



REPUBLIC OF KENYA



KENYA LAW
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**Chumo v Republic (Criminal Appeal 5 of 2019)
[2020] KEHC 3804 (KLR) (30 July 2020) (Ruling)**

Sarah Chumo v Republic [2020] eKLR

Neutral citation: [2020] KEHC 3804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL 5 OF 2019
AN ONGERI, J
JULY 30, 2020**

BETWEEN

SARAH CHUMO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. S. Mokua
(CM) in Kericho CMCC No.4162 of 2015 delivered on 1/2/2019)*

RULING

1. The Appellant SARAH CHUMO was charged in Kericho CMCC No.4162 of 2015 with six counts of performing Female Genital Mutilation (FGM) on six different persons contrary to Section 19(1) as read with Section 29 of the [PROHIBITION ACT](#) No.62B of 2011 Laws of Kenya.
2. The particulars of the charge were that on various dates between 26th and 28th November 2018, at XXXX village in Kericho District within Kericho County, the Appellant performed female genital mutilation on six different persons named in the charge sheet (names withheld).
3. The four victims who testified in this case as pw1, pw2, pw3 and pw6 are adult ladies who told the court that it was the Appellant who performed FGM on them at the home of one Joan Bett where the Appellant and the victims were found. The victims said in their evidence in court that they were not forced to undergo the circumcision.
4. The Appellant did not challenge the prosecution evidence. The court found the Appellant guilty as charged and convicted her on four counts. The Appellant was acquitted on two counts where the victims did not testify.



5. The Appellant was fined 200,000 on each count in default she was ordered to serve 3 years imprisonment. The total fine amounted to Kshs.800,00 in default to serve 12 years imprisonment.
6. The Appellant who is aggrieved with the conviction and sentence has appealed to this court on the 23 grounds which can be summarized as follows:
 - (i) That the learned magistrate erred in law and fact in giving reliance to dock evidence and failing to find that the Appellant was not properly identified.
 - (ii) That the particulars of the charge were at variance with the evidence adduced.
 - (iii) That the court failed to record all the issues raised by the defence during the trial.
 - (iv) That the Appellant was convicted on uncorroborated, inconsistent and unreliable evidence.
 - (v) That the Appellant's constitutional rights were violated when he was not granted the chance to meet and question all his accusers while challenging their evidence which is contrary to the provisions of Article 50 (2) (c) of the Constitution.
 - (vi) That the sentence meted out by the trial court is excessive, manifestly harsh and unconstitutional.
 - (vii) That the trial magistrate erred in law and fact in holding as he did yet the prosecution witnesses confirmed that they consented to the act freely and willingly.
7. The Appellant's counsel submitted as follows:
 - (i) That the sentence meted on the Appellant of 15 years imprisonment is excessive, manifestly harsh and outright unconstitutional as her fair trial was impeded which action is against Article 27 of the [Constitution of Kenya](#).
 - (ii) That the offences against the Appellant were not proved beyond reasonable doubt as the evidence including the medical report was inconsistent and unreliable and was produced by a person other than the maker contrary to section 77 of the [Evidence Act](#).
 - (iii) That the search at the Appellants house was done without a search warrant contrary to section 118 of the [Criminal Procedure Code](#) and no inventory was ever made of the items recovered.
 - (iv) That the court ignored the Appellant's evidence that the procedure was performed in accordance with the dictates and norms of her culture and further that Article 238 (2) (c) of the [Constitution](#) makes it a requirement that the state respects the diverse cultures of communities within its territory.
 - (v) That the procedure was carried out on consenting adults as defined in Article 260 of the Constitution of Kenya and further that the Appellant together with the prosecution witnesses were simply exercising the dictates and norms of their custom and culture which is an inherent right as provided for under Article 11(2) and Article 27 (4) and (5) of the [Constitution](#)
8. The Respondent submitted as follows:
 - (i) That the Appellant stated in the first ground of appeal that she was not properly identified yet all the prosecution witnesses identified her as the person who conducted female genital mutilation on them.
 - (ii) On grounds 2, 8 and 10, the Respondents submitted that the allegation that the charge was defective cannot hold as the Appellant actively participated in the trial and therefore the



Appellant understood the charges and she had legal representation and no objection was raised concerning the charges.

- (iii) On the ground that the trial court did not capture some of the issues raised during the trial, the Respondent submitted that the same is an afterthought as it was not raised at the trial under Section 197(3) and 198(1) and (2) of the Criminal Procedure Code.
 - (iv) On the issue that the prosecution evidence was uncorroborated, inconsistent and unreliable, the Respondent submitted that it was clear from the evidence that pw1, pw2, pw3 and pw6 were all circumcised by the Appellant and therefore it is not true that the evidence was not corroborated.
 - (v) The Respondent further submitted that enough witnesses were called to warrant a conviction since Section 143 of the Evidence Act does not require a particular number of witnesses to prove any fact and further that the Appellant was given the opportunity to cross examine the prosecution witnesses in court through her Advocate and the allegation that she did not cross examine the witnesses is not true.
 - (vi) On the issue that the sentence meted on the Appellant was harsh and excessive, it was submitted that the sentence provided for under Section 29 of the Prohibition of *FGM Act* for the offence the Appellant committed is a jail sentence of up to three years imprisonment or a fine of not less than Ksh.200,000 or both hence the sentence was legal.
 - (vii) The Respondent submitted that the trial court appreciated the defence raised by the Appellant and stated that the Appellant did not challenge the prosecution case and even tried to justify the offence committed by stating that the victims consented to the act.
 - (viii) The prosecution denied that any search was conducted in the house of the Appellant and said that no such evidence came up during the hearing. It was also denied that the rights of the Appellant were violated contrary to Article 27 of the Constitution of Kenya or that she was discriminated against and neither was the burden of prove shifted to her.
9. The Respondent urged the court to find that the conviction is secure and to dismiss the appeal and uphold both the conviction and sentence.
10. The first duty of the first Appellate Court was stated in the case of *Okeno vs. Republic* [1972] EA 32bin the Court of Appeal 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.”

11. Similarly in *Kiilu & Another vs. Republic* [2005]1 KLR 174, the Court of Appeal stated thus;



1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
2. 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 findings and 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.
12. In the current case, I find that the prosecution evidence was not challenged by the Appellant. The four complainants who testified identified the Appellant as the person who performed the female genital mutilation on them.
13. The Doctor's evidence confirmed that the complainants were mutilated. It is immaterial that the four complainants consented to the act as the same is outlawed by the Prohibition of the *FGM Act*.
14. I find that the conviction is secure and I accordingly uphold it. However, I find that the sentence of 12 years imprisonment or a fine of Ksh. 800,000 is excessive considering that the Appellant is an elderly woman aged over 73 years and in poor health.
15. The Appellant has been in custody since 1/2/2019 when she was sentenced to jail. I set aside the jail term of 12 years imprisonment or a fine of Ksh. 800,000 and instead I sentence her to 12 months imprisonment on each of the four counts.
16. The sentences to run concurrently. Since the Appellant has been in custody for more than 12 months, I direct that she be released unless lawfully held for any other reason.
17. The Appellant is warned against practicing FGM since that tradition is retrogressive and it has adverse effects on those who are subjected to it.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 30TH DAY OF JULY 2020.

A. N. ONGERI

JUDGE

