



REPUBLIC OF KENYA



**Muchine v Republic (Criminal Appeal E061 of 2023)
[2024] KEHC 8794 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E061 OF 2023
DKN MAGARE, J
JULY 18, 2024**

BETWEEN

BENSON WARUI MUCHINE APPELLANT

AND

REPUBLIC RESPONDENT

(appeal arises from the Judgment of the trial court, Hon. D.N. Bosibori, Senior Principal Magistrate in Mukurweini PMCRC No. E194 of 2022 delivered on 23/8/2023)

JUDGMENT

ARGUMENTS

1. This appeal arises from the Judgment of the trial court, Hon. D.N. Bosibori, Senior Principal Magistrate in Mukurweini PMCRC No. E194 of 2022 delivered on 23/8/2023.
2. The Appellant was charged with the offence of use of premises to perform Female Genital Mutilation contrary to Section 22 as read with Section 29 of the *Prohibition of Female Genital Mutilation Act, 2011*.
3. The particulars of offences were that the Appellant, on 4/4/2022 at Muthuthini of Mukurweini subcounty within Nyeri County, knowingly allowed his premises to be used for the purpose of performing female genital mutilation to T.W.W, a child aged 10 years old.
4. The Appellant was also charged on Count II, III, IV and V in respect of the same offence against 3 other minors and one adult namely, E.N.W aged 12 years, P.W aged 13 years, C.W aged 17 years and E.N.N aged 27 years.
5. The Appellant was presented before the trial court and denied the charges against him and a plea of not guilty was entered.



6. The trial court considered the case and rendered the Judgment. The court found the Appellant guilty and convicted him of the offences in Counts I, II and III and acquitted him on Counts IV and V.
7. The Appellant, aggrieved, lodged this Appeal. In the Petition of Appeal filed on 5th July 2022, the Appellant pleaded that the trial court erred in law and fact in:
 - a. Failing to find that the charges against the 1st and 2nd Appellant did not raise any offence.
 - b. Failing to find that the prosecution had not achieved the required standard of proof beyond reasonable doubt.
 - c. Ignoring the Appellants' defence.
 - d. Ordering for the destruction of the Appellant's property.
 - e. Meting out sentence that was harsh and excessive.

Evidence

8. PW1 was Stephen Maina Dedan, the Chief of Gathuitu Location. It was her case that he was called by Cpl. Bett to meet him at the Appellant's home. He went and the Appellant was not there. That he did not know about the FGM incidence before then and he was not certain if the children underwent FGM.
9. PW2 was Nicholas Matimu Kaburia, a health officer at Mukurweini Hospital. He relied on his treatment notes dated 8/4/2022 and testified that he attended to E.N.N on 7/4/2022 and that she was on her menses. That her clitoris had been partially removed.
10. PW3 was Dr. Ben Oyugi. He produced 4 medical reports for E.N, T.W, C.W and P.W. On E.N it was his testimony and evidence that the x-rays showed crown formation of wisdom teeth 8s and flaring of teeth 7s all being the second permanent molars. For T.W, wisdom 8s were missing and there was apical flaring of the 2nd permanent molars, 7s. For C.W, wisdom 8s were missing and apical flaring of molars 7s. On P.W, the wisdom teeth were missing and there was apical flaring of the molars.
11. In cross examination, he testified that wisdom teeth erupt between 16 and 25 years. That apical closure provided more certainty and his age assessment was an estimate.
12. PW4 was Dr. Naomi Sitati. She relied on her medical reports. She testified that she examined T.W.W, E.N.N, and C.W.W on 4/4/2022. That C.W.W had 6 hours injuries on examination. The girl was in pain and she had a bleeding clitoris. Similarly, T.W.W had a cut to the clitoris and the clitoris was missing, compatible with having undergone FGM. Further, that for E.N.W, her clitoris had been cut. For P.W.M, she had a cut on the clitoris compatible with FGM.
13. In cross examination, it was her case that the clothes of the victims indicated to be soaked in blood were missing and not produced in court and the subject sharp object was not presented in court.
14. PW5, was PC Elizabeth Mwikali. It was her testimony that when they arrived at the scene of the crime, they found the victims in a wooden hall in the Appellant's compound. That some of the girls like N.W and E.W had not undergone FGM. That they went to the latrine made of wood and demolished it whereby they seized razor blades, and banana leaves with wrapped cotton wool and pieces of flesh suspected to be clitoris of the victims.
15. That C.W also was present and showed them where the incident took place from where they seized 2 razor blades, 3 cotton wool pieces and 2 pieces of flesh wrapped in banana leaves. That the subject



- house belonged to the Appellant and photographs taken showed the homestead of the accused with latrine, a hall and main house. Based on the evidence, they decided to charge the Accused.
16. PW6 was IP Stephen Natembeya Ochoya. That he was a photographic officer under the ODPP. He produced the photographs marked as 1-4 and confirmed that they were not altered. He produced a certificate and confirmed that they were the photos he had taken. On cross examination, he stated that he processed the photos. That he could not tell when the photos were taken.
 17. PW7 was P.W the minor. She stated that she was 14 years. It was her case that she was at her mother's home in Narumoru when her mother took her to the Appellant. She was told to go indoors. She found therein mama Shiko and Christine. Banana leaves were spread on the floor. Christine injected her on the clitoris and took a razor and cut her. That she found the Appellant cutting banana leaves at the time she arrived.
 18. On cross examination, it was her case that she narrated to the police that Christine removed her panty. That she could not identify the razor that was used on her. She had a yellow dress.
 19. PW8 was T.W. She was 10 years. That her mother called a driver to take them somewhere she did not know. On the way, Natasha joined them and later Catherine joined them. They reached the homestead and were given chairs to sit. She went to the hall in the homestead and found Ngendo, Catherine, Precious, Nyawira and Natasha seated. She was injected by an old woman who also took a razor and cut her clitoris.
 20. PW9 was Mary Wahu Maina, Government Analyst. She testified that she did DNA profiling and produced results which she produced in court. On cross examination, it was her case that she did generate DNA profile for the razor blades. That there was a disparity in the dates of the report but the correct date was 6/7/2022.
 21. PW10 was E.N.W. She testified that her mother took her to the Appellant and one Christine injected her and then cut her clitoris. On cross examination, it was her case that she heard that the person was called Christine Nthenya. That the subject house is where she underwent the cut on her clitoris and her underwear was not returned to her body as it was soaked in blood.
 22. On the part of the Appellant, he also testified in defence and called one witness.
 23. DW1 was the Appellant. It was his testimony that he was away in Nairobi until 4 pm on 4/4/2022 and was not at home. That the subject homestead did not belong to him. On cross examination, it was his case that he had no travelling receipts.
 24. DW2 was Peter Gichane Gacheru. He testified that on 4/4/2022, he was home and the Appellant had left home on 1/4/2022 to Githurai Market. On cross examination, he confirmed that he was with the Accused on 1/4/2022 but was not with the accused between 1/4/2022 and 4/4/2022 and could not tell where he was.
 25. The court convicted and sentenced the Appellant as follows:
 - a. On count 1, 2 and 3, the Accused was sentenced to 3 years imprisonment to run consecutively.

Submissions

26. The Respondent filed submissions on 7/3/2024. It was submitted that the appeal on conviction and sentence were not merited. That the Appellant failed to demonstrate that he had no knowledge that the premises were being used to perform FGM and that he was responsible for the premises. I was urged to dismiss the appeal.



Analysis

27. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

28. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is 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.”

29. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“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 v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*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, see *Peters v. Sunday Post*, [1958] E. A. 424.”

30. The issue in this case is whether the prosecution proved its case to the required standard. Most oft quoted English decision of by Viscount Sankey L.C in the case of *H.L. (E) Woolmington vs. DPP* [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove



the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

31. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

32. According to Halsbury’s Laws of England, 4th Edition, Volume 17, paras 13 and 14:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.”

33. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

34. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-

‘That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a



doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

35. On my reevaluation, the issue is whether the offences were committed in the premises of the Appellant and which fact the Appellant was aware of. The evidence before the trial court was that the hall where the FGM took place belonged to the Appellant. The Chief testified that he was accompanied by the Assistant Chief to the Appellant’s house when he was called by the police officers. Both were in administrative positions within the national government respectively in Gathuitu Location and Muthuthini Sublocation.
36. The victims whose clitoris had been cut had been inside the hall in the Appellant’s homestead. When the police asked for the owner, as testified by PW5, they were informed that the owner was the Appellant, and the hall was his.
37. In my view, there was overwhelming evidence in support of the prosecution’s case that the Appellant was the owner of the premise and therefore the Appellant was in control of the said premises and allowed them to be used for the purposes of FGM. I say so also because it was clear and a proved fact that FGM had taken place. I am therefore unable to fault the decision of the trial court on this ground.
38. The evidence of the victims was consistent that they all underwent FGM inside the hall. The Appellant alleged contradictions in the evidence tendered by the prosecution. However, from my analysis of the evidence which I have set out earlier in this judgment, there is no contradiction, material or otherwise, that I can discern in the prosecution case.
39. The Appellant raised a general defence of alibi and that the offence was not committed in his home. With reference to alibi evidence, the Court of Appeal in *Erick Otieno Meda vs. Republic* [2019] eKLR stated thus:

“In considering an alibi, we observe that:

 - a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
 - b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
 - c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
 - d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mhlungu - v - S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014).”
40. Viewed in light of the Appellant’s defence, alibi defence if sufficient would not assist in proving that the Appellant did not own the premises from which FGM was committed. It was immaterial that the Appellant was or was not at the premises at the time of the offence. What matters was that he had control and/or ownership over the premises.



41. Moreover, the Appellant’s assertion that the premises belonged to his brother had been credibly proved otherwise by the evidence of the Chief who knew the Appellant and where the victims were found during the unlawful FGM act, to be the home of the Appellant. Credible evidence was equally tendered to the effect that Christine Nthenya, who largely performed the FGM on the girls was the Appellant’s wife.
42. I note that the trial court acquitted the Appellant on counts IV and V because the prosecution failed to trace and avail C.W.W and E.N to testify in court. Therefore, the appeal herein does not concern counts IV and V.
43. I therefore find no basis to interfere with the finding of the trial court on conviction.
44. On sentence, I start from the provisions of Section 29 of the [Prohibition of Female Genital Mutilation Act](#), No. 32 of 2011, which provides as follows:
- A person who commits an offence under this Act is liable, on conviction, to imprisonment for a term of not less than three years, or to a fine of not less than two hundred thousand shillings, or both.
45. As regards sentence, Section 22 of the [Prohibition of Female Genital Mutilation Act](#) provided for the offence of permitting one’s house to be used for FGM, while Section 29 provides for a term of not less than 3 years imprisonment or a fine of Kshs. 200,000/- or both. The appellant in this case was sentenced to a term of 3 years’ imprisonment to run consecutively on the three counts of which he was found guilty.
46. It is important to note that the protection of female genitals is not just a legal duty but a human right and responsibility placed on the human kind. In *Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) (Constitutional Petition 244 of 2019) [2021] KEHC 450 (KLR) (Constitutional and Human Rights) (17 March 2021) (Judgment)*, a three judge bench L.A. Achode J, (as then she was) K. Kimondo & M.W Muigai, JJ found and held as doth: -

“[The Constitution](#) entrenched respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, as its foundational values. Article 28 of [the Constitution](#) provided for the right to the inherent dignity and the right to have that dignity respected and protected. Human dignity was that intangible element that made a human being complete. It went to the heart of human identity. Every human had value. Human dignity could be violated through humiliation, degradation or dehumanization. Each individual had inherent dignity which [the Constitution](#) protected. Human dignity was the cornerstone of the other human rights enshrined in [the Constitution](#). The impugned Act did not violate [the Constitution](#) or women’s right to dignity.

The [Protection of Traditional Knowledge and Cultural Expressions Act](#) defined cultural heritage. Under that Act, intangible cultural heritage was defined as the practices, representations, expressions, knowledge and cultural spaces associated therewith communities, groups and, in some cases, individuals recognized as part of their social cultural heritage. Culture was dynamic and not static and would continue to grow to respond to new factors. It was also fluid and changed from time to time. It was susceptible to be swayed by many factors such as religion, education, and influence from other communities, inter-marriage and urbanization. However, there were certain aspects of



culture that identified a particular group, their history, ancestry and way of life and that diversity was recognized and protected by *the Constitution*.

The Constitution granted the freedom to exercise one's culture. However, that freedom had to be carried out in line with the other constitutional provisions. Culture entailed various modes of expression. Therefore, what was limited was any expression that would cause harm to a person or by a person to another person. FGM/C fell into the latter category.

47. It is not just a legal duty but a responsibility to protect the female genital organs and human dignity appertaining to the completeness of a person both as a woman and as a human being. The responsibility to protect therefore calls that all levels of culpability be punished while having respect to minimum sentences. A clitoris is not just an appendage but a part of completeness of the human person.
48. The Court of Appeal in the case of Thomas Mwambu Wenyi – vs- Republic (2017) eKLR stated as follows: -
- “A sentence imposed on an accused person must be commensurate with the blame worthiness of the offender and that the court should look at the facts and circumstances of the case in its entirety before settling for any given sentence”.
49. I have perused the Sentencing Guidelines. The Supreme Court has propounded them in Francis Karioko Muruatetu & Another v Republic (2017) eKLR. The following are guidelines with regard to mitigating factors before sentencing.
- (a) age of the offender;
 - (b) being a first offender;
 - (c) whether the offender pleaded guilty;
 - (d) character and record of the offender;
 - (e) commission of the offence in response to gender-based violence;
 - (f) remorsefulness of the offender;
 - (g) the possibility of reform and social re-adaptation of the offender;
 - (h) any other factor that the Court considers relevant.
50. The court notes that FGM is a cultural practice that, despite the prohibition by the law, is deeply embedded in our society. In this case, minors were victims and they were taken to the Appellant's home by their own mothers. However, FGM is prohibited by law because of the harm to women and more so to young girls who may not have the choice as is in this case where some travelled long distances in unknown motor vehicles and drivers to a place so harmful and to undergo prohibited activities. It is noteworthy that the *Prohibition of Female Genital Mutilation Act* is described as “An Act of Parliament to prohibit the practice of female genital mutilation, to safeguard against violation of a person's mental or physical integrity through the practice of female genital mutilation...”
51. In the circumstances, I am satisfied that the sentence imposed on the Appellant is lawful and not excessive. Hopefully, it will act as a deterrence to other persons in the society who, regrettably, offer their premises to facilitate the perpetration of FGM against the express provisions of the law, and to the detriment of those who undergo the rite.



52. The Supreme Court, (Koome CJ & P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ), last week, posited as follows regarding minimum sentences in Petition No. E018 of 2023 - Republic v Joshua Gichuki Mwangi (UR) stated as follows: -

“(56) Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

53. The sentence meted out was the minimum mandatory sentence. The court has no discretion on this point. I cannot disturb the same. This is in line with the Supreme Court directions.

54. Having found that the sentence is proper and dismissed the appeal on conviction, I find no basis to disturb the finding of the trial court on both conviction and sentence.

55. I only need to make two clarifications on the sentences. The court stated in order (a) that: -

“In light of the cumulative effect of the sentences imposed, it is ordered that the sentences imposed on counts II and III are to run concurrently with the sentence imposed in count 1.”

56. What is the logical meaning of this order? It basically means that counts I and II are between themselves to run concurrently. However, they will both run consecutively with count 1. This means that the Appellant will serve cumulatively 6 years, and not 9 years.

57. The second aspect is when the sentences start running. The court found that the Appellant had been in custody throughout the trial. Therefore, under section 333(2) of the Criminal Procedure Code, the sentence starts running from the date of arrest on 23/5/2022.

Order

58. In the upshot, I make the following orders:

- a. The Appeal against conviction and sentence is dismissed.
- b. The Appellant’s conviction and sentence in Mukurweini PMCR No. E194 of 2022 is upheld. The Appellant to serve the sentence meted out by the lower court starting from the date of arrest on 23/5/2022, as per section 333(2) of the Criminal Procedure Code. For avoidance of doubt the three years imposed in count I and II are to run concurrently while those in count III are to run consecutively, effectively serving 6 years, as ordered by the lower court.
- c. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF JULY, 2024.



JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Mr. Karanja Maina for the Appellant

Miss. Muniu for the State

Appellant – present

Court Assistant – Jedidah

