REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NUMBER 52 OF 2019

JECINTA MAKENA MUTURUCIO....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both judgement and sentence delivered by PM's Court Mavoko in Criminal Case No. 135 of 2013, **P. O. OOKO, PM** on 30th March, 2017)

REPUBLIC.....PROSECUTOR

VERSUS

JECINTA MAKENA MUTURUCIO.....ACCUSED

JUDGEMENT

1. The appellant herein, **Jecinta Makena Muturucio,** (as the Appellant) together with **Albert Mureithi Nyamu** (as the 2nd Accused) and **Jackson Kaaria Mutegi** (as the 3rd Accused) with **Gladys Kanini**, (as the 4th Accused) were charged in the Principal Magistrate's Court at Mavoko in Criminal Case No. 135 of 2013 with 2 counts of Kidnapping contrary to section 255 as read with Section 257 of the ***Penal Code***, and Demanding Money by Menaces Contrary to Section 302 of the ***Penal Code***. While all the 4 accused persons faced Count I, the 2nd and 3rd accused also faced Count II.

2. The facts of Count I with which the appellant herein was charged were that on 29th January, 2013 at Kitengela Township in Kajiado County, the accused persons jointly kidnapped **BN**, a child aged 2 years from lawful guardianship of **EWM**.

3. After hearing the case, the Learned Trial Magistrate found the Appellant, the 2nd and 3rd accused guilty on the 1st Count and convicted them accordingly and the 3 accused persons were sentenced to five years in respect of Count I.

4. In support of its case the prosecution called 5 witnesses. Briefly their evidence was as follows:

5. On 29th January, 2013, PW1, **JKN**, the father of **BN** who at the time was aged 2 years and 3 months was at his place of work when at 7.00pm he received a call from their caretaker, one **Muringe**, against the background of noise or cries. He tried to call his house girl, the Appellant herein, but she never picked the call and later the phone went off. He then called their caretaker but the call was received by his neighbour who informed him that his said son had been stolen. He immediately called his wife, **EW**, PW2, and relayed the information to her and then rushed to the scene. He had been informed that the vehicle which the kidnappers had used was Reg. No. KBK 229C.

6. PW1 then reported the matter to Kitengela Police Station and was given two police officers who accompanied him to the scene. At his house he found the Appellant crying and upon interrogation, she disclosed that the child had been kidnapped by people who had assisted her at the shop where she had gone to buy maize. She then led them to the scene which was approximately 500 metres from PW1's house. At the scene some eye witnesses disclosed that they had seen the Appellant with another man though the Appellant refuted this. The Appellant however informed them that her cell phone, which PW1 had used to reach the Caretaker, had also been stolen during the incident. According to the witness since they were the ones who had bought the said cell phone they gave the details thereof to the police and the Appellant was detained at the police station.

7. The following day at 10.30 am, PW2, PW1's wife, was called by a stranger who demanded Kshs 1,000,000.00 as a condition for release of the said child which amount was reduced to Kshs 600,000.00. The police then tracked the number from which the call was made and also got

the details of the vehicle that was used in the kidnap in question and tracked the owner as being based in Zimmerman Estate where the vehicle was recovered. The police arrested the driver and the driver's wife and they were led to the 2nd and 3rd accused who were arrested and upon interrogation admitted knowledge of the whereabouts of the child. On their way the 2nd and 3rd accused called the 4th accused on phone and PW1 requested her to bring the child and shortly thereafter the 4th accused showed PW2 the child and she was arrested.

8. In cross-examination PW1 stated that she had not disagreed with the Appellant who had been in his employment for one year. On the material day the Appellant had been given Kshs 1,000.00 by PW2 for purchasing beans and charcoal. He was however unaware of the relationship between the 3rd and the 4th accused though it was the 2nd and the 3rd accused who led them to where the child was kept where the child was found in the custody of the 4th accused. According to him it was his phone that the kidnappers used when demanding for the ransom.

9. According to PW2, **EWM**, the mother of the child and the wife of PW1, on 29th January, 2013 at 6.00 am he woke up and left her house at Kitengela for her place of work at [particulars withheld] Airport at 7.00 am leaving her baby, **BN**, aged 2 years and 8 months with the Appellant who was her house help with Kshs 1,000.00 for the purchase of beans and charcoal. At 12.30 pm, she was called by PW1 who informed her that their child had been kidnapped and she immediately rushed to the scene and thereafter to Kitengela police station before going to the house. However, upon reaching the house she found he Appellant being interrogated by the police and the Appellant informed them that she had been stopped by the kidnappers who snatched the baby from her plus the phone. According to the witness this was about 200 metres away at a place with no market at all and where they never used to purchase beans. To her they used to do their purchases just outside the apartment which was fenced. However, some people in the crowd disclosed that the Appellant had been seen with three other people before the child was kidnapped. The Appellant was thereafter arrested and taken to Kitengela Police Station.

10. On 30th January, 2013, she received three missed calls from phone number 0754275951 which she called back and was received by a man who informed her that he had the baby and introduced himself as **Gitonga**, a retired officer. The caller then demanded Kshs 2 million from her. PW2 however said she had only Kshs 100,000.00 which the man rejected telling her to give the same to police officers as a bribe. He however reduced the amount to Kshs 600,000.00. The same person called her at 12.30 pm and informed her that the baby needed food and asked for the sum earlier demanded and PW2 sent him Kshs 2,000.00 for food. The police officers then requested them to accompany them to Githurai upon information that the vehicle Reg. No. KBK 229C which had been used during the kidnapping of the child had been tracked there. However, by 10.30 pm they had failed to track the vehicle and returned home. The following day at 5.30 pm she went back to Githurai with PW1 and the Police. PW1 then informed her that they had already tracked the vehicle as they were ahead and she saw the vehicle parked outside an apartment after which she went back to Kasarani Police Station. In the meantime, the man who had called her kept on calling and threatening to kill her son. After some time PW1 called her and informed her that they had already tracked the child together with some suspects and he was later brought to the Police Station with the 2nd, 3rd and 4th accused. According to her she employed the Appellant in December 2011 and there was no bad blood between them as she paid her salary promptly save for the month she was arrested. According to her when she sent the sum of Kshs 2,000.00 the phone did not record the name of the recipient. She stated that she never witnessed the kidnapping as well as the recovery. While she stated that the Reg. No. of the vehicle was revealed by the eye witnesses she denied that she had any relationship with the owner of the vehicle. According to her the child was kidnapped for three days before being released. She admitted that she did not know the 3rd and the 4th Accused.

11. PW3 was **PC Martin Gitonga**, a police officer based at Isinya Police Station who was at the time of the incident based at Kitengela Police Station. According to him, on 29th January, 2013 at 1.20pm while at the Police Station, PW1 and PW2 reported that their child had been kidnapped from the Appellant. He was then directed, together with **PC Manjengo** and **PC Buluma** by the OCS to track and recover the child. Accordingly, they proceeded to the scene where they found the Appellant relaxing in the house. Upon interrogation the Appellant stated that she was going to the shop with the child when they met somebody who was driving a saloon car and who inquired from her if she knew a lady by the name of **Wa Kimani.** The man requested for her phone to make a call. In the process, the person slapped her, grabbed the child and put the child in the vehicle.

12. PW3 requested the Appellant to accompany them to where she said she was slapped and fell down. However, at the said place there were no shops and there were no marks showing that she had fallen. Further, she did not have any marks on her face where she alleged she had been slapped and her clothes had no dust. Therefore, she became a suspect. In addition, the eye witnesses confirmed that a vehicle Reg. No. KBK 229C was seen being driven at high speed as the Appellant screamed for help. However, the Appellant was in company of another man. The Appellant was then escorted to the Police Station. Along the way, the Appellant disclosed that during the incident she was in the company of a friend namely **Albert Mureithi**, the 2nd accused whose contact she gave as 0725918207. This number was however unavailable and the Appellant alleged that she did not know his whereabouts.

13. The witness moved to Court and obtained a warrant to investigate the Appellant's phone number. Thereafter PW3 proceeded to Safaricom for investigation in respect of the Sim Card No. 0725182207 as well as the Appellant's number 0723436458 which was allegedly stolen. The witness then proceeded to KRA to investigate the ownership of Motor Vehicle Reg. No. KBK 229C and discovered that the same was registered in the name of Kitson Travel and Safaris Limited based at Zimmerman along Thika/Nairobi Road. However, their search for the vehicle failed to locate either the office or the vehicle. In the meantime, PW2 disclosed that she had been called on a YU line No. 0754275951 and was requested to pay Kshs 1,000,000.00 before the child could be released.

14. The following day at 5.00pm they proceeded to Githurai 44 Area and at 6.30 am traced the vehicle parked outside a plot and after a while a man showed up, opened the vehicle and was arrested. The man introduced himself as **Mugendi** and upon inquiry the man stated that on that day he had been hired to do some work at Kitengela by 3rd accused i.e. to ferry some of his relatives from the Airport to Kitengela. However, since the 3rd accused was his close friend he just requested the 3rd accused to use the vehicle on his own. The vehicle was returned after two hours. Upon request, the said **Mugendi** took them to Muigai Inn along Thika Road where the 2nd and 3rd accused were arrested by **Sgt Leweri** who was heading the operation. They also recovered the phone which PW1 had bought for the Appellant. Upon demanding to know whereabouts of the child the 2nd and 3rd accused agreed to produce the child after which the 3rd accused led them to the by-pass leading to Mombasa. However, along the way, he changed his mind and stated that the child was with another woman whose residence he was not aware of and instead opted to call her.

15. According to PW3, after 15 minutes, the 4th accused showed up after she had been called by the 3rd accused and PW1 confirmed that the child belonged to him. The 4th accused was then arrested and she led them to a house, about a kilometre away where the child had been kept. The 4th accused informed them that she was staying there with the 3rd accused in a relationship and that they had conspired to steal the child from the complainants so that they could extort the money from them. She further disclosed that all the 4 accused persons were part of the conspiracy save for **Mugendi** who was tricked to give his vehicle. The 4th accused further confirmed that she was brought the child on 29th January, 2013 by the 3rd accused. The child was then handed over to the parents and the 2nd, 3rd and 4th accused persons arrested and charged with the offences.

16. PW4 was **Sgt Patrick Leweri** was the initial investigating officer. According to him, on 29th January, 2013 he was in the office when the complainants, PW1 and PW2 made a report concerning the loss of their child. They then proceeded to their house where they interrogated the Appellant. They also were able to get the registration number of the vehicle which was used in the kidnap and they retrieved its particulars from the Registrar of Motor Vehicles as belonging to Kidson Travellers Car & Hire Company based at Zimmerman. From that date PW2 informed them of having received a call from a person on YU number demanding ransom in the sum of Kshs One Million. By this time the Appellant had been arrested. They also took her cell phone and compared it with the data from the said YU number.

17. On 30th January, 2013 their attempts to trace the vehicle at Zimmerman were fruitless but on 31st January, 2013 in the morning they spotted the vehicle parked outside a plot within Githurai Estate and after laying ambush, they arrested a man and a lady who upon interrogation introduced themselves as couples. The man, **Mr Mugendi,** admitted that he had hired out the vehicle on 29th January, 2013 to the 2nd and 3rd accused who were his friends. He further furnished the cell phone contacts of the said two accused which the police officers used to trace them. In the meantime, the ransom demanded was reduced to Kshs 600,000.00.

18. However, the 2nd and 3rd accused persons were tracked somewhere in Ruiru though they were eventually arrested at Juja by PW4 who was reinforced by his other colleagues. Upon interrogation, the 3rd accused disclosed that the child was somewhere at Ruai By-Pass and they proceeded there. After a short while the child was brought by the 4th accused person who also took them to the place where the child had been hidden.

19. According to the witness in the course of the investigations he discovered that the Appellant was the girlfriend of the 2nd accused while the 3rd accused was the boyfriend of the 4th accused.

20. PW5 was **Cpl. Johana Lamui**, the scene of crime officer. According to him on 5th February, 2013 at 11.00 am at Kitengela Police Station he met **PC Gitonga** who showed him Motor Vehicle KBK 229C, Toyota Corolla, Silver in colour which he was requested to photograph and accordingly did so. The said photographs were produced as exhibits.

21. At the close of the prosecution case, the accused persons were placed on their defence.

22. In her defence, the Appellant, **Jacinter Makena**, in her unsworn statement stated that on 29th January, 2013 she was employed by the complainants as a house help to take care of their junior son, **BN**, as from 11th December, 2011 and she worked for them till she was arrested over this matter.

23. According to her, on that date, she prepared the child and later went with him to the shop. However, upon leaving the gate, while holding the boy by one hand, somebody slapped her on the face and she became unconscious and when she regained consciousness she realised that the child and her cell phone were gone. She screamed for help and the caretaker went to her aid. However, since she did not know the direction to the police station she decided to go back to their plot where the caretaker called and informed PW1 of the incident.

24. The 2nd accused, **Albert Mureithi**, in his unsworn statement stated that he was a butcher employed by one **Julius Kimathi** and was only familiar with the 3rd accused who was his cousin.

25. According to him, on 30th January, 2013 at 7.00 pm, the 3rd accused called and requested him to pay him a visit but since he was working he informed the 3rd accused that it was not possible. On 31st January, 2013 at 2.00pm he called the 3rd accused who directed him to his whereabouts along Thika Road. So he boarded a vehicle and alighted at Ruiru area along Thika Road, where he met the 3rd accused but as they walked together, he heard people saying they were under arrest and they were asked the whereabouts of the child. According to him, they were beaten and bundled into a civilian vehicle and when the vehicle stopped PW1 appeared carrying a minor chid on his shoulders. He was later arraigned in Court and charged with the offences in question.

26. On his part the 3rd accused person, **Jackson Karia Mutegi**, testified that he knew the 2nd accused as his cousin while the 4th Accused person was his wife.

27. On 31st January, 2013, the 3rd accused testified that he was at his place of work, selling second hand shoes, in Juja when at 2.00pm he got good snicker shoes which he thought the 2nd accused would like and called him to go and fit the same. The 2nd accused went at around 2.30pm and the 3rd accused collected him from the bus stage since the 2nd accused did not know where he was staying. After meeting the 2nd accused, and as they were on their way, they saw two men coming from the opposite direction who arrested them at gun point. After a short while two police vehicles approached, parked at the scene and police officers alighted and interrogated them about the whereabouts of a child they did not know. They were then bundled inside one of the vehicles as the officers decided to search their residential places and so the 3rd accused led them to his residential house. However, on their way they stopped where there were three civilian vehicles one of which was KBK 229C belonging to his customer, **Mr Mugendi**, whom he saw had been handcuffed together with his wife. He also saw PW1 carrying the child with PW2 coming to the vehicle.

28. He testified that that thereafter they proceeded to his house where a search was conducted but nothing was found after which his wife, the 4th accused was arrested and they were taken to Kasarani Police Station where they found two other people who had been arrested over the same matter. After recording their statements, they were charged with the offences in question which he denied having committed. According to him the other suspects including **Mr Mugeni** were released.

29. In cross-examination the 3rd accused disclosed that he had a wife and a child aged 3 years old. He admitted that he knew **Mr Mugendi's** vehicle since **Mr Mugendi** had been his client for almost two years prior to the incident. He however stated that he had no personal differences with **Mr Mugendi** though prior to the incident **Mr Mugendi** owed him some money in respect of the shoes he had been sold. He was also aware that **Mr Mugendi** was in the car hire business.

30. The 4th accused, **Gladys Kanini Munyeke**, gave an unsworn statement in which she stated that she was working in an M-Pesa shop belonging to **Mary Mueni** at Kerugoya. According to her she was once married to the 3rd accused from December, 2012 to October, 2014 and they had an issue aged 3½ years old. They however broke up due to misunderstandings.

31. According to her on 29th January, 2013 at 3.00pm the 3rd accused with whom he was then living as her husband went back to the house with a boy child the subject of the case and informed her that the said child belonged to his cousin but never disclosed the names of the cousin. The 3rd accused informed her that there was some misunderstanding between the said cousin and his wife. By that time, the 4th accused stated, she had only stayed with the 3rd accused for 3 months and she had not yet been introduced to any of the 3rd accused's cousins. The 3rd accused requested her to stay with the child until his cousin reconciles with his wife.

32. According to the 4th accused she only stayed with the child from 29th to 30th January, 2013 and on 31st January, 2013, the 3rd accused called her on his cell phone whose number she could not recall and directed her to take the said child to the nearest bus stage i.e. by-pass. She complied with the request but before she reached the said stage which was approximately 200 metres, she met two men who grabbed the child from her and interrogated her about the child and she explained to them the circumstances under which she was in possession of the child. It was then that one of the men informed her that the child had been kidnapped from Kitengela Town. She then accompanied the said police officers up to the by-pass stage where she only saw the police officers but not the 3rd accused. Thereafter she was taken back to her house by the said police officer and the house was searched after which she was taken to Kitengela Police Station where she recorded her statement and the following day she was charged in court charged with the offence. In her evidence she only came to know of the 1st and 2nd accused while at Kitengela police station.

33. At the conclusion of the case the Court found the Appellant, 2nd, and 3rd accused persons guilty of count I while the 2nd and 3rd accused persons, the 1st and 2nd, were convicted of the offence in Count II. The Court however found the 4th accused innocent and acquitted her. In respect of Count I the 1st, 2nd and 3rd accused persons were sentenced to serve five years each while in respect of Count II the 2nd and 3rd accused persons were sentenced to serve seven years each.

34. The trial magistrate in his judgement relied on the definition of kidnapping under Section 255 of the ***Penal Code*** and considered the evidence of Pw1 and Pw2 as evidence that the minor was kidnapped. He relied on the evidence of Pw3 and Pw4 as corroboration. On the issue of participation of the appellant he found that the appellant had the custody of the child and she was part of the commission of the offence that she was charged of. The court also found that the appellant gave a denial that could not challenge the overwhelming evidence against her and resultantly found her and her co accused's guilty of the offence they were jointly charged with. After considering the mitigation, the appellant was sentenced to 5 years imprisonment.

35. Vide amended grounds the sought to challenge her conviction on the grounds that firstly the elements of the offence were not proven as envisaged under section 255 as read with section 259 of the ***Penal Code***; Secondly she challenged the fact that essential witnesses were not availed; Thirdly she assailed the trial court for shifting the burden of proof; Fourthly she challenged the trial court for basing conviction on wrongly admitted electronic evidence contrary to section 78 of the ***Evidence Act*** and Finally she challenged the dismissal of her defence.

36. The appellant vide her submissions submitted that the prosecution failed to prove that she was the chief facilitator for there was no evidence that connected her with the offence. Based on the case of **Joan Chebichi Sawe v R. Cr App 2 of 2002** it was submitted that her conviction was based on suspicion and could not stand. It was submitted that the prosecution did not prove that the appellant intentionally caused the child to be wrongfully confined. The appellant submitted that the trial court erred in convicting the appellant while failing to appreciate that the prosecution failed to avail key witnesses. In citing the provisions of section 78(4) of the ***Evidence Act***, the appellant challenged the reliance and admission of Electronic Evidence produced by the arresting officer for the same was not authenticated by a person who was in the service of production of such evidence. It was submitted that the dismissal of her evidence was erroneous. According to the appellant, she gave a true account of what happened and her defence ought to have been considered. Vide further submissions, the appellant submitted that the court relied on hearsay evidence and in this regard reliance was placed on the case of **Tenywa vs. Uganda (1967) EA.** It was submitted that the failure to give the appellant witness statements was a violation of her right to fair trial as per Article 50(2)(j) of the Constitution. Reliance was placed on the case of **Thomas Patrick Gilbert Cholmondeley vs. R (2008) eKLR.** The appellant urged the court to consider her for a non-custodial sentence and also that the time served be considered in her sentence in terms of section 333 of the ***Criminal Procedure Code***. She submitted that she was arrested in 2013 and had been in custody ever since.

37. Miss Mogoi, learned prosecution counsel submitted that the evidence was to the effect that the appellant agreed with the kidnappers to kidnap the child. It was submitted that the circumstantial evidence was sufficient to support conviction and there was no reason to interfere with the decision of the trial court, neither did the defence case cast doubt on the prosecution case. The Court was therefore urged to uphold the conviction and confirm the sentence of the trial court.

Determination

38. I have considered the material placed before the Court. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and

re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

39. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

40. However, it must be stated that there is no set format to a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
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> > **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

41. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

42. In this case, the prosecution evidence was that on 29th January, 2013, the complainants (PW1 and PW2) left their son under the care of the Appellant who was their house help and went to work. Later they received a call from the Caretaker that the said son had been kidnapped. The matter was reported to the police and in the course of the investigations it was discovered that the Appellant had been seen in the company of a man. The Appellant however stated that the child was snatched from her by a person not known to her when she had gone to do some shopping. According to her she was slapped, lost consciousness and by the time she regained consciousness both the child and her phone were missing. She however disclosed during interrogation that she was with the Appellant.

43. Further investigations revealed the particulars of the vehicle which was used during the kidnapping. Based on a search conducted, the police traced the vehicle and the owner disclosed that the vehicle had on that day been hired by the 3rd accused and the said person offered to assist the police trace the 3rd accused. In the meantime, PW2 the mother of the child received demands to pay ransom of Kshs 1000,000.00 as a condition for release of the child. Further investigations by the police revealed that the Appellant was in communication with the 2nd accused herein.

44. Based on the information received from the said **Mr Mugendi**, the police traced the 3rd accused who was arrested in the company of the 2nd accused and upon further interrogation, the 3rd accused called the 4th accused who turned up with the child. According to the police when they apprehended the 2nd and 3rd accused they were found in possession of the Appellant's phone.

45. In her defence, the Appellant, **Jacinter Makena**, in her unsworn statement stated that on 29th January, 2013 she was employed by the complainants as a house help to take care of their junior son, **BN**, as from 11th December, 2011 and she worked for them till she was arrested over this matter.

46. According to her, on that date, she prepared the child and later went with him to the shop. However, upon leaving the gate, while holding the boy by one hand, somebody slapped her on the face and she became unconscious and when she regained consciousness she realised that the child and her cell phone were gone. She screamed for help and the caretaker went to her aid. However, since she did not know the direction to the police station she decided to go back to their plot where the caretaker called and informed PW1 of the incident.

47. The substance of the evidence has been reproduced hereinabove.

48. Section 255 of the ***Penal Code*** provides that:

> **Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of a lawful guardian of the minor or person of unsound mind, without the consent of the guardian, is said to kidnap the minor or person from lawful guardianship.**

49. Section 257 of the ***Penal Code*** on the other hand provides that:

> **Any person who kidnaps any person from Kenya or from lawful guardianship is guilty of a felony and is liable to imprisonment for seven years.**

50. In this case the Appellant would only be guilty of the offence of kidnapping if she took the subject minor, who it is agreed was under fourteen years of age out of the keeping of his lawful guardian without the consent of the guardian.

51. In this case it is not in doubt that the subject of the offence was a male minor below the age of fourteen. He was in the lawful custody of the Appellant who was the guardian. He was taken from that lawful guardianship. While the prosecution set out to show that the Appellant was part and parcel of the said conspiracy and therefore consented to the said transaction, section 20 of the ***Penal Code*** provides that:

> **(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-**
>
> **(a) every person who actually does the act or makes the omission which constitutes the offence;**
>
> **(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
>
> **(c) every person who aids or abets another person in committing the offence;**
>
> **(d) any person who counsels or procures any other person to commit the offence;**
>
> **and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.**

52. It therefore follows that if the Appellant conspired with the 2nd and 3rd accused herein to commit the offence, the Appellant as well as the 2nd and 3rd accused would be culpable.

53. In this case the evidence against the Appellant was that on the material day, she had been left in charge of the minor and was given money to buy groceries. Although it was alleged that she was seen in the company of some men, the people who allegedly saw her were never called to testify. PW4 however testified that when he proceeded to the scene where they found the Appellant relaxing in the house. Upon interrogation the Appellant stated that Though the appellant stated she had been slapped upon being requested to accompany the police to where she said she was slapped and fell down, it was discovered that at the said place there were no shops and there were no marks showing that she had fallen. Further, she did not have any marks on her face where she alleged she had been slapped and her clothes had no dust. However, the eye witnesses confirmed that as the vehicle Reg. No. KBK 229C was seen being driven at high speed, the Appellant screamed for help. According to PW3, along the way, the Appellant disclosed that during the incident she was in the company of the 2nd accused, her friend, whose contact she gave as 0725918207. This number was however unavailable and the Appellant alleged that she did not know his whereabouts.

54. The Appellant's case, however was that she returned back to the plot because she did not know where the police station was. She however did not deny that she was an acquaintance of the 2nd accused. It is however clear that there was no direct evidence linking the Appellant with the kidnap. However, in **Neema Mwandoro Ndurya vs. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

> **"Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. *It is no derogation of evidence to say that it is circumstantial."***

55. Caution is nevertheless called for when relying on circumstantial evidence. While recognizing the dangers in relying on circumstantial evidence without exercising this caution the Court in **Teper v. R [1952] AC at p. 489** had this to say:

> **"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."**

56. In **Sawe vs. Rep [2003] KLR 364** the Court of Appeal held:

> **"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

57. In **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

> **"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the**

prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

58. The question that arises then is whether the the inculpatory facts against the Appellant in this case are incompatible with her innocence and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The Appellant explained why she did not go to the police, though she never denied that she knew the 2nd accused. However, the failure to deny the same in my view, on its own does not necessarily lead to inference of guilt. While that may raise strong suspicion against her, the burden still remained on the prosecution to prove her guilt and that burden falls on the prosecution at every stage of the proceeding and never shifts to the accused.

59. In **R vs. Ally (Criminal Appeal No. 73 of 2002) [2006] TZCA 71**it was held by the Tanzania Court of Appeal that:

> **"Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted."**

60. In the case of **John Mutua Munyoki vs. Republic [2017] eKLR** the Court of Appeal opined as follows:

> **"…Her story fitted their suspicion and that the appellant had the opportunity to commit the crime as urged by Murithi. All this is but suspicion and speculation. This can never be the basis of a conviction. In the case of Michael Mugo Musyoka v Republic (2015) eKLR we observed:**
>
> > **"We have looked at the evidence on record, there is no evidence or testimony to prove that there was any contact between the genital organs of the appellant with that of the minor. We are of the considered view that the evidence of PW1 was hearsay and did not carry much weight. We say so because she was not present at the house and did not witness what actually happened. She relied on what her daughter C had allegedly told her. Without the evidence of the said or eye witness we find that the prosecution did not prove that the appellant had intentionally and unlawfully indecently touched the child.....we find that the case against the appellant was based on a mere suspicion. In Mary Wanjiku Gichira v Republic, Criminal Appeal No 17 of 1998, this court held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life".**
>
> **In our view the evidence of PW1, 3, 5 and 10 as relates to the appellant only helped to advance the suspicion and was not cogent enough to found a conviction. As correctly submitted by the appellant, in all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged."**

61. In this case I have considered the material above and I cannot say that the inculpatory facts disclosed are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis than that of her guilt. Though burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and never shifts to the party accused, the said facts do not satisfy the above criterion.

62. In this case however there was evidence from the mobile phone service provider which was meant to prove that the 2nd accused was in communication with the Appellant on at least two occasions on 8th January, 2013 and 18th January, 2013. According to PW4, in the course of the investigations he discovered that the Appellant was the girlfriend of the 2nd accused.

63. The Appellant has challenged the admissibility of the evidence obtained from the Mobile Service Provider based on section 78A of the ***Evidence Act*** which provides as hereunder:

> **(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.**
>
> **(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.**
>
> **(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—**
>
> > **(a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;**
> >
> > **(b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;**
> >
> > **(c) the manner in which the originator of the electronic and digital evidence was identified; and**
> >
> > **(d) any other relevant factor.**
>
> **(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts**

contained in such record, copy, printout or extract.

64. In this case what was produced was a printout bearing the stamp of Safaricom. There was no certification by any person purporting to be in the service of the said Safaricom. In **Donald Atemia Sipendi vs. Republic [2019] eKLR**, **Mativo, J** expressed himself as hereunder:

> **"The only corroboration was data from Safaricom which was used to allegedly trace the appellant. The document was produced by a police officer. Electronic record is documentary evidence under Part 111 of the Evidence Act. Any information contained in an electronic record is deemed to be a document. An electronic record may be like computer print out, Compact Disc (CD), Video Compact Disc (VCD), Pen drive, Chip etc.,. In other words, it may be printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer. Admissibility of electronic evidence is wholly governed by sections 78A of the Evidence Act. The Supreme Court of India in *Anvar P.V. v. P.K. Basheer & Others* observed, *inter alia*, that in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate obtained at the time of taking evidence, without which, the secondary evidence pertaining to that electronic record, is not admissible. Where the probative value of the information in a data message depends upon the credibility of a (natural) person other than the person giving the evidence, there is no reason to suppose that section 78A seeks to override the normal rules applying to hearsay evidence. On the other hand, where the probative value of the evidence depends upon the "credibility" of the computer (because information was processed by the computer), the Prosecution is obliged to adduce evidence to satisfy the court as to the evidence is credible. Such evidence depends solely on the reliability and accuracy of the computer itself and its operating systems or programs. It is admissible as evidence in terms of section 78A of the Evidence Act. However, the court's discretion simply relates to an assessment of the evidential weight to be give thereto. The first port of call is to 'closely examine the evidence in issue and to determine what kind of evidence it is and what the requirements for admissibility are. In addition, documentary evidence from a computer may involve hearsay, and it is necessary to determine whether the value of the statements depend on the credibility of anyone other than the person giving the evidence. The truth of the contents of such statements must be tested against the author. Once the evidence is admitted, a court must decide what weight to attach when evaluating the evidence. The evidential weight of a data message must similarly be determined, once admitted into evidence. In assessing the evidential weight of a data message, regard must be had to- (a) The reliability of the manner in which the data message was generated, stored or communicated; (b) The reliability of the manner in which the integrity of the data message was maintained; (c) The manner in which its originator was identified; (d) Any other relevant factors. The accuracy of the computer is an important consideration when evaluating data evidence from a computer. The computer experts are likely to be cross-examined explaining the required standards of accuracy, and whether that computer met the standards at the time the data was generated, stored or communicated. Any doubts as to the accuracy of the operating system may affect the reliability of the evidence and the evidential weight given thereto. This is the reason why the computer expert should be called as a witness to produce the data and satisfy the court on the reliability test. The court will need an expert to help it understand the technical procedures in regard to the accuracy and reliability of a computer. As stated above, the Safaricom data records were produced by a Police Officer. He is not the maker of the document nor does he work for Safaricom. He could not give evidence on how the records were generated, stored or printed or vouch on their accuracy. In short, he was not competent to produce the same. The said evidence was not properly received. The learned Magistrate erred in law by allowing the said records to be produced by a person who was not competent to produce them."**

65. Similarly, **J. Ngugi, J** in **Republic vs. Mark Lloyd Steveson [2016] eKLR** expressed himself as hereunder:

> **"For avoidance of doubt and for future guidance, it is important to point out that authentication is required where any "real" evidence (as opposed to testimonial evidence) is sought to be adduced at trial. This applies both to e-evidence as well as other documents or items sought to be admitted into evidence. Authentication of proposed evidence is a crucial step in its admission – one which reliance on section 78A of the Evidence Act (or even section 106B) does not obviate. To avoid confusion it is important to set out where authentication fits into the evidence map. The admission and consideration of tangible exhibit in evidence follows the following steps:**
>
> **a. *First*, the Court determines if the proposed evidence is relevant. Here, the Court simply determines the probative value of the proposed evidence: whether the proposed evidence has tendency to make the existence of any fact that is of consequence to the determination of a fact in issue more or less probably that it would be without the evidence. If the proposed evidence passes the *Relevancy Test*, it proceeds to the second step.**
>
> **b. *Second*, in the case of tangible exhibits (like the two documents in this case), the Proponent for the evidence authenticates the proposed piece of evidence that is the Proponent must prove that the evidence is what the proponent claims it to be. The court only proceeds to the third step if the proposed evidence passes muster under the *Authentication Test*. It is important to explain here that the term "authentication" though the technically correct word which is widely used for this step can be misleading. In fact, what is meant by "authentication" at this stage is merely that a proper foundation for admission of the document or exhibit has been laid. It does not, at all, mean that the exhibit must now be accepted and believed. The Trial Court, as the fact finder, must ultimately weigh (in step 4 below) the admitted evidence in light of all the circumstances. The weighing can only happen after the foundation for the proposed evidence has been laid.**
>
> **c. *Third*, the Court, at the urging of the parties or on its own motion, determines if there is any other rule of evidence that excludes the proposed evidence. Here is the Court considers whether the evidence is excluded by the Constitution (for example the right against self-incrimination discussed above, prohibition against hearsay evidence or whether the proposed evidence would lead to unfair prejudice with its probative value substantially outweighed by the danger of unfair prejudice. If the proposed evidence survives this *Exclusion Test*, then the proposed evidence is admitted into evidence and the Court proceeds to the fourth step.**
>
> **d. *Fourth*, the Court considers the weight to be accorded to the admitted evidence. At this stage the opponent may still**

bring to the Court's attention evidence opposing authenticity of the evidence, thereby allowing the Court to give less weight to the evidence or no weight at all.

66. Returning to the case before him, the learned judge expressed himself as follows:

"Granted that the relevance of the contents of the two contested documents is not in question, the all-important question becomes: Was the email dated 9th March, 2011 and the attached document properly authenticated in order for them to be admitted into evidence and for the Court to consider its weight" I do not think so. To demonstrate why this is so, I will outline what a proper authentication would look like when the proposed tangible evidence is an email printout like in the present case. First, it is important to reiterate that the purpose of authentication is to demonstrate to the Court that there is a reasonable probability that the proposed evidence is what the proponent claims it is. For example, the Trial Court must be put in a place where it can determine that it is reasonably probable that there was no material alteration of the evidence after it came into the custody of the proponent. This requirement is no less true for email print-outs sought to be introduced under section 78A of the Evidence Act as in the present trial. For email print-outs (as well as other printed electronic messages), the most convenient authentication technique would be circumstantial. Elsewhere, this is defined as "evidence of its distinctive characteristics and the like - including appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." (US Federal Rule of Evidence 901(b)(4)). For example, many email messages can be authenticated circumstantially by "distinctive characteristics" including information known only to the sender or the use of nicknames or internal patterns which taken in conjunction with other circumstances create sufficient evidence to support a finding that the email message in question is what its proponent claims it is. For example, in *United States v Safavian 435 F. Supp. 2d (D.D.C. 2006*), the US District Court for the District of Columbia remarked that "the emails in question have many distinctive characteristics, including the actual email addresses containing the "@" symbol, widely known to be part of an email address, and certainly a distinctive mark that identifies the document in question as an email. In addition, most of the email addresses themselves contain the name of the person connected to the address, such as abramofj@ftlaw.com...The contents of the emails, also authenticate them as being from the purported sender and to the purported recipient, containing as they do discussions of various identifiable matters, such as Mr. Safavian's work…and various other personal and professional matters." An email may also be authenticated through testimony by the recipient that the sender closed with a nickname known only by the recipient (See, for example, *United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000).* Similarly, an email may be admissible if coupled with testimony that the author of the email called the testifying party to discuss "the same requests that had been made in the email." As the *Siddiqui* Court remarked in affirming that the context and contents of emails can be used to authenticate the admission of emails into evidence:

> **In this case, a number of factors support the authenticity of the e-mail. The e-mail sent to Yamada and von Gunten each bore Siddiqui's e-mail address 'msiddiquo@jajuar1.usouthal.edu' at the University of South Alabama. This address was the same as the e-mail sent to Siddiqui from Yamada as introduced by Siddiqui's counsel in his deposition cross-examination of Yamada. Von Gunten testified that when he replied to the e-mail apparently sent by Siddiqui, the 'reply-function' on von Gunten's e-mail system automatically dialed Siddiqui's e-mail address as the sender. The context of the e-mail sent to Yamada and von Gunten shows the author of the e-mail to have been someone who would have known the very details of Siddiqui's conduct with respect to the Waterman Award and the NSF's subsequent investigation. In addition, in one e-mail sent to von Gunten, the author makes apologies for cutting short his visit to EAWAG, the Swiss Federal Institute for Environmental Science and Technology. In his deposition, von Gunten testified that in 1994 Siddiqui had gone to Switzerland to begin a collaboration with EAWAG for three or four months, but had left after only three weeks to take a teaching job. Moreover, the e-mail sent to Yamada and von Gunten referred to the author as 'Mo.' Both Yamada and von Gunten recognized this as Siddiqui's nickname. Finally, both Yamada and von Gunten testified that they spoke by phone with Siddiqui soon after the receipt of the e-mail, and that Siddiqui made the same requests that had been made in the e-mail. Considering these circumstances, the district court did not abuse its discretion in ruling that the documents were adequately authenticated. *Siddiqui*, 235 F.3d at 1322-23.**

Emails can also be authenticated through technological footprints such as internet protocol addresses or an IP address. Since an IP address identifies which computer sent an email, the Service Provider can be called to testify that the IP address from where the email was sent is the residence or business premises of the opponent. Similarly, an expert can also testify that a particular email was retrieved from an author's email hard drive. In the present case, a Technology (Cyber-crime) expert testified for the Prosecution but he did not testify as to this aspect of the case. Mr. Kirimi is right that if the Prosecution wanted to produce the piece of evidence in question, it would have been appropriate for this expert to lay the foundation by authenticating it through the email's technological footprint. Mr. Kinyanjui heavily relied on section 78A of the Evidence Act in his submissions… My understanding of this section is that it makes explicit that electronic messages are admissible as evidence in Kenya provided that they satisfy the other requirements for such admission. This section does not obviate the need for establishing the relevance of the proposed evidence in the same way it does not excuse the need for authentication of the proposed evidence. This section is also helpful in codifying the factors to be taken into account in assessing the weight to be given to an authenticated and admitted electronic message."

67. The learned judge continued:

I did not understand Mr. Kinyanjui to be saying that he wanted the email printout admitted under section 78A(4). This section, in essence, provides for a route for print-outs of electronic documents to be admitted as evidence where such documents are produced in the course of business *and* are accompanied by certification by a person in the employ of the business in question that the document was, indeed, generated in the course of business. Neither conditions are satisfied here. For completeness, it is important to refer to the provisions of sections 106B(1), (2) and (3) as well as section 106(I) of the Evidence Act even though neither parties brought them up. The former sections reinforce the admissibility of electronic records including computer print-outs and provide for a straightforward way of automatically authenticating them if certain conditions enumerated in section 106B(2) are met by producing a certificate of authenticity. That certificate needed must satisfy three conditions:

a. It must identify the electronic records and production process;

b. It must show the particulars of the producing device; and

c. It must be signed by the responsible person.

In the present case none of these conditions were met. In any event, for a computer output to be considered a document for admissibility under section 106B(1), it must satisfy the conditions in section 106B(2) namely that:

a. The output must have been produced during regular use;

b. It must be of a type expected in ordinary use;

c. The computer generating the output must be operating properly or it must be shown that the accuracy of the computer is not otherwise affected; and

d. Where multiple computers are involved, those operating in succession and considered as one.

It should be fairly obvious that the Prosecution does not satisfy the conditions for section 106B(1) to apply. For one to come under this section, the computer output proposed as evidence must both certify the conditions in section 106B(2) and be accompanied by a Certificate under section 106(4). In this case, the accompanying certificate serves the authenticating purpose.

68. According to the learned judge:

"Finally, neither does the presumption in section 106(I) of the Evidence Act come to the rescue of the State in this case. Section 106(I) of the Evidence Act provides that:

A court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such a message was sent.

This section applies when an electronic message (such as an email) has been received by an addressee who wishes to produce it as such. The presumption afforded to the message is that it is the same message that was fed into the computer by the sender. In other words, the Court is permitted to presume that the electronic message received by the receiver or addressee is the same one sent by the sender or originator of the message. The presumption goes to the authenticity of the electronic message as produced by the addressee by permitting the Court to assume that there was no manipulation of the contents of the message between the sending and the reception of the message. It is important to note that this section applies to situations where the addressee produces the electronic message and seeks its admission as proof that it was the same message sent to him or her. The section is categorical on two things: First, it is expressly categorical that the presumption does not extend to the identity of the author of the message. Hence, a proponent of such evidence would have to introduce some other evidence to link the message with its alleged author. Second, the section does not obviate the need for authenticating the proposed evidence (electronic message). Indeed, the section is a substantive instruction to the trial court on what to do with an admitted piece of evidence. It does gives no guidance whatsoever to the process of admission of such a piece of evidence. Differently put, such a piece of proposed evidence must, first, be admitted in the usual way described above…The outcome of this revision, then, is that the Learned Trial Court was correct in refusing to admit the evidence for the reason that the proposed evidence would have violated the right against self-incrimination. Further, we have added a second reason that the Trial Court would have been justified to rely on in rejecting the document: lack of proper authentication of the proposed evidence. I have, however, concluded that the proposed evidence would not have been excludable by reason of being inadmissible confession. In the end, however, the outcome that matters for the parties is that the rejected evidence remains excluded."

69. Dealing with the same issue, **Mrima, J** in **Godwin Musungu Kitui vs. Republic [2019] eKLR** cited his decision in **High Court of Kenya at Bungoma Election Petition No. 4 of 2017 - Levi Simiyu Makali vs. Koyi John Waluke & 2 Others (2018) eKLR** and held that:

Where a party wishes to rely on electronic evidence under the foregone provisions, the one who undertook the actual work of processing that electronic evidence must prepare a Certificate whose contents are provided for in Section 106B (4) as follows: -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particular of any device involved in the production of that electronic record as may be appropriate for the purposes of showing that the electronic record was produced by a computer.

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.

The need to strictly comply with the law when dealing with electronic evidence in this era of technological advancement cannot be overemphasized. I take judicial notice of the fact that through technology one can easily come up with anything 'real' be it a still or live photograph or a video more so even a fictious one. It is just that easy. That is why for such evidence to be admissible the Certificate must strictly pass the test laid in the law."

70. In this case, it is clear that the law was not strictly adhered to. Accordingly, the data from the mobile phone service provider was improperly admitted. If the said evidence is discounted, as it must be, then the circumstantial evidence fails to meet the standard that would warrant the conviction of the Appellant.

71. In the premises, this appeal succeeds, the Appellant's conviction is hereby set aside and her sentence quashed. She is set at liberty unless otherwise lawfully held.

72. Judgement accordingly.

73. This Judgement ruling has been delivered pursuant to section 168 of the ***Criminal Procedure Code*** as read with Article 50 of the Constitution in the absence of the Appellant due to the prevailing restrictions occasioned by COVID 19 pandemic and particularly as the decision is in favour of the Appellant.

Ruling read, signed and delivered in open court at Machakos 30th day of March, 2020.

G V ODUNGA

JUDGE

In the presence of:

Ms Edna Ntabo for the State

Sadique for the Prison

CA Josephine