered her that it was a shrine. She told me to call the doctor from the shrine. I told her to enter and see him. She answered me and said that they did not know each other and asked me to call him for her. I told her to enter inside and the people inside would show him to her. She walked up to the door and peeped. She did not enter. She came back where I was. She told me she was begging me to call him for her because she did not know him and he also did not know her. She told me that when she peeped there was a lot of people and she fears people. I asked her how she was brought up as she fears people."

This defence evidence was not re-evaluated by the Court of Appeal. Furthermore, the appellant and Rashidah Nakawooya (PW6) were jointly indicted for the offence of kidnap with intent to murder.

Therefore, the evidence of PW6 against the appellant was evidence of an accomplice. Section 132 of the Evidence Act provides:

An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely

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because it proceeds upon the uncorroborated testimony of an accomplice.

However, as a matter of practice, accomplice evidence ought to be corroborated. In **Davies vs. Director of Public Prosecutions,** [1954] 2 W.L.R. 343 the House of Lords considered the scope and legal effects of the rule as to warning the jury with regard to the evidence of an accomplice as laid down in **R v. Baskerville,** (supra). The court held:

> **There is no doubt that the uncorroborated evidence of an accomplice is admissible. But it has long been a rule of practice at common law for a judge to warn the jury of the danger of convicting a prisoner on uncorroborated testimony of an accomplice or accomplices.**

The court stated further in that case:

> **"Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it."**

Nakawooya (PW6) standing outside the appellant's shrine cannot be evidence that the appellant had asked her to bring the child to the

shrine. DW2 testified that PW6 never entered the shrine and so did DW 4 who testified that PW6 tried unsuccessfully to persuade her to take her (PW6) into the shrine to see the appellant. There is also evidence from both the prosecution and defence that PW6 had brought the child intending to sell him to the appellant. With due respect to the learned Justices of Appeal, we are, therefore, of the view that they erred to hold that the evidence of PW6 is corroborated by the fact that she was found with the child near the appellant's shrine.

We think that the common law rule requiring a court to warn itself of the danger of convicting an accused on the basis of uncorroborated evidence of an accomplice applies only when the evidence of the accomplice is found trustworthy. Where, however, it is found to have discrepancies and therefore discreditable as in this case the rule on corroboration of an accomplice's testimony does not arise.

Both the prosecution and defence witnesses refer to the appellant as a witch doctor. However, the standard of proof in criminal cases which is proof beyond reasonable doubt does not change even when an accused person is a witch doctor. We note that the learned trial judge underlined the words "witch doctor" in his judgment and we think this was prejudicial to the appellant. The fear of witch doctors in this country notwithstanding, it is also common knowledge that shrines exist in Uganda and people go there to consult witch doctors on their personal problems. DW2 and DW4 had gone to

consult the appellant. It cannot be said that all witch doctors engage in human sacrifice. DW5 the Local Council Chairman of Mayinja Zone, the area where the appellant was operating his shrine testified that he had known the appellant as a witch doctor and that apart from the incident which happened when he was away (leading to the appellant being arrested for the offence he was indicted for) he had no problem with him. The appellant himself testified that he could never engage in child sacrifice.

We, therefore, find that the learned Justices of Appeal erred in law and in fact when they failed to evaluate the evidence and came to the conclusion that the prosecution evidence satisfied the required standard of proof beyond reasonable doubt. Accordingly, the appellant's ground one of appeal succeeds and his conviction is quashed.

Since the appellant's ground 2 is based on his conviction its consideration becomes no longer necessary. The appellant's sentence is, therefore, set aside.

Dated at Kampala this .....2nd .....day of ..August ...2017

Bart M. Katureebe

CHIEF JUSTICE

JUSTICE OF THE SUPREME COURT

Faith Mwondha

Jotham Tumwesigye

JUSTICE OF THE SUPREME COURT

Dr. Esther Kisakye

JUSTICE OF THE SUPREME COURT

Prof. Lillian T