**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 4 OF 2017**

**1. M M D**

**2. S W.....APPELLANTS**

**-VERSUS-**

**REPUBLIC..... RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. G. Sagero, Senior Resident Magistrate in Kehancha Principal Magistrates Court Criminal Case No. 829 of 2014 delivered on 01/02/2017)***

**JUDGMENT**

1. The Appellants herein, **M M D** and **S W** were arraigned before the Principal Magistrates Court at Kehancha on 03/12/2017 and were charged with the offence of **failing to report the commission of female genital mutilation** contrary to **Prohibition of Female Genital Mutilation Act**, Cap 62B Laws of Kenya.

2. The particulars of the said offence were as follows:

> ***'On the 2nd day of December 2014 in Kuria East District within Migori County being aware that an offence of genital mutilation has been committed failed to report accordingly to a law enforcing officer.'***

3. The appellants denied the offence and the trial was ordered. The charge was however amended after the testimony of the first prosecution witness. The amended charge sheet was as follows:-

> ***'Failing to report the occurrence of female genital mutilation contrary to Section 24 as read with Section 29 of the Prohibition of Female Genital Mutilation Act No. 32 of 2011:***
>
> ***'On the 2nd day of December 2014 in Kuria East District within Migori County being aware that an offence of genital mutilation has been committed failed to report accordingly to a law enforcing officer.'***

4. The prosecution called a total of five witnesses. **PW1** was **No. 81670 Cpl. Hellen Koech. PW2** was the OCS Ntimaru Police Station No. **231260 CIP Roseline Chebosa. PW3** was one **S.M.C**., a minor aged about 13 years old. **PW4** was a Clinical Officer from Ntimaru Sub-District Hospital whereas **PW5** was **No. 86469 PC Francis Agesa** who was also the investigating officer. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except otherwise stated.

5. Briefly the prosecution's case was that on 02/12/2014 the police under the command of the OCPD Kuria East organized and carried out an operation to curb the then rampant cases of female genital mutilation in that area. Acting on a tip off the police visited the homestead of the appellants and carried out a search. They picked two girls they suspected had undergone female genital mutilation. They were PW3 and another one. Since the girls were under the guardianship of the appellants the police arrested the appellants for further interrogation. The girls were later taken to Ntimaru Sub-District Hospital where it was confirmed that PW3's genitalia had been mutilated. A P3 Form was produced by PW4. The appellants were then charged accordingly.

6. At the close of the prosecution's case, the trial court placed the appellants on their defences where the appellants opted to and gave sworn defences. They both denied any involvement in the commission of any of the alleged offence and contended that they were not aware that PW3 had engaged in the genital mutilation exercise on the 02/12/2014 as the two did not spend the day at home neither did they allow PW3 to undergo the cut. The second appellant however explained that when she returned home later in the day she learnt that PW3 had engaged in the genital mutilation exercise. She was very enraged and vowed to report the matter. However that very night they were arrested by the police. They prayed that they be acquitted. The appellants did not call any witnesses.

7. By a judgment rendered on 01/02/2017 the trial court found the appellants guilty as charged and convicted them. Each of the appellants was sentenced to a fine of Kshs. 200,000/= in default to serve one year imprisonment.

8. Being dissatisfied with the conviction and sentence, the appellants through the firm of **Kerario Marwa & Company Advocates** lodged an appeal by filing the Petition of Appeal dated 06/02/2017 on 07/02/2017 and challenged the conviction and sentence on 12 grounds. The grounds of appeal are as follows: -

**1. The learned trial magistrate erred in law and in fact, when he convicted and sentenced the appellants yet the PW3 the victim had categorically testified that she did not inform the appellants that she would undergo Female genital mutilation.**

**2. The learned trial magistrate erred in law and in fact when he failed to consider all the circumstances surroundings the case; specifically, the fact the appellant's did not take part in any way on carrying out the Female genital mutilation on the PW3, the victim.**

**3. The learned trial magistrate erred in law and in fact when he failed to consider the victim's testimony that the 2nd appellant was annoyed when she realized that the victim had went through FGM and that she even planned to report.**

**4. The learned trial magistrate erred in fact and in law when he failed to consider the fact of whether the appellants had enough and reasonable time to report between the time of being aware of the act and the time of arrest.**

**5. The learned trial magistrate erred in law and in fact when he failed to consider the issue that the appellants were not under legal obligation to report the commission of the offence as the police were already aware of it and were planning to take a action.**

**6. Section 24 of the Prohibition of Female Genital Mutilation Act Cap 32 of 2011 is to harsh, punitive and places unreasonable burden on he accused's as it would be unjust to hold the accused culpable if he or she was made aware out of some unreliable, unbelievable and undependable information of which a reasonable person given the circumstances would not have taken the information as true. Section 24 should be declared unconstitutional by this court.**

**7. The learned trial magistrate erred in law and in fact when he shifted the burden of proof to the appellant to prove that they had made attempts to report but failed.**

**8. The learned trial magistrate erred in law and in fact on relying on P3 form, exhibit 3 to convict the appellants yet there were glaring doubts as to why the said P3 form was filed on 16th January 2015 one year after the accused had been charged in court.**

**9. The learned trial magistrate erred in law and in fact when he convicted the appellants on the offence of Failing to Report the Commission of Female genital mutilation contrary to Section 29 as read together with Section 29 of the Prohibition of Genital mutilation A ct Cap 32 of 2011 yet the Prosecution had vailed to proof beyond reasonable doubt that the appellant actually knew that the victims had under gone female genital mutilation and the specific time which they became aware.**

**10. The learned trial magistrate erred in law and in fact, in convicted the appellants yet the appellants had failed to prove beyond reasonable doubt that the time when the appellants actually became aware that the victims had undergone Female Genital Mutilation.**

**11. The learned trial magistrate erred in law and in fact, when he failed to consider the defense testimony of the appellants.**

**12. The learned trial magistrate was biased against the appellant.**

9. The appellants filed the Petition of Appeal contemporaneously with a Notice of Motion dated 07/02/2017 which sought that the appellants be released on bail pending appeal. Upon the consensus of the Counsel for the appellants and the Learned Prosecutor the Notice of Motion was abandoned and the main appeal was instead argued. That was on 16/02/2017.

10. The appeal was heard by way of oral evidence. Mr. Nelson Jura, Learned Counsel instructed by the firm of Kerario Marwa appeared for the appellants and argued all the grounds in clusters. Grounds 1, 2, 3 and 6 were argued together; Grounds 4 and 5 were also argued together; Grounds 7 and 8 we separately argued and the rest of the grounds 9,10,11 and 12 were also argued together. In essence the appellants contended that the charge was not proved and urged this Court to allow the appeal. The persuasive decisions of **K.L. vs. Republic (2016)eKLR** and **S.M.G. vs. R.A.M. (2015) eKLR** were cited.

11. The State through Learned State Counsel Miss Owenga vehemently opposed the appeal.

12. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

13. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of ***'Failing to report the occurrence of female genital mutilation' were*** proved and as so required in law; beyond any reasonable doubt. Needless to say I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the oral

submissions made and the judicial decisions referred to.

14. In the cause of perusal and evaluating the evidence on record, this Court's attention was drawn to the amended charge which I will look at as to satisfy myself that the same is a proper one in law. I have already reproduced the charge and the particulars elsewhere above. The amended charge was **'Failing to report the occurrence of female genital mutilation contrary to Section 24 as read with Section 29 of the Prohibition of Female Genital Mutilation Act No. 32 of 2011'.**

15. **Section 24** of the said Prohibition of Female Genital Mutilation Act (the Act) states as follows:

> ***'A person commits an offence if the person, being aware that an offence of female genital mutilation has been, is in the process of being, or intends to be committed, fails to report accordingly to a law enforcement officer."***

16. **Section 29** of the Act is the sentencing section and is tailored as under: -

> '*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."*

17. A look at the charge as drafted reveals that the same is at variance with **Section 24** of the Act. That is because **Section 24** of the Act creates an offence known as **'Failure to report commission of offence'** and provides that it is an offence for one who is aware that an offence of female genital mutilation has been, is in the process of being or intends to be committed to fail to report accordingly to a law enforcement officer. However the amended charge instead is ''**Failing to report the occurrence of female genital mutilation contrary to Section 24...'** It is hence clear that the law envisaged the offence of failing to report the commission of the offence of female genital mutilation and not the failure to report the occurrence of female genital mutilation. Infact there is no offence in law known as ''**Failing to report the occurrence of female genital mutilation..".** In essence one can be found guilty of the offence of failing to report the commission of the offence of female genital mutilation under Section 24 of the Act but not the failure to report the occurrence of such an offence.

18. Apart from the charge, there are also the particulars. The particulars of the charge were that *on the 2nd day of December 2014 in Kuria East District within Migori County being aware that an offence of genital mutilation has been committed failed to report accordingly to a law enforcing officer.* The particulars do not relate to the '**failure to report the occurrence of female genital mutilation'** but failure to report that "**an offence of genital mutilation has been committed".** Again the particulars are at variance with the charge. The particulars indeed do not support the amended charge.

19. That being so, can the amended charge be said to have been defective, and if so, incurably defective? What constitutes a defective charge was considered by the then East Africa Court of Appeal in the case of ***Yosefu and Another -vs- Uganda (1960)E.A. 236*** as follows: -

> ***'the charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the act.'***

20. In the case of S***igilani -vs- R (2004) 2 KLR 480***, it was held that: -

> ***'the principle of the law governing charge sheets is thatan accused should be charged with an offence known inlaw. the offence should be disclosed and stated in a clearand unambiguousmanner so that the accused maybe able to plead to specific chargethat he canunderstand. it will also enable the accused to preparehis defence.'***

21. The **Black's Law Dictionary** defines what is ***'defective'*** as follows:

> ***'lacking in some particular which is essential to the completeness, legal sufficiency, or security of the object spoken of.....'***

*22. A fortiori* therefore a defective charge sheet means one which is lacking some particular or material component(s) and which deficiency goes to affect the completeness or legal sufficiency of such a charge sheet.

**23. Section 134** of the **Criminal Procedure Code** has the following to say on the matter: -

> ***'every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.'***

24. S**ection 137** of the Criminal Procedure Code deals with the rules for framing of charges or informations and under S**ection 137 (a) (i), (ii), (iii)** and **(iv)** it states as follows:-

> *"137.* ***the following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this code, not be open to objection in respect of its form or contents if it is framed in accordance with this code –***
>
> ***Mode in which offences are to be charged***
>
> ***(a) (i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of***

***offence;***

***(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;***

***(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:***

***Provided that where any rule of law or any act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;***

25. From the foregone discourse, I find that the amended charge sheet was defective. As to whether the same was incurably defective, the starting point is **Section 382** of the Criminal Procedure Code which provides that: -

***"Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reserved or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to question whether the objection could and should have been raised at an earlier stage in the proceeding."***

15. The Court of Appeal in the case of ***Nyamai Musyoka v. Republic (2014) eKLR*** while dealing with the issue of a defective charge sheet expressed itself as follows:-

***'The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect...'*** (emphasis added).

26. The charge was on an alleged failure to report the occurrence of female genital mutilation whereas the particulars were on alleged failure to report the commission of an offence of female genital mutilation. That state of affairs clearly goes to the root of the charge and distorts it in such a manner that the appellants were not able to really understand if they were defending themselves on the alleged failure to report the occurrence or the failure to report the commission of an offence. The position is further gravitated by the fact that the offence is such a serious one as it infringes on the dignity of the victim and has a very stiff penalty. The charge sheet was therefore fatally and incurably defective.

27. That being so, it hence follows that all what followed and was based on that defective charge sheet could not stand. The proceedings, judgment, conviction and sentence therefore were devoid of any legal legs to stand on and cannot indeed be allowed to stand.

28. I would have ended this judgment at this point, but for the completeness of the consideration of this appeal I will look at some other aspects raised as well. The first relates to the ambiguity and lack of clarity as to what constitutes one **'being aware'.** Since that issue was discussed at length by my brother ***Hon. S. M. Githinji, J.*** in the case of **K.L. vs. Republic (2016)eKLR,** and which analysis I fully agree with, I will add that the words **'being aware'** need to be clearly expounded to clarify what they constitute in law.

29. Another area of the said **Section 24** of the Act which is also clothed with similar ambiguity and lack of clarity relates to the aspect of **'failure to report'.** This aspect equally needs some explanation. Such need is premised on the reality that different parts of this country have different challenges which impact on the ability and speed at which one may be in a position to make a report as envisaged. There hence arises the need to have at least some timelines within which a person is expected to make the report on learning of the commission of the said serious offence. A leaf can be borrowed from the Traffic Act in respect to the offence of failure to report an accident under **Sections 73** to **75** of the said **Traffic Act**, Chapter 403 of the Laws of Kenya.

30. The other aspect relates to **'the law enforcement officers'**. **Section 2** of the Act describes such an officer to include **'a member of the provincial administration'**. The Act was assented to on 30/09/2011 and came into operation on 04/10/2011. That was after the promulgation of the now Constitution of Kenya 2010. Under the new constitutional dispensation, the provincial administration which reigned before did not find its way into this new era after the expiry of five years from the promulgation of the Constitution, that is up to 2015. (See **Sixth Schedule Rule 17 of the Transitional and Consequential Provisions)**. It therefore means that, as from 2015, a person required to make a report to a member of the provincial administration is infact called to report to an officer unknown in the law. I say so being alive to the provisions of **Rule 7** of the **Transitional and Consequential Provisions** which only dealt with the laws which were existing at the promulgation of the Constitution. Surprisingly such an unconstitutional standing is then criminalized. The question which now begs an answer is suppose in an area there is no police officer, children officer, probation officer, gender and social development officer or a cultural officer; would it be in order to still charge a person who fails to report the offence allegedly to a member of the provincial administration after 2015? The definition of **'the law enforcement officer'** to include **'a member of the provincial administration'** therefore needs to be accordingly amended. However, and as things stand now the only way this lapse can be safely taken care of is by the particulars of the charge to clearly state the officer or the officers to whom the report was to be made. That did not happen in this case. For purposes of clarity, I find that a charge under **Section 24** of the Act must state or disclose the **'the law enforcement officer or officers'** to whom the report was to be made. Needless to say that will enable an accused person to understand the charge(s) so clearly and to prepare the defence with precision.

31. There is also the issue as to whether the appellants were actually aware of the commission of the offence before they were called upon to

make a report. I have carefully perused the evidence on record and I find no difficulty in holding that there is no iota of evidence that the first appellant knew of the commission of the alleged offence or at all. PW3 was very categoric that she was neither allowed by the appellants to undergo the genital mutilation nor did she inform the appellants upon undergoing such. In respect to the second appellant, it is on record that when she became aware of what PW3 had unilaterally done she was very upset and quarreled her and further vowed to report the matter. The appellants were arrested at around 11:00pm that night. From the above analysis and noting that the second appellant knew of the PW3's mutilation late that afternoon, it cannot be said that she failed to make the report a couple of hours thereafter given that she had made her intention to report the matter so clear but for the logistical challenges including the distance that was to be covered to the nearest such officer. I therefore find that the second appellant was within what can be described as **'the reasonability test'** as she was to report the commission of the offence '**as soon as reasonably possible'.** In the unique circumstances of this case, it will be unfair to hold her guilty of the offence even if the charge would have been proper.

32. I therefore choose to stop here. The upshot is that the appeal succeeds. The conviction is quashed and the sentence set-aside. The appellants are hereby set at liberty except otherwise lawfully held.

33. Orders accordingly.

**DELIVERED, DATED** and **SIGNED** at **MIGORI** this **21st** day of **March 2017.**

**A. C. MRIMA**

**JUDGE**