

Chapter 8

Female Genital Mutilation

Case 8.1 Pauline Robi Ngariba v Rep

(Criminal Appeal No. 6 of 2014)¹

High Court of Kenya at Migori

Aspects relevant to VAWG: Female genital mutilation, forced circumcision, harmful cultural practices, role of judiciary in addressing FGM and other harmful cultural practices.

Brief facts

The appellant in this case was charged on two counts, with the offence of performing female genital mutilation contrary to section 19(1) as read with section 29 of the Prohibition of Female Genital Mutilation Act (Cap 62B of the Laws of Kenya). In the first count, it was alleged that on the 11th day of December 2012 in Kuria East District within Migori County, she performed female genital mutilation on SGC. In the second count, it was alleged that on the 14th day of December 2012 in Kuria East district within Migori County, she performed female genital mutilation on ECM. She was convicted as charged on the second count and sentenced to seven years' imprisonment and acquitted on count 1. She appealed against conviction and sentence.

Summary of evidence

The subject of count 2, which formed the basis of the conviction, was the circumcision of ECM, who was circumcised on 14th December 2012. The victim (ECM), a girl in standard six pupil, testified that she knew the appellant. She recalled that on 14th December 2012, she was at her uncle's place and she was woken up by her friend who was going to be circumcised. On reaching the place, the appellant came and circumcised her using a razor blade purchased by her friend.

Her father recalled that on the material date, he woke up to find that his daughter was absent. As it was the circumcision season, he suspected that she had joined the other children for circumcision. He called a fellow pastor to find out where the ceremony was taking place. They proceeded to the place where the ceremony was being conducted and found his daughter among the children who were waiting to be circumcised. He identified his daughter, but when he went to hold her hand, he was warned that he would be attacked.

He left with his daughter and, on the way back home, some young men attacked them with pangas, bows and arrows and went back with his daughter. He went back with his daughter and asked the appellant not to circumcise her. He then left and later learnt that the appellant had circumcised her. He reported the matter to the police and the appellant was arrested and charged. The fact of her circumcision was corroborated by the clinical officer, who examined ECM and found that the clitoris and hood were absent and a fresh scar, without active bleeding, was noted. She concluded that the injury was caused by a sharp object and assessed the injury as harm.

In defence, the appellant said that on 11th December 2012 she was arrested on allegations that she had circumcised someone's daughter on 10th December 2012. She stated that on 11th December 2012, she was at home when members of the public came to her house, forced the door open and removed her by force. There were police officers who tried to prevent her from going, but they were overpowered by the public. She stated that she was forced to perform the circumcision on 10th December 2012. She confessed that the District Commissioner had warned her not to carry out circumcision and she had stopped it three years prior to this incident.

Issues and resolution

The prosecution was required to prove beyond reasonable doubt that ECM underwent female genital mutilation on 14th December 2012, participation of the appellant in the crime and that the appellant wilfully circumcised ECM. The trial magistrate found that the evidence of ECM was corroborated by that of her father and the medical person who examined her. He also found that it was the appellant who circumcised her and that she did it voluntarily. The appellant was convicted and sentenced.

She appealed against conviction and sentence on the following grounds, which form the issues for determination on appeal:

1. that the learned trial magistrate erred when he convicted the appellant on the second count while the evidence was similar to that availed in support of the first count on which the appellant was acquitted;
2. that the learned trial magistrate erred in law and in fact when he convicted the appellant on count 2 of the charge while the evidence clearly manifested that the appellant had no free will in the commission of the offence; and
3. that the learned trial magistrate erred in law and in fact when he sentenced the appellant to seven years in prison.

The High Court found that in her testimony, the appellant did not say anything touching on 14th December 2012, neither did she state where she was on that date. The learned judge further found that there was no evidence to show that on 14th December 2012, the appellant was forced, by the youth or by the elders or anyone else, to perform the circumcision.

Both the appellant and the second defence witness (the assistant chief) confirmed that the circumcision period was between 10th and 14th December 2012, which supported the prosecution case. Finally, the learned judge held that the prosecution proved beyond reasonable doubt that the appellant performed the prohibited act on 14th December and that she had done so voluntarily.

Sentence

The trial magistrate took note of the fact that section 29 of the Prohibition of Female Genital Mutilation Act provides for a minimum sentence of three (3) years imprisonment. In sentencing the appellant to seven (7) years imprisonment, the trial magistrate decried the prevalence of FGM within the court's jurisdiction, the adverse effect on the lives of victims and the need to pass a deterrent sentence. A deterrent sentence was therefore necessary to send out a message to the community, that the court will not tolerate the practice of FGM. Similarly, on appeal, the learned judge took judicial notice of the prevalence of FGM and of the fact that the accused had been warned against performing FGM by the District Commissioner, yet she still proceeded to do so. Finally, the Appellate Court held that the verdict and sentence by the trial magistrate could not be faulted, upheld the conviction and sentence and dismissed the appeal.

Contribution to jurisprudence/Point to note

Aware of the need to protect children from a hitherto deeply valued but harmful cultural practice, court used its discretion to pass a severe sentence and not merely the minimum statutory sentence of 3 years' imprisonment.

This was in line with the duty of judicial officers to send out a clear message that violence against women even in circumstances where it is justified as part of culture is unacceptable in contemporary society.

Comment: In light of the fact that the law on FGM was new at the time of trying this offence, the case is evidence that actors within the criminal justice system are taking on their responsibility to enforce a law specifically passed to protect women from violence.

Case 8.2 SMG & RAM v Republic

(Criminal Appeal No. 66 of 2014)²

High Court of Kenya, Migori

Aspects relevant to VAWG: Female genital mutilation, harmful cultural practices, role of the justice system to create awareness, sentence

Brief facts

The appellants, a husband and wife, 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 particulars of the offence alleged that on 15th December 2012 in Kuria East District, they jointly, being aware that the offence of female genital mutilation (FGM) had been committed on their daughter BM, failed to report the same to a law enforcement officer.

They pleaded not guilty and were tried, convicted and sentenced to pay a fine of KShs300,000 and in default to serve four years' imprisonment.

They appealed against the conviction and sentence on the ground that there was insufficient evidence to convict them, as they were not involved in taking BM to undergo FGM and that the sentence imposed on them was harsh and excessive. Learned state counsel opposed the appeal on the ground that the prosecution proved that the appellants, knowing that their daughter had undergone FGM, failed to report the incident.

Summary of evidence

According to the prosecution evidence, the victim (BM) who was 16 years old at the time of the offence, told the Magistrates Court that on 15th December 2012, at about 1.00pm, she went for 'tohara' on her own volition, but ended up in hospital due to excessive bleeding. The medical superintendent at Kehancha District Hospital who examined BM on 17th December 2012 and prepared the P3 medical report observed that her clitoris had been incised and that there was 6mm wound at its base. He concluded that she had undergone genital mutilation and that a sharp object had been used.

A police officer (PW4) visited the victim at Kehancha District Hospital on 16th December 2012. He found the victim (BM) undergoing treatment as a result of excessive bleeding and she told him that she had undergone FGM on her own volition and that her parents were not present on the material date. The appellants were present at the hospital and he asked them to accompany

him to the police station, where they were arrested by the investigating officer and charged.

The appellants elected to make unsworn statements when put on their defence and denied knowing that their daughter had undergone FGM. The first appellant added that even after he came to know of the fact, he did not know that it was his duty to report the matter to the police. As for the second appellant, she said that she had much earlier warned the victim against going for FGM, but she later went and was circumcised without her knowledge. She only came to know about it when the victim fell sick and she took her to hospital.

After the conclusion of the prosecution case but before the judgement, the trial magistrate admitted that the prosecution case was wanting, after the defence had closed its case and invoked section 150 of the Criminal Procedure Code and re-summoned BM so as to establish when the appellants knew that BM had undergone FGM and when they took her to hospital.

At the conclusion of the defence case and when the matter was pending judgement, the trial magistrate issued a ruling to recall the victim to testify further. He purported to do this under section 150 of the Criminal Procedure Code³ in order for the victim to clarify when she was taken to hospital and by whom. Section 150 of the criminal Procedure Code provides that:

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.

Issues and resolution

The fact that the victim was circumcised was proved by her evidence and medical evidence to that effect.

The trial court was satisfied and found that the appellants were aware of this fact, but deliberately decided not to report the matter to the authorities. However, the High Court did not make a finding on whether the prosecution had proved that the appellants knew that their daughter had been circumcised.

The appellate judge was of the view that, whereas 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 does not entitle the court to call witnesses after the close of the defence case, just because the court feels that the prosecution has not established its case. He stated that there may well be exceptional circumstances where the provision may be invoked, but this was not one of them.

The appellate judge further noted that it was not the duty of the trial magistrate to assist the prosecution to make up its case by recalling BM. The record showed 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 victim, but he did not. In the circumstances, the learned judge found that the only option available to learned magistrate was to acquit the accused.

Verdict

The appeal was allowed, the conviction quashed and sentence set aside and the appellants were set free.

Contribution to jurisprudence/Point to note

- In this particular case, the prosecution failed to prove that the parents knew that their daughter had been mutilated. Nevertheless, it is a case which establishes the duty of a parent to protect a child from harmful practices such as FGM. Therefore, the law has the potential to punish not only persons who are directly engaged in the act of mutilation, but also those charged with parental responsibility, if having knowledge of the mutilation, they do not report to the relevant authorities.
- The decision was also in line with international laws on the duty to protect the girl child from the harmful practices like FGM.

Case 8.3 Law and Advocacy for Women in Uganda v AG⁴

Constitutional Court of Uganda, Kampala

Aspects relevant to VAWG: Female genital mutilation, harmful cultural practices, role of judiciary in stemming harmful cultural practices

Summary of facts

This petition was filed by Law and Advocacy for Women in Uganda, a non-governmental organisation (NGO) under Article 137(1) (3)(a) and (d) of the Constitution of Uganda and Rule 3 of the Constitutional Court (Petitions and References) Rules. The petition sought the following declarations and orders:

- that the custom and practice of female genital mutilation as practiced by several tribes in Uganda is inconsistent with the Constitution of the Republic of Uganda, 1995, to the extent that it violates Articles 2(2), 21(1), 24, 27(2), 32(2) and 33 thereof;
- that as a result of this violation, the custom and practice of female genital mutilation should be declared null and void and unconstitutional;
- that no order be made as to costs and that the court should make any other declaration that the court may deem fit to grant.

Issues and resolutions

The Attorney General initially contested the validity and merits of the petition. At the pre-trial the issues that were isolated for the court to make a decision were whether the petition raised any matter for constitutional interpretation and whether the custom and practice of female genital mutilation was unconstitutional and should be declared null and void. At the trial the Attorney General did not wish to contest the petition and the petitioners treated this as a concession. The petitioners did not make any submissions and left the matter to the court to consider and deliver judgement.

The petitioners made available to court two documents, namely: 'Eliminating Female Genital Mutilation: An Interagency Statement by UNCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO' and another document entitled *Female Genital Mutilation in Uganda*, compiled by Hon. Dora C Kanabahita Byamukama on behalf of Law and Advocacy for Women in Uganda (Law-Uganda).

In the petitioners' view, these two documents contained enough literature on female genital mutilation, which information would help the court in understanding the meaning and effects of the practice.

Verdict

After due consideration of the unchallenged petition and the evidence contained in the affidavits, which were on the court record, the judges made several pronouncements:

1. That any person is free to practice any culture, tradition or religion as long as such practice does not constitute disrespect for human dignity of any person, or subject any person to any form of torture or cruel, inhuman or degrading treatment or punishment. Social and cultural claims cannot be evoked to justify female genital mutilation (International Covenant on Civil and Political Rights, Article 18.3; UNESCO 2001, Article 4).
2. That the practice of FGM does exist in Uganda, especially among the Eastern and North Eastern tribes, and it has very harmful consequences to the health and dignity of women and girls. Almost all those who have undergone female genital mutilation experience pain and bleeding as a consequence of the procedure. The procedure itself is traumatic, as girls are usually physically held down during the procedure.
3. That female genital mutilation is a violation of the rights of women enshrined in Articles 21, 24, 32(2), 33 and 44 of the Constitution of Uganda. To the extent that girls and women are known to die as a direct consequence of female genital mutilation, it contravenes Article 22, which provides protection of the right to life and therefore is a violation of the right to life.

To this end, the court was of the view that it was clear beyond any doubt that the practice of female genital mutilation is condemned by both the Constitution of Uganda and international law (the treaties, covenants, conventions and protocols to which Uganda is a party). In particular, the practice contravenes the provisions of Articles 21(1), 22(1), 24, 32(2), 33(1) and 44(a) of the constitution. The court therefore declared the practice to be wholly inconsistent with the Constitution of Uganda and outlawed the practice.

Ratio Decidendi

- (a) Unjustifiable statutory differentiation between men and women solely on the basis of sex contravenes the principle of equality before and in the law.

Contribution to gender jurisprudence/Points to note

- The Court's holdings clearly communicate the point that laws which provide for criminal conduct or have a civil effect should not differentiate between men and women solely on the basis of sex.
- The Court struck down provisions which existed prior to Uganda's progressive Constitution which recognises equality between men and women.

Point to note

1. Regarding the law on criminal adultery, the Court opined that the duty of the Court is only to make a declaration on the constitutionality of the impugned section and that the court cannot create a sentence to impose on adulterous spouses. In other words, the duty of courts is to enforce sanctions prescribed by the legislature.

To date the Legislature has not enacted a law on criminal adultery – neither men nor women can be punished for adultery.

Case 8.4 Joyce Nakacwa v AG and 2 Others

(Joyce Nakacwa v AG, Kampala City Council & Mrs Miwanda)⁵

Constitutional Court at Kampala

Aspects relevant to VAWG: Discrimination, denial of medical care, subjection to cruel, inhuman and degrading treatment, torture, violation of right to personal privacy, denying a baby care and protection

Summary of facts

This petitioner filed this petition to the Constitutional Court in Kampala and averred that she delivered a baby girl by the roadside near Naguru, Kampala City Council Clinic. She then approached the said clinic with the baby still attached to the afterbirth in order to complete the birth process, but she was denied medical care and instead referred to Mulago Hospital, without any referral letter. The petitioner was then forced to walk immediately thereafter, in spite of the fact that she was still bleeding and weak from the delivery and her clothing was all soaked in blood. She was unable to walk due to dizziness from excessive bleeding and was forced to sit outside in the early morning with a baby barely two hours old. The petitioner was later rescued by a passer-by on her way to work and taken to a clinic in Kireka, and later ended up at her sibling's house in Kireka. She returned to her house in Nakawa area later that day, and at the instigation of some boda cyclists she was accused by some area residents and the local council chairperson (third respondent) of having stolen the baby.

She averred that the residents stormed her room and in the presence of the third respondent pushed her outside and led her to the home of the third respondent, where they subjected the petitioner to mob justice. While at the house of the third respondent, the third respondent and another subjected the petitioner to unlawful vaginal examination, using polythene bags for gloves, in full view of both male and female area residents. The

third respondent then called the police who came, arrested her and took her to Naguru Clinic for medical examination and it was confirmed that the petitioner had gone to the clinic that morning with a baby still attached to the afterbirth. The third respondent refused to accept this position and convinced the police that she had never seen the petitioner pregnant and that she must have stolen the baby.

The petitioner and her baby were thereafter placed in custody at Jinja Road Police Station. Here, the petitioner, on suspicion of child stealing, was made to sit in the cold at the police reception desk through the night until the following day.

The petitioner's baby was forcefully removed from her, thereby preventing her from breastfeeding the baby who was kept apart in the cold and fed on water and glucose supplied by the third respondent.

The baby was later taken to Sanyu Children's Home through the Probation and Social Welfare Office without making proper inquiries. The petitioner was held in police custody for five days, without any charge being made against her. While in police custody, she had no access to sanitary and toilet facilities and she began to emit a foul smell which turned her inmates against her, forcing the police to take her for a medical examination which established that she had been delivered of a baby a few days before the examination. While she was in police custody, there was no female prison officer to attend to female prisoners, as provided under S28 of the Prisons Act. Finally, the petitioner was released on police bond, without any charges being preferred against her. She was asked to report back to the station, which she did diligently.

Upon her release, the petitioner asked for her baby, but the police at Jinja Police Station did not produce the baby. She repeatedly went to the station and asked for her baby, but no information concerning the baby was given to her. After one week, she was told that her baby had been taken to Sanyu Babies' Home, but when she went to the said home she was informed that the baby had died on 2nd of July 2001 and was buried at Lusaze cemetery. She was shown a burial permit, but she had no evidence to prove that the burial permit shown to her related to her baby since it related to the death of a two-day-old baby while the petitioner's baby was 11 days old. It was the petitioner's case that the loss of her baby, either by death or otherwise, was caused by negligence of all the respondents, and that had not the facts above stated taken place, the petitioner's child would be alive and/or in her custody and care today.

In these circumstances, the petitioner sought the following declarations:

- that the acts and/or omissions of the respondents stated in this petition are in contravention of and inconsistent with the

- petitioner's rights as guaranteed in the constitution in Articles 22(1), 24, 33(3), 27(1) (a) and (b), 34(1), and 23(4) (a);
- that the respondents contravened the deceased child's rights under Article 34 (1);
 - that the petitioner is entitled to compensation for unlawful detention, pain and suffering, embarrassment and humiliation and loss of her baby from respondents jointly and severally;
 - an order for redress due to the petitioner so as to cut down her costs of litigation as it is empowered to do under Article 137 (4) (a);
 - any other relief as the court may deem appropriate.

Issues and resolutions

Five issues were framed for determination, namely whether: the petition was time barred, the court had jurisdiction to hear the matter and whether these acts and/or omissions were actually committed against the petitioner and her child. The fourth issue was whether these acts or omissions contravened constitutionally guaranteed rights and freedoms and who was responsible for these acts or omissions. Since the respondents had raised a preliminary objection, arguing that the petition had been filed outside the limitation period, and also challenged the jurisdiction of the court, the court decided to first adjudicate on the preliminary objection.

Having heard and considered arguments from both sides, the court dismissed the preliminary objection and directed that the petition be fixed for hearing and determination.

This case raises substantial issues on VAW. First it raises the issue of women's reproductive rights and how these are violated by some health institutions, which discriminate against some women by refusing to provide maternal care to those who might not be able to pay the hospital expenses. This petition discloses that not all violence against women is perpetrated by men. Some women perpetrate violence against other women. The petition also raises the issue of VAW in places of detention manifested through failure to provide women victims with sanitary pads, taking the baby away from the petitioner and denying her the right to breastfeed the baby. It also brings out the plight of children who accompany their mothers in places of confinement.

This petition must have generated a lot of interest and it would be important to find out how the court determined the petition.

Comment: The case is a clear example of violation of several rights committed by agents of the State for example Kampala City Council and the Police.

Notes

- 1 {2014} eKLR, available at: www.kenyalaw.org.
- 2 {2015} eKLR, available at: www.kenyalaw.org.
- 3 Chapter 75 of the Law of Kenya.
- 4 High Court of Uganda, Constitutional Petition No. 8 of 2007.
- 5 Petition No. 2 of 2001.