



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 6 OF 2014

BETWEEN

PAULINE ROBI NGARIBA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 726 of 2012 at Senior Resident Magistrate's Court at Kehancha, Hon. C.M.Kamau, SRM dated on 6th March 2014)

JUDGMENT

1. **PAULINE ROBI NGARIBA** faced two counts of performing female genital mutilation contrary to **section 19(1)** as read with **section 29** of the *Prohibition of Female Genital Mutilation Act (Chapter 62B of the Laws of Kenya)*. The charges were as follows:

Count 1.. On the 11th day of December 2012 at [Particulars Withheld] in Kuria East District within Migori County, performed Female Genital Mutilation on SGC

Count 2.. On the 14th day of December 2012 at [Particulars Withheld] Kuria East district within Migori County performed Female Genital mutilation on ECM.

2. The appellant was convicted on count 1 and acquitted on count 1. She was sentenced to 7 years imprisonment. She now appeals against the conviction and sentence. In the grounds set out in the memorandum of appeal (which should be a petition), she attacks the conviction and sentence on the following grounds.

1. *THAT the learned trial magistrate erred in law and in fact when he found that the appellant was guilty of count 2 of the charge while the evidence was insufficient to warrant a conviction.*
2. *That the learned trial magistrate erred when he found convicted the appellant of count one of the charge while the evidence was similar to the evidence availed for count two in which the appellant was acquitted.*
3. *The learned trial magistrate erred in law and in fact when he convicted the appellant on count 1 of the charge while the evidence clearly manifest that the appellant had no free will in the commission of the offence.*
4. *The learned trial magistrate erred in law and in fact when he sentenced the appellant to seven years in prison.*

3. Before I proceed to consider the grounds of appeal, it is necessary to appreciate the evidence that

- was before the subordinate court. PW1, SGC, a girl aged 16 years and attending secondary school testified that on 11th December 2012, she went with other girls to be circumcised. She found three girls standing waiting to be circumcised. A woman, whom she identified as the appellant, came and demanded Kshs. 400 which she did not have. As she was leaving, some boys and elders came and took her back. She recalled that at first the woman was reluctant but was forced to proceed with the operation by the boys. In the meantime, her father who had gone to report to the authorities came back but was attacked by the boys. She was later taken to hospital.
4. PW2, ECM, a girl in standard six, she recalled that on 14th December 2012 she was at her uncle's place she was woken up by her friend who was going to be circumcised. On reaching the place, the appellant came and circumcised her using a razor blade purchased by her friend. She testified that she knew the appellant before the incident. Her father took her to Kehancha District Hospital where she was examined. He also referred the matter to the police.
 5. PW3, PCCM, the father of PW1 recalled that on 11th December 2012, he woke up to find that his daughter was absent. As it was during the circumcision season, he suspected that she had joined the other children for circumcision. He called a fellow pastor to find out where the ceremony was taking place. They proceeded to the place where the ceremony was being conducted and found PW1 among the girls waiting to be circumcised. He identified his daughter but when he went to hold her hand, he was warned that he would be attacked. On the way back home with his daughter, some young men attacked them with pangas, bows and arrows and went back with PW1. He went back with his daughter and asked the appellant not to circumcise her. He then left, later at home, he learnt that his daughter had been circumcised he reported the matter to the police.
 6. PW7, a clinical officer testified that she examined PW1. Her examination revealed that the genital clitoris was absent and a scar was noted at the base. The vagina had blood and the clitoral hood was absent. She confirmed that a sharp object was used and assessed the degree as harm. She prepared the P3 form dated 19th December 2012. She also examined PW2, who was brought under escort by the children's officer, and found that the clitoris and hood were absent and a fresh scar, without active bleeding, was noted. She concluded that the injury was caused by a sharp object and assessed the injury as harm. She prepared and filled a P3 form dated 20th December 2012.
 7. PW5, the investigating officer from Ntimaru Police Station, confirmed that the appellant was brought to his office by his superior who asked him to investigate allegations of FGM committed against PW1 and PW2. He investigated the matter by procuring statements. PW6 the arresting officer recalled that the appellant had been warned by the district security team about performing FGM. However complaints continued to be received which caused him to cause her arrest.
 8. The appellant was put on her defence. She testified that on 11th December 2012, she was arrested on allegations that she had circumcised someone's daughter on 10th December 2012. She stated that on 11th December 2012, she was at home when members of the public came to her house, forced the door open and removed her by force. There were police officers who tried to prevent her from going but they were overpowered by the public. She stated that she was forced to perform the circumcision on 10th December 2012. She admitted that the District Commissioner had warned her not to carry out circumcision and she had stopped it three years ago.
 9. DW2, an assistant chief, of the locality testified that the circumcision season was between 10th and 14th December 2012. On 10th December 2012, officers were mobilized to prevent circumcision from taking place but soon they were overpowered as they attempted to take the appellant away. Their attempts to stop the circumcision of young girls were unsuccessful.
 10. In his judgment, the learned trial magistrate acquitted the appellant on the first count as he found that the act was performed by use of threats by the public hence the act was not voluntary. He

found the appellant guilty of the second count, convicted her and sentenced her to 7 years imprisonment.

11. The thrust of the submission by Mr Kisia, counsel for the appellant, was that she was forced by armed youth to circumcise PW2. He also contended that the court did not consider the appellants defence that she had retired from the business of performing FGM. Ms Owenga, counsel for the State, submitted that the evidence was sufficient that the appellant performed the illegal act.
12. This court, as the first appellate court, is enjoined to evaluate all the evidence and come to an independent conclusion making allowance for the fact that it neither saw nor heard the witnesses (see *Okeno v Republic* [1972] EA 32).
13. The subject of count 2 which formed the basis of the conviction was the circumcision of PW2, ECM, who was circumcised on 14th December 2012. PW1 testified that she knew the appellant. The fact of her circumcision was corroborated by the testimony of PW4, the clinical officer. There was no evidence that on 14th December 2012, the appellant was forced by the youth or elders to perform the illegal act. The appellant in her testimony did not state where she was on 14th December 2012. Both the appellant and DW1 confirmed that the circumcision period was between 10th and 14th December 2012 which supports the prosecution case. I find that the prosecution proved beyond reasonable doubt that appellant performed the prohibited act on 14th December voluntarily. She was therefore properly convicted and I affirm the conviction.
14. The appellant was sentenced to serve 7 years in prison. **Section 29** of the *Prohibition of Female Genital Mutilation Act* provides for a minimum sentence of 3 years. In sentencing, the learned magistrate noted as follows, *“It is well within public knowledge that FGM is widely practiced in this court’s jurisdiction. I agree with the prosecution that stern action needs to be taken to stem this vice. However, I also take cognizance of the accused person’s mitigation albeit without forgetting the impact of the crime on the victim who was a minor. I hereby sentence the accused person to serve seven (7) years imprisonment...”*
15. The appellant had been warned against performing FGM by the District Commissioner yet she proceeded to do so. Although she is a person of mature age, it is that fact that makes her a person experienced in performing FGM and should she be released, she is likely to perform the FGM again. I cannot fault the magistrate for the sentence imposed. It is affirmed.
16. Consequently the appeal is dismissed.

DATED and DELIVERED at MIGORI this 15th August 2014

D.S. MAJANJA

JUDGE