



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 115 OF 2010**  
**CONSOLIDATED WITH**  
**CRIMINAL APPEAL NO. 117 OF 2010**

*(From original conviction and sentence in criminal case No. 777 of 2008 of the Principal Magistrate's Court at Narok - W. N. Njage {SPM})*

KATET NCHOE.....1<sup>ST</sup> APPELLANT  
NALANGU SEKUT.....2<sup>ND</sup> APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

**JUDGMENT**

The Appellants, Nalangu Sekut and Katet Nchoe were charged with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code (*Cap. 63, Laws of Kenya*).

The particulars were that on the 18<sup>th</sup> day of August 2008 at Koitiko Village in Narok South District within Rift Valley Province jointly killed SASINOI NCHOE (*the deceased*).

Both appellants pleaded not guilty to the charges when they first appeared in court on 3<sup>rd</sup> September 2009, and pleas of not guilty were entered and the prosecution went on to call three witnesses. When the Appellants appeared for further hearing on 31<sup>st</sup> March 2010, they both indicated to the court that they wished to change their pleas from **not guilty** to **guilty**. The charges were therefore read afresh to them, and each of the appellants pleaded guilty, and pleas of guilty were entered accordingly.

The Appellants were each convicted on their pleas of guilty, and after the facts were read to them by the prosecution, each of the appellants stated - "**Facts are true**", and conviction was confirmed.

In mitigation, the 1<sup>st</sup> Appellant said - "**I am sorry, I did not intend to have her killed**" and the 2<sup>nd</sup> Appellant said - "**I am sorry, I was hired to do female genital mutilation.**"

The prosecution asked the court to consider the appellants as first offenders. The court sentenced each of the appellants to ten (10) years imprisonment. The Appellants each appealed to this court separately but their appeals being from the same conviction and sentence, were consolidated by order of court made on 25<sup>th</sup> October, 2010. None of the grounds of appeal filed by the Appellants were however argued, and instead Mr. Ayuka counsel for both appellants urged the Petition of Appeal filed by him on 16<sup>th</sup> April 2010 but dated 13<sup>th</sup> April 2010.

In summary the grounds were that the Appellants were convicted on a plea which was equivocal, that the language of proceedings was not indicated, and was not understood by the Appellants, that the sentence handed down upon the appellants was manifestly harsh and excessive, and was outside the sentencing policy, and consequently prayed that -

**(1) the conviction be quashed and sentence set aside,**

**(2) the appellate court enters such orders as are fair and just in the circumstances of the case.**

Mr. Ayuka learned counsel chose to urge one ground of the Petition of Appeal, namely that the sentence imposed by the lower court upon each of the appellants was manifestly harsh and excessive, and was inconsistent with one primary purpose of sentencing, deterrence. Counsel argued and with which argument Mr. Nyakundi learned State Counsel agreed, that the offence for which the appellants were charged, convicted and sentenced arose out of a centuries old practice circumcision of both men and women, and now commonly referred as female genital mutilation (FGM).

In this case, the 2<sup>nd</sup> Appellant approached the 1<sup>st</sup> Appellant to come and carry out the rite of passage on his sixteen year old daughter. The rite of such passage in the Maasai Community is not taking out of two, four or six teeth as some communities do, but rather removal of the clitoris of the teenage girl. The correct expression these days is female genital mutilation (FGM) as already observed above. When that rite is exercised, neither the parents of the teenage girl nor the circumciser (*or if preferred the mutilator*) intends any harm beyond the cut which in time heals, and least of all bleeding to the death of the subject. So when circumcision goes wrong (*as sometimes things do, even in ultra-modern surgical theaters*) it goes very wrong, it could be a surgeon's, or circumciser's bad hand (*mkono mbaya*), negligence or perhaps bad luck. It is hard to say, unless factors are shown otherwise, that the doctor, or circumciser was negligent.

In this case, the facts that came out from the prosecution that the 2<sup>nd</sup> Appellant had approached several circumcisers who declined to carry out the circumcision on the teenage girl show that the girl was pregnant, and it was unsafe to carry out the circumcision in that condition. It is unclear whether the 2<sup>nd</sup> Appellant gave that information to the 1<sup>st</sup> Appellant. In any event, a qualified and experienced circumciser (*being an elderly lady*) with a keen eye on the condition of her patient) would have noticed the condition of the girl before carrying out the circumcision on her. The 1<sup>st</sup> Appellant might also have

sought a second opinion from her competitors and peers who had already declined to circumcise the girl suspected of carrying a pregnancy. 2<sup>nd</sup> appellant being a hard core traditionalist would obviously hide that information from her. In the event both appellants acted in a manner which endangered, and eventually even though unintentionally caused the untimely demise of Sasinoi Nchoe. To that extent therefore they deserved a deterrent sentence, both on themselves and on those not caught, reckless enough to engage in female genital mutilation.

Both Mr. Ayuka and Mr. Nyakundi urged that the sentence be left to the court. The punishment for the offence of manslaughter under Section 205 of the Penal Code is life imprisonment. The Appellants were sentenced to ten (10) years imprisonment. Mr. Ayuka submitted that this sentence was harsh and excessive. I neither think it is harsh nor excessive.

Section 3 of the Judicature Act (*Cap. 8 Laws of Kenya*) enjoins the High Court, the Court of Appeal and all subordinates, to apply by the Constitution, any written law, and to apply customary law where such custom is not repugnant to justice and morality. The repugnancy clause evokes a lot of anger and discussion among students of law, whose justice, and whose morality, I do not think it is the justice of the colonialist, or the judge or the court. It is the justice of all the surrounding circumstances of the custom in point. There is no more justice in this custom if ever there was any. I doubt there was any morality in it, except perhaps that a girl or boy had no right of marriage until she or he had passed through that rite.

The Repugnancy Clause has been defined in the Ghanaian Constitution to mean no more than a custom that is harmful to the physical and social well-being of the citizen.

In our case, female genital mutilation is certainly harmful to the physical and no doubt the psychological and sound well being of the victim. It may lead to child-birth complications, in this case, it led to premature death of a teenager. That kind of custom could be truly be well discarded and buried in the annuals of history, just as we no longer remove our two, four or six teeth from our lower jaws, or adorn our faces, cheeks with healed blisters.

The appellants herein are said to be middle-aged individuals. The 2<sup>nd</sup> appellant is said to be a widower with 7 children whose well being he does not know. The appellants were held in custody beyond 14 days mandated under Section 72(3)(b) of the former Constitution. For such extended determination the remedy lies in Section 72(6) of the former Constitution a suit for damages, not a ground for either reduction of sentence or acquittal.

The Appellants by following a custom which causes both physical and psychological harm to the victim is not a custom to be adhered to anymore. For one reason, it causes serious physical harm to the individual girl, and in this case, caused her to bleed to death as the Doctor's Post-Mortem Report showed, and for another because that breed of experienced "*mamas*" is fast getting lost, the "*profession*" has been invaded by "*quacks*" who think they are maintaining the age old custom of our ancestors, but are in fact causing irreversible harm to their victims.

For all those reasons, I would have confirmed the sentence of ten years imprisonment imposed upon the appellants by the lower court. I will not do so. I will reduce their sentence to two (2) years, to run from the date of their sentence but upon a direction that upon their release, they will each be under probation, for a period 24 months, with assistance of the District Probation Officer, and will attend seminars organized in the District for eradication of female genital mutilation, and education on the alternative rite of passage to adult hood for young girls.

In summary, the Appellants sentence is reduced from ten (10) years to two (2) years to run from the date of sentence. Secondly the Appellant will upon release be put on probation for a period of 24 months and attend campaigns for alternative rite of passage for girls as indicated with the assistance of the District Probation Officer.

There shall be orders accordingly.

**Dated, delivered and signed at Nakuru this 11<sup>th</sup> day of February 2011**

**M. J. ANYARA EMUKULE**

**JUDGE**