



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CRIMINAL APPEAL NO. 14 OF 2016

DIRAM DUBA KULI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. 540 of 2015 of the Principal Magistrate's Court at Marsabit by BOAZ M OMBEWA– Senior Resident Magistrate)

JUDGMENT

The appellant, **DIRAM DUBA KULI**, was charged with two counts of performing female genital mutilation on female juveniles contrary to section 19 (1) as read with section 29 of the Prohibition of Female Genital Mutilation Act.

She pleaded guilty to the offences and was sentenced to five years imprisonment and in addition to pay a fine of Kshs. 200, 000 in default to serve one year imprisonment on each count.

The particulars of the offences were that on 1st August 2015 in Marsabit Central sub County of Marsabit County, performed female genital mutilation on two female juveniles namely **DD** and **SM**, female juvenile aged 8 AND 12 years respectively.

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 was paid Kshs. by the mothers of the two girls to undertake the rite which she did.

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 on each count. The sentence to run concurrently from 19.8.2015. The appeal to that extent succeed.

DATED at Marsabit this 8th day of September 2016

KIARIE WAWERU KIARIE

JUDGE