REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL REVISION NO. 1 OF 2017

FANCY TERER CHELAGAT & SIX OTHERS ..….. APPLICANTS

VERSUS

REPUBLIC ……..…. RESPONDENT

(From original conviction and sentence in Criminal Case No. 1488 of 2016 of the PM's Court at Kilgoris – Hon. A.K Mokoros SRM)

RULING

1. This is a Revision file grounded on the Notice of Motion filed herein on the 10th January 2017 through the firm of **Sunkuli & Co. Advocates**, which notice is essentially grounded on S.362 of the Criminal Procedure Code which grants this court powers to call for records of any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

2. In that regard and pursuant to the Notice of Motion, this court called for Criminal Case No. 1488 of 2016 filed at the PM's Court in Kilgoris. The file was today availed for perusal by this court notwithstanding that the notice of motion is scheduled for hearing on 31/1/17 pursuant to an order of this court made yesterday (24/1/2017).

3. It is apparent from the file that the seven accused (herein applicants) were charged with failing to report commission of prohibition of female genital mutilation contrary to S. 24 of the Female Genital Mutilation Act No.32 of 2011.

They all pleaded guilty to the charge upon which they were convicted and sentenced to pay a fine of Kshs. 200,000/= each and in default serve three (3) years imprisonment.

4. S.24 of the Prohibition of Female Genital Mutilation Act provides that:-

> *"A person commits an offence if the person being aware that an offence of female genital mutilation has been, is in the process of being, or intends to be committed, fails to report accordingly to a law enforcement officer."*

And, S.29 of the same Act provides that:-

> *"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."*

5. The record of the lower court proceedings "prima facie" shows that the plea was properly taken. It was unequivocal and the resultant sentence was lawful.

However, it was not established prior to the sentence that the applicants/accused were all aged eighteen (18) years and above at the time of the offence. Their ages as reflected in the police medical examination reports (P3 form) exhibited in court were not confirmed by a proper age assessment report from a qualified medical doctor or specialist in that area.

It followed therefore, that the applicants accused were treated and sentenced by the lower court as adults rather than minors in which case the provisions of the Children Act (Cap 141 LOK) should have been invoked. Apparently, this is the more reason why the applicants have moved this court for an order of revision of the sentence as may be deciphered from the notice of motion.

6. Being minors, the applicants were in need of protection and care especially after having been genitally mutilated by persons expected to provide that protection and care. As it were, they were the victims of the offence rather than the culprits. They ought not to have been subjected to such a harsh sentence. Instead, the provisions of the Children Act should have been applied to deal with them in a fair and just manner.

Under S.186 of the Children Act, every child accused of having infringed any law shall "inter-alia" if found guilty have the decisions and any measures imposed in consequence thereof reviewed by a higher court and under S.189 of the Act, the words "conviction" and "sentence" shall not be used in relation to a child dealt with by the Children Court.

Under S.190 of the Act, no child shall be ordered to imprisonment or to be placed in a detention camp.

7. Consequently and in exercise of the powers conferred to this court under S.364 of the Criminal Procedure Code, the sentence imposed by the lower court upon all the seven applicants is hereby set aside and substituted for a Probation Order under S.191(c) of the Children Act. Accordingly, the applicants are henceforth set at liberty and placed on probation for a period of eighteen (18) months each under the supervision of the appropriate probation officer.

The matter be mentioned in court on the 26/1/2017 instead of 31/1/2017 for communication of this ruling to the applicants and the DPP whose representative appeared in court on 24/1/2017 and filed their submissions today (25/1/2017).

8. It is instructive to note that the DPP is not opposed to a review of the sentence.

[Delivered and signed this 26th day of January 2017]

J.R. KARANJAH

JUDGE

In the presence of

Mr. Sunkuli for the Applicants

M/s Mbelete for State

CC Njoroge

Applicants 1 – 7