REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NUMBER 50 OF 2017

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 45 OF 2017)

(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)

1. ALBERT MUREITHI NYAMU

2. JACKSON KAARIA MUTEGI.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. The appellants herein, **Albert Mureithi Nyamu** (as the 2nd Accused) and **Jackson Kaaria Mutegi** (as the 3rd Accused) with others (**Jecinta Makena**, the 1st accused and **Gladys Kanini**, 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 appellants also faced Count II.

2. The facts of Count I were that on 29th January, 2013 at Kitengela Township in Kajiado County, the accused persons jointly kidnapped **B N**, a child aged 2 years from lawful guardianship of **E W M**. As for Count II the facts were that on 30th January, 2013 at Kitengela Township in Kajiado County with intent to steal, the appellants jointly demanded Kshs 1,000,000 (one million) with menaces from **E W M** by threatening to kill her kidnapped son namely, **B N**.

3. After hearing the case, the Learned Trial Magistrate found the appellants together with the 1st accused person guilty on the 1st Count and convicted them accordingly. The appellants were also found guilty of the 2nd count and convicted accordingly.

4. Accordingly the 3 accused persons were sentenced to five years in respect of Count I while the appellants were sentenced to seven years in respect of Count II. The said sentences were to run concurrently.

The Prosecution Case

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

6. On 29th January, 2013, PW1, **J K N**, the father of **B N** 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, **Jecinta Makena Maturucio**, the 1st accused in the lower Court, 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, **E W**, 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.

7. 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 1st accused crying and upon interrogation, she disclosed that the child had been kidnapped by people who had even 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 his house. At the scene some eye witnesses disclosed that they had seen the 1st accused with another man though the 1st accused refuted this.

The 1st accused 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 1st accused was detained at the police station.

8. 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, the appellants herein who were arrested and upon interrogation admitted knowledge of the whereabouts of the child. On their way the appellants 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.

9. In cross-examination PW1 stated that she had not disagreed with the 1st accused who had been in his employment for one year. On the material day the 1st accused 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.

10. According to PW2, **E W M**, 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 Jomo Kenyatta Airport at 7.00 am leaving her baby, **B N**, aged 2 years and 8 months with the 1st accused 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 1st accused being interrogated by the police and the 1st accused 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 1st accused had been seen with three other people before the child was kidnapped. The 1st accused was thereafter arrested and taken to Kitengela Police Station.

11. 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 to search the vehicle Reg. No. KBK 229C which had been used during the kidnapping of the child. The said vehicle had been tracked to Githurai. 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 1st accused 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.

12. 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 1st accused. 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 1st accused relaxing in the house. Upon interrogation the 1st accused 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.

13. PW3 requested the 1st accused 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 1st accused screamed for help. However the 1st accused was in company of another man. The 1st accused was then escorted to the Police Station. Along the way, the 1st accused disclosed that during the incident she was in the company of a friend namely **Albert Mureithi**, the 1st appellant whose contact she gave as 0725918207. This number was however unavailable and the 1st accused alleged that he did not know his whereabouts.

14. The witness moved to Court and obtained a warrant to investigate the 1st accused's phone number. Thereafter PW3 proceeded to Safaricom for investigation in respect of the Sim Card No. 0725182207 as well as the 1st accused'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.

15. 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 2nd appellant i.e. to ferry some of his relatives from the Airport to Kitengela. However since the 2nd appellant was his close friend he just requested the 2nd appellant 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 appellants were arrested by **Sgt Leweri** who was heading the operation. They also recovered the phone which PW1 had bought for the 1st accused. Upon demanding to know whereabouts of the child the appellants agreed to produce the child after which the 2nd appellant 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.

16. According to PW3, after 15 minutes, the 4th accused showed up after she had been called by the 2nd appellant 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 the 4th accused informed them that she was staying there with the 2nd appellant 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 2nd appellant. The child was then handed over to the parents and the 2nd, 3rd and 4th accused persons arrested and charged with the offences.

17. 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 1st accused. 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 1st accused had been arrested. They also took her cell phone and compared it with the data from the said YU number.

18. 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 appellants 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.

19. However the appellants 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 2nd appellant 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.

20. According to the witness in the course of the investigations he discovered that the 1st accused was the girlfriend of the 1st appellant while the 2nd appellant was the boyfriend of the 4th accused.

21. 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.

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

23. In her defence, the 1st accused, **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, **B N**, as from 11th December, 2011 and she worked for them till she was arrested over this matter.

24. 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.

25. The 2nd accused, **Albert Mureithi**, the 1st appellant herein, in his unsworn statement stated that he was a butcher employed by one **Julius Kimathi** and was only familiar with the 2nd appellant who was his cousin.

26. According to him, on 30th January, 2013 at 7.00 pm, the 2nd appellant called and requested him to pay him a visit but since he was working he informed the 2nd appellant that it was not possible. On 31st January, 2013 at 2.00pm he called the 2nd appellant 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 2nd appellant 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.

27. On his part the 3rd accused person, **Jackson Karia Mutegi**, the 2nd appellant herein, testified that he knew the 1st appellant as his cousin while the 4th Accused person was his wife.

28. 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 1st appellant would like and called him to go and fit the same. The 1st appellant went at around 2.30pm and the 2nd appellant collected him from the bus stage since the 1st appellant did not know where he was staying. After meeting the 1st appellant, 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 2nd appellant 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.

29. 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.

30. In cross-examination the 2nd appellant 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.

31. 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 2nd appellant from December, 2012 to October, 2014 and they had an issue aged 3½ years old. They however broke up due to misunderstandings.

32. According to her on 29th January, 2013 at 3.00pm the 2nd appellant 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 2nd appellant 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 2nd appellant for 3 months and she had not yet been introduced to any of the 2nd appellant's cousins. The 2nd appellant requested her to stay with the child until his cousin reconciles with his wife.

33. According to the 4th accused she only stayed with the child from 29th to 30th January, 2013 and on 31st January, 2013, the 2nd appellant 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 2nd appellant. 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.

34. At the conclusion of the case the Court found the 1st, 2nd, and 3rd accused persons guilty of count I while the 2nd and 3rd accused persons, the 1st and 2nd appellants herein respectively, 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.

35. Not being satisfied with the conviction and sentence the appellants herein have lodged Criminal Appeals Nos. 50 and 45 of 2017 which appeal were consolidated on 10th October, 2017 with the 1st appellant being **Albert Mureithi** while the 2nd appellant, **Jackson Kaaria Mutegi**, being the 2nd appellant. The instant appeal is based on the following grounds:

> **1. THAT the Learned Trial Magistrate erred in law and facts by convicting the appellants on the evidence which was below the standard required in a criminal case.**
>
> **2. THAT the Learned Trial Magistrate erred in law and facts by putting reliance on circumstantial evidence whereas the same did not meet the threshold to invoke the same.**
>
> **3. THAT the Learned Trial Magistrate erred in law and facts by putting reliance on the evidence of the 4th accused in her unsworn testimony when she was a co-accused and the same was not put to test.**
>
> **4. THAT the Learned Trial Magistrate erred in law and facts by failing to observe that crucial witnesses were not called to testify.**

36. According to the appellants, they were charged under section 255 as read with section 257 of the ***Penal Code*** as well as section 302 of the ***Penal Code***. While they conceded that the subject was a child, they submitted that it was not the appellants who took the child from the 1st accused. It was submitted that the source of information that the vehicle that was used in the kidnap being KBK 229C cannot be believed since the person who gave that information was never called to testify. Based on ***Halsbury's Laws of England***, Vol. 11(3) para 1598 it was submitted that this evidence was therefore hearsay. It was therefore submitted that there was no evidence placing the 1st appellant at the scene. It was further submitted that there was no evidence that the 1st appellant was a boyfriend to the 1st accused. As regards the statement

of **Mugendi**, it was submitted that there were material contradictions in the evidence of PW3 and PW4 and reliance was placed on **Republic vs. Sarah Wanjiku Kamau [2005] eKLR**. Based on the evidence of recovery it was submitted that the 1st appellant had nothing to do with the child in question.

37. As regards the 2nd account it was submitted that there was no evidence that it was the 1st appellant that demanded for the amount in question as no service provider produced any data to prove the *bona fide* owner of the number used in making the calls. It was further submitted that there was no evidence that there was a demand with menaces or force against PW2. Further there was no evidence as to who was found with the 1st accused's phone. Going by the evidence of the 1st appellant which was corroborated by the 2nd appellant that he had gone to visit the 2nd appellant who was his cousin, there is no way the 1st appellant would have known of the 2nd appellant's motives, since being found together with the 3rd accused could not connote guilt on the part of the 1st appellant. In the 1st appellant's submissions there was no evidence connecting him with the offence.

38. As for the failure to call the said **Mugendi**, the 1st appellant relied on Criminal Appeal No. 135 of 2007 – **Lawrence Murugu vs. Republic [2005] KLR** as well as **Bukenya & Others vs. Uganda [1972] EA 549**.

39. As regards the communication between the 1st appellant and the 1st accused it was submitted that in producing the data from Safaricom, section 65(8) of the ***Evidence Act*** was not complied with.

40. On the part of the 2nd appellant it was similarly submitted that there was no evidence that the 2nd appellant was in possession of the vehicle that was used in kidnapping the child. Further there was no evidence that from which of the accused person the cellphone was found. According to the 2nd appellant he was not at all connected with the demand for the ransom as it was not proved that he was the one ho made the call in question.

41. Based on **Abanga Alias Onyango vs. R Criminal Appeal No. 32 of 1990**, it was submitted that the circumstantial evidence adduced did not lead to irresistible conclusion that the 2nd appellant was one of the two persons who committed the offences.

42. It was further submitted that it is trite law that an unsworn testimony is a mere statement that cannot be relied upon to convict an accused person. In this case it was submitted that the Learned Trial Magistrate erred in relying on the unsworn statement of the 4th accused.

43. It was similarly submitted that crucial witnesses such as **Mr Mugendi** were not called as witnesses in the case.

44. According to the 2nd appellant, the sentence was manifestly excessive taking into account the fact that he was a first offender.

45. The Respondent on its part opposed the appeal. It was submitted that the evidence against the appellants was overwhelming, consistent, direct and clear that the appellants committed the offences in question. It was further submitted that the sentences were lawful.

Determination

46. 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.**

47. 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**.

48. 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).'"**

49. 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."**

50. In this case, the prosecution evidence was that on 29th January, 2013, the complainants (PW1 and PW2) left their son under the ca of the 1st accused 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 1st accused had been seen in the company of a man. The 1st accused 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 1st accused.

51. 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 2nd appellant and the said person offered to assist the police trace the 2nd appellant. 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 1st accused was in communication with the 1st appellant herein.

52. Based on the information received from the said **Mr Mugendi**, the police traced the 2nd appellant who was arrested in the company of the 1st appellant and upon further interrogation, the 2nd appellant called the 4th accused who turned up with the child. According to the police when they apprehended the 1st and 2nd appellant they were found in possession of the 1st accused phone.

53. On his part the 1st appellant stated that the 2nd appellant was his cousin and that he had been invited by the 2nd appellant to go and look for some shoes which the 2nd appellant was selling and that it was in the course of going to do so that he was arrested in the company of the 2nd appellant. Similarly, the 2nd appellant testified that the 1st appellant was his cousin and that they were arrested while he was going to show the 1st appellant the shoes. Both the appellants denied that they had anything to do with the offence. However, the 4th accused person disclosed that the child had been taken to her to take care of by the 2nd appellant who alleged that he was the 2nd appellant's child.

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

55. 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.***

56. 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.***

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

58. 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 1st accused who was the guardian. He was taken from that lawful guardianship. While the evidence is that the 1st accused 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.***

59. It therefore follows that if the 1st accused conspired with the appellants herein to commit the offence, the 1st accused as well as the appellants would be culpable.

60. In this case the evidence against the 1st appellant was that he was the man who was with the 1st accused on the material day. Though he denied any knowledge of the 1st accused the evidence from the mobile phone service provider showed that he was in communication with the 1st accused. When the 2nd appellant was arrested, the 1st appellant was in the company of the 1st appellant and it was the 2nd appellant who disclosed where the child was. The 1st appellant did not deny that it was the 2nd appellant who disclosed the whereabouts of the child. His case was however that he was not a party to the plan to kidnap the child. He however did not deny that he was with the 1st accused on the day

of the kidnap. He in fact did not deny that he was an acquaintance of the 1st accused. In my view it is inconceivable that the 1st appellant who was an acquaintance of the 1st accused and who was present at the time the child was taken away from the 1st accused and who disappeared thereafter would by pure coincidence find himself in company of the 2nd appellant who knew the whereabouts the child was and who was the one who had hired the vehicle that was used in the kidnap. It is true that there was no direct evidence linking the 1st appellant with the kidnap. However, there was circumstantial evidence linking the 1st appellant to the offence committed. 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."**

61. However, caution is 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."**

62. 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."

63. 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."

64. In **John Gichunge Mitie vs. Republic [2006] eKLR** the complainant was in her house at 8.30 p.m. together with her minor children when two people entered the house and attacked her. One of the two men had a *simi* and cut her on the forehead but she held onto it. Another hit her on the back with a gun butt and as she was screaming, her brother came to her rescue and the two men ran away. The attack took less than ten (10) minutes and nothing was stolen during the incident. It was her evidence that she did not recognize her attackers but later in evidence, she said that "the accused person …..cut" her on the forehead and that she was also cut on her fingers as she held on to the *simi*. She also said that she did not know the Appellant before but in cross-examination, she stated that the Appellant was arrested five (5) minutes after the incident, near P.W.1's house. It was submitted by the appellant that the evidence against him was wholly unsatisfactory and could not sustain a conviction. The Court, however, proceeded to find as follows:

> **"We now have two matters that we must resolve; the contradictory evidence as articulated above and the circumstantial evidence of the presence of the Appellant near the scene of the attempted robbery without explanation. Which evidence must prevail? There is no doubt that P.W.1 and P.W.3 were attacked by three (3) men whose motive in the absence of any other evidence may have been robbery. When P.W.1 raised an alarm, the robbers took to their heels and headed in the direction of P.W.2's land. Shortly thereafter the Appellant was arrested hiding in napier grass within that land. This was five (5) minutes or so after the attempted robbery. He had no weapon with him and the simi used to attack P.W.1 was actually found in P.W.1's house and it was produced in evidence. He goes on to admit the circumstances of his arrest but gives no reasonable explanation for it. In those circumstances what would any court confronted with that evidence decide other than that the Appellant with or without the evidence of identification was one of the robbers? In Margaret Wamuyu Wairirioko vs R Cr Appeal No. 35/2005 (unreported), the Court of Appeal cited these words as made in R. vs Taylor, Weaver and Donoran [1928]21 Cr.App. R. 20 to explain the worth of circumstantial evidence;**
>
> **"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."**
>
> **It is our considered view that taking all circumstances of this case into account and removing the contradiction highlighted, the Appellant was involved in the attempted robbery at the house of P.W.1 and that is the only conclusion that we can reasonably reach and even the benefit of contradictions being given to the Appellant, he cannot escape the consequences of his participation in it."**

65. The question that arises then is whether the the inculpatory facts against the 1st appellant in this case are incompatible with the innocence of the 1st appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The uncontroverted evidence

against the 1st appellant is that he was at the scene of the offence. He immediately thereafter disappeared and the next time he was found in the company of the 2nd appellant who directed the police where the kidnapped child was. Apart from that the phone that had been taken from the 1st accused was recovered from the appellants.

66. In my view if the 2nd appellant is guilty of the offence of kidnapping then a reasonable inference from the facts would be to the exclusion of any other reasonable hypothesis of innocence in the absence of any co-existing circumstances which weakens or destroys that chain of circumstances or inference.

67. In this case I have considered the material paced before the Court and there is no such co-existing circumstances which weakens or destroys that chain of circumstances or inference.

68. However that inference would depend on whether the 2nd appellant was culpable. The evidence against the 2nd appellant was that he was the one who hired the vehicle that was used in the kidnapping from **Mr Mugendi** who identified him when the appellants were arrested. Whereas it is true that just like the 1st appellant, there was no direct evidence placing the 2nd appellant at the scene of the crime, there was circumstantial evidence against him. He was arrested in the company of the 1st appellant who was at the scene of crime and who disappeared immediately thereafter; the 1st accused's phone that had gone missing was found with the appellants; the 2nd appellant admitted that he was in a relationship with the 4th accused who admitted that the kidnapped child was in her custody and he was the one who disclosed the information where the child was. In her evidence, the child was taken to her by the 2nd appellant.

69. I am alive to the fact that the evidence of the 4th accused person was an accomplice evidence. In **Nguku vs. Republic[1985] eKLR,** the Court of Appeal expressed itself as follows:

> **"We therefore turn to ground 4 and 7 of the appeal, which were argued together, Mr Menezes' submission here was that the trial magistrate had ignored the first duty of a court dealing with accomplice evidence, which is that the court must first decide whether the accomplice, in this case the complainant, is a credible witness and then ascertain if there is any evidence corroborative of it before the accomplice's evidence can be accepted. This proposition receives support from the passage which Mr Menezes cited from Republic v Ndara Kuruki [1945] 12 EACA,84, which was a case mainly concerned with the extent to which an accused's statement can be used against his co-accused, and in which the court said, as regards accomplices, at page 86:**
>
> **"A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence, and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If, however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affect the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case the court should record in its judgment whether or not it regards the accomplice as worthy of belief."**
>
> **It is also supported by the following extract from Lord Hailsham's speech in Director of Public Prosecution v Kilbourne [1973] 1 AER, 440, a case concerning the corroboration by one group of young boys of the evidence of another group of young boys in relation to indecent assaults committed on them, in which he said at page 452**
>
> **"In addition to the valuable direction to the jury, this summing-up appears to contain a proposition which is central to the nature of corroboration, but which does not appear to date to have been emphasized in any reported English decision until the opinion delivered in Director of Public Prosecutions v Hester by Lord Morris of Borth-y- Gest although it is implicit in them all. Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witnesses's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise."**
>
> **In the case of Director of Public Prosecutions v Hester [1972] 3 AER 1056, at page 1065, a case of an indecent assault on a girl, Lord Morris gave a similar direction as follows:-**
>
> **"One of the elements supplied by corroborative evidence is that there are two witnesses rather than one. The weight of the evidence is for the jury. It is for the jury to decide whether witnesses are creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one credit worthy witness confirms what another credit worthy witness has said."**

70. However the Court proceeded to find that:

> **"The magistrate went on to say, again specifically, that he accepted the complainant's evidence as to what took place after the complainant and the appellant left bar, as to the handing of the envelope containing the money by the complainant to the appellant, and the appellant putting it in his trouser pocket. He also accepted the complainant's evidence that he and the appellant had prearranged the meeting at the bar. The magistrate did not say in so many words that he accepted the complainant's evidence regarding the conversation at the nursing home, and as to the telephone conversation on the morning**

of January 21, but it is obvious that he did so…"

71. Similarly, in this case the Trial Magistrate found the evidence of the 4th accused credible. As for corroboration, there was evidence that it was the 2nd appellant who called the 4th accused to avail he child. In the premises the evidence of the 4th accused was properly relied upon by the Learned Trial Magistrate.

72. However even if the evidence of the 4th accused to the effect that it was the 2nd appellant who took the child to her was discounted, and in my view there is no reason why the same ought to have been discounted since it did not amount to a confession, the circumstantial evidence placed the 2nd appellant squarely at the center of the kidnap. As was held by the Court of Appeal in **Benjamin Mbugua Gitau vs. Republic [2011] eKLR**:

> **"It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143* Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."**

73. It is therefore my view that the finding by the Learned Trial Magistrate that the appellants hatched and executed the plan to kidnap the child the subject of the case cannot be faulted.

74. As regards count II, Section 302 of the ***Penal Code*** provides that:

> ***Any person who, with intent to steal any valuable thing, demands it from any person with menaces or force is guilty of a felony and is liable to imprisonment for ten years.***

75. In this case whereas there was no direct evidence that the appellants were the ones who made the call to PW2, the fact that the appellants conspired to kidnap the child would make them culpable as long as the demand was made with a view to completing the transaction in which the appellants were involved. In other words it does not matter whether the call was made by a third person as long as it was part of the transaction. According to PW2, the caller threatened to kill her son if the money was not paid. That in my view amounted to demanding with menaces.

76. As regards the sentence, I have no reason for interfering with the same as the same was a lawful sentence and in the circumstances of the case, there is no justification to interfere with the same. It is clear that the evidence against the appellants was watertight. In the premises his appeal fails and is dismissed.

77. Right of appeal 14 days.

78. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 18th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellants in person

Ms Mogoi for the Respondent

CA Geoffrey