



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 92 OF 2013

LC N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of R.M. Washika – AG. PM.

in Criminal Case No. 751 of 2013 delivered on 30th July, 2013 at Kapenguria.)

J U D G M E N T

The appellant, **LC N**, appeared before the Principle Magistrate at Kapenguria charged with failing to report commission of an offence contrary to section 24 of the Prohibition of Female Genital Mutilation Act No. 32 of 2011 as read with section 29 of the Act, in that between the 13th and 22nd July, 2013, in West Pokot County, being aware that an offence of female genital mutilation had been committed on her child, P N, failed to accordingly report to a law enforcement office.

After pleading not guilty, the trial commenced immediately as the victim child needed to be taken to a rescue home. The appellant had no objection with the trial commencing immediately after plea.

On conclusion of the trial, the appellant was convicted and sentenced to a fine of Ksh. 200,000/= in default to serve three (3) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant filed this appeal on the basis of the grounds filed herein on the 13th August, 2013, by her advocates, **Messrs Chebii Cherop & Co.**

At the hearing of the appeal, learned counsel, **Mr. Chebii**, appeared for the appellant and opted the six grounds of appeal together. He thus submitted that there was no assessment report on the age of the victim. That, there was no prove that a report had not been made to the chief or police.

That, the chief was already aware of the circumstances and that the appellant was not at the scene of the circumcision as she was attending to her sick father who unfortunately passed away. That, it was only when she returned to the scene that she found that the child had already been circumcised. That, members of the public were hostile such that they prevented the police from arresting the appellant. That, the prosecution established that the child was circumcised but not the failure of the appellant to report. That, the appellant was not given time to defend herself as she was arrested, tried and sentenced on the same day as if the judgment of the trial court had been predetermined. That, the appellant was not even given time for mitigation and the burden of proof was shifted on her.

Learned counsel, urged this court to allow the appeal.

The learned Prosecution Counsel, **M/s. Kiingi**, appearing for the state/respondent opposed the appeal by submitting that she was relying fully on the trial court record. She contended that the complainant child was circumcised in the presence of the appellant who failed to report to the authorities. That, age assessment was not necessary with regard to female genital mutilation and that justice was dispensed in a very efficient manner as the appellant intimated to the trial court that she was ready with the trial. That, female genital mutilation (FGM) is an unlawful act yet the appellant failed to report to the authorities. The learned prosecution counsel prayed for the dismissal of this appeal.

Having considered the appeal together with the submissions by both sides, the duty of this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

The speed with which the trial was commenced and concluded was very commendable and a clear demonstration of the efficiency and determination of all the players in the trial in their quest to swiftly dispense justice in the interest of both the victim and the appellant.

The appellant must be particularly commended for seeing and accepting the need to proceed with the trial and have it concluded in the shortest period possible.

It is also instructive to note that the trial started on 24th July, 2013, and was adjourned only once to the 30th July, 2013, when it was concluded and judgment rendered on the same day.

It is against the foregoing background that this court cannot agree with the appellant's learned counsel that the appellant was not given time to defend herself as she was arrested, tried and sentenced on the same day. The remarks by the learned counsel to the effect that the judgment of the trial court may have been pre-determined was most unfortunate and was clearly not the truth.

It is always advisable for counsels to attack the substance of a court's judgment and not the person who made it.

Counsels must be reminded that courts do have independent minds of their own and would only arrive at a decision after due consideration of evidential material placed before them and the applicable law.

Be that as it may, this court has considered the evidence against the appellant through the complainant, **P N (PW1)**, the area chief, **Paul Achia Loimale (PW2)**, the investigations officer, **Cpl. Enock Lagat (PW3)** and the doctor, **Dr. Makari Michael (PW4)**.

The evidence led by the appellant by way of her defence was also given consideration.

From all that, it is the opinion of this court that there was enough credible evidence establishing that the complainant (PW1) underwent the forbidden female genital mutilation or female circumcision. She said that the act was prompted by her father who took her to the circumciser. She exonerated her mother, the appellant, and contended that all she (appellant) did was to take care of her after the act.

In her defence, the appellant indicated that she arrived home after attending to her sick father and found that her daughter (PW1) had already been circumcised.

Apparently, the appellant was arrested by the chief (PW2) after she was found in the house with the daughter.

The chief indicated that members of the public had attempted to block him from arresting the appellant and that the girl (PW1) had never gone to school since her father wanted to marry her off.

The chief received information on 21st July, 2013, that female circumscicion was taking place at the home of one Piatokei. He later proceeded there and found that four girls had been circumscized. Three disappeared but one (PW1) was found with her mother (appellant) in their house.

The chief did not disclose the source of his information and never bothered to determine whether the appellant had prior knowledge of the unlawful act, whether she participated in it and whether she deliberately withheld information from law enforcement officers. Indeed, there was no credible and sufficient evidence to prove that the appellant and the daughter were found at the scene of the circumscion. The owner of the alleged homestead was not called to testify, neither was any other person at the place at the material time.

In sum, the prosecution evidence against the appellant was not satisfactory to meet the thresh hold required in establishing beyond reasonable doubt that an offence had been committed. She deliberately failed to report to the law enforcers. Her conviction by the learned trial magistrate was neither proper nor sound.

Consequently, this appeal is allowed. The appellant's conviction by the learned trial magistrate is hereby quashed and the sentence set aside.

Apparently, the appellant failed to pay the fine imposed upon her. She is thus set at liberty forthwith unless otherwise lawfully held.

[Delivered and signed this 5th day of August, 2014.]

J.R. KARANJA.

JUDGE.