



REPUBLIC OF KENYA



KENYA LAW
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**Mwera v Republic (Criminal Appeal E035 of 2023)
[2025] KEHC 7215 (KLR) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 7215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E035 OF 2023
A. ONG'INJO, J
FEBRUARY 18, 2025**

BETWEEN

KENNEDY MWERA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. Karimi (SRM) delivered on 15th day of July 2023 in Kebancha SPM's Court Criminal Case No E092 of 2020)

JUDGMENT

1. The Appellant herein Kennedy Mwera was convicted and sentenced to fined Kshs. 200,000/= in each of the two counts of aiding and abetting the commission of female genital mutilation contrary to Section 20(a) of the Prohibition of Female Genital Mutilation Act No 32 of 2011. In default of paying the fines he was condemned to serve 3 years imprisonment.
2. The particulars of the said charges were that the Appellant on the 20th Day of October 2020 at Gwikonge Sub-Location in Kuria West Sub-County within Migori County being a rider of motor cycle Reg. No KMEY 2717 assisted in escorting SG to undergo FGM contrary to the Act.

Appellant was aggrieved by the conviction and sentence and he lodged the appeal herein vide Petition of Appeal filed on 29th June 2023 based on the following grounds;

1. That the trial court erred in both law and facts by failing to comply with Article 50 (2) (g) (h) of the Constitution
2. That the trial court erred in law and facts by not observing that ingredients of the offence were not proved to the required standard in law.
3. That the trial court erred in law and facts by not considering his defence and mitigation.



Reason whereof:

3. The Appellant prayed that the conviction be quashed and sentence set aside.
4. The Prosecution's case was that P.C Patrick Kivuva in company of 3 officers together with the driver while being led by Chief Inspector Kibiton Boino came across girls who had gone through female genital mutilation were being escorted while dancing and there was loud music being played from 2 speakers which was being powered by a generator that was carried on the Appellant's motor cycle.
5. That when the officers stopped their vehicle and alighted members of the public who were escorting and celebrating with the circumcised girls escaped into nearby maize plantation. That the Appellant whose motor cycle was used to mount the generator and loud speakers also abandoned the motor cycle and ran. The said motor cycle was Reg. No KMEY 271Y. Pw1 testified that the girls who were being escorted could not run and they stood still and 2 were seized and taken to Kuria West Sub-County Hospital where they were examined and it was established they had undergone FGM as per PEX 1 and 2.
6. P3 forms were duly filled and produced by PW4 the Clinical Officer at Kuria West Sub-County Hospital who found chopped clitoris of the 2 girls with healing wound. The 2 girls were aged 11 and 12 years respectively. PW4 treated the 2 girls and assessed degree of injury as grievous harm.
7. PW1 further testified and said that the Appellant when the Appellant took the owner of the motor cycle to the station he was arrested. That the motorcycle was photographed and released to the owner whereas the 2 speakers, generator and cable were produced in court as exhibits 6(a) and (b) and the cable Ex 7. PW1 said they did not establish owner of the speaker, generator and cable.
8. PW2 was one of the 2 girls who were seized on being found to have undergone FGM. She said that the girl they were with on the day of arrest was since married. She said further that on 17.10.2020 she left home in company of her friends S, M, C, E and M and went for a visit at Gwikonge. That they met the Appellant at an FGM celebration and that is where they were arrested. She said the Appellant was riding a motor cycle with speakers and radio that was playing music which people were dancing to. Pw2 said there was a girl who had been circumcised and she did not know her name. She said that she had been circumcised 3 days prior to the day she was arrested. She said they were arrested because police did not want girls to be circumcised.
9. PW3 Chief Inspector Kibiton Boino reiterated evidence adduced by PW1 who had accompanied on patrol when they came across the FGM celebrations. He said the Appellant fled the scene and left the motor cycle and he was arrested at the station when the owner of the motor cycle took him there. PW3 said the Appellant was leading the procession
10. PW5 SG testified that on she underwent FGM so that they avoid being insulted as uncircumcised (omosagane). She said they were circumcised by a lady known as Boke in Tanzania. PW5 said they were walking along the road with Pauline and Gati when police vehicle stopped and they were arrested and escorted to Kehancha Police Station.
11. PW6 P.C. Gideon Airo took over investigations from PC Martin Kuria who died in a road traffic accident. He also reiterated evidence adduced by PW1 how the arrest of the Appellant and PW2 and 5 was executed when they were found celebrating after girls had undergone FGM. He said that in the course of the arrest the Appellant escaped but on 22.10.2020 the Appellant was accompanied to the station with the owner of the abandoned motor cycle who said on interrogation that he had rented it to the Appellant. That the Appellant was placed in custody and charged as the motor cycle was released to the owner.



12. When the Appellant was placed on defence he gave sworn statement and said that on 20.10.2020 he was going to Sirare to repair the speakers he uses at his kinyozi. He said he hired a motor cycle to carry the speakers. That on the way back they stopped to take tea at Taranganya near the Police station and that is when police arrested the motor cycle and alleged he had participated in circumcision. That when he and the owner of the motor cycle went to the station they found the girls in cells. That he was then arrested and charged. He said S did not know him and the 2nd girl was just told his name. The Appellant said he did not participate in the FGM and he did not know the girls. He said he did not know the girls had undergone FGM and the circumciser was not arrested.
13. In cross examination the Appellant admitted that the owner of motor cycle said he had hired it for purposes of celebrating FGM
14. The appeal herein was canvassed by way of written submissions.
15. The Appellant filed his submissions on 29th July 2024 and argued that the prosecution did not prove the case against him to the required standards. He said there was a contradiction between the evidence on record and the date when the offence was committed on the charge sheet.
16. The Appellant also submitted that the evidence of PW2 and PW5 did not support the charge as they were not circumcised on the day the prosecution alleged in the charge sheet and so they were not the right complainants.
17. The Appellant questioned why the parents of the girls who were allegedly circumcised were not arrested and yet he was arrested and it was not established if he was related to the victims. He said it was not explained how it was his responsibility to report a crime which took place 10km away from his home.
18. Although the Respondent Counsel said in court that they had filed their submissions this court has not found any in the file or in the CTS.

Analysis and Determination.

19. The duty of a first appellate court in criminal appeal is to re-evaluate the evidence and judgment of the trial court. The court must make its own independent judgment on whether to allow the appeal.
20. The Court of Appeal of East Africa in *Pandya V Republic* [1957]EA 336 held as follows;

On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."



Okeno V Republic [1972] E.A 32.....36

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.

21. In Shantilal M. Ruwala v. R., [1957] E.A. 570).

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

22. In Peters vs. Sunday Post [1958] E.A. 424

An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution."

23. Having re-evaluated the evidence on record and judgment of the trial court as well as the grounds of appeal and the submissions by the Appellant the issue for determination is whether the prosecution proved their case to the required standard of beyond reasonable doubt.

24. The charge for which the Appellant was convicted is aiding and abetting the commission of female genital mutilation. For this offence to be proved the prosecution needed to establish that the Appellant provided support or assistance to someone to commit a crime and encouraged someone to commit a crime.

25. The Appellant was found celebrating with girls who had already undergone the cut. He was hired to transport the generator and speakers used to play music that the crowd was dancing to. It cannot be said that he was escorting the girls to go for FGM as the performance of the cut was not done on the material day. PW5 said she had the cut 3 days prior to the date of arrest. This court finds that celebrating after the fact by a crowd cannot be equated to aiding and abetting. In the circumstances this court finds that the appeal has merit and the same is allowed. The conviction is quashed and sentence set aside. The Appellant is to be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF FEBRUARY, 2025

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HON. JUSTICE A. ONGINJO

JUDGE

In the presence of: -

