



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL APPEAL NO. 66 OF 2014**

**BETWEEN**

S M G ..... 1<sup>ST</sup> APPELLANT

R A M ..... 2<sup>ND</sup> APPELLANT

**AND**

REPUBLIC ..... RESPONDENT

*(Appeal from the original conviction and sentence in Criminal Case No. 717 of 2012 of the Principal Magistrates Court at Kehancha, Hon. A.P. Ndege, Ag PM dated 25<sup>th</sup> July 2013)*

**JUDGMENT**

1. The appellants are husband and wife. They were charged with the offence of failing to report commission of female genital mutilation contrary to **section 24** of the ***Prohibition of Female Genital Mutilation Act, 2011***. The facts alleged were that on 15<sup>th</sup> December 2012 at [Particulars Withheld] in Kuria East District, they jointly, being aware that the offence of female genital mutilation (FGM) has been committed to their daughter BM, failed to report the same to a law enforcement officer.
2. After pleading not guilty they were tried, convicted and sentenced to pay a fine of Kshs. 300,000.00 and in default to serve four years imprisonment. They now appeal against the conviction and sentence on the ground that there was insufficient evidence to convict them as they were not involved in taking BM for FGM and that the sentence imposed on them was harsh and excessive. Learned counsel for the State, Ms Owenga, opposed the appeal on the ground that the prosecution proved that the appellants failed to report the incident.
3. As this is a first appeal, this court is enjoined to review the evidence and come to an independent conclusion as to whether or not to uphold the conviction bearing in mind that it neither saw nor heard the witnesses testify (see ***Okeno v Republic [1972] EA 32***).
4. BM testified that she was 16 years old and that on 15<sup>th</sup> December 2012, at about 1.00 pm, she went for “*tohara*” on her own. PW 3, the medical superintendent at Kehancha District Hospital, examined BM on 17<sup>th</sup> December 2012 and prepared the P3 Medical report. He observed that her clitoris had been incised and that there was 6 mm wound at its base. He concluded that she had undergone genital mutilation caused by a sharp object. PW 4, a police officer, testified that on 16<sup>th</sup> December 2012 at about 2.00 pm he went to Kehancha District Hospital where he found BM undergoing treatment after suffering excessive bleeding. BM told him that she had undergone

FGM on her own volition and that her parents were not present on the material date. He met the appellants at the hospital and asked them to accompany him to the Police Station where they were arrested by PW 2, the investigating officer.

5. The appellants elected to make unsworn statements when they were put on their defence. The first appellant denied that he knew BM had undergone FGM and that when he realized this fact, he did not know that it was his duty to report. The second appellant stated that she had advised her daughter not to get circumcised but she nevertheless underwent FGM on her own volition without her knowledge. She testified that she only realized that BM had undergone FGM when she got sick and she had to take her to hospital. BM also testified in favour of the defence. She admitted that she decided to go for FGM on her own volition although the second appellant had warned her against it. She said that she decided to go after her friends scared her and told her that she would remain “*omosagane*.”
6. After the conclusion of the prosecution case but before the delivering the judgment, the learned magistrate issued a ruling where he invoked **section 150** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** to recall BM to testify. He expressed himself as follows;

*This matter is supposed to be coming up for a final judgment after the close of hearing herein. I have however do hereby find crucial evidence is necessary herein especially on the date/time when the child victim herein was taken to hospital and by whom. This evidence appears essential to the just decision of this case especially on the criminal guilt or otherwise of the defendants herein. The fact that the child victim, PW1/DW BM, was unlawfully subjected to female genital mutilation is not in doubt; and it not an issue materially connected to the criminal guilt or otherwise of the defendants herein. Pursuant to section 150 of the CPC ..... I accordingly do hereby re-summon PW1/DW 1, BM to clarify on when and by whom she was taken to hospital herein.*

7. When BM was recalled, she testified that she was taken to hospital on 15<sup>th</sup> December 2012 at about 3.00 pm by her brother and that the appellants were not present at the time and that the second appellant came to the hospital on the next day at about 7.00 am after she had been informed of the incident at night. She said that the first appellant came to see her the following day at about 1.00pm. After considering the testimony, the learned magistrate was convinced that the appellants knew that BM had undergone FGM and that they failed to report the same and he consequently convicted them.
8. Having reviewed the evidence and the proceedings I find that the learned magistrate erred in invoking **section 150** of the ***Criminal Procedure Code*** after the close of the prosecution and defence. **Section 150** relied upon provides as follows;

*A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:*

*Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.*

9. **Section 150** of the ***Criminal Procedure Code*** entitles the court to call or summon any witness at any stage of the proceedings or re-call any witness who has testified. This provision is not a *carte blanche* for the court to call witnesses after the close of the defence case when the court feels that the prosecution has not established its case. There may well be exceptional circumstances where

the provision may be invoked but this is not one of them.

10. The learned magistrate admitted that the prosecution case was wanting after the defence had closed its case. Having found that the prosecution had failed to establish when the appellants knew that BM had undergone FGM and when they took her to hospital, it was not his duty to assist the prosecution make up its case by recalling BM. The record shows that the prosecution had called BM to testify and after she had given sworn testimony she was stood down and was not recalled to complete her testimony. When she testified on behalf of the defence, the prosecutor elected not to cross-examine her. Furthermore, the learned magistrate did not ask her any questions to clarify any points of evidence he may have noted. The prosecutor had the opportunity to present the relevant evidence or elicit necessary facts from the witnesses but he did not. In light of the paucity of evidence, the only option available to learned magistrate was to acquit the accused.

11. For the reasons I have stated, the appeal is allowed. The conviction and sentence is quashed. The appellants are set free unless otherwise lawfully held.

**DATED and DELIVERED at MIGORI this 6<sup>th</sup> day of March 2015.**

**D.S. MAJANJA**

**JUDGE**

Appellants in person.

Ms Owenga, Senior Prosecuting Counsel, instructed by the Office of the Director of Public Prosecutions.