



Mohamed & another v Republic (Criminal Appeal E056 & E057 of 2022 (Consolidated)) [2023] KEHC 18710 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E056 & E057 OF 2022 (CONSOLIDATED)**

JN ONYIEGO, J

MAY 31, 2023

BETWEEN

ALI ABDULLAHI MOHAMED 1ST APPELLANT

HAWA IBRAHIM MMURSAL 2ND APPELLANT

AND

REPUBLIC RESPONDENT

**AS CONSOLIDATED WITH
CRIMINAL APPEAL E057 OF 2022**

BETWEEN

HAWA IBRAHIM MMURSAL APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence arising from Criminal Case No. E547 of 2021 at Mandera Law Courts Hon. Mukabi Kimani SRM and Judgement delivered on 21/10/2022)

JUDGMENT

1. The Appellants herein Ali Abdullahi Mohamed (herein after the 1st appellant) and Hawa Ibrahim Mursal (herein after the 2nd appellant) were jointly charged with each facing a separate count. The first appellant was charged with the offence of Subjecting a Child to harmful cultural rites contrary to Section 14 as read with section 20 of the Children’s Act No. 8 of 2001(count1). The particulars of the



- offence were that on the 20th day of November 2021 in Mandera East Sub- County within Mandera wilfully and unlawfully being a guardian to SO a girl child aged 17 years old subjected her to Female Genital Mutilation.
2. The second appellant was charged with the offence of performing female genital mutilation contrary to Section 19(1) as read out with Section 29 of the *prohibition of female genital mutilation Act* 2011. Particulars were that on 20th November 2021 in Mandera East Sub-county within Mandera County, wilfully and unlawfully performed female genital mutilation on SO a girl child aged 17 years old against her will.
 3. Having returned a plea of not guilty, the matter proceeded to full trial with the prosecution calling a total of three witnesses. On their part, the appellants gave sworn testimony and closed their case. Upon conviction, they were each sentenced to 5 years imprisonment.
 4. Brief facts of the case are that, on 16th November 2021, PW1 SO then 17 years old left Eldoret for Mandera to visit her father whom she had not seen since she was 5 years old. She stated that having left Eldoret by flight facilitated by her aunt NA, she was received at the airport at Mandera by the 1st appellant whom she didn't know. She stated that after Ali picked her, he took her to his house where she found his wife and children minus her father who arrived after 3 days. She further stated that she stayed with him (1st appellant) for 6 days and everyday there were meetings held by elders and since she was unwell, she was told that she would be taken to the hospital for treatment.
 5. It was her testimony that she was subsequently taken by the 1st appellant while in the company of two ladies to a female doctor (the 2nd appellant) who executed the FGM process by cutting her clitoris using a pair of scissors after injecting her. That the said doctor had been talking all through to the ladies who were taking her to the hospital.
 6. That after the incident, she went back home and slept until 26th November 2021 when she managed to escape to Mandera police station where she reported the incident. She was then issued with a P3 form which was filled at Mandera Referral Hospital where it was confirmed that she had been circumcised.
 7. Dr. Abdirahman Hassan PW2 testified that he was a medical officer at Mandera County Referral Hospital and was representing Dr Anwar Hussein who examined and filled the P3. He stated that he had worked with Dr Anwar for almost 1 year and was familiar with his handwriting and signature. He continued to state that there was a complaint received from PW1 on 3rd December 2021 claiming to have been circumcised on 20th November 2021. That the clothing had no tears nor stains. On physical examination she was in fair general condition and not intoxicated.
 8. He continued to state that the genitalia had a small scar on the clitoris of about 6mms which was probably the site of the cut. That no medication was given as it was an old scar and there was no complaint of pain although the lab test detected infection and the doctor prescribed antibiotics.
 9. On cross-examination, PW2 testified that the doctor did not diagnose further on the scar in the vagina but only said that it was an old scar probably FGM. He continued to testify that it may or may not have been FGM but most likely FGM. During re-examination, PW2 testified that the scar could also be caused by accidental injury.
 10. PW3 NO. 108013 PC Ngore Kitirinya testified that he was attached to Mandera Police Station performing investigative duties. He confirmed that pw1 made a report of having been circumcised and that she was in need of protection and care. He issued her with ap3 form and escorted her to the Mandera referral hospital where she was examined and the p3 form filled thus confirming that pw1



had indeed undergone FGM. He recited the story narrated by the complainant. That he proceeded to arrest the two and charged them with the charges before the court.

11. On their defence, DW1, Ali Abdullahi Mohamed the 1st appellant herein gave his defence on oath stating that he was a ‘tuk tuk’ driver. He continued to state that on 16th November 2021 he picked PW1 from the airstrip at Mandera and dropped her at ShafShafey as per the request of her father and maternal uncle. He stated that he did not take the girl to the clinic where the FGM was allegedly conducted but some ladies took her there. He could however not recall their names as it was a long time ago. He further stated that he later picked them from the clinic but denied knowledge of what transpired in the clinic. He further denied having procured or aided the alleged FGM as he was just a ‘tuk tuk’ driver. Finally, he stated that the victim ran away from her home and went to the police station to make false allegations against him.
12. The Appellants being dissatisfied with the judgement and sentence of the honourable court, separately appealed against the said judgement and sentence. The first appellant filed his appeal on 1st November 2022 vide criminal appeal number E0057 of 2022 citing the following grounds;
 - a. That, the Honourable learned magistrate erred in law and in fact in failing to appreciate that the prosecution case was not only insufficient but also unreliable, discredited, fabricated and thus lacked probative value to warrant conviction.
 - b. That, the honourable learned Magistrate erred in law and fact in failing to consider that the rights of the accused person enshrined in *the constitution* of Kenya were infringed more so the right to privacy, dignity and fair trial.
 - c. That, the Honourable Learned Magistrate erred in both law and fact by relying on a matter where crucial witnesses were not summoned to appear before the court like the parents of the complainant, her aunt she was allegedly visiting in Mandera who were adversely mentioned but whose testimonies were never sought or factored.
 - d. That the hon. Trial magistrate erred in law and fact by relying on evidence of PW1 (Complainant) who did not produce any document whatsoever to ascertain her age.
 - e. That the hon. Trial magistrate erred in law and by relying on evidence of PW2 (Medical Officer) that was too shoddy and contradictory and the medical officer who testified is not only contradictory but different from the one who assessed the complainant.
 - f. That the hon. Trial magistrate erred in law and fact by not taking into account that the Appellant herein is just a mere ‘Tuk Tuk’ driver hired to drop passengers like any other driver.
 - g. The learned trial Magistrate erred both in law and fact by not taking into account that the complainant is a foreigner who was in the country illegally.
 - h. The learned Trial Magistrate erred in law and in fact in failing to consider the glaring gaps the complainants treacherous historical background that she was a resident of Eldoret Uasin Gishu County, yet she was a minor with no information as to her residential address in Eldoret, what she was doing at all.
 - i. The learned Magistrate erred both in law and fact in failing to consider that the alleged complainant was mature enough to seek a ride from the accused who would not have ordinarily known the purpose and /or objective of the complainant and the happening afterwards in the absence of complainant which the accused would have been of help it comes to his attention.



13. On her part, the second appellant filed her petition of appeal on 27th October 2022, vide criminal appeal No. E056 of 2022 citing 5 grounds of appeal as hereunder ;
 - a. That the learned trial magistrate erred in law and fact in failing to appreciate that the prosecution had failed to establish their case to the required standards.
 - b. That the learned trial magistrate erred in law and fact in failing to appreciate and acknowledge the glaring contradictions on the prosecution's case which definitely created reasonable doubts in the prosecution's case which made it unreliable.
 - c. That the trial court erred in law and fact whether the Appellant was correctly identified.
 - d. That the trial court erred both in law and fact when he convicted the Appellant on contradicting testimonies.
 - e. That the sentence imposed on the Appellants is manifestly harsh and excessive in the circumstances being a first offender without a fine.
14. When the two appeals came for directions, the court had them consolidated with criminal appeal number E057 of 2022 being the lead file. Parties then agreed to file submissions to dispose the two appeals.

1st Appellant's submissions

15. The 1st appellant filed his submissions on 18th January 2023 through the firm of Abdirazak advocate thus stating that the trial court overlooked some material factors such as the age of the complainant, the Appellant was a mere tricycle driver, nationality of the complainant and medical evidence.
16. Learned counsel submitted that the sentence of 5 years meted out on the Appellant for an offence that he had no linkage whatsoever is tantamount to inhuman degrading treatment that is prohibited under Article 25 (1) (a) of *the Constitution* of Kenya 2010.
17. Finally, counsel contended that the appeal be allowed, and the conviction and sentence be set aside.

Respondent's submissions.

18. Mr. Kihara principal state counsel appearing for the Respondent filed his submissions in respect to the first appellant on 16th December 2022. He submitted that there was overwhelming evidence to show the role the first appellant played in execution of the offence. He however conceded that the sentence imposed was excessive as the maximum penalty provided under Section 20 of the *children Act* 2001 was 12 months imprisonment or a fine of kshs 50,000.

2nd Appellant's submissions

19. Through the firm of Anyoka and company advocates, the 2nd appellant filed her submissions dated 1st December 2022. Learned counsel submitted that the p3 and laboratory test report was not tendered as required in that pw2 Dr. Abdirahman who produced the same on behalf of Dr. Anwar did not examine the complainant. That proper basis was not laid for the doctor who did not examine the complainant to have produced the medical evidence.
20. Counsel contended that Section 33 and 77 of the *Evidence Act* was not complied with as leave was not sought stating reasons why Dr. Anwar could not testify. To buttress that position, the court was referred to the case of Sibo vs Republic criminal Appeal number 39 of 1996 and Boaz Owiti Okoth



vs Republic (2014) e KLR. In counsel's view, the p3 form should have been treated as being of no probative value as the maker was not made available to produce the same.

21. Regarding the sentence, counsel submitted that the penalty section provides for a fine hence as a first offender, the 2nd appellant ought to have been given a fine as a first option.

The respondent's submissions

22. Mr. Kihara for the respondent filed his submissions on 8th December 2022 simply reciting the grounds of appeal. Counsel submitted that the sentence imposed was lawful and justified hence should not be interfered with.

Analysis and determination

23. I have considered the record of appeal, grounds of appeal and rival submissions by both counsel. Although the appellants filed separate appeals, their grounds of appeal are almost similar. In my view, they can be condensed into two as follows; whether the prosecution had proved its case to the required degree that is proof beyond reasonable doubt and; whether the sentence meted out was excessive.
24. This being a first appeal, this court is duty bound to re-assess, re-evaluate and re-examine afresh the evidence tendered before the trial court so as to arrive at its independent conclusion or determination bearing in mind that the trial court had the advantage of seeing and or listening to the witnesses so as to be able to assess their general demeanour of witnesses. See *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 v 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.”

25. It is trite law that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt. This position was clearly stated in the case of *Stephen Nguli Mulili v Republic* [2014] e KLR where the court held that :

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP V Woolmington*, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa V R*, [2013] eKLR.”

26. There is no doubt that the onerous legal duty to prove a case beyond reasonable doubt lie squarely with the prosecution. It does not shift to the accused person. See *Kiilu and another v Republic* (2005) e KLR and *Peter Wafula Juma and 2 others vs Republic* (2014) e KLR where the court held that ;

“As I have already stated, the expression “burden of proof” entails two distinct concepts; “legal burden of proof” and “evidential burden”. The two are different, and understanding the distinct application



of each is essential. It is also important to understand the position of the law on burden of proof in criminal cases and civil cases; there is a marked difference especially on the legal burden of proof. We shall deduce that difference in the application of the legal burden from the sources I am going to quote below.

Legal burden of proof; does it shift?

According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues".

27. In respect to the 1st appellant's case, he was alleged to have picked the complainant from Manderu airport on instructions of her father and maternal uncle. That he took her to his house where her father an Ethiopian and a friend to the 1st appellant re-united with his daughter after a long period of separation. It was alleged that after some three days, the 1st appellant in company of two ladies took pw1 to the 2nd appellant's clinic where she was circumcised. The 1st appellant did not deny picking pw1 from the airport. He denied taking her to the clinic where the FGM was allegedly conducted
28. Was there a possibility that just like the complainant the 1st appellant was made to believe that pw1 was going to be treated of chest pains? As a taxi driver, there was every reason to believe that his role was to ferry passengers to whatever destination without necessarily being involved in the passengers' business. In my view, the 1st appellant's defence did create reasonable doubt that he had knowledge that the complainant was going to be circumcised. In a criminal case there is no room for speculation of evidence. Even the slightest doubt is sufficient ground to acquit. The complainant simply said that she was driven to the clinic using a tuk tuk owned by the 1st appellant.
29. The complainant did not state that the 1st appellant ever entered into the clinic where she was circumcised or even indicated to her that she was going to be circumcised. It was a mere inference drawn from the conduct of the 1st appellant in engaging in a conversation with the ladies who allegedly took her to the clinic that he was implicated. This was pure reliance on circumstantial evidence which was not free from any doubt or error. There was no direct evidence to connect the 1st appellant with the offence save for circumstantial evidence which in my view did not meet the test of relying on such evidence. See the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, where the court of appeal had this to say on circumstantial evidence:

"However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but 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



from evidence to say that it is circumstantial.”Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR) in which this court held as follows:“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”And in Sawe Vs. Republic [2003] KLR 364, the Court of Appeal amplified on the above thus:“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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.”

30. Was the 1st appellant aware that pw1 was being taken to the clinic for circumcision? According to pw1 she was made to believe that she was being taken to hospital for treatment for chest pains. She also stated that she was taken to the clinic by two ladies where she found the 2nd appellant who cut her clitoris. In a nut shell, the 1st appellant has created reasonable doubt that he was not a guardian to the complainant nor did he subject her to FGM. The prosecution did not prove these ingredients.
31. Accordingly, it is my finding that the prosecution did not prove its case beyond reasonable doubt against the 1st appellant. To that extent, the appeal herein is upheld, the conviction quashed and the sentence thereof set aside. The 1st appellant is hereby set free unless otherwise lawfully held.
32. Regarding the second appellant, she is said to have executed the act of FGM against the complainant. Besides the complainant nobody else gave direct evidence against the 2nd appellant. The complaint narrated how two ladies took her to the clinic where she was to be treated of chest pain. She did not know the two ladies. According to her testimony, it was the 2nd appellant who cut her clitoris with scissors and thereafter stitched it. She later escaped to the police station and made a report to the police who referred her to the hospital where a p3 form was filled after 13 days.
33. According to the p3 produced by pw2, the complainant had a healed scar on her clitoris. A cut on the clitoris was confirmed. Obviously, after 13 days of circumcision the scar was bound to heal. To that extent, I have no doubt the complainant was circumcised. Mr. Anyoka argued that the p3 form was produced by a Dr. who did not examine the complainant and that proper leave was not sought.
34. Pw2 clearly stated that he was stepping in on behalf of his colleague who was not available. Counsel then on record did not oppose the application. Failure to explain where Dr.Anwar who filled the p3 form was is a mere procedural technicality which flies on the face of Article 159(4)(d) of *the constitution* which advocates that courts shall dispense justice without due regard to technicalities. For those reasons it is my finding that that submission does not hold water hence dismissed.
35. The outstanding key question is, whether the 2nd appellant was responsible. As stated, nobody testified to corroborate pw1’s testimony. The complainant gave a detailed testimony which is well corroborated by medical evidence. She had no reason to fabricate the case against the 2nd appellant. The trial court was satisfied that the complainant was truthful in her testimony.



36. It has been held time and again that a court can safely convict based on the evidence of a single witness as long as the court is satisfied that the witness is telling the truth and warns itself of the dangers of convicting based on the evidence of a single witness. see *Roria v Republic (1967) e EA* and *Ogeto v Republic (2004) KLR* where the court held that;

“it is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the court has to bear in mind it is possible for a witness to be honest but to be mistaken”.

37. Indeed, there is no maximum number of witnesses required in a criminal case. See Section 143 of the [Evidence Act](#), Cap. 80 which states that:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

38. The above legal principle was affirmed in *Keter v Republic [2007] EA 135* as follows:

“... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt.”

39. I do agree with the learned magistrate that the evidence of the complainant was watertight and sufficient to sustain a conviction. Accordingly, the appeal against conviction is dismissed.

40. Regarding the question of sentence, Section 29 of the female genital mutilation Act does provide as follows;

Penalty for offences

“A person who commits an offence under this Act is liable, on conviction, to imprisonment for a term of not less than three years, or to a fine of not less than two hundred thousand shillings, or both. “

41. In this case the court gave a sentence of 5years ostensibly to act as a deterrence to such offenders. I am alive to the fact that sentencing is at the discretion of the trial court and an appellate court can only interfere where it is shown that such sentence is excessive or that the court considered extraneous or irrelevant factors or that the trial court applied wrong legal principles; In the case of *Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003* the Court of Appeal stated thus:-

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka – vs- R. (1989 KLR 306)*”

42. The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs. Republic [2002] eKLR* restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy



and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

43. In this case, the trial court was of the view that a harsh sentence was the only appropriate sentence. The appellant felt that being a first offender, the option of a fine ought to have been applied first as a first option. Taking into account the totality of the mitigating factors that the appellant is a widow and a first offender, the court ought to have considered the lesser sentence which is a fine as a first option as opposed to imprisonment term of five years which in my view is excessive.

44. In the case of Jackson Konde Kyalo vs Republic (2018) eKLR the court had this to say regarding imposition of fine as a first option against the imprisonment term;

“The law and policy in sentencing in (sic) that where the law provide for a fine or imprisonment or both then unless the court for good reasons decides to give both, the accused person has a right to be given an option of a fine. In Annis Muhidin Nur vs Republic, High Court Criminal Appeal No. 98 of 2001, Mwera, J, as he then was, stated the relevant policy in sentencing, most appropriately:

“... unless circumstances obtain which irresistibly [impede] a trial Court from imposing a fine first where the law provides for a fine in default of a prison term, the option of a fine must be visited first. This is a sound and tested principle in the art of sentencing ...”

8. Accordingly, when the trial court opted to mete out an imprison (sic) sentence without the option of a fine, there was an error and thus an improper sentence which can only be viewed as too harsh. Harsh only to the extent that it denied the appellant his option of a fine.

9. To that extent, I revise the sentence on Count I and sentence the Applicant to a fine of Kenya Shilling one million and in default to serve a term of imprisonment of five (5)”.

45. Guided by the above judicial decisions, I am persuaded by the appellant’s submission that she was entitled to a fine as a first of option. Accordingly, I am inclined to substitute the sentence of five years with that of a fine of Kshs 200,000 in default serve three years imprisonment commencing from the date of sentence.

ROA 14 Days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF MAY 2023

J.N. ONYIEGO

JUDGE

