**Kibuuka v Uganda**

[2006] 2 EA 140 (SCU)

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 4 November 2006

**Case Number:** 3/04

**Before:** Odoki CJ, Oder, Tsekooko, Karokora and Kanyeihamba JJSC

**Sourced by:** LawAfrica

**Summarised by:** H Kibet

*[1] Appellate procedure – Duty of first appellate court – Re-evaluation of the evidence on record –*

*Whether the court had adequately discharged its duty.*

*[2] Criminal law – Kidnapping with intent to murder – Elements of the offence – Taking by force or*

*fraud – Intent to commit offence of murder – Whether necessary intent proved – Section 235(1)(*a*) and*

*(2) – Penal Code.*

*[3] Evidence – Alibi – Onus of proof – Burden always on the prosecution to disprove alibi – Whether*

*prosecution had discharged burden.*

*[4] Evidence – Identification – Corroboration – Former statement made by a witness relating to a fact –*

*Whether identification of the appellant as the kidnapper was proper – Whether evidence of complainant*

*was corroborated – Section 155 – Evidence Act.*

**Editor’s Summary**

The appellant was convicted of the offence of kidnapping with intent to murder by the High Court and

sentenced to 20 years’ imprisonment. At his trial, it was alleged that the appellant had had an affair with

his niece, AN, which had

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resulted in the birth of a boy. Evidence was adduced to the effect that on 24 October 1998 at about 8pm.

The appellant had sent for AN to come from her brother’s house and meet him. Following their meeting,

she returned to her brother’s house. Later that night, the appellant again sent for her. Because her child

was crying, her brother requested her to take the baby with her. Some time later, AN returned to her

brother’s house crying that the appellant had taken her child away from her. The following day she

reported the matter to her mother as well as to the authorities. The appellant was later arrested but the

child was never seen again.

In his defence, the appellant put forward an alibi to the effect that on the night in question he had been

at the mosque, after which he had visited a friend then gone home. He called his friend as a witness to

support his alibi. He also denied having indulged in an incestuous relationship with AN. The trial judge

believed the prosecution case, rejected the defence evidence and convicted the appellant. His first appeal

to the Court of Appeal was rejected.

He now appealed to the Supreme Court on the grounds that the Court of Appeal erred in finding that it

was he who had kidnapped the child, that it had failed to scrutinise and re-evaluate the evidence and that

it erred in regard to the alibi. Counsel for the appellant also argued that the prosecution had failed to

prove that the appellant had the intention to murder. Counsel for the respondent supported the Court of

Appeal’s decision and argued, *inter alia*, that the Justices of Appeal had correctly directed their minds to

the law and evidence regarding the offence of kidnapping with intent to murder and had properly

evaluated the evidence and arrived at the right conclusion. She also argued that it was not necessary to

include section 235(2) in the indictment and that what had been included in the particulars of the offence

had been sufficient to explain to the appellant what he was charged with.

**Held** – It was the duty of a first appellate court to properly scrutinise and re-evaluate the evidence of both

the prosecution and the defence; *Abasi v Uganda* and *Bogere Charles v Uganda* followed. In this

instance, the Court of Appeal had properly discharged this duty and had not faulted the trial judge’s

findings on the complainant’s credibility as a single identifying witness.

Section 155 of the Evidence Act provided that any former statement of a witness relating to the same

fact made at or about the same time the fact took place could be proved to corroborate the testimony of

that witness. Such a statement must have been made either (*a*) at or about the same time when the fact

took place or (*b*) before any authority legally competent to investigate the fact; *Ndaula John v Uganda*

applied. In this instance, the statement made by AN to her brother that her child had been taken away

satisfied the provisions of section 155 and was provable against the appellant.

The Court of Appeal rightly upheld the findings of the trial judge that a love affair had existed

between the appellant and AN.

Counsel for the respondent’s submission that it was unnecessary to include section 235(2) in the

statement of the offence was erroneous. The inclusion of the subsection was necessary to inform the

accused of the relevant ingredient that the prosecution must prove in order to secure a conviction. The

omission by the prosecution of section 235(2) in the statement of the offence did not occasion a

miscarriage of justice nor did it prejudice the appellant. The prosecution

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evidence brought out the fact that the child had not been seen since the kidnapping and intention to

murder was thus rightly presumed and proved.

It was well settled law that an accused person who raised an alibi did not have the burden of proving

it; *Sekitoleko v Uganda, R v Johnson* and *Leonard Aniseth v R* followed. In this instance, the Court of

Appeal had reviewed all the evidence for both sides and agreed with the trial judge in rejecting the

appellant’s alibi and there were no grounds for interfering with this finding.

The sentence imposed on the appellant was lawful and hence the appeal against its severity was

barred by section 5 of the Judicature Act.

Appeal dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Abbasi and another v Uganda* criminal appeal number 10 of 1995 (SC) – **F**

*Bogere Charles v Uganda* criminal appeal number 10 of 1997 (SC) (UR) – **F**

*Bogere Moses and Kamba v Uganda* criminal appeal number 1 of 1997 (SC) (UR)

*Godfrey Tinkamarirwe and another v Uganda* criminal appeal number 5 of 1986 (SC)

*Ibrahim Bilal v Uganda* criminal appeal number 5 of 1995 (SC) (UR)

*Kifamunte Henry v Uganda* [1997] LLR 72 (SCU)

*Leonard Aniseth v Republic* [1963] EA 206 – **F**

*Mukoome Moses Bulo v Uganda* criminal appeal number 12 of 1995 (SC)

*Ndaula John v Uganda* [2000] LLR 130 (SCU) – **AP**

*Sekitoleko v Uganda* [1967] EA 531 – **F**

***United Kingdom***

*R v Johnson* [1961] All ER 1967 – **F**

**Judgment**

**Odoki CJ, Oder, Tsekooko, Karokora and Kanyeihamba JJSC:** This is an appeal against the decision

of the Court of Appeal which dismissed the appellant’s appeal against the conviction by the High Court

for the offence of kidnapping with intent to murder contrary to section 235(1)(*a*) of the Penal Code Act

and sentence of twenty years imprisonment.

The brief facts of the case were as follows:

The appellant and Aida Nankya, (PW1) lived in his home at Kazo as husband and wife despite the

fact that they were related as uncle and niece, PW1 being a daughter of the appellant’s brother. They

eventually produced a baby boy, Ibrahim Kibuka, who was aged six months at the time he was

kidnapped.

Mariam Nansubuga, (PW4) who was the sister to PW1 knew about the love affairs between the

appellant and PW1 because when the appellant and PW1 were still in love, the appellant used to send

money to PW1 through her PW4. However, in 1998, (PW1) left the appellant’s home and went to live at

Natete with her brother, Asumani Mukasa, (PW3).

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On the night of 24 October 1998 at 8pm, the appellant sent for PW1 to go and meet him. PW1 left her

brother’s home and went to meet the appellant, but she returned to her brother that same night. Later the

same night at 11pm the appellant sent for her again. However, her brother, PW3 this time requested PW1

to take her child with her which was crying. PW1 took her child with her when she went to meet the

appellant. On reaching where the appellant was, the appellant requested to be allowed to hold the child as

he used to do in the past. PW1 handed the child to the appellant. The appellant did not return the child to

PW1. He, instead, entered a stationary special hire vehicle which he entered and was driven away

together with the child. PW1 returned to PW3, crying saying that her child had been taken away by the

appellant. PW3 advised her to report to the authorities on the following day. On the following day, PW1

reported the matter to her mother who advised that she should report to the authorities. PW1 tried to trace

the appellant at his home but could not find him. She reported to authorities and later to a Police Station.

The appellant was later arrested. The child, Ibrahim Kibuka, has never been seen alive again. The

appellant was indicted with kidnapping with intent to murder.

In his defence, the appellant denied the charge and pleaded the defence of alibi to the effect that at the

material time he was at the Mosque between 7 pm and 10pm praying. He stated that after his prayer, he

went to the home of Yusuf Kurumba (DW2), and later went to his own home and slept till the following

day. He denied having indulged in an incestuous relationship with PW1. He called DW2 to support his

alibi.

The learned trial Judge believed the prosecution evidence, rejected the defence of alibi, convicted and

sentenced him as already stated.

His appeal to the Court of Appeal was dismissed and hence this appeal. The appellant has filed the

following four grounds of appeal.

(1) That the learned Justices of Appeal erred in law and fact when they found that it is the appellant

who kidnapped PW1’s child;

(2) That the learned Justices of Appeal erred in law and fact when they failed to properly re-evaluate

all the evidence before it and thereby erroneously confirmed the conviction of the appellant;

(3) That the learned Justices of Appeal erred in law and fact on the issue of alibi and as a result arrived

at a wrong decision;

(4) That the sentence of 20 years’ was harsh and excessive in the circumstances.

Mr *Ojokol*, counsel for the appellant, in written submissions argued grounds one and two together. He

submitted that the offence of kidnapping with intent to murder comprises of two elements; namely, the

prohibited conduct of or taking away by force or fraud and secondly the specific intent to commit an

offence of murder. He cited the cases of *Mukoome Moses Bulo v Uganda* criminal appeal number 12 of

1995 (SC) and *Ibrahim Bilal v Uganda* criminal appeal number 5 of 1995 (SC) (UR) for the above

proposition.

Counsel submitted that although the Court of Appeal after reviewing the evidence on record

concluded that the learned trial Judge properly evaluated the evidence and came to the right conclusion

that it was the appellant who kidnapped PW1’s child, it was his contention that the Justices of Appeal

never properly directed themselves on the law and evidence in respect of the charge

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of kidnapping with intent to murder. He cited the case of *Abbasi and another v Uganda* criminal appeal

number 10 of 1995 (SC) and *Bogere Charles v Uganda* criminal appeal number 10 of 1997 (SC) (UR)

for the proposition that the first appellate has a duty to properly scrutinise and re-evaluate the evidence of

both the prosecution and the defence. He concluded that if it had done so, it would have found that the

evidence of identification of the appellant by PW1 did not rule out the possibility of mistaken identity or

even of a frame-up. Counsel cited section 6(1)(*a*) of the Judicature Act and the cases of *Kifamunte Henry*

*v Uganda* criminal appeal number 10 of 1997 (SC) and *Bogere Moses and Kamba v Uganda* criminal

appeal number 1 of 1997 (SC) (UR), for the proposition that except in the clearest of cases, this Court as

a second appellate court, is not required to re-evaluate the evidence like a first appellate court. Counsel

contended that the instant case was one of the clearest of cases which makes it incumbent upon this Court

to re-evaluate the evidence. He submitted that in the instant case PW1 was a single identifying witness

who claimed to have identified the appellant when the appellant took away the child from her PW1 and

therefore, her evidence required corroboration.

Counsel submitted that there was no witness who corroborated PW1’s evidence to the effect that the

appellant kidnapped the child. He submitted that PW3’s evidence to the effect that when she went away

at night with the child and returned without it, crying that the appellant had taken it from her could not

corroborate PW1’s evidence on reliance on section 155 of the Evidence Act, since no police reports were

produced to court in evidence.

On the issue of specific intent to have the victim murdered, counsel submitted that it was essential for

prosecution to prove the intention of the appellant to murder. Counsel contended that the appellant was

not placed in a position whereby he had to rebut the presumption. He further contended that the intention

could be presumed if the victim had not been seen or heard of within a period of six months or more.

This presumption is provided for under section 235(2) of the Penal Code Act as follows:

“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 subsection (1).”

Counsel cited the case of *Godfrey Tinkamarirwe and another v Uganda* criminal appeal number 5 of

1986 (SC) for the proposition that in law on a charge of kidnapping with intent to murder, it is necessary

for the prosecution to establish that at the time of kidnapping there was a contemporaneous intent that the

victim be murdered or put in danger of being murdered.

Counsel submitted that in the case of *Mukombe Moses Bulo* (*supra*) the court held that subsection (2)

of section 235 of the Penal Code Act casts a burden on the appellant to prove that he did have that

intention. The appellant in that case failed to rebut the presumption. Counsel submitted that in that case

the charge had made reference to subsection (2) of section 235 of the Penal Code Act, unlike in the

instant case where subsection (2) was omitted in the charge.

In conclusion, counsel submitted that the offence of kidnapping with intent to murder was not proved

and therefore the Court of Appeal erred to confirm the conviction and sentence against the appellant.

Therefore, he prayed that grounds one and two should succeed.

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Ms Alice *Komuhangi*, Senior State Attorney supported the Court of Appeal’s decision to confirm the

appellant’s conviction and sentence for the offence of kidnapping with intent to murder.

She submitted that the Justices of Appeal properly directed their minds to the law and evidence in

respect of the charge of kidnapping with intent to murder contrary to section 235(1)(*a*) of the Penal Code

Act. She was in agreement with counsel for appellant regarding the ingredients which constitute the

offence charge. Counsel also agreed with counsel for the appellant that the court of appeal as a first

appellate court had a duty to re-evaluate the evidence for both the prosecution and the defence but

contended that the Court of Appeal in the instant case had properly evaluated the evidence and arrived at

the right conclusion.

Turning to the evidence of PW3, the learned Senior State Attorney submitted that the prosecution

evidence was not that he saw the appellant take the child, but that he saw (PW1) leave his house with the

child going outside where she had been called and only saw her coming back, crying and reporting that

the appellant had taken away the child from her.

Learned Senior State Attorney submitted that the Justices of Appeal rightly applied section 155 of the

Evidence Act when they held that PW3’s evidence corroborated PW1’s evidence in as far as

identification of the appellant was concerned. She submitted that since PW3 was in court and gave

evidence on oath and was cross-examined, the production of police report was not necessary. Counsel

submitted that throughout the trial, the learned trial Judge found and the Justices of Appeal agreed that

although PW1 was a single identifying witness, she was truthful and credible whose evidence was

corroborated by other pieces of evidence.

On the issue of specific intent to cause the victim to be murdered, and omission of subsection 2 of

section 235, the Senior State Attorney’s reply was that it was not necessary to include that subsection in

the Indictment. She cited section 22 of the Trial on Indictment Decree (TID) which clearly stipulates

what should be contained in the Indictment.

She submitted that whatever was contained in the particulars of the offence was good enough to

sufficiently explain to the appellant of what he was charged with. She submitted that subsection (2) of

section 235 of the Penal Code Act is an explanation of how the intention in subsection (1) thereof can be

presumed. She submitted that in the instant case it was rightly presumed.

We agree with the submissions of counsel for the appellant that the first appellate court has a duty to

properly scrutinise and re-evaluate the evidence of both the prosecution and defence. See *Abbasi and*

*another v Uganda* (*supra*) and *Bogere Charles v Uganda* (s*upra*).

However, we do not agree with counsel’s submission that the Justices of Appeal never properly

scrutinised and re-evaluated the evidence of both the prosecution and the defence.

The learned Justices of Appeal scrutinised and re-evaluated the evidence of both sides and considered

how the learned trial Judge had treated the evidence of (PW1) as a single identifying witness during

conditions which were not favourable for correct identification. They never faulted her finding that she

was satisfied PW1 knew the appellant before as they were related and as she

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had met him (appellant) that night. They did not fault her finding of her observation as to her demeanour

and truthfulness.

In our view, the Justices of Appeal rightly found that PW3’s evidence corroborated PW1’s evidence

that it was the appellant who kidnapped the child. They found that PW1’s statement to PW3 that it was

the appellant who kidnapped the child was made at about the time the fact of kidnapping the child took

place and therefore satisfied the provisions of section 155 of the Evidence Act, which provides as

follows:

“(155) 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 the fact took place, or before any authority legally

competent to investigate the fact, may be proved.”

We reiterate what we stated in the case of *Ndaula John v Uganda* (SC) criminal appeal number 22 of

2000 that:

“In Uganda, a former statement made by a witness, which satisfies the conditions stipulated in section 155 of

the Evidence Act, is provable as corroboration of the testimony of that witness. The conditions stipulated in

the section are that the former statement must have been made either (*a*) at or about the time when the fact

took place or (*b*) before any authority legally competent to investigate the fact. The statement made by the

complainant in the instant case to witnesses who answered her alarm should have been viewed in that

context.”

Therefore, we agree with the Justices of Appeal that in the instant case the report by PW1 when she

returned soon after the time the child was taken away from her, crying and reported to PW3 that her child

had been taken away by the appellant, satisfies the provisions of section 155 of the Evidence Act is

provable against the appellant.

The Justices of Appeal further and rightly in our opinion found that the evidence that PW4 was

substantially truthful. They rightly, upheld the findings of the learned trial Judge that PW4 knew about

the love affairs that existed between the appellant and PW1 as she PW4 was the conduit through whom

the appellant sent money to assist PW1.

The issue of specific intent to cause the victim to be murdered was seriously argued by Mr *Ojakol* in

his submissions. The learned trial Judge had addressed the issue in her judgment in the following passage

thus:

“The fact that the accused was the father of the abducted child was neither here nor there particularly because

section 235(2) of the Penal Code Act stipulates that the intention to murder at the time of taking away, can be

implied if the victim remains unaccounted for, for six months or over. It is not in dispute therefore that the

accused had a contemporaneous intent to murder since all evidence indicates that the victim has never been

recovered to-date. Reliance on section 235(2) of the Penal Code Act does not burden the prosecution with any

further need to prove the intention for the offence. Relying on section 235(2) of the Penal Code Act, the

accused is assumed to have had the desired intention to commit the offence.”

The learned trial Judge found the accused guilty and convicted him for kidnapping with intent to murder

contrary to section 235(1)(2) of the Penal Code Act.

We think that although the prosecution omitted to mention subsection (2) of section 235 of the Penal

Code Act (*supra*) in the statement of the offence the omission did not occasion a miscarriage of justice

nor did it prejudice the appellant. The particulars of the offence must have conveyed to the appellant

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the offence for which he was tried. The particulars of the offence in this case took care of that omission

when it stated:

“Nuuhu Asumani on the night of 24/25 of October 1998, at Natete in Kampala District forcefully took away

Ibrahim Kibuka aged about 6 months from its mother against her will, with intent that such a child may be

murdered or may be so disposed of as to be in danger of being murdered.”

Be that as it may, we do not agree with the submission of the learned Senior State Attorney that it was

not necessary to include subsection (2) of section 235 of the Penal Code Act in the statement of the

offence. In our view, the inclusion of the subsection is necessary for the purpose of informing the

appellant the relevant ingredient which the prosecution must prove in order to secure a conviction against

the accused.

We think that subsection (2) of section 235 of the Penal Code Act is an explanation of how the

intention in subsection (1) thereof, can be presumed. In our view, the prosecution evidence, brought out

the fact that since its kidnap in October 1998, the child has never been seen or heard of. Therefore, the

intention to murder was rightly presumed and proved.

Consequently, we cannot fault the Justices of Appeal for confirming the findings of the learned trial

Judge. In the result, we find no merit in grounds one and two.

Ground three raised the issue of whether the Justices of Appeal erred in law and fact on the defence of

alibi. The law on the defence of alibi is well settled and is that – “An accused person who raises a

defence of alibi does not have a burden of proving it.” See *Sekitoleko v Uganda* [1967] EA 531, *R v*

*Johnson* [1961] All ER 1967, *Leonard Aniseth v Republic* [1963] EA 206.

The mode of evaluation of evidence in case where the accused raises an alibi in his defence was

settled by this Court in the case of *Moses Bogere and another v Uganda* (SC) criminal appeal number 1

of 1997. There we stated:

“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 the 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.”

The learned Justices of Appeal reviewed all the evidence both for the prosecution and the appellant and

concurred with the learned trial Judge in rejecting the appellant’s alibi. We agree with the conclusion of

the two courts. Mr *Ojakol*, counsel for the appellant has not persuaded us that either court erred.

Therefore, ground three fails.

Ground four raised the issue of right of Appeal against severity of sentence of imprisonment to this

Court.

Section 5 of the Judicature Act deals with appeals to the Supreme Court in criminal matters. Its

subsection 3 specifically debars appeals to this Court against severity of sentence. It provides that:

“In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may

appeal to the Supreme Court against the sentence or order, on a matter of law, not including the severity of

the sentence.”

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The sentence of 20 years’ imprisonment is not unlawful. The ground must therefore fail.

For the appellant:

Mr *Ojakol*

For the respondent:

*Information not available*