



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KILGORIS
CRIMINAL APPEAL CASE NO. E029 OF 2021
(CORAM: F.M. GIKONYO J.)

(Being an appeal from the conviction and sentence of Hon. R.M. Oanda (P.M) in Kilgoris Cr case No. 579 of 2020 delivered on 21/09/ 2020)

MIRIAM CHEBET.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein along with two others was charged with the offence of failing to report the commission of female genital mutilation contrary to Section 24 as read with Section 29 of the Prohibition of Female Genital Mutilation Act no. 32 of 2011.
2. The particulars of the offence were that on 04/09/2020 at Sachagwan Village in Transmara West Sub- County, within Narok County, jointly being aware that an offence of female genital mutilation had been committed on them, failed to report to a law enforcement officer.
3. The Appellant was convicted on her own plea of guilt. In mitigation, she asked for forgiveness. The court considered their mitigation and that she was a first offender but the offence is serious. Therefore, a deterrence sentence was needed. She was sentenced to pay a fine of Kshs. 200,000/=in default to serve 3 years imprisonment.
4. Before me is an application dated 27th May 2021 for review of sentence of a fine of Kshs. 200,000/=in default to serve 3 years' imprisonment imposed on a charge of failing to prevent female genital mutilation. The application is supported by her affidavit sworn on the same day and the grounds set out in the application.
5. The appellant has sought the sentence to be reviewed and non-custodial sentence to be considered or a reasonable fine for the reasons that; she is remorseful, a mother of three children of tender age and a bread winner; she single handedly maintains her children.

Evidence

6. The facts of the case were that on 4/9/2020 the three accused persons headed to the home of Geoffrey and Zeddy Mutai for the purpose of undergoing FGM. They arrived there at 9 p.m. and found the person who was to do that activities there. They all underwent FGM. After the cut they were left under the care of Zeddy Mutai and the husband until 16/9/2020.
7. On 16/9/2020 at 2 pm police officers who had been informed to go there arrived and arrested the three ladies together with the house owners. The ladies were taken to Angata H/Centre where the P3 forms were filled. They were taken to Angata police station. P3 form and Treatment note, **P Exh 3 a**, and **b**.

Appellant's submissions

8. The appellant in her oral submissions prayed for leniency. That she will not repeat it. That she has a child and her parents are not able to take care of the child. She requested to be pardoned and her sentenced be reduced.

Respondent's submissions

9. Mr. Ondimu OGW, senior prosecution counsel in opposing the appeal submitted that the sentence and fine imposed on the appellant was

what is provided under the law. Therefore, the sentence was proper in the present circumstances.

10. The respondent submitted that the procedure laid out in **Adan's case** was followed to the later.

11. In conclusion, the respondent submitted that the prosecution did discharge its burden of proof as facts were read to the appellant and exhibits were tendered. Mr. Ondimu OGW therefore urged this court to dismiss the appeal.

12. The respondent relied on the following authorities in support of its case;

i. Section 348 of the Criminal Procedure Code.

ii. Section 207 of the Criminal Procedure Code.

iii. Adan V Republic [1973] EA 446

ANALYSIS AND DETERMINATION

Court's duty

13. As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See **Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.**

14. The appellant having pleaded guilty, it is not open to her to raise grounds that touch on facts. She is estopped by section 348 of the Criminal Procedure Act from doing so. It provides:

15. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

16. In the instant case , I will endeavor to establish the following:

i. Whether the plea was unequivocal,

ii. Whether the procedure for taking plea was adhered to; and

iii. Whether the sentence meted out was legal or not.S.24 of the Prohibition of Female Genital

17. I have perused the original record and the typed copy of proceedings. I have noted that after the appellant pleaded guilty to the offence, the facts were read and she confirmed that they were correct. The procedure in plea taking was adhered to and the learned trial magistrate cannot be faulted. The plea was unequivocal

18. The penalty for the offence is provided for under section 29 of the Act 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.”

19. Thus, the trial court imposed sentence as prescribed in law.

20. When I consider the mitigation as well as aggravating factors I find that Female Genital Mutilation as a cultural practice is a harmful practice to a person's mental and physical integrity. It is also prohibited by law. It is clear that, the **Prohibition of Female Genital Mutilation Act** is: -

“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...”

21. Notably, many violate the law and continue with this harmful and prohibited practice. In this case, I do note that all the three women voluntarily submitted themselves to this harmful and unlawful practice. These facts portend prevalence of the offence and call for a deterrent sentence. However, I do note that the appellant has been in prison for over I year now. She is a mother and first offender. For those reasons, I order that the appellant shall serve a probation sentence for the period of the remainder of the prison term.

22. Sentence accordingly reviewed.

23. I should also state that the District Probation Officer, who shall supervise the probation order should advise the appellant on the dangers of this practice and encourage her to attend seminars organized for eradication of female genital mutilation. Such interventions will help.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 7TH DAY OF DECEMBER, 2021

F. GIKONYO M.

JUDGE

In the presence of:

1. Appellant

2.

Kasaso

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