

UGANDA / JUDGMENT

Uganda v Olobo (Criminal Session Case 429 of 1995) [1996] UGHC 18 (29 July 1996)

[1996] UGHC 18

COURT

High Court of Uganda

BEFORE

GM OKELLO, J

CASE / FILE NUMBER

Criminal Session Case 429 of 1995

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT SESSION HODDEN AT GUDU

CRIMINAL SESSION CASE NO. 429 OF 1995 UGANDA PROSECUTOR -versus-

DEO ODOBO ACCUSED

JUDGEMENT

The accused, Deo Olobo stands indicted on a charge of kidnapping with intent to murder contrary to section ²³⁵ (1)(a) of the Penal Code Act. The particulars of the offence allege that Olobo and another not in court, on the 14th day of September ¹⁹⁹¹ ^a t Nfinakulu Go-down Market, Bobi Division 4h. tbs Guju. I[^]trict, by force took away Olobo with that Phi lip. -Qceng may be murdered or may be disposed of as to be put in danger of being murdered.

On arraignment, the accused pleaded not guilty thus setting in issue all the essential elements in the offence. That meant that each and every essential element in the offence had to be proved to the standard required to secure a conviction. The law places on the prosecution the burden to prove such essential elements. An accused does not bear the duty to prove his innocence'.

In Peppard Aniseth vs Republic (1963) EA 2Q6, the accused was charged with murder. At the trial the accused set up a defence of alibi. The trial Judge directed that the burden of proof with regard to alibi was on the person setting up that defence. On appeal, the Court of Appeal for Eastern Africa held at page 208 that,

"Since the well-known decision of Woolmington-vs DPP (1935) AC 462, it is well settled that subject to the defence of insanity and to certain statutory exceptions which are not relevant to the present case, no burden rests upon an accused person to establish any defence".

The prosecution is required to prove the essential elements beyond a reasonable doubt to secure a conviction. In the instant case, the essential elements requiring proof beyond reasonable doubt are-

- 1) that there was taking away or detention of the victim against his will.
- 2) that those who so took away or detained the victim had intention that the victim may be murdered or be disposed of as to be put in danger of being murdered.
- 3) that it was the accused who so took away or detained the victim.

The prosecution called the evidence of five witnesses in a bid to discharge the burden so placed on it by law. As regards ingredient No. ¹ - taking away or detention of the victim against his will, the prosecution relied on the evidence of four witnesses Jend Oceng (PW 1) the wife of the victim testified that on the 14th September ¹⁹⁹¹ at about 3.00 p.m. she accompanied one Anna Akello, her co-wife to Go-down Market to sell the latter's locally brewed beer. At the market, she saw the accused whom she had not known before went and called her husband aside. According to PW 1, she could not hear what the accused and her husband were discussing because they were out of hearshot from where she sat with Anna Akello but that soon her husband came to where she was seated and handed to her his wrist watch and a pair of shoes and told her that he was being taken to Palenga Army Barracks. PW ¹ further stated that she eventually saw her husband Philip Oceng tied up with a rope and

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was 'being led. away by the accused, and. Acellam towards Palenga.

Anna Akello (PW2) confirmed in her testimony that on 14th September ¹⁹⁹¹ she went to Go-down Market with Jenti Oceng (PW1) and that while in the Market she saw the accused came to where Philip Oceng (victim) was seated. Then she heard the accused called the victim to go with him to where the RC Executives were seated in the market. According to Anna Akello, she saw the accused and the victim walked towards where the RCs were seated. Then she became concerned and followed them. There she heard the accused said that he arrested the victim because the latter had written letters "To whom it may concern" to assist rebels. PW ² further told the court that she later saw the accused tied the victim with a rope and eventually she saw the accused and Acellam led the already tied victim away towards Palenga.

Both Onen Jubinaldo (PW4) and Mateo Oding (PW 3) who were Chairman and Vice Chairman respectively of R. C. II of Palwo Parish confirmed that they were in the Go-down market on 14th September, ¹⁹⁹¹ at about 4.00 p.m. That at the market, they saw the accused put the victim under arrest. According to these RC II Executives, they saw the accused gave money to Acellam to buy rope with which the victim was tied. The two witnesses further told court that on their enquiry, the accused waived a small typed written letter which he had in his hand and replied that the victim had written that letter "To whom it may concern" to assist rebels and that for that reason he was taking the victim to the Army Barracks at Palenga. From the testimonies of PW3 and PW 4, the accused rejected their plea not to take the victim to the Army Barrack but to

let the RCs handle the case. According to PW ³ (Mateo Oding) the accused even threatened to arrest him instead if he insist that the victim should not be taken to the Army Barrack. PW ³ and PW 4 both confirmed that they later saw the accused and Acellam who was a Home Guard askari led the victim away towards Palenga.

From the above evidence, it is clear that the victim Philip Ocong was forcibly taken away from the Go-down Mafket on 14th September, 1991. There was no evidence at all that he willingly went with those who took him.

As to whether those who so took away the victim from the Godown Market on 14th September, ¹⁹⁹¹ had intention that the victim might be murdered or be disposed of as to be put in danger of being murdered, section 235(2) of the Penal Code Act presumed the existence of intention to murder where a person who has been kidnapped or detained has not been seen or heard of after six months or more. The relevant section reads thus,

235(2) "Where a person so kidnapped or detained is thereafter not seen or heard of within a period of six months or more the accused person shall be presumed to have had the intention and knowledge stipulated in paragraph (a) and (b) of sub-section (1)"

In the instant case, the evidence of PW ¹ - PW ⁵ indicated that the victim Philip Oceng since his arrest and taking away on 14th September 1991 had not been seen or heard of. PW ⁵ Isaac Newton Otim who is the elder brother of the victim testified that he made extensive search in various military barracks for the victim but that he did not get any fruitful result. He has since not been seen or heard of. Pff ¹ Jenti Oceng, the wife of the victim ala? confirmed that since his kidnap, the victim has not been seen or heard of by her. It is over four years since the victim was kidnapped. From the above evidence it can now be presumed that those who so took him away from the Go-down Market on 14th September, 1991 had the intention that the victim may be murdered or may be so disposed of as to be put in danger of being murdered. Ingredients Nos. ¹ end ² above are in my view proved beyond reasonable doubt.

As to whether the accused was one of those who took away the victim from the Go-down Market on 14th September, 1991, the prosecution contended that the accused was one of those who kidnapped the victim. In support of that contention, the prosecution relied on the evidence of the four witnesses

Jenti Oceng (PW 1) wife of the victim, Anna Akello. (PVZ 2) sister-in-law of the victim. Both of these witnesses testified that they had not known the accused before. But according to them, the incident took place during the day at about 3.00 p.m. That they both saw the accused quite clearly. They saw him arrest the victim and was later seen with Acellam leading the victim away.

In addition to the above, there was the evidence of PW ⁴ and PW 3. These were the Chairman and Vice Chairman RC II of Palwo Parish. Both testified that they knew the accused before since he was senior to them in the RC hierarchy. He was Secretary for Information in RC III of Bobi division while they were Chairman and Vice Chairman RC II of Palwo Parish of Bobi

Division. The accused himself did not deny that PW ³ and PW ⁴ know him. Infact he admitted that he too knows them but that he did not see them in the Go-down Market on that day since there were many people. Both PW ³ and PW ⁴ however testified that they saw the accused put the victim under arrest. According to them, they pleaded with the accused not to take the victim to the Army Barrack but to hand the case to them as RC to handle it. That the accused rejected their plea and they confirmed that they later saw the accused and Acellam led away the victim under arrest towards Palenga.

The defence of the accused was that he carried the victim to Palenga Army Barracks on compulsion by Acellam who was a Soldier and was at the time armed with a grenade. According to the accused, he feared because only the previous day, soldiers had arrested RC officials and civilians in the area*

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With regards to ^a defence of compulsion, it is instructive to hear in mind that compulsion is only a defence where the accused has been under threat of instant death or grievous bodily harm throughout the commission of the offence. (See section ¹⁶ of the Penal Code Act).

In the instant case, the evidence available did not indicate that the accused was under threat of being instantly killed or grievously harmed if he refused to take away the victim to Palenga. On the contrary the evidence of PW ³ and PW ⁴ indicated that he refused to hand over the victim's case to the RC to handle but insisted that the victim had to be taken to the Army Barracks. The testimony of PW ³ indicated further that the accused had even threatened to arrest PW ³ instead if he (PW 3) insisted to plead that the victim should not be taken to the Army Barracks.

The accused further argued that the evidence of PW ³ and PW ⁴ was a fabrication engineered by a grudge they had on him for being a Secretary for Information RC III. They wanted their own man from Palwo in that post.

I find the above claim hard to believe in the face of the fact that the accused himself admitted that he truly carried the victim from Go-down Market on his bicycle to Palenga Army Barracks Quarter Guards Gate on 14th September, 1991» This confirmed what PW ¹ - ⁴ told court that they saw the accused and Acellam led the accused under arrest towards Palenga on 14th September, 1991.

I am aware that there were some discrepancies in the evidence of the prosecution for example regarding whether or not the victim was tied with a rope after his arrest and by who; whether the victim was after his arrest taken to where the RCs were seated in the Go-down Market, and thirdly whether it was PW ³ or PW ⁴ who pleaded with the accused for the latter not to be taken to Palenga Army Barracks

It is ^a well settled, principle of our law since the decision in . Alfred Tagai vs Uganda (1969.) EACA Cr Appeal No 167/69 that Grave inconsistency unless satisfactorily explained may result into the evidence being rejected. Minor inconsistency however, unless deliberately made to mislead court usually does not have the same effect.

In my view, those discrepancies in the prosecution evidence were minor and referred only to details. They did not go to the root of the case. They also did not point to a deliberate falsehood. They can be explained away on lapse of time the incident having happened nearly five years ago. In the circumstances like the two Assessors, I believe the prosecution witnesses.

I did consider the case of Uganda vs Matovu and Another (1983) HOB ²⁷ to which Mr. Kabali referred me. I agree that the accused in the case before me, did more towards the arrest and taking away of the victim than the saza chief in Matovu's case had done. The present accused arrested the victim and invited a Military Intelligence with whom they took the victim to the Army Barracks accusing him of assisting rebels. Like the Assessors therefore, I find that the prosecution have proved their case against the accused beyond reasonable doubt. I reject the accused's defences of compulsion and grudge as mere attempts to wriggle out of the problem he found himself in. He is therefore found guilty as charged and convicted accordingly.

G. M. OKELLO

Judge

29/07/1996

Sentence and reasons for it;

The accused is convicted of kidnaps with intent to murder contrary to section ²³⁵ (1) (a) of the Penal Code Act. This is an offence which carries the maximum sentence of death. Court however has discretion to give ^a lesser sentence if the circumstances warranted. The principle of sentence is that the sentence must "befit not only the offence but also the offender.

I am told that the accused is ^a first offender. The established practice of this court is not to sentence a first offender to the maximum sentence unless that is a mandatory sentence.

In this case the accused had been in custody for *2i* years before his trial. This will be taken into account. He is said to have family hardship. All these must be contrasted with the gravity of the offence committed. The accused was a person in authority. He acted too jealously in the execution of his duty. He ought to have cross-checked to find out the correctness of the accusation for which he was taking the victim to the army barracks. If he had executed his duty humanely he probably would have heeded to the appeal made to him not to take the victim to the army on such allegation.

Considering all the above factors, I consider four years imprisonment adequate penalty for the accused. So I order.

G. K. OKELLO

Judge

29/07/1996

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