



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 222 of 2005

(From original conviction (s) and Sentence(s) in Criminal case No. 1708 of 2004 of the Senior Principal Magistrate's Court at Kiambu (M.W. Wachira – SPM))

MARTIN NGANGA WARONJA
.....APPELLANT

VERSUS

REPUBLIC.....
.....RESPONDENT

J U D G M E N T

MARTIN NGANGA WARONJA was convicted of one count of **ABDUCTION** contrary to **Section 258** of the **Penal Code**. The particulars of the charge were as follows: -

“on the 13th day of May 2004 at Githarane village of Kiambu District within central province, abducted SAMUEL WAMUI THUO so as to be disposed of as to be put in danger of being murdered.”

The Appellant was sentenced to 5 years imprisonment and it is against the conviction and sentence he now appeals to this court.

The Appellant challenges the conviction on the basis of circumstantial evidence which he claims lacked in corroboration, and on the basis of hearsay evidence which he claimed was inadmissible and that the evidence of the prosecution was full of loopholes and that vital witnesses were not called to testify. The state opposed the appeal.

The brief facts of this case were that one **SAMUEL WAMUCII THUO** went missing on 13th May 2004. His brother **JOSEPH** PW2 told the court that the Appellant had at 9.00 a.m. on the 13th gone to their home at Thigio to ask for Samuel. That Joseph then called Samuel. Samuel went to the gate where the Appellant was and they discussed. Then Samuel reported to Joseph that the Appellant had asked him to go to a night meeting to take photographs of that occasion. Joseph said that later in the evening Samuel borrowed a torch from him and eventually left the home. The following day, Samuel did not go home and was not seen again up to the time that the case was heard and finalized in the lower court. The family through Samuel's father PW1 and brother PW2 reported him missing. The day after he went missing, one Simon, PW3, a cousin of Joseph and Samuel got a call from someone claiming to be Samuel. Simon then went to Joseph and gave him the information. Together they called the telephone number and a voice which claimed to be Samuel informed them “that he was in

Narok and on his way to Busia where he had gotten a job". The phone then went off and attempts made to call the number subsequently were fruitless. In the meantime, one Peter, PW4 informed the family that the Appellant had been to Narok and had visited him on four occasions during the month of May 2004. During the month of May 2004, PW8, **PC Jane** visited Narok and got the information concerning the Appellant's visit to Narok in May 2004. PW4 said that the Appellant was alone during the visit.

The Appellant in his defence stated that he was unaware of the disappearance of Samuel until 19th July 2004 when his neighbour gave him the information. That is when he surrendered to the police after learning that he was being looked for.

I have evaluated and analyzed the whole evidence afresh and bearing in mind that I neither saw nor heard any of them and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32.**

Section 258 of the Penal Code provides thus: -

"S.258 Any person who kidnaps or abducts any person in order that the person may be murdered, or may be so disposed of as to be put in danger of being murdered, is guilty of a felony and is liable to imprisonment for ten years."

The Appellant in his written submission contended that the evidence adduced before the Court was shoddy and not worth to conclusively draw an inference of guilt. He relied on the case of **KIPKERING ARAP KOSKEI vs. REPUBLIC (1949) EACA 135**, submitting that it was trite law that the circumstantial evidence being relied upon to infer guilt must be watertight. That it must disprove innocence on the part of the accused.

Mr. Gitonga, learned counsel for the State opposed the appeal. He submitted that the conviction was safe. He submitted that contrary to the Appellant's submission, the evidence of PW1 did not contradict the rest of the witnesses' evidence. Counsel submitted that PW1 had borrowed a torch from PW2 in order to go for a night visit and that he never returned the next day. Counsel submitted that the appeal had no merit and that the sentence of 5 years imprisonment was reasonable. In reply the Appellant submitted that the person it was alleged he abducted had not been found by the time the lower court case was finalized.

It is quite obvious that the learned counsel for the State had either not prepared for this appeal by studying the proceedings of the lower court. Alternatively, if he did, then he did not understand them at all.

The learned trial magistrate in her judgment relied on the definition of abduction as provided under **Section 256** of the Penal code to find as follows: -

"The evidence on record is that the accused herein personally went to the home of Samuel Wamui and called him through PW2 his younger brother. He deceived him that he would take photographs in an overnight prayer meeting. There was no such a meeting. He induced him that he could be paid Sh.100/- for photography. He accused knew that Wamui was a photographer and that's why he called him. Wamui bid his brother goodnight as he spoke the words see you tomorrow God willing. He has not been seen to date. The accused doesn't deny that he went to the home of Wamui and deceived him and made him go out to his home to unknown destination. Evidence on record is that there was no overnight meeting that day."

Section 256 of the Penal Code defines an abductor as a person who either by force compels another person to go to any place or who by any deceitful means induces any person to go to any place. The evidence before the court was to the effect that the Appellant visited the home of Samuel and Joseph asking for Samuel. Later, after Samuel had talked to the Appellant,

Samuel told Joseph that the Appellant had asked him to take photographs in a night prayer meeting to be held that night. It is clear from the evidence of Joseph who was present at the time the appellant visited, that Samuel remained at home until that evening when he took a torch from Joseph and went away. There is no evidence to show that Samuel went to Kiriri where the prayer meeting was supposed to be held. There is no evidence at all of where Samuel went after he left Joseph in their home on the evening of 13th May 2004.

The learned trial magistrate's finding that there was no night prayer meeting at Kiriri where the Appellant had invited Samuel has no support in the evidence before the court. I do not understand on what basis the learned trial magistrate concluded that there was no such meeting. That finding of fact was a serious misdirection on the part of the learned trial magistrate. There was no evidence adduced to show that the Appellant acted deceitfully when he invited Samuel to the prayer meeting to take photographs as indicated. Before the court can find that an accused person acted deceitfully under **Section 258** as read with **Section 256** of the **Penal Code**, it must be shown that the accused person deliberately gave a dishonest or false statement concerning a fact which he knew was not true in order to make another person to believe it to be true and to act on it by going to a place where he is either murdered or is exposed to the danger of being murdered. There must be a connection between the *mensrea* that is the person abducted was made to believe a state of fact which was untrue and the *actus reus*, that acting on that belief he went to a place where he was murdered or disposed to the danger of being murdered. In this case there was evidence of *mensrea* but no evidence to provide the necessary link that would justify a finding that the said Samuel acted on the information given by the Appellant by going to the place directed by the Appellant.

The evidence adduced by the prosecution falls short of the required standard of proof. There may be strong suspicion that there may be a connection between the Appellant's visit to Joseph and Samuel's home and the subsequent disappearance of Samuel. However, that strong suspicion is not sufficient to safely found a conviction for the offence charged. Having carefully considered this appeal, I find that the conviction entered herein was unsafe and cannot be allowed to stand. I will allow this appeal, quash the conviction and set aside the sentence.

The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 3rd day of August 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant – present

Mr. Gitonga - State Counsel

Tabitha – Court clerk.

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LESIIT, J.

JUDGE