REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 13 OF 2016

BOKAYO HUSSEN ALIAS KURADIKA .... APPELLANT

VERSUS

REPUBLIC …………………………………………………. RESPONDENT

(From the original conviction and sentence in Criminal Case No. 541 of 2015 of the Principal Magistrate's Court at Marsabit by BOAZ M OMBEWA– Senior Resident Magistrate)

JUDGMENT

The appellant, **BOKAYO HUSSEN ALIAS KURADIKA,** was charged with an offence of aiding female genital mutilation contrary to section 20(a) as read with section 29 of the Prohibition of Female Genital Mutilation Act.

She pleaded guilty to the offence and was sentenced to three years imprisonment and in addition to pay a fine of Kshs. 200, 000 in default to serve one year imprisonment.

The particulars of the offence were that on 1st August 2015 at Manyatta Shrine area in Marsabit Central sub County of Marsabit County, aided **Diram Duba Kuli** to perform female genital mutilation to her daughter namely **D.D**, a juvenile aged 10 years.

She now appeals against both the conviction and sentence. She was represented by Mr. Halake, learned counsel.

The state opposed the appeal through Mr. Kibet, the learned counsel.

The facts of the prosecution case were briefly as follows:

On the 1.08.2015, the appellant paid one Diram Duba Kuli Kshs. 500/= to circumcise her daughter. After the circumcision, a report was made to the police. The appellant was arrested and her daughter was taken to hospital for examination where it was confirmed that indeed she had undergone the rite.

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:

> **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.**

In the instant case , I will endeavour to establish the following:

1.Whether the plea was unequivocal,

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

3. Whether the sentence meted out was legal or not.

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 plea was unequivocal.

My perusal of the record indicate that the procedure in plea taking was adhered to and the learned trial magistrate cannot be faulted.

The penalty for the offence is provided for under section 29 of the Act. It states:

> **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.**

The court was informed that the appellant was a first offender. This coupled with the mitigation she proffered, would have persuaded the learned trial magistrate to mete out the lowest sentence allowed by the law. I concur with the learned state counsel that in the circumstances the sentence was excessive. I therefore set aside the sentence by the learned trial magistrate and substitute it with a fine Kshs. 200 000/= and in default to serve 12 months imprisonment. The sentence to run from 19.8.2015.The appeal to that extent succeed.

DATED at Marsabit this 8th day of September 2016

KIARIE WAWERU KIARIE

JUDGE