



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 18 OF 2016

(From original conviction and sentence in criminal case number 1733 of 2015 of the Principal Magistrate's Court at Kapenguria)

K L..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

K L, the Appellant herein was and tried and convicted for an offence of failing to report the commission of **Female Genital Mutilation, contrary to Section 29 of the Prohibition of Female Genital Mutilation Act number 32 of 2011.**

The particulars of the said offence as carried in the charge sheet are that on the 3rd day of October 2015 at *particulars withheld* in Pokot Central District, within West Pokot County, the accused being aware that an offence of Female Genital Mutilation had been committed, failed to report accordingly to a law enforcement officer, of her daughter namely N C.

The evidence presented in the lower court by the prosecution is that on 23.9.2015 N C together with her two friends namely Mercy and Nancy left their respective homes for a place known as *particulars withheld*. N C (PW-3) was at the time a standard 5 pupil at *particulars withheld*. The three girls intended to undergo Female Genital Mutilation and knew Mama K could perform it. They went to her home. The parents of N C were not aware of it. They were there till 3.10.2015. At about 11.00am, they were taken to the forest where they underwent Female Genital Mutilation. At around 3.00am PW-3 got home at Chester. Her mother, the appellant in this case was at home. That is when she found that PW-3 had undergone Female Genital Mutilation.

The area chief, one Johana Pkieny Loritai, who gave evidence as PW-2, stated that on 2.10.2015 at around 5.00pm he was at Chester Centre. A person called SP called him through the phone and reported that his daughter namely C had gone missing from home for four days. He started looking for C. Several days later, while in company of seven Kenya Police Reservists officers raised the house of Mama K where the girls were. He contacted police officers from Sigor Police Station who arrested the girls together with their parents. The said girl had undergone Female Genital Mutilation. They were taken to hospital. The appellant had not reported that NC had gone missing. Her home is about 300 metres from the house of Mama K.

N C was examined on 5.10.2015 byPW-1 at Sigor sub-county Hospital. She had a history of having undergone Female Genital Mutilation on 3.10.2015 at around 9.00am. Her external female genitalia had been chopped off and blood was oozing out. A P-3 form was filled to that effect and presented as an

exhibit.

The appellant in her unsworn testimony, when she was placed on her defence stated that her child when to an unknown place and she was not at home at the time.

The trial court found her guilty of the offence charged with and consequently fined kshs.20,000/- in default to serve three years imprisonment. Dissatisfied with both the conviction and sentence, she appealed before this court on 26th August, 2016 through the firm of Philip Magal & Company Advocates.

I have evaluated the entire evidence and the submissions by Mr. Philip Magal and the State Prosecutor. **Section 24 of Prohibition of Female Genital Mutilation** read

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.”

From the above quotation, the ingredients of this offence of Failure to report commission of offence are that:-

- 1. Another person intends to, is in the process of or has committed an offence of Female Genital Mutilation.***
- 2. The accused knew of the said intention, process or commission.***
- 3. The accused did not report it to a law enforcement officer.***

The above three elements for the offence of failure to report omission of offence if applied strictly can occasion injustice to an accused person. To be aware that an offence of Female Genital Mutilation has been, is in the process of being, or intends to be committed might most likely not happen by choice, but by chance. It can therefore happen when and where circumstances cannot allow the suspect to report immediately. The elements suggest the time allowed within which to report is before arrest. Reporting is not just to anyone but to a law enforcement officer, who is destined in **Section 2** to include a police officer, a member of the provincial administration, a children’s officer, a probation officer, a gender and social development officer and a cultural officer. These groups of persons are mainly found in Town Centres and are hardly accessible by persons living in vast, remote villages of some counties like West Pokot. Poverty and underdevelopment can limit efforts of a person willing to report. Such a person may not be having a mobile phone, may have problems of network, credit, fare and public transport. Vividly, the **“opportunity cost”** of making such a report to the stated persons is not equal to all Kenyans.

Lack of **‘mens rea’** provisions in the element of the offence like:-

“..... having an opportunity to report fails to do so within a reasonable time or as soon as is practically possible, or without any reasonable cause, fails to report”

Makes the said offence vague, difficult to apply to real varied situations and amounts to unacceptable encroachment of civil freedom. It might not be irrelevant to observe here that this offence closely related to the offence of misprision of felony of which offence have been done away with by many states for the foregoing stated reasons.

In the case of *Marbury –vs. - Brooks 20 US [7 Wheat] 556, 5L Ed. 522*) it was observed that:-

“It may be the duty of a citizen to proclaim every offence which comes to his knowledge, but the law which would punish him in every case, for not performing this duty is too harsh.”

Back to the facts of our case, PW-3 in whose evidence the lower court relied on to arrive at a conclusion that the accused was aware that the offence of Female Genital Mutilation had been committed against her daughter shows that she became aware on 3rd October, 2015 at around 3.00am. PW-2 the area chief had established about the commission of the offence on 2.10.2015 at about 5.00pm. That was a day before the accused had become aware of the commission of the offence. Definitely the purpose of the duty to report is to make the law enforcement officer who is unaware, aware, so that he or she can take steps to avoid its commission or conclusions if it is in the process, and to bring the culprits to book. It is not reporting for the sake of merely doing so. The legal duty to report does not therefore arise where the information is already within the knowledge of law enforcement officer, as it was the case herein. If it was otherwise, all Kenyans would be obliged to report such cases even where information about them is learned on the Television or Radio coverage, and even the Newspaper. Such is illogical.

The words '**being aware**' would need some explanation. It would be unjust to hold an accused culpable if he or she was made aware out of some unreliable, unbelievable and undependable information of which a reasonable person given the circumstances would not have taken the information as true. Probably it is time the Attorney General should have **Section 24 of the prohibition of Female Genital Mutilation** relooked to ensure justice to those charged under it, or have it deleted all together.

I had earlier on observed that the accuse din this case was not under legal obligation to report commission of the offence as the chief was already aware of it, and had taken action. This issue had not been considered by the trial magistrate. If she had, most probably would have acquitted the accused. On the ground I find that the offence against her had not been established by the prosecution beyond reasonable doubt. I therefore quash the sentence, and do order that she be set to freedom unless otherwise lawfully held.

Judgment Read and Delivered in the open court this 3rd day of November, 2016

In the presence of:-

Mr. Mark Nabuyumbu for the state

Miss Chebet who is holding brief for Mr. Magal who was for the Appellant.

S. M. GITHINJI

JUDGE