



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 21 OF 2016

JULIANA CHELULE CHEPKOSGEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence dated 14/4/2016 in the chief magistrate's court at Narok in Criminal Case No.2024 of 2015, R. V. Juliana Chelule Chepkosgei)

JUDGEMENT

INTRODUCTION

1. The appellant has appealed against his conviction and sentence of a fine of Shs.200,000/= in default to serve three years imprisonment in addition to also serve three years imprisonment in respect of failure to report the commission of an offence contrary to section 24 as read with section 29 of the Prohibition of the Female Genital Mutilation Act (Cap 62B) Laws of Kenya.
2. The state indicated they were going to file submissions by 25/7/2018, but failed to do so.
3. The appellant was convicted and sentenced on the direct evidence of M.C.C. (initials of her name), who was the complainant (PW 1), Cpl Robert Kendagor (PW 2), administration chief Johnstone Kiptanui Koskei (PW 3) and No. 62073 P.C Kenneth Kanyoro (PW 4).
4. The unsworn defence of the appellant was a bare denial. She did not call any witnesses in her defence.

The case for the prosecution

5. The complainant (PW 1) was allowed by the court to give unsworn evidence. This was done after the court found that the complainant did not understand the nature of the oath, following the conclusion of a *voire dire* examination. She also gave evidence in camera.
6. The evidence of the complainant was that on 1/2/1015, she was with her mother and some women at home. She further testified that there was a circumcision ceremony in her honour. According to her, she was circumcised on 24/10/2014. Her parents were informed by her grandmother, that she had undergone a circumcision ceremony. It was the chief who pointed out the appellant as the circumciser. She also testified that she had healed, after being treated both at Ololulunga and Narok County Hospitals. Finally, she testified that she was born in 1997, although she had left her birth certificate at home.
7. Furthermore, the prosecution called Cpl Robert Kendagor (PW 2), who along with PW 3 and PW 4 arrested the appellant. It was his (PW 2) evidence that on 1/12/2015, they went to Enalarai village to the home of Wilson Tangus, where they found women celebrating.
8. The said women were jumping, rejoicing and were taking alcohol. After interrogation, the complainant said she had undergone female genital mutilation.
9. Furthermore, the evidence of the investigating officer (PW 4) was that the complainant was taken by her mother to the house of the appellant. It was also the evidence of PW 4 that they arrested the complainant from the house of the appellant.
10. PW 4 then took the complainant to Ololulunga health centre, where the latter was examined and treated by Felix Rotich Kibe (PW 5). The evidence of PW 5 was that the complainant was 22 years. She found as follows. Her clothes were soiled with blood. Her labia majora, minora and clitoris were cut off. There were bruises, a watery discharge and dry blood in her private parts. The injuries were one week old, which PW 5 classified as grievous harm. She put her report (the P3 form) in evidence as exhibit Exh. 1
11. Upon being put on her defence, the appellant in her unsworn statement stated: "*it is not me who circumcised them. That is all.*" She then

closed her case.

Findings on grounds of appeal

12. In this court, the appellant raised six (6) grounds in her petition of appeal. In addition to those grounds the appellant filed a well written submission replete with many authorities.

13. In ground one, the appellant has faulted the trial court both in law and fact for failing to consider that her identification was not proved. In this regard, the evidence of the complainant was that she was circumcised on 24/10/2014. Furthermore, she testified that on 1/12/2015 police went to their home, where a circumcision ceremony was held in her honour.

14. The evidence of the police (PW 2) is that he arrested the appellant.

15. After reassessing the totality of the prosecution and defence evidence, I find that the appellant was positively identified by the prosecution witnesses. This ground of appeal in respect of the appellant's identification is hereby dismissed for lacking in merit.

16. In ground two (2) the appellant has faulted the trial court both in law and fact for failing to consider that the initial report did not mention her name. The evidence is that the appellant was arrested while participating in the circumcision ceremony in honour of the complainant in the home of Tangus. The circumcision had been performed much earlier. Furthermore, the evidence of the administration chief Johnstone Kiptanui Koskey (PW 3), was that he learned that on 1/12/2012, certain ladies were carrying on Kipsigis circumcision rites for girls who had been circumcised.

17. PW 3 caused this information to be passed to the OCS Mulot police station, C.I. Macharia. As a result, police responded by going to the home of Tangus, the venue of celebrations. The appellant was then arrested as one of those ten women, who were participating in the celebrations.

18. In the circumstances, it is not surprising that the initial report did not mention the appellant's name. It therefore follows that this ground of appeal is lacking in merit and is hereby dismissed.

19. On grounds 3, 4, 5 and 7, the appellant in a condensed form has faulted the trial court both in law and fact for convicting her on evidence that was not credible. She submits that the evidence against her was fabricated.

20. I find from the evidence adduced that it was credible and it also proved the offence beyond reasonable doubt. It therefore follows that this ground of appeal is lacking in merit and is hereby dismissed.

21. In ground six the appellant has faulted the trial court both in law and fact in failing to appreciate that she may not have understood the English and Kiswahili that was used in court. In this regard, the record of the proceedings shows that the appellant participated fully in the trial. There are several examples of her participation. She cross examined PW 2, who testified in English. She also cross examined PW 3, who testified in Kiswahili.

22. Furthermore, she also cross examined PW 4, who testified in Kiswahili. She chose not to cross examine PW 5, who testified in English. She chose not to cross examine the complainant who testified in Kipsigis.

23. Finally, there is not a single incident that the appellant complained of her inability to follow the court proceedings, in respect of which there was a Kipsigis language interpreter in court for purposes of interpretation as required by article 50 of the 2010 constitution. This ground of appeal fails and is hereby dismissed for lacking in merit.

24. This is a first appeal. As a first appeal court, I have re-assessed the entire evidence and the authorities cited by both counsel. As a result, I find that the appellant was convicted on sound evidence. I therefore confirm her conviction.

25. The appellant has been in both remand and prison custody since 2/12/2015, which is now about three years. She was sentenced to a fine of Shs.200,000/= in default to serve three years imprisonment and in addition to serve a sentence of three years imprisonment.

26. In sentencing the appellant, I have taken into account that she is a first offender and has children suffering at home. I have also taken into account the period she has been in custody.

27. Finally, I have taken into consideration that this is a serious offence in view of the minimum sentence prescribed by law. However, by virtue of the decision of the Supreme Court in *Francis Kariuki Muruatetu and Another v. R, (2017) eKLR*, I am not bound to impose the minimum sentence. I find that the sentence imposed was manifestly excessive.

28. It therefore follows that I am entitled to interfere with it. In the circumstances, I hereby reduce the sentence to the one she has already served.

29. The upshot of the foregoing is that the appellant is hereby set free unless otherwise held on other lawful warrants.

Judgement delivered in open court this 1st day of October, 2018 in the presence of the appellant and Ms Nyaroitia for the respondent.

J. M. Bwonwonga

Judge

1/10/2018