

# Chapter 9

## Female Genital Mutilation



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**Female genital mutilation/cutting:** “Cutting healthy genital tissue.”

Kenya 

Joan Bett v Republic [2017] HC

### Principle or Rule Established by the Court's Decision

A person who owns premises in which FGM occurs may be guilty of knowingly allowing their premises to be used for FGM even if they are not physically present in the premises when the FGM took place.

Judge: Mumbi Ngugi

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
<b>Appeal dismissed; conviction and sentence upheld</b>	High Court (Kenya)	Criminal Appeal No. 10 of 2017	FGM

### Case Summary

The appellant was found guilty of knowingly allowing premises to be used for the purpose of performing FGM. She was sentenced to pay a fine of KSh 200,000 and in default to serve three years of imprisonment. Dissatisfied with both the conviction and sentence, she filed an appeal.

The following grounds for appeal arose:

- i. That the trial court failed to confirm that the appellant was in exclusive control of the premises where the FGM took place.
- ii. That there was no evidence that that is where the FGM took place.
- iii. That there were no eye-witnesses who testified to witnessing the FGM take place in the appellant's house.
- iv. That the sentence was excessive, in that the Court did not consider that the appellant was undefended.

The High Court found the evidence sufficiently satisfactory to uphold the conviction.

- i. The evidence of eight prosecution witnesses placed the six victims of FGM in a house that the accused had previously admitted to

owning, as witnessed by the investigating officer. Although in her sworn statement she denied being present at the scene when FGM took place, in cross-examination she accepted that the house was hers. The trial court had therefore rightly found in its judgement that the accused was the owner of the premises and that, from the evidence, FGM had taken place there.

- ii. Five prosecution witnesses all told the court that they went to the said premises, which belonged to the appellant, and were all circumcised there. After they were circumcised, they were locked inside the house, and were let out only two days later when the police came and took them to hospital, where one of them was admitted.
- iii. In light of the evidence of those five prosecution witnesses, who had emphasised that they had been personally subjected to the circumcision in the house of the appellant, it was not elaborated what other kind of eye-witness evidence would have been necessary.

Regarding the sentence, Justice Mumbi noted that the trial court had the discretion to sentence the appellant, on conviction, to a higher penalty. However, it had given her an appropriate sentence. Despite having mitigating circumstances, including a lack of previous convictions, the High Court held that the sentence was both lawful and deterrent.

#### Points to Note

- This case illustrates a commitment to fighting the deeply ingrained practice of FGM.
- In response to the appellant's claim that the sentence was excessive, the High Court maintained it with the hope that it would act as a deterrent to others, who, regrettably, may offer their premises to facilitate the perpetration of FGM against the express provisions of the law, and to the detriment of those who undergo the rite.
- The case demonstrates the sanctity of FGM in the communities that practise it, given the victims in this case were forced by societal pressure and the fear of being ostracised to undergo the ceremony.
- The case is illustrative of the fact that any law must be understood. If the populace does not appreciate its relevance in their community, it may be disregarded, as this Prohibition of FGM Act seems to be.

### Principle or Rule Established by the Court's Decision

- The Constitution and any written law apply in preference to any custom where that custom is repugnant to justice and morality. FGM is one such customary practice.
- The sentence passed for FGM should be deterrent but also rehabilitative. FGM is a vice that is too often revered in practising communities and there is a need for behavioural change to effect real impact.

Judge: M. J. Anyara Emukule

Decision	Court/ jurisdiction	Date & case reference (citation)	VAWG incident type
<b>Conviction upheld; sentence reduced</b>	High Court (Kenya)	Criminal Appeal No. 115 & No. 117 of 2010	FGM

### Case Summary

The appellants were members of the Maasai community. The second appellant approached the first appellant to circumcise his daughter. As a result of the circumcision, the victim bled to death. When they were charged before the Court with manslaughter under the Penal Code, they both pleaded guilty and were sentenced to 10 years' imprisonment.

The appellants appealed to the Court to quash their conviction and set aside the sentences, and make such orders as are fair and just in the circumstances. They contended that their guilty pleas were equivocal, that they did not understand the charges against them and that the sentences imposed were harsh and excessive.

The High Court upheld the conviction but reduced the sentences two years' imprisonment in light of their personal circumstances. Furthermore, the reason for the offending was following an outdated custom rather than malice. The Court directed that, on the release of the appellants, they each be under probation for a period of 24 months, during which time they would each be required to attend seminars organised by the district on the eradication of FGM and education on alternative rites of passage to adulthood for young girls.

#### Obiter Dictum

*"Section 3 of the Judicature Act (Cap. 8 Laws of Kenya) enjoins the High Court, the Court of Appeal and all subordinates, to apply by the Constitution, any written law, and to apply customary law where such custom is not repugnant to justice and morality. The repugnancy clause evokes a lot of anger and discussion among students of law, whose justice, and whose morality, I do not think it is the justice of the*

*colonialist, or the judge or the court. It is the justice of all the surrounding circumstances of the custom in point. There is no more justice in this custom if ever there was any. I doubt there was any morality in it, except perhaps that a girl or boy had no right of marriage until she or he had passed through that rite.*

*"Female genital mutilation is certainly harmful to the physical and no doubt the psychological and sound wellbeing of the victim. It may lead to child-birth complications; in this case, it led to premature death of a teenager. That kind of custom could truly be well discarded and buried in the annals of history, just as we no longer remove our two, four or six teeth from our lower jaws, or adorn our faces, cheeks with healed blisters."*

### Points to Note

- The sentence imposed for FGM should be deterrent but also rehabilitative. FGM is a vice that is well revered in practising communities so there is a need for behavioural change to effect real impact.
- In this case, the Court also gave a period of probation during which the appellants were to attend seminars on the eradication of FGM, to inform and inspire them to campaign against the practice.

Pauline Robi Ngariba v Republic [2014] HC

### Principle or Rule Established by the Court's Decision

When sentencing a person for practising FGM, the court may consider the convict's propensity to recidivism as warranting the imposition of a deterrent penalty.

Judge: D. S. Majanja

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
<b>Guilty</b>	High Court (Kenya)	Criminal Appeal No. 6 of 2014	FGM

### Case Summary

The appellant was convicted of performing FGM contrary to Section 19(1) of the Prohibition of FGM Act and sentenced to seven years' imprisonment. A girl aged 16 years attending secondary school went with other girls to be circumcised. The appellant demanded money that she did not have. The girl decided to leave but some boys and elders took her back and stopped her from leaving. The appellant performed the operation and the father of the girl reported the matter to police.

On appeal, the Court was asked to determine whether the appellant was properly convicted. The appellant's defence was that she had been warned by the district commissioner three years earlier not to carry out circumcision,

and that she had stopped. She contended that she had been forced to carry out the operation by the boys and elders, and relied on the fact that local officers had been overpowered in their earlier attempts to stop the circumcision. The Court was also asked to determine whether the sentence was excessive.

The conviction was upheld. There was no evidence that anyone forced the appellant to perform the operation on the date in question. The sentence of seven years was also upheld appropriate. The appellant had previously been warned not to practise FGM. Because of the appellant's old age, she was experienced in performing FGM. She was therefore likely to perform FGM again when released.

### Points to Note

- This case brings to light the reality that communities that perform FGM view and consider this as a custom that everyone should adhere to.
- It reveals how far people will go to protect such custom, to the extent that perpetrators may force someone to undergo FGM. It was unfortunate that the boys were not charged alongside the appellant in this case for aiding this crime.
- The case also reveals the need to sensitise communities affected by such customs.

## Uganda

Law and Advocacy for Women in Uganda v The Attorney General [2010] CC

### Principle or Rule Established by the Court's Decision

- The custom of FGM contravenes fundamental constitutional rights and is therefore void.
- FGM is cruel, inhuman and degrading treatment; it offends the dignity of women; it violates women and girls' right to the highest attainable standard of health.
- FGM is a form of discrimination and inhibits the full enjoyment of rights by women and girls
- FGM is a form of violence against women with physical and psychological consequences.
- Cultural rights cannot be evoked to limit the fundamental rights and freedoms of others.

**Judges:** Mukasa-Kikonyogo, Mpagi-Bahigeine, Twinomujuni, Byamugisha and Kavuma | JJA

Decision	Court/jurisdiction	Date & case reference (citation)	VAWG incident type
<b>Petition allowed</b>	Constitutional Court (Uganda)	Constitutional Petition No. 8 of 2007; 28 July 2010.	FGM

## Case Summary

The petitioners sought declaratory orders from the Constitutional Court that the custom and practice of FGM by several tribes in Uganda is inconsistent with the 1995 Constitution because it violates several articles of the Constitution:

- i. Article 2(2) of the Constitution, which directs that any other law or custom inconsistent with any article in the Constitution is void.
- ii. Article 21(1), which proclaims the principle of equality of all before the law.
- iii. Article 24, which guarantees freedom from torture or cruel, inhuman or degrading treatment or punishment.
- iv. Article 27(2), which proclaims the right to privacy.
- v. Article 32(2), which proclaims that laws, cultures, customs and traditions that are against the dignity, welfare or interest of women or any other marginalised group are prohibited by the Constitution.
- vi. Article 33, which guarantees the right of women to be accorded full dignity with men.

Both parties accepted that the custom and practice of FGM was seen among the Sabiny, in eastern Uganda in Kapchorwa, Bukwa and Bugiri districts; among the Pokot in Nakapiripit district; and in Tepeth in Moroto district.

The Court relied on the unchallenged evidence of a female member of the Sabiny community and made the following findings of fact:

- i. FGM is carried out without anaesthesia, which makes the victim suffer excruciating pain and suffering that may lead to death and trauma, and may permanently maim the person.
- ii. Mutilation of girls' genitalia is carried out crudely by traditional "surgeons" and often causes victims to suffer urinary incontinence and odour, which renders them social outcasts as a result.
- iii. Some girls suffer paralysis and are left with permanent disability.

The Court also recognised that girls and women were known to have died as a result of FGM in contravention of the right to life contained in Article 22 of the Constitution.

The Court cited the UN Interagency Statement on Elimination of FGM, which outlines the long-term consequences of FGM and the specific risks.

The Court agreed with the UN statement that FGM:

*Interferes with the healthy genital tissue in the absence medical necessity and can lead to severe consequences for a woman's physical and mental health and therefore a violation of a person's right to the highest attainable standard of health.*

According to the UN Statement, it is a form of discrimination:

*... based on sex because it is rooted in gender inequalities and power imbalances between men and women and inhibits women's full enjoyment of their human rights. It is a form of violence against girls and women, with physical and psychological consequences.*

The UN statement further makes the point that, although international law protects the right to participate in cultural life and freedom of religion, that freedom can be the subject of limitation to protect the fundamental rights of others and therefore social and cultural rights cannot be evoked to justify FGM.

The Court held that FGM is a custom that contravenes Articles 2(1), 22(1), 24, 32 (2) and 33 of the Constitution and is wholly inconsistent with the Constitution and therefore void.

The Court noted with approval that, while the hearing of the petition was pending, a law to prohibit FGM was passed and assented to. This meant that the law would accord with the declaration of the Court in the petition that FGM was inconsistent with the Constitution.

#### Points to Note

- Although Parliament legislated against FGM while the petition was pending, the Court's judgement is a powerful statement on the status of FGM versus the Constitution, from a judicial perspective.
- The fact that the custom and practice of FGM has been declared void means those who persist in its practice are doing so against the judgement of the court and the Constitution.
- The Prohibition of Female Genital Mutilation Act No. 5 of 2010, the Constitution and the Court's judgement form a formidable front against the custom of FGM, which must be eliminated without any excuses.
- The absence of criminal cases on FGM suggests that either the custom is dying out or law enforcement agencies are not following up on reports of violations of the Prohibition of the FGM Female Genital Mutilation Act.