

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 34 of 2006

SAMUEL NDEGWA MWANGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Judgment and Conviction in the Principal Magistrate's Court at Nyahururu in Criminal Case No. 905 of 2005 dated 28th February 2006 by S. M. Mungai – P.M. Nyahururu)

J U D G M E N T

Samuel Ndegwa Mwangi (hereinafter referred to as the Appellant) and one Margaret Wangechi Nyokabi (hereinafter referred to as Co-Accused) were jointly tried and convicted by the Principal Magistrate Nyahururu for the offence of Kidnapping contrary to section 255 of the Penal Code. They were each sentenced to serve 2 years imprisonment. Being dissatisfied the appellant has filed this appeal raising several grounds including *inter alia* that the offence against the appellant was not proved; that his conviction was against the weight of evidence; that the prosecution failed to prove the required mensrea on the part of the appellant; and that the trial magistrate erred in rejecting the appellant's defence without giving it due consideration.

The particulars of the charge against the appellant alleged that on the 11th day of March 2005 at Augustine village in Laikipia District of the Rift Valley Province they jointly kidnapped Samuel Karanja and Daniel Maina both minors, from the lawful guardianship of Gathitu Karanja without his consent.

During the trial in the lower court the prosecution called 6 witnesses. Briefly their evidence was as follows:

The Complainant Gathitu Karanja (P.W.1) and the Co-Accused were married and are the parents of the minor children Samuel Karanja (P.W.6) and Daniel Maina. At the material time, the complainant and the Co-Accused were separated and the minor children who were aged 4 years 10 months and 3½ years respectively were living with the complainant who had been granted custody of the children by the children's office. At the material time both children were students at St. Augustine Nursery School. On 11th March 2005 at about 1.00 p.m. the children came out of school, the Co-Accused with the assistance of Wanjama Wanjala (P.W.5) grabbed the two children and put them in a taxi which was being driven by the appellant. Notwithstanding the screams of the children the taxi drove to a hotel owned by the mother of the Co-Accused. Nancy Nduta Njoroge (P.W.2) a teacher at St Augustine Nursery School witnessed the incident and noted that the taxi was Registration No. KQE 060. She reported the matter to Corporal Boniface Musau (P.W.3) an officer at Nyahururu Police Station. P.W.2 also alerted the complainant. The police officers traced the taxi and arrested the appellant. The police also apprehended the Co-Accused. Both the Co-Accused and the appellant were charged with this offence.

The Appellant gave a sworn defence in which he explained that he was contacted by phone that some customers needed a taxi at St. Augustine Nursery School. He went to the school where he found the Co-Accused, one Waithira and P.W.5 with two children. He carried them and dropped them at the Hotel of the mother of the Accused and he was paid for his services.

After about 40 minutes the appellant was confronted by police officer who demanded to know where he had taken the children. He took them to the Hotel where he had dropped the Co-Accused and the children. He was subsequently charged with this offence.

It is not disputed from the above evidence that the appellant was a taxi driver. It is evident that the Appellant did not participate in the removal of the children from the school but was only contracted by the Co-Accused to provide transport. There is no evidence that the appellant was aware of any dispute relating to the custody of the children or that he conspired with the Co-Accused as was alleged by P.W.3. The fact that the children were screaming and apparently resisting may have raised an alarm but did not necessarily prove that the appellant knew that the children were being taken away from lawful custody nor was there any evidence of a common intention between the appellant and the Co-Accused.

Moreover the trial court did not appropriately consider the issue of custody of the children. Although a copy of a letter from the District children's office Nyandarua District purported to officially place the custody of the children under the protection and care of the complainant, no evidence was called from the children's office nor did the court weigh the right of the Co-Accused as against that of the complainant in so far as custody of the children was concerned.

In the above premises I concur with learned Principal State Counsel that the appellant's conviction cannot be sustained. Accordingly I allow this appeal quash the conviction and set aside the sentence imposed upon the appellant. The appellant shall be released unless otherwise lawfully held.

Dated signed and delivered this 9th day of October 2006.

H. M. OKWENGU

JUDGE