



REPUBLIC OF KENYA



KENYA LAW
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**Rioba v Republic (Criminal Appeal E029 of 2024)
[2025] KEHC 6738 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E029 OF 2024
A. ONG'INJO, J
FEBRUARY 13, 2025**

BETWEEN

WANKURU RIOBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the conviction and sentence by
Hon.M. Obiero Senior Principal t Magistrate in Kehanch Principal
Magistrate's Sexual Offence Case No. E 886 of 2023 delivered on 12.3.24)*

JUDGMENT

1. The Appellant Wankuru Rioba was charged with the offence of grievous harm Contrary to Section 234 of the Penal Code in Count I.
2. Particulars to Count 1 are that on 2.11.23 in Kuria West Sub County within Migori County the Appellant intentionally did grievous harm to B. N.by performing Female Genital Mutilation to her.
3. In Count II the Appellant is charge with the offence of performing female genital mutilation contrary to Section 19 (1) as read with Section 29 of the Prohibition of Female Genital Mutilation Act No. 32 of 2011. The particulars are that on 2.11.23 in Kuria West Sub County within Migori County the Appellant performed the act of Female Genital Mutilation on B. N. a child aged 13 years.
4. In Count III Appellant is charge with the offence of being in possession of tools connected with purpose of perming FGM contrary to Section 19 (1) as read with Section 29 of the Prohibition of Female Genital Mutilation Act No. 32 of 2011. The particulars are that on 2.11.23 in Kuria West Sub County within Migori County the Appellant was found in possession of namely:- Razor Blade, Surgical Gloves, Methylated Spirit and powder for the purpose connected with Female Genital Mutilation on one B.N a child age 13 years.



5. Based on the evidence of six (6) Prosecutions witnesses and the Appellants sworn statement the trial Magistrate convicted the Appellant in the second and third count and acquitted her in the first count. Upon conviction the Appellant was fined Kshs. 200,000/= each in count one and two in default to serve three years imprisonment.
6. The Appellant was aggrieved by the conviction and sentence and she lodged her Petition of Appeal filed on 2.4.24 on the following grounds:-
 1. That the plea taken was no unequivocal.
 2. That her rights under Article 50 (2) (g) and (h) were disregarded and violated
 3. The learned trial Magistrate disregarded her right to mitigation and presentence report which was against the tenets of fair trial.
 4. The learned trial Magistrate disregarded all the open discrepancies of the offences as captured by the prosecution.
 5. That the sentence is overly harsh , excessive and inordinate in spite of being a first offender
7. The Prosecution case was that the complainant PW3 a grade five pupil aged 13 years testified that her grandmother A took her to the home of the Appellant where the Appellant circumcised her among other girls including C. PW4 corroborated the evidence of PW3 that she was also taken to the Appellant's home by her grandmother AM and that the Appellant circumcised her. She said that she was with the complainant and F who are her cousins. PW4 said that the Appellant used different blades for each of them to circumcised them. She said that when her parents discovered that they were circumcised they were angry and brought the police. The evidence of PW1 the clinical officer from Isebania Sub County hospital confirms that when PW3 was being examined her clitoris had fresh cut wound.
8. PW2 PC Jecinta Ndiema from Isebania Police Station investigated the offence where the Appellant was alleged to have performed female genital mutilation on some girls she issued P3 form to PW3 who was treated at Isebania Sub County Hospital which she filled. She said that it was three girls who were circumcised on 2.11.23 by the Appellant but the Appellant was arrested in Mabera by Insp. Korir and Sgt. Range and upon arrest items suspected to be tolls connected with FGM were recovered in a green polythene bag. She produced the said items in court as exhibits.
9. PW5 Sgt. James Range testifies how in company pouf Insp. Korir they proceeded to the home of the Appellant on 5.11.23 as it was alleged that she had circumcised some girls. When they conducted search they recovered 8 gloves, 16 blades, power and surgical spirt in a green paper bag. They arrested her and escorted to the police station where she was handed over to the OCS. That on the same night they went and collected the 7 girls who have been circumcised from different home. They also took the parents of the girls.
10. Insp. Fredrick Kori reiterated the evidence of PW5 as he accompanied him to effect the arrest of the Appellant. The Appellant didn't have any questions in cross examination for PW5 and PW6 and she admitted that she was arrested from her home and that the items were recovered from her house as she used them long time ago.
11. When the Appellant was placed on defence, she gave sworn statement and said that on 2.11.2023 she was in her house when the police went and arrested her on allegation that she had circumcised some girls. She said that some items used for female genital mutilation was found in her home but she did



not circumcise the girls in this matter and that their testimony was false. She said PW2 and PW3 were defending their parents.

12. This appeal was canvassed by way of written submission. The Appellant filed her submission on 18.9.24. She submitted that when the charge was read to her afresh her rights under Article 50 (2) (b) were violated. She also submitted that the evidence of PW3, PW4, PW5 and PW6 were contradicting the first evidence as per the outpatient attendance card which clear indicated that the complainant underwent Female Genital Mutilation unknown date and time. She also questioned why she was the only one charged despite the fact there were other girls and parents who participated in the crime. She said that there was a plan to fix her by the prosecution who inflicted injuries on the complainant to look fresh to enable them charge her.
13. The Appellant's in their submissions urged the court to dismiss the appeal and uphold the conviction and sentenced of the trial magistrate for reasons that the Appellant was accorded the right under Article 50 (2) and (h) and she responded that she was ready. It was also submitted that the Appellant elected the language she was comfortable to use in court and as result proceedings were conducted in Kiswahili language that she confirmed she understood and she adequately followed the oral proceedings and also cross examine the witnesses.
14. On the ground that there was contradiction in the evidence of the prosecution witnesses and that the charge sheet was defective the respondent submitted that the charge against the Appellant was clearly stipulated and the particulars were explained to the Appellant in a manner that enabled her to prepare and make her defence and that there was no prejudice caused to her.
15. Regarding alleged contradiction in the prosecution's case the respondent submitted that both PW3 and PW4 testified that the appellant circumcised them using a razor blade. The Respondent also submitted that PW1 clarified that the indication that circumcision was done in 2022 was an error as the injuries to the Complainant was fresh and the age of injury was assessed to one week. On the ground that the tool recovered ought to have been produced by the medical officer the respondent submitted that the blade recovered from the Appellant among other items were used to conduct female genital mutilation.
16. On claim that the sentence was harsh the respondent submitted that the Appellant was not a first offender as she had been convicted if a similar charge

Analysis and Determination

17. In a first appeal, the duty of the court was stated in Mark Oiruri Mose vs. R (2013) eKLR thus;

.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze 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.”
18. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are:-
 - i. Whether plea taken was an unequivocal.
 - ii. Whether the Appellant was informed with sufficient details the charge against her.
 - iii. Whether the evidence of prosecutions had discrepancies
 - iv. Whether the sentence was harsh and excessive.



19. The complainant PW3 a grade five pupil aged 13 years testified that her grandmother A took her to the home of the Appellant where the Appellant circumcised her among other girls including C. PW4 corroborated the evidence of PW3 that she was also taken to the Appellant's home by her grandmother AM and that the Appellant circumcised her. She said that she was with the complainant and F who are her cousins. PW4 said that the Appellant used different blades for each of them to circumcised them. She said that when her parents discovered that they were circumcised they were angry and brought the police. The evidence of PW1 the clinical officer from Isebania Sub County hospital confirms that when PW3 was being examined her clitoris had fresh cut wound. The prosecution therefore proved beyond reasonable doubt that female genital mutilation had been performed on PW3 and it is the Appellant who performed it. It is not therefore not true that the prosecution inflicted injuries on the complainant in order to fix the Appellant. There was no evidence on record to show that the prosecution had no reason to fabricate the Appellant as they didn't know her until she was presented in court.
20. On the issue of whether the Appellant understood the charge facing her when the Appellant was presented to court the provisions of Article 50 (2) (g) were explained to her and she also selected to use the Kiswahili language. The Appellant pleaded not guilty to the charge and the matter proceeded to full hearing and she had the opportunity to cross examine the witnesses. It cannot therefore be said that the plea was not unequivocal or that she didn't understand the charge against her as she was accorded all the necessary assistances to enable her have a fair trial.
21. On regarding sentence Section 29 of the *Prohibition of Female Genital Mutilation Act* No. 32 of 2011 provides that a person found guilty under Section 19 (1) of the Act is liable to imprisonment for a term of not less three years or a fine of not less 200,000/= or both.
22. The sentence passed on the Appellant was therefore lawful. However, being that the two count formed a series of transactions this court finds that the sentences in two counts ought to run concurrently. In the circumstances, this court sets aside the penalty in the trial court and substitute thereof sentence of three years in each count to run concurrently from the date that the Appellant was arraigned in court on 10.11.23.
23. In addition, upon completion of the said sentence the Appellant will remain under probation supervision for another period of one year.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 13TH DAY OF FEBRUARY, 2025.

A. ONGINJO

JUDGE

Judgment delivered in the presence of:

