THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE S. G. ENGWAU, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.
HON. LADY JUSTICE C. K. BYAMUGISHA, JA.

CRIMINAL APPEAL NO. 23 OF 2000

NUULU ASUMANI KIBUUKA :::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Appeal from the conviction and sentence of the High Court of Uganda holden at Kampala (A. Magezi, J.) Dated 5-5-2000 in Criminal Session Case No. 507 of 1999]

JUDGEMENT OF THE COURT:

Nuulu Asumani Kibuuka, the appellant, was indicted for kidnapping with intent to murder contrary to section 241 (1) (a) of the Penal Code Act. He was convicted as indicted and was sentenced to a term of imprisonment for twenty years. He has appealed to this court against the conviction and sentence.

The case for the prosecution was that the appellant lived with Aida Nankya, PW1, in his home at Kazo as husband and wife. This was despite the fact that they were related as uncle and niece. The issue of that relationship was a baby, Ibrahim Kibuuka, who was aged about 6 months at the time it was kidnapped. Mariam Nansubuga, PW4, was the sister of PW1. PW4 knew about the love affair between the appellant and PW1. When the two were still in love she was sent by the appellant to take money to PW1. Sometime in 1998, PW1 left the appellant's home and went to live at Natete with her brother, Asumani Mukasa, PW3.

On the night of 24th October at around 8.00 p.m. the appellant sent for PW1. PW1 left her brother's home and went to see the appellant but later returned home. At around 11.00 a.m. another messenger told her that the appellant wanted to see her. PW3 requested PW1 to go with the baby because it was crying. She complied and took the baby with her. On reaching the place where the appellant was, he requested her to

hold the child as he used to do. The appellant did not return the baby to PW1. He instead entered a stationary special hire vehicle which sped away and disappeared. PW1 returned to her brother's home crying that her baby had been taken away by the appellant. PW2 advised her to report the matter the next day.

On the following day PW1 went to Masaka and reported to her mother what had happened. She was advised to return to Kampala and report to the authorities. PW1 tried to trace the appellant at his home but did not find him there. She reported to PW4, the Local Council authorities and later to Kawempe Police Station. The appellant was arrested by the police from a lodge at Kazo. The baby, Ibrahim Kibuuka, has never been seen alive again. The appellant was indicted with kidnapping with intent to murder.

In his defence the appellant denied the offence and pleaded alibi. He stated that, he was at the mosque from 7.00p.m. to 10.00 p.m. After that he went to the home of Yusufu Kurumba, DW2 and later retired to his home and slept until the following morning. He denied any incestuous relationship with PW1. He called DW2 in his defence.

The learned trial judge believed the prosecution case, rejected the defence and convicted and sentenced the appellant as already stated. The appellant has appealed to this court on the following 3 grounds in the Memorandum of Appeal dated 10/01/03.

> **"1. That, the learned trial judge erred in fact and in law when she convicted the appellant for kidnapping with intent to murder contrary to section 235 (1) (c) and section 235 (2) of** the **Penal Code Act.**
>
> **2. That, the learned trial judge erred in fact and in law,**
> **When she rejected the defence of alibi raised by the appellant and thus came up to a wrong conclusion.**
>
> 3. **That, the learned trial judge erred in fact and in law,**
> **when as a valuation she failed to adequately evaluate evidence and as a result arrived at the wrong decision."**

It was his prayer that;

1. This appeal be allowed
2. Conviction to be quashed
3. Sentence be set aside

Mr. Edward Ddamulira Muguluma argued ground 1 separately and grounds 2 and 3 together. On our part we shall handle ground 1 and 3 together and ground 2 separately.

On ground 1 and 3 the thrust of counsel's arguments was on the learned trial judge's evaluation of the evidence. Counsel complained that the learned trial judge was wrong to believe the evidence of PW1 who was a single identifying witness that it was the appellant who kidnapped her baby. Counsel submitted that PW1 gave various dates in her testimony. In her examination she testified that the baby was kidnapped sometime in November 1998 whereas in cross-examination she said that it was on 10th October 1998. He argued that as PW1 was the mother of the baby the date of the kidnapping was very important to her. She should have, therefore, remembered it if she was honest. Counsel argued further that PW1 did not report the matter to the police immediately. She only did so after going to Masaka to her mother. Besides, no police officer gave evidence of the report which PW1 made to the police. When PW1 was requested by the police to take to them people who were present when the child was kidnapped, she took Mariam Nansubuga PW4 and Mikidadi Ssemuwemba PW2. However none of these witnesses testified that they were present when the child was kidnapped.

Counsel submitted that the learned trial judge was wrong to hold that PW1's evidence was corroborated by the testimony of PW4 which was to the effect that the appellant had on 26th November 1998 told her that he had taken the child from PW1 to be looked after by a baby minder.

Ms. Susan Nafula Bukenya learned State Attorney, supported the learned trial judge's finding. PW1 saw the appellant on the material day kidnapping her child. PW1 knew the appellant before and there was electric light. She described how the appellant was dressed. She talked to the appellant before he took away the child. She further

submitted that PW4's evidence was not at all challenged in cross-examination. The learned judge was, therefore, right to find that it corroborated PW1's evidence. She argued that the conduct of the appellant corroborated PW1's evidence. The appellant went to Kenya soon after the kidnapping of the child. Then he disappeared from his home together with his family and went to live at Chez Hotel from where he was arrested. In counsel's view, that was conduct of a guilty person.

On variation in dates, she submitted that PW1 testified two years after the incident which was a long time. She was mixed up in dates because of the length of time and the trauma of loosing her child. However, the appellant was not prejudiced in his defence because the indictment indicated the right date and some prosecution witnesses gave the correct date in their evidence. There was corroboration of PW1's evidence, in the evidence of PW4 who testified that on 26th October the appellant told her that she had taken the child away from PW1. He was to give it to a baby minder.

In her judgment the learned trial judge considered the evidence of PW1. She observed that PW1 was a single identifying witness and her evidence had to be taken with caution. She found that though the conditions were not very favourable for correct identification the witness knew the appellant before as they were related. PW1 had seen the appellant that night. She observed her demeanour and found that she was a truthful witness and withstood cross examination. The learned trial judge attributed her mistakes in dates to lapse of time and to the loss of her child. She found that PW3's evidence did not corroborate PW1's evidence regarding the identification of the appellant, it only corroborated her evidence that she went with the baby.

With due respect to the learned trial judge we are of the considered view that PW3's evidence corroborated PW1's evidence that it was the appellant who kidnapped the child. PW1's statement that it was the appellant who had kidnapped the child was made at about the time the fact took place and therefore satisfied the provisions of section 155 of the Evidence Act which provides:-

> **"<u>In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when</u>**

the fact took place or before any authority legally competent to investigate the fact, may be proved." (Underlining ours)

See **Ndaula John v Uganda Supreme Court Criminal Appeal No. 22 of 2000** (unreported).

We have closely examined the testimony of PW4. We also note that apart from minor contradictions her evidence was substantially truthful. She knew about the love affair between the appellant and PW1. It is not surprising that the appellant informed her that she had taken the child away. According to PW1's testimony she too went to her and told her that the appellant had taken the child away. We agree with the learned State Attorney that the appellant's conduct of relocating himself and family from his residence to a lodge was not conduct of an innocent man.

In our view, it is clear according to the evidence that the appellant run away from his home so as to avoid being arrested. We are of the considered view that the learned trial judge properly evaluated the prosecution evidence. She came to the right conclusion that it is the appellant who kidnapped PW1's child. Grounds 1 and 3 have no merit and therefore fail.

We now consider ground 2 which is a complaint that the learned trial judge erred in law and fact when she rejected the appellant's alibi. On this ground, Mr. Muguluma criticised the learned trial judge for considering the defence case only without giving due regard to the appellant's defence of alibi. The learned State Attorney disagreed, she contended that the alibi was merely concocted. The judge was therefore right to reject it.

The law is that an accused person who raises a defence of alibi does not have the burden of proving it. See**:** **Sekitoleko v Uganda [1967] EA 531**. The mode of evaluation of evidence in case where the accused raises an alibi in his defence was laid down by the Supreme Court in the case of **Moses Bogere and Another v Uganda Supreme Court Criminal Appeal No. 1 of 1997** thus:-

> **"Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, but adduces evidence showing that the accused person was elsewhere at the material time it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted."** (Unreported).

In the instant appeal the learned trial judge considered judiciously both the prosecution and the defence cases. She observed that in his defence the appellant had testified that he was either at the mosque or with DW2 between 7.00 p.m. and 10.00 p.m. According to the judge this did not account for the time between 11.00 p.m. and 12.00 p.m. when the offence was alleged to have been committed. The appellant had also testified that he had left for Kenya on 25th October 1996. Later he changed his testimony to say that he left on 30th or 31st October. The judge observed his demeanour and came to the conclusion that he was lying. She also evaluated the evidence of DW2. She found that this witness was mixed up about the dates. DW2 denied ever seeing the appellant on 24th October 1998. He later changed his statement and said that he saw the appellant on 25th October at his home and at the mosque. He changed his story about the number of Koran lessons taught on the material day. First he said it was one lesson and later said they were two. The learned trial judge found that the witness was confused. She observed his demeanour and found that he was unimpressive. She concluded that the defence evidence failed to raise a doubt in the prosecution case and he accordingly rejected it.

We have carefully examined the evidence on record. We are of the view that the learned trial judge judicially evaluated both the prosecution and the defence evidence. She came to the right conclusion. Ground 2, therefore, fails.

The memorandum of appeal did not contain a ground of appeal on sentence. However, during the hearing of the appeal Mr. Muguluma submitted on sentence. He contended that the sentence of twenty years imprisonment was too harsh in the circumstances. He suggested that the sentence of five years imprisonment would be adequate.

The learned State Attorney disagreed. She argued that the maximum sentence for the offence which the appellant was convicted is death. The sentence for twenty years imprisonment was neither illegal nor excessive. She prayed court to dismiss the appeal against sentence.

This court would only interfere with a sentence passed by the trial court if it is either illegal or manifestly excessive as to amount to a miscarriage of justice. See section 139 (1) of the Trial on Indictment Act and Boona Peter v Uganda, Court of Appeal Criminal Appeal No. 16 of 1997 (unreported)

When passing sentence the learned trial judge took into account all the mitigating circumstances. She took note of the fact that the child had never been seen alive again. She also took into account the maximum sentence of the offence, which is, death.

We note that the learned trial judge properly considered the relevant law and the circumstances of the case before passing sentence. We observe that the sentence is neither illegal nor excessive. There is, therefore, no good reason for the court to interfere with the sentence passed.

The appeal against sentence has no merit. In the result, we find no merit in the whole appeal. It is accordingly dismissed.

Dated at Kampala this 10th day of June 2004.

S,G, Engwau
JUSTICE OF APPEAL

C.N.B. Kitumba
JUSTICE OF APPEAL

C.K. Byamugisha
JUSTICE OF APPEAL