



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CRIMINAL APPEAL NO.10 OF 2017**

**JOAN BETT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence in Kericho CM Cr. Case No. 4160 of 2017 by Hon. C. K. Mungania (SRM) dated 28<sup>th</sup> July 2017)*

**JUDGMENT**

1. The appellant was charged with the offence of knowingly allowing premises to be used for the purpose of performing female genital mutilation contrary to section 22 as read with section 29 of the **Prohibition of Female Genital Mutilation Act, No. 32 of 2011**, Laws of Kenya.
2. The particulars of the offence were that on diverse dates between 26<sup>th</sup> and 28<sup>th</sup> November 2015 at Polywek sub-location within Kericho County and being responsible for a premises namely (a) house, knowingly allowed the premises to be used for the purpose of performing female genital mutilation.
3. The appellant pleaded not guilty to the offence and was tried before Hon. C. K. Mungania (SRM, as she then was) and was found guilty as charged. She was sentenced to pay a fine of Kshs. 200,000/- and in default 3 years imprisonment by Hon. S. M. Mokuu (CM) on 6<sup>th</sup> October 2017, the Hon. Mungania having left the judiciary.
4. Dissatisfied with both the conviction and sentence, she has filed the present appeal (erroneously registered as a Miscellaneous Criminal application) in which she raises some 13 grounds of appeal. The appeal was argued before me on 3<sup>rd</sup> May 2018.
5. In his submissions on behalf of the appellant, Learned Counsel, Mr. Motanya, argued in respect of ground 1 and 8 of the Appeal that the trial magistrate did not confirm that the appellant was in exclusive control of the premises where the female genital mutilation (FGM) took place. His submission was that no evidence was brought to prove that the appellant was the owner of the house; she was not found inside the house where the FGM took place, and she was only brought there after she was arrested.
6. It was his submission on ground 2 of the appeal that the court erred in law when it convicted the appellant for allowing her premises to be used for FGM while there was no evidence that that is where the FGM took place.
7. On ground 3, his submission was that there were material contradictions in the prosecution evidence. His contention was that the evidence of PW1 – PW3 was essentially hearsay evidence, yet the trial court gave weight to the said evidence.
8. As for grounds 9, 10 and 13, Mr. Motanya's submission was that there were no eye witnesses who testified that they witnessed the FGM take place in the appellant's house. In his view, the prosecution tended to shift the burden of proving the case to the appellant, and the evidence and the charge sheet are at variance as the appellant did not allow her place to be used for FGM.
9. The appellant was also dissatisfied with the sentence meted out against her. Mr. Motanya submitted that it was excessive in that the court did not consider that the appellant was undefended. Had the court considered this and explained what mitigation was, the appellant would have explained that she had just delivered a child who was barely 4 weeks old. As she was a first offender, the court would have considered a more lenient sentence as three years is harsh in the appellant's circumstances. He urged the court to consider whether the period served is not enough and sentence her to that period, or give her a non-custodial sentence.
10. The response from the state through Senior Prosecution Counsel, Mr. Ayodo, was that the state had established its case against the appellant to the required standard. With respect to grounds 1,2 and 8, PW1, the Assistant Chief, had testified that the house where FGM took place belonged to the appellant. The state's position was that the Assistant Chief was in a position to know that the house belonged to the

appellant due to his position as Assistant Chief. His evidence had been corroborated by the area Chief, whose testimony was that he knew the appellant since she resided in his location and the house belonged to her. Further, the testimony of PW2, PW4, PW5, PW6 and PW7 was that they had all been circumcised in the appellant's house. The Learned Senior Prosecution Counsel further observed that even in her own defence, the appellant had admitted that the house where the FGM took place belongs to her.

11. The state's response to the allegation that there were material contradictions in the prosecution case as alleged at ground 3 of the appeal was that there were no material contradictions as alleged.

12. It was the state's position further that there was no hearsay evidence relied on by the trial court: the evidence of PW1 and PW3 - the Assistant Chief and the area Chief respectively, was reliable as it was within their administrative jurisdiction and cannot be said to be hearsay.

13. Finally, on the allegation that the burden of proof had been shifted to the appellant, the state's case was that the burden of proof always lies on the prosecution. In this case, the prosecution proved its case against the appellant beyond reasonable doubt, and at no point did the burden shift to the appellant.

14. As regards sentence, the state's case was that section 22 of the Prohibition of Female Genital Mutilation Act provided for the offence of permitting one's house to be used for FGM, while section 29 provides for a term of not less than 3 years imprisonment or a fine of Kshs. 200,000/- or both. The appellant in this case was sentenced to a term of 3 years' imprisonment or a fine of Kshs.200,000/-. The conviction was safe and the appeal should be dismissed.

15. In his submissions in reply, Mr. Motanya observed that as a first offender, the appellant should have been sentenced to a non-custodial sentence.

16. I have considered the appellant's grounds of appeal and the submissions made on her behalf as well as the submissions in response by the state. I believe that the appellant's thirteen grounds of appeal can be reduced to six main grievances:

*i. That the trial court failed to confirm that the appellant was in exclusive control of the premises where the female genital mutilation (FGM) took place.*

*ii. That the trial court erred in convicting the appellant for allowing her premises to be used for FGM while there was no evidence that that is where the FGM took place.*

*iii. That there were material contradictions in the prosecution evidence.*

*iv. That the court erred in relying on the evidence of PW1 – PW3 which was essentially hearsay evidence.*

*v. That there were no eye witnesses who testified that they witnessed the FGM take place in the appellant's house.*

*vi. That the sentence meted out against the appellant was excessive in that the court did not consider that the appellant was undefended.*

17. Before considering these grounds, the issues arising therefrom, and making a determination thereon, I believe that I am required, as the first appellate court, to re-evaluate the evidence and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing.

## **The Evidence**

18. I note that the prosecution called 8 witnesses in support of its case against the appellant. PW1 was the Assistant Chief of Polywek sub-location, where he had worked for 9 years. He had received a call from the chair of the Nyumba Kumi to the effect that some girls were being circumcised at [particulars withheld] village within his sub-location. He called the Chief of the area, one Sitienei (PW3) and they went to the home of the accused where they were told those who had been circumcised had been locked in the house. They called the DC and the OCS of Nyagacho, as well as police officers from Nyagacho and Ainamoi. They ordered the accused to open the door of the house which she did.

19. The evidence of PW1 was that they found six women, who had been circumcised, inside the house, as well as the woman who had done the circumcision. The circumcision had been done the previous night by a woman known as Sarah Juma (Chumo) in the house of the accused. The circumcised women were taken to hospital.

20. The evidence of the second prosecution witness, J K (PW2), was extracted with some difficulty. Initially she stated that she did not remember what she had recorded in her statement to police, and was declared hostile. On cross-examination by the Prosecution Counsel, she stated that she could remember going to the accused's house for circumcision. She denied recording in her statement that the ceremony had started at the river, then they went to the accused's house.

21. PW2 later conceded that her recorded statement to the effect that the circumcision ceremony started in the river and then moved to the accused's house was true. Her statement was produced as exhibit 1. In her statement, she had narrated how she had arrived at the accused's house to undergo circumcision because she was discriminated against in her village for being uncircumcised, though she was married with three children. She had gone to the accused's house on 27<sup>th</sup> November 2015 at around 9.00 p.m. and was circumcised by one Sarah. Five other women also joined her in the accused's house and they were all circumcised. She and the other five stayed in the accused's house until

they were taken to the hospital by police on 25<sup>th</sup> November 2015.

22. Joseph Sitienei (PW3) was the Chief of Polywek location where he had worked for 24 years. He had received a report that there were women and school children who were being circumcised at the accused's house in [particulars withheld]. He knew the accused, who was a resident of his location. He had rushed to the accused's house and found many people there. He had been told that some women had been circumcised by Sarah Chumo inside the house which was locked with a padlock. He had called the DC and the OCS Nyagacho as well as the OCPD who had directed that the house be opened. The accused opened the house in which were some six women and Sarah Juma (Chumo). The women were taken to the hospital and two, who were bleeding, were admitted.

23. It was his evidence that the circumcision had been done in the house of the accused, and he confirmed in cross-examination that he found the accused at the house, to which she had the keys.

24. PW4 was S K. She had gone to the accused's house to be circumcised as she wanted to join a merry go round for a 'Kipkapenge' group. She had gone with the wife of her husband's brother, one D K, and they were both circumcised by Sarah. They were in the accused's house, which was locked from outside. Later the Chief had gone to the house with another Chief and the police. She stated that there were six girls in the accused's house who had gone to be circumcised, and that the circumcision took place in the accused's house.

25. PW5, F K, also testified that she went to the accused's house to be circumcised by Sarah Chumo. She was with J (PW2), S (PW4), B and D. They had gone to the accused's house to be circumcised, and they stayed there after they were circumcised until the police came and found them at the appellant's house. PW5 testified that the appellant was at her mother's house nearby and PW5 had not found her at home when she went to be circumcised.

26. PW6, P K, had gone with J (PW2) to be circumcised at the appellant's house. They were circumcised by a woman she did not know. They stayed in the appellant's house till the police came, and they were taken to Kericho District Hospital and later the police station. She stated in cross-examination that the accused was not there at the time of the circumcisions.

27. Like the other women, PW7, P N, had gone to be circumcised at the accused's house. She had gone with F K (PW5). They stayed at the accused's house till the police came.

28. The last prosecution witness was C. Daisy Leting, No. 80527 (PW8) from Ainamoi Police Post, Nyagacho Police Station. She had received a call on 28<sup>th</sup> November 2015 around 1530 hours that female genital mutilation had taken place at [particulars withheld] and the victims were all still locked in the house. She had gone to the scene with the OCS and they found the area Chief and Assistant Chief (PW3 and PW1). They found the house locked from outside. They asked for the owner of the house and were shown the accused.

29. PW8 asked the accused whether the house was hers and she responded in the affirmative. They requested her to open the house, which she did. They found six girls inside, all of whom had undergone FGM. They asked who had committed the act and were shown an elderly woman called Sarah Chumo. They escorted the circumcised women to Kericho District Hospital where they were examined. One woman fainted due to excessive bleeding and was admitted to hospital. The suspects- the owner of the house and the woman who had committed the acts of circumcision-were taken to Nyagacho Police Station and charged with the offence.

30. When placed on her defence, the accused elected to give a sworn statement in which she denied the offence on the basis that she was not at the scene where the FGM took place. In cross-examination, she stated that she was not there when the offence was committed but admitted that the house was hers.

31. The trial court found in its judgment that the accused was the owner of the premises and that from the evidence, FGM had taken place there. She also found that the prosecution had proved its case against the accused beyond reasonable doubt. She therefore proceeded to convict the accused, who was thereafter sentenced to a fine of Kshs.200,000 or three years' imprisonment.

### **Analysis and Determination**

32. I now turn to consider the six grounds of appeal identified earlier in this judgment and the issues that they raise against the evidence before the trial court which I have set out above.

#### **Whether the appellant was in exclusive control of the premises where the FGM took place.**

33. The evidence before the trial court was that the house where the FGM took place belonged to the appellant. The Assistant Chief and the Chief, both of whom were in administrative positions within the national government in the Polywek area, confirmed that they knew the appellant and that the premises belonged to her. PW2, PW4, PW5, PW6 and PW7, five of the women who had undergone FGM in the premises testified that the premises belonged to the appellant. It is noteworthy that all the witnesses were from the same locality, [particulars withheld] village in Polywek location within Kericho, so they knew each other well.

34. More tellingly, the six women who had been circumcised had been locked inside the house. When the police asked for the owner, as testified by PW8, they were informed that the owner was the appellant, and she confirmed when asked by PW8 that the house was hers. She had the keys to the padlock with which the house had been locked, and she used it to unlock the house when required by the police to do so. Her defence was that the house was hers, but she was not in the premises.

35. In my view, the evidence with regard to ownership of the premises, and the fact that the appellant was in control of the said premises and allowed them to be used for the purposes of FGM was clear and was safely relied on by the trial court. I am therefore unable to fault the decision of the trial court on this ground.

### **Whether there was evidence that the FGM took place in the said premises**

36. The appellant argues that the trial court was wrong in convicting her for allowing her premises to be used for FGM while there was no evidence that is where the FGM took place. Again, I go back to the evidence of PW2, PW4, PW5, PW6 and PW7. They all narrated, albeit reluctantly on the part of PW2, that they went to the said premises which belonged to the appellant, and were all circumcised by a woman known as Sarah Chumo. After they were circumcised, they were locked inside the house, and were only let out two days later when the police came and took them to hospital, where one of them was admitted. I can find no merit in this ground.

### **Material contradictions in the prosecution evidence**

37. Mr. Motanya argued that there were material contradictions in the prosecution evidence. He did not, however, elaborate on this ground, or illustrate the contradictions in the prosecution evidence. I am therefore unable to make a finding on this ground, save to say that from my analysis of the evidence which I have set out earlier in this judgment, there is no contradiction, material or otherwise, that I can discern in the prosecution case.

### **Hearsay evidence**

38. The appellant contends that the trial court erred in relying on the evidence of PW1 and PW3 which was essentially hearsay evidence. The two witnesses were the Assistant Chief and the Chief of Polywek Location respectively. They gave evidence that they knew the appellant, and that they had been informed that acts of FGM had taken place in their locality. They had personally gone to the scene of the offence, had called the area DC and police officers from Nyagacho Police Station, and were present when the premises were opened by the appellant. I believe that such evidence does not qualify to be dismissed as hearsay.

### **Absence of Eye Witnesses**

39. The appellant argues that there were no eye witnesses who testified that they witnessed the FGM take place in the appellant's house. Given the evidence of the five women who were circumcised in the appellant's house, it is difficult to see a basis for this ground. The evidence of PW2 and PW4-PW7 was that they were personally subjected to the circumcision in the house of the appellant. Mr. Motanya did not elaborate on what other kind of eye witness evidence would have been necessary.

### **Whether the sentence meted out against the appellant was excessive**

40. It was argued that the sentence meted out on the appellant was excessive given the fact that the appellant was not represented. In considering this issue, I start from the provisions of section 29 of the **Prohibition of Female Genital Mutilation Act, No. 32 of 2011**, which provides as follows:

*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. Thus, the trial court had the discretion to sentence the appellant, upon conviction, to a penalty higher than three years. It however, gave her the minimum sentence provided, which was a fine of Kshs 200,000/, and in the alternative, imprisonment for three years.

42. Secondly, while it is true that the appellant was undefended, it is clear from the record that she understood the charges that she faced, and conducted her own defence competently, including cross-examining witnesses to demonstrate that she was not present in the premises when the offence took place.

43. The court notes that FGM is a cultural practice that, despite the prohibition by the law, is deeply ingrained in the minds of many in our society. In this case, what is notable is that all the six women who were circumcised in the appellant's premises voluntarily went to be circumcised. PW2 narrated in her statement that she wanted to undergo circumcision as she was discriminated against in her village because she was not circumcised.

44. However, notwithstanding the fact that the appellant is a first offender, FGM is prohibited by law because of the harm it does to women, and more so to young girls who may not have the choice-if one can call succumbing to social pressure, as the witnesses in this case did, choice- but are put through a process that has been found to be harmful and is now prohibited by law. It is noteworthy that the **Prohibition of Female Genital Mutilation Act** is described as “**An Act of Parliament to prohibit the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation...**”

45. In the circumstances, I am satisfied that the sentence imposed on the appellant is lawful and not excessive in the circumstances. Hopefully, it will act as a deterrence to other women who, regrettably, may offer their premises to facilitate the perpetration of FGM against the express provisions of the law, and to the detriment of those who undergo the rite.

46. I accordingly find the present appeal to be without merit. It is hereby dismissed and the conviction and sentence upheld.

**Dated Delivered and Signed at Kericho this 13<sup>th</sup> day of June 2018.**

**MUMBI NGUGI**

**JUDGE**