



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MARSABIT**  
**CRIMINAL APPEAL NO. 21 OF 2016**

**ABDUL DIBA GUYO..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in criminal case No. 39 of 2015 of the Senior Magistrate's Court at Marsabit by Sogomo Gathogo. – Senior Resident Magistrate)*

**JUDGMENT**

The appellant, **ABDUL DIBA GUYO**, was charged with an offence of kidnapping a child under 14 years with intent to steal from its person contrary to section 262 of the Penal Code.

He was tried and convicted and was sentenced to six years imprisonment with hard labour.

The particulars of the offence were that on 5<sup>th</sup> October 2014 at [particulars withheld] Moyale sub County of Marsabit County, kidnapped **M.H.G**, a child under the age of fourteen years with intent of dishonestly taking Kshs. 1,000,000 /= from **H G S**, the father of the said child.

He now appeals against both the conviction and sentence. He was represented by Mr. Mukira Mbaya, learned counsel.

The appellant raised five grounds of appeal as follows:

1. That the learned trial magistrate erred in law and fact in convicting the appellant without proof of the ingredients of section 262 of the Penal Code.
2. That the learned trial magistrate erred in law and fact by failing to furnish the appellant with witnesses' statements.
3. That the learned trial magistrate erred in law and fact by failing to allow the appellant to call his witnesses.
4. That the learned trial magistrate erred in law and fact by convicting the appellant without evidence of his formal arrest in Ethiopia.
5. That the learned trial magistrate erred in law and fact by convicting the appellant on contradictory evidence.

The state opposed the appeal through Mr. Chirchir, the learned counsel.

The facts of the prosecution case were briefly as follows:

On 5<sup>th</sup> October 2014, the appellant kidnapped **M.H.G** and moved with him into Ethiopia from where he demanded a ransom. He was however arrested and charged before he received the money.

The appellant contended that he was framed up in this offence after he had demanded his share of a business he was running with the child's father.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”***

Section 262 of the Penal Code provides as follows:

***Any person who kidnaps or abducts any child under the age of fourteen years with the intention of taking dishonestly any movable property from the person of such child is guilty of a felony and is liable to imprisonment for seven years.***

I agree with the appellant's counsel that these ingredients were not established. However if you read the facts of the charge and the evidence, you realize that the wrong section was cited. This error did not prejudice the appellant. He was able to understand the offence alleged against him. This defect is curable under section 382 of the Criminal Procedure Code.

The correct section under which the appellant ought to have been charged with was section 257 of the Penal Code that provides as follows:

***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.***

Article 50 (2) ( j) of the Constitution of Kenya provides as follows:

***Every accused person has the right to a fair trial, which***

***includes the right—***

***to be informed in advance of the evidence the prosecution***

***intends to rely on, and to have reasonable access to that***

***evidence;***

Upon my perusal of the record of appeal, I noted that on 4th February 2015, the learned trial magistrate after taking the plea from the appellant, ordered that he be supplied with copies of statements and the

charge sheet. At no time did the appellant inform the court that he had not been supplied with the said copies. Without him informing the court that he had not been supplied with the copies as ordered, the learned trial magistrate would not have known this fact. He cannot be faulted. The appellant had a duty to inform the court that the order had not been complied with. He therefore forfeited his right for failure to inform the court about it.

When the appellant was placed on his trial, he indicated that he had three witnesses to call. After the appellant had testified, he indicated that he did not have any witnesses on that day. The court ruled that he had been accorded ample time to call his witnesses. The record however indicated that that was the first adjournment the appellant was applying for. This amounted to unfair treatment to the appellant. The trial therefore is declared a mistrial.

I therefore quash the conviction and set the sentence aside. I make an order that the appellant be escorted to Moyale Law Courts for retrial before any other magistrate other than Hon. Gathogo Sogomo. The appellant to be taken for plea on 23rd February 2017. The retrial to be conducted on a priority basis and where possible on a day to day basis.

**DATED at Marsabit this 16<sup>th</sup> day of February 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**