



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL REVISION NO. 4 OF 2019

REPUBLIC.....PROSECUTOR

-VERSUS-

ESTHER RIOBA MAKORI.....ACCUSED

RULING ON REVIEW

1. The Learned Resident Magistrate at Kehancha Law Courts forwarded this matter to this Court requesting for review of the orders on sentencing as the court had inadvertently not sentenced the accused person on the second count.

2. The accused, **Esther Rioba Makori**, was charged with two counts under the **Prohibition of Female Genital Mutilation No. 32 of 2011** (hereinafter referred to as '**the Act**'). The charges were tailored as follows: -

Count 1: Aiding and Abetting Female Genital Mutilation contrary to Section 20 (a) as read with Section 29 of the Prohibition of Female Genital Mutilation No. 32 of 2011.

On the 21st November 2018 in Kuria West Sub-County within Migori County, aided the commission of Female Genital Mutilation on her daughter namely SNM a girl aged 16 years.

Count 2: Failing to Report Commission of Female Genital Mutilation Contrary to Section 24 as read with Section 29 of the Prohibition of Female Genital Mutilation No. 32 of 2011.

On the 21st November, 2018 in Kuria West Sub County within Migori County, was found having not reported the Commission of Female Genital Mutilation on her daughter namely SNM a girl aged 16 years.

3. The accused pleaded guilty to both counts and the court rightly entered pleas of guilty. Facts were immediately read out and the accused person admitted them. She was subsequently convicted on her own plea of guilty and tendered mitigations. The sentence followed a week later where the court sentenced the accused person to pay a fine of Kshs. 200,000/= and in default to serve one year in prison.

4. It is that sentence which prompted this review. The accused person faced two counts under **the Act**. On the first count she was charged with aiding and abetting her daughter to undergo genital mutilation on 21/11/2018. On the second count, the accused person was charged with failing to report that her daughter had undergone genital mutilation on the same 21/11/2018.

5. I have carefully considered the twin charges and I am of the considered position that an accused person cannot be rightly charged with such both counts. That is because one cannot be accused of aiding and abetting the commission of a crime and at the same time be charged with failing to report the commission of the very crime he/she is accused of taking part in. If the investigator was intent on preferring both charges, then at least one of them must have been in the alternative.

6. The Charge Sheet was therefore incurably defective and the plea court ought to have declined to admit it. I therefore find that proceedings on the plea up to the sentence were a nullity. The same are hereby set-aside. It then follows that the convictions are quashed and the sentence set-aside accordingly. The Charge Sheet is equally dismissed for being fatally defective.

7. The upshot is that the accused person, **Esther Rioba Makori**, shall forthwith be released from prison unless otherwise lawfully held and in the event the fine was paid, the same shall be refunded to the depositor forthwith.

8. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 08th day of March 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Esther Rioba Makori the Accused person.

Mr. Kimanthi, Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant.