

Hon. Mr Justice
J. M. N. Iskoo'60

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

HOLDEN AT SOROTI

CRIMINAL SESSION CASE NO. 9 OF 1993.

UGANDA PROSECUTOR

VERSUS

CHARLES EECHU ACCUSED.

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

Kidnapper
10 years

J U D G M E N T:

The accused is charged with Kidnapping with intent to murder contrary to section 235 (1) (a) of the Penal Code Act.

In the particulars of offence, it is alleged that Charles Eechu during the month of September, 1988 at Kelim village in Kumi District by force took away one Betty Asado against her will with intent to murder the said Betty Asado or to expose her to the dangers of being murdered.

An eye witness, PW2, was drinking enguli with Betty Asado at the home of one Melson Esiaru on the material day when the accused in the company of one Orongoronga came and asked for Betty as the lady they were looking for. Present also were the said Esiaru and one Eriku the father in-law of the victim but both were not called to give evidence. PW2 was a clan leader of Ajesa Parish who knew the accused as a rebel in 1988.

The accused and his colleague the said Orongoronga then apprehended Asado at around 3 p.m. and took her first to her home but later she was brought before the witness as a clan leader on the allegation that she was taking enguli to the enemy, N.R.A. soldiers. The witness paid a ransom of one cock and shs 1000/- to try and save her life but all in vain. Instead the witness and Asado were taken to Omuge-Eeru village where they spent a night waiting for one Taifa who was the boss of rebels. In the morning they met the said Taifa whom he assured that the allegations against Asado were untrue.

After the ordeal lasting several days, PW2 and PW3 were set free but Asado remained in the custody of the accused and the said Taifa. Since then the witness has not seen or heard anything about Asado. PW3 also confirmed that in 1988 the accused was a rebel in their village. In September, 1988 he was arrested by one Okello and another rebel and was taken to Omugeru village before Taifa. The allegation against him was that he was the one who brought the enemy, N.R.A. soldiers who put a roadblock in the village. He successfully denied the allegation but all the same he was made to pay a ransom of five chickens and shs 3,000/-. The witness spent a night there together with Betty Asado and PW2 and learnt from Asado that she was also arrested on the allegation that she took some enguli to the N.R.A. soldiers.

The witness and PW2 were eventually set free but Asado remained with the accused and other rebels. Since then he has not also seen or heard anything concerning Asado.

Evidence of another eye witness is that of PW1, a teacher of Atapar Primary School. He says in September, 1988 on a date he cannot remember, but between 3 p.m. - 4 p.m. he was at home when he saw the accused and one Anyelu come with Asado to their home. Asado was his aunt and he knows the accused as a villagemate and also as a schoolmate of Kapir Primary School. His mother is the sister of Asado and Asado was brought for food.

After Asado had eaten, the accused and his colleague took her to unknown destination. The following morning, one rebel called Ogwang came and asked that food be prepared again for Asado and should be taken to an island lying between Kapir and Aukot. His brother Ekau Moses now with the N.R.A took the food and returned home safely. Ekau Moses again took some food for the third time on the request of the said Ogwang, but on the fourth time, Ogwang told them not to prepare any longer more food for Asado.

Four days later, the witness saw another rebel called Auta offering for sale half petty, handkerchief and a belt all belonging to Asado. Since then the witness has also not seen or heard anything concerning the victim, Betty Asado.

In his defence, the accused pleaded an alibi. He says he was arrested by N.R.A soldiers on 4.9.88 on suspicion that he was a rebel. He denied being a rebel in 1988 or at all. He claims he was and still he is a mere peasant of Atapar Parish. He completely denies being involved in the alleged kidnapping of the said Betty Asado. He does not know Asado nor does he know the rebel leader the said Taifa.

The accused narrated his story that after his arrest by the N.R.A. soldiers, he was detained at Koloin detach together with DW2, DW3 and other youths. He puts the blame on N.R.A. soldiers that around that period, any young person was suspected and considered a rebel. On that basis he was arrested and detained in diverse military barracks/detaches along with DW2, DW3 and others. He was transferred from Koloin detach to Kumi Brigade after which they were taken to Basima House in Kampala. His other places of detention included the training school in Mbarara, Luzira Prison, Malukhu Prison in Mbale, Kirinya Prison, Jinja and eventually back to Kumi on 8.10.91 where he was handed to the Police for this alleged offence on 9.10.91 and since then he has been on remand custody.

In another development, the accused points a finger at all the prosecution witness, PW1, PW2, and PW3 with an accusation that in 1987 they were among the group who threw a grenade at his house which damaged the face of his mother now rendering her blind. For that reason alone, all the prosecution witnesses fabricated the story against him for fear of revenge in case he wins this case.

DW2 says he is a peasant farmer of Atapar village and knows the accused as a villagemate. He remembers that in September, 1988 he was among the people arrested by the N.R.A soldiers on suspicion that he was also a rebel. He was first detained at Koloin military detach together with the accused and DW3 among others. They were transferred to Kumi Brigade after which to various places in Kampala, Simba Battalion in Mbarara and on 26.4.90 he was released on Presidential Amnesty at Luzira Prison. His home from that of the accused is about 2½ miles apart otherwise he has never known that the accused was a rebel nor did he know the said Taifa or the victim Asado.

DW3 also gave a similar story. He said he was arrested by the N.R.A soldiers on 28.8.88 on the allegation that he was a rebel. After arresting all people in the village, screening took place in which old people were released but the young ones including the accused and himself were detained at Koloin detach. He was eventually released on 19.12.91, leaving the accused still in detention at Kumi Prison. He knew the accused since his school days at Wiggins Primary School and his home is across the swamp 3 miles away from that of the accused. He does not know Betty Asado nor does he know the said rebel boss one Taifa.

By and large, that was the evidence before the court in this case. Both the learned Counsel for the prosecution and the defence Counsel framed the ingredients of the present alleged offence to include the following:-

1. THAT, a person was taken against her will by force or fraud;
2. THAT, that person has not been seen or heard about since, and
3. THAT, it was the accused who took that person away.

In resolving the first ingredient stated above, the prosecution relies on the evidence of PW2, the clan leader and an in-law of the victim, Betty Asado who in September, 1988 at around 3 p.m. was drinking enguli with her at the home of one Melson Esiaru when the accused and his friend one Orongorongo came and apprehended Asado. The accused later told the witness that Betty Asado was being arrested on the allegation that she was supplying enguli to the enemies, the N.R.A soldiers.

As a clan leader, PW2 offered to settle the matter so that Asado would not be taken away. He paid the accused a ransom of shs 1000/- and one cock which the accused accepted, but still the accused insisted in taking her away to the rebels' boss one Taifa for necessary action. The witness also went with them to secure her life.

In addition, the prosecution relies on the evidence of PW1 who on the material day saw the accused and his friend bring aunty Asado to their home for food. She looked worried and she did not know where they were taking her. PW3 who was also arrested by rebels said mock trials took place in that area. He was also taken there on the allegation that he was collaborating with the N.R.A. He was released because the accused supported him against the allegation of collaboration with the N.R.A but nonetheless paid a ransom of shs 3000/- and five chickens.

Apparently, the accused who arrested Asado on the allegation that she used to supply enguli to the N.R.S. soldiers did not support her before the said Taifa otherwise she would have also been released. As PW2 and PW3 were released, but Asado remained behind pending trial before rebel bosses.

All the circumstances of the case, it is submitted, show that Asado was detained against her will. As in the instant case, the accused was an Intelligence Officer of the rebels, who took her on the allegation of supplying enguli to the enemies, that constituted an intention to murder her or to expose her to dangers of being murdered, otherwise without such allegation Asado would have not been arrested and tried by the rebels.

In the context of all that evidence, the learned defence Counsel submitted that the prosecution has failed to prove that Asado was taken against her will and that at the time of taking her away, there was mens rea/ an intent to expose her to the dangers of being murdered. The prosecution evidence, it is submitted, shows that the accused acted as a mere messenger. PW2 was invited by the accused to witness what would happen to Asado before the said Taifa.

It is submitted also that evidence of PW3 supports the defence in that after paying ransom, he was released by Taifa but Asadi remained in custody. When PW3 took the N.R.A soldiers to where that group of rebels were, they ran away. In that confusion, it is possible that Asado was shot in cross-fire. Evidence is that Taifa was later shot dead by the N.R.A (not on this particular occasion), it is submitted that it is possible that he was shot together with Asado. As that possibility raises some doubt, the accused be given favour of that doubt.

The elements of the offence of kidnapping seems to me to be well established. It is the forcible seizure and taking away of a person against his or her will. In the instant case, the evidence clearly shows that Asado was the lady the accused and his friend were looking for. She was taken first to her home by the accused and the said Orongorongo, his friend. Later, they took Asado to the home of the clan leader, PW2. For the first time when Asado was taken as the wanted woman from the home of Melson Esiaru where she was drinking enguli together with DW2, no reason was given why they wanted her. It was when she was taken before PW2 that the accused said she was wanted by the rebel boss Taifa on the allegation that she was supplying the enemies, the N.R.A soldiers with enguli.

When PW2 paid a ransom of shs 1000/- and one cock, in a bid to settle the matter, the accused accepted that ransom but still insisted that Asado be taken to Taifa, the rebels' boss. Despite that, PW2 went with them purposely to plead for her safety as according to him (PW2) the allegation of supplying enguli to the N.R.A was false. Even when Asado was taken to the home of PW1 for food, she looked worried and did not know where she was being taken. PW3 who was also arrested on the allegation of collaborating with the N.R.A. was released when the accused supported him. With that evidence on the background, Asado was kidnapped. She was not free from the arrest.

On a charge under section 235 (1) (a) of the Penal Code Act, it must be proved by the prosecution that at the time of the kidnapping there was a contemporaneous intent that the victim be murdered or be put in danger of being murdered. Section 235 (2) of the Act, permits me to presume the necessary intent required by section 235 (1) (a) and (b) as the victim in the instant case has not been seen for a period of more than six months. It is common knowledge that around that period, rebels were killing people in the district. Evidence of all the prosecution witnesses reveals that the accused at the material time was an Intelligence Officer of the rebels who took Asado on the allegation of supplying enguli to the enemies and that in itself constituted an intention to murder her or to expose her to the danger of being murdered. An inference can be drawn that she was murdered from the evidence of PW1 who said that after Ogwang, another rebel, had told them not to prepare food for the victim any longer, four days later he saw her clothes being sold to the public by another rebel called Auta.

All in all, my finding is that constructive force was used by taking the victim to the rebels. She was under constructive arrest in which she was not free to go where she wanted, especially as PW2 paid a ransom but all the same the accused insisted that she should appear before Taifa. In the circumstances, an intent to have her murdered or be exposed to the danger of being murdered is established by the prosecution right from the time of her arrest as she was wanted by the rebel group.

Whether the allegation labelled against her was true or not, it is understandable that it was a serious allegation, especially as the rebels and the N.R.A. soldiers at the time were enemies.

As to whether Betty Asado has not been seen or heard about since her arrest, there is overwhelming evidence from the prosecution witnesses to that effect. The victim was an aunt of PW1, PW2 was her clan leader and in-law and PW3 was the chief of the area, but all confirmed that to date, Asado has not been seen or heard about. The court therefore presumes that she is dead as she has not been seen for a period of more than six months since her kidnapping.

As to whether it was the accused who kidnapped Betty Asado, he pleaded the defence of an alibi. The defence is that the accused did not kidnap Asado with intent to murder her or at all. He pleaded an alibi that on 4.9.88, he was arrested by the N.R.A. soldiers and was detained until his release in 1991. It is submitted the onus is on the prosecution to disprove the defence of an alibi: R v. Sukha Singh s/o Waziri Singh & others (1939) 6 EACA 145.

The learned Counsel for the State submitted that the prosecution in this regard relies on the evidence of all the prosecution witnesses which reveals that it was the accused who actually kidnapped Asado on the material day. Even when PW2 and PW3 were being detained, the accused was physically present. All the prosecution witnesses knew the accused before the incident and the incident took place in broad day light. In the circumstances there was no mistaken identity of the accused.

From the evidence on record, the accused forcibly took away Asado from the home of Melson Esiaru in the presence of PW2 who knew him very well before the incident. On the same day, the accused and his friend passed with Asado to the home of PW1 for food. He too knew the accused as a villagemate before the incident. All that happened between 3 p.m. and 4 p.m. on the day of the incident. PW3, the village chief who was already arrested by the rebels also saw Asado in the company of the accused, his friend and PW2 and they all appeared before Taifa the following morning after spending a night with PW3. Evidence is also that it was the accused who secured the release of PW3. Although all the prosecution witnesses did not mention the exact date of the incident, but all of them said it happened in September, 1988 and that was before the accused was later arrested on the allegation of being a rebel at the time. Evidence is that in fact the accused was an Intelligence Officer of the rebels before the incident. In view of all that I have no doubt in my mind that the prosecution evidence puts the accused at the scene of crime at the material time.

His defence of an alibi is false as it is sufficiently rebutted by the prosecution side. The alleged grudges put on the prosecution witnesses are but a mere fabrication of an afterthought as they were not put to the witnesses in cross-examination amounting to such a concocted story.

In the end result, I share the opinions of the gentlemen assessors in their deliberations that the accused is guilty of the offence charged and do find him guilty of the offence of kidnapping and accordingly convict him.


STEVEN GEORGE ENGWAU
JUDGE

27.4.94.

28.4.94: Accused before the court.

Mr. Kakembo for the accused on state brief.

Ms Nandawula for the State.

Judgment delivered in open court.


STEVEN GEORGE ENGWAU
JUDGE

28.4.94.

S E N T E N C E:

An offence committed under section 235 (1) (a) of the Penal Code Act carries a maximum sentence of death. In the circumstances of the present case before me, I have opted not to impose a sentence of death.

The accused is first offender and a young man of about 28 years old during his trial but when the offence was committed he was about 21 years old. He deserves to be given a chance to reform. Rebel activities during that period were rampant in the district and with that age, the accused was vulnerable to joining the rebels. As intelligence officer of the rebels at the time, Taifa his boss ordered him to kidnap the victim which according to the evidence resulted into her death.

It is the duty of the court to protect weak victims like Asado, a mere woman from the whims of brutal people in the like of the accused. A deterrent sentence is adequate in the present case to deter the accused and others of his like from killing people senselessly as in the instant case.

Accordingly, the accused is sentenced to 10 years' imprisonment.


STEVEN GEORGE ENGWAU

JUDGE

28.4.94.

Court: R/A against conviction and sentence explained.


STEVEN GEORGE ENGWAU

JUDGE

28.4.94.

SGE/eg