



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 28 OF 2020

CASTROL KOOME.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an appeal from the original conviction and sentence of the Senior Resident Magistrate's Court at Meru in Criminal Case No. 1647 of 2019 delivered on 18th December 2019 by Hon. L. N. Juma, SRM)

JUDGMENT

1. Castrol Koome was charged with 'Unnatural Offence contrary to Section 162 (b) of the Penal Code.' The particulars of offence in the charge sheet dated 2nd October 2019 were as follows: -

'On the 29th day of September, 2019 at Muringombugi Area in Imenti North Sub-County within Meru County, had carnal knowledge of a cow.'

2. The Appellant pleaded not guilty and the matter proceeded to trial. The Appellant was placed on his defence and by Judgement delivered on 18th December 2019 by Hon L. N. Juma, SRM, he was convicted for the offence of Unnatural Act contrary to Section 162 (b) of the Penal Code and was sentenced to 7 years imprisonment.

The Appeal

3. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, he has preferred the instant appeal. In his Petition of Appeal dated 5th March 2020, the Appellant has urged the following grounds of appeal: -

- i) The learned trial magistrate erred in both law and fact by relying on the evidence of a single witness.*
- ii) The learned trial magistrate erred in both law and fact in failing to establish the intensity of the light and the fact that it is only PW2 who stated there was light.*
- iii) The learned trial magistrate erred in both law and fact in failing to consider the defence of the Appellant.*
- iv) The learned trial magistrate erred in law and fact in failing to analyze the legal issues.*
- v) The learned trial magistrate erred in law in convicting the Appellant against the weight of the evidence.*
- vi) The learned trial magistrate erred in law by sentencing the Appellant to serve 7 years in prison which is excessive in the circumstance.*

Appellant's Submissions

4. The appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 7th August 2020. He urges that PW2 was the only eye witness and that the rest of the evidence was hearsay and circumstantial. He urges that when PW2 testified to have seen him having carnal knowledge of a cow, it was midnight and there was darkness in normal circumstances. That PW2 did not indicate the intensity of the light and thus his identification was negative. He relies on ***R vs Turnbull & Others*** (1973) ALLER 549. He further urges that PW2 did not state whether he found the Appellant's penis inserted in the cow's vagina but he only states that he found the accused on top of the cow. That PW1 states that he found him at the cow shed tied up but does not state whether he had his trousers on. He urges that a cow's vagina is on the back side of the cow and hence for any penetration to happen, one must be standing on the back side. He urges that one cannot rule out the possibility that the cow might have been mated by a bull. He urges that PW6, the veterinary surgeon did not provide his qualification, thereby putting his qualification in question.

5. He urges that the sentence of 7 years was excessive in the circumstances as he is a young man of 23 years and a first offender. He urges that the sentence is not proportionate. He urges that the Court's hands should not be tied with a provision for a mandatory minimum sentence and that each case should be looked at in its peculiar circumstances. He cites ***Christopher Ochieng vs R*** (2018) eKLR and ***Jared Koita Injiri vs R*** (2019) eKLR and ***Francis Karioko Muruatetu & Another vs Republic*** (2017) eKLR.

6. He urges that there was a vendetta as during cross examination, he established that there was a land dispute whereby PW1 chased away the Appellant's father from the land.

Prosecution's Submissions

7. The Prosecution filed submissions dated 15th September 2021. They urge that PW2 was the only eye witness who found the Appellant molesting PW4's cow. That PW2 stated that on 29th September 2019, at 12.44 a.m, he heard cows moaning and when he went, he found the Appellant molesting PW4's cow. That PW2 saw clearly because there was an electricity bulb and that PW2 stated that the Appellant did not have his trouser on. That the Appellant was also previously well known to PW2. They urge that when relying on the evidence of a single witness for identification, the Court must look at other evidence pointing to guilt of the accused. They cite ***George Mbaya Githinji vs Republic*** (2019) eKLR, ***Abdalla Wendo vs Republic*** (1953) 20 E.A.C.A 166, ***Roria vs Republic*** (1967) EA 573, ***Andrea Nahashon Mwarisha vs Republic*** (2016) eKLR and ***Kĩlu & Another vs Republic*** (2005) 1 KLR 174.

8. They further urge that once PW2 found the Appellant molesting PW4's cow, he informed PW1 and PW4 and that PW4 informed PW3 who went and witnessed the Appellant on top of PW4's cow. That the witness also went and stated that this was not the first time the Appellant had been found committing an unnatural act with a farm animal. That moreover, the trial magistrate found the evidence of PW2 credible, concise, clear and truthful.

9. They cite ***Maitanyi vs Republic*** (1986) KLR 198 which was cited in ***Amos Ogwang Dola vs Republic*** (2016) eKLR for the proposition that an inquiry into the intensity of light is essential in testing the accuracy of evidence of identification. They urge that there was an electricity bulb which produced enough light for the witnesses to see the Appellant and thus positively identify him.

10. They urge that the trial Court took into account the Appellant's defence and found that his testimony was greatly overwhelmed by the Prosecution's evidence which was firm, consistent and corroborative. That the Appellant further confirmed that he was arrested at the cowshed where he was found by PW2. That the Appellant also sought forgiveness in his defence hearing which shows his guilt and acceptance of the fact that he did in fact commit an unnatural act with PW4's cow.

11. They cite Section 162 (b) of the Penal Code and ***Jackson Kiruga Githuga vs Republic*** (2016) eKLR for the ingredients of the offence of unnatural act which they urge were proven beyond reasonable doubt against the Appellant.

12. They urge that the sentence of 7 years was in accordance with the law and was very lenient. That the Appellant had been known to commit the unnatural offence as this was not the first time and this called for a deterrent sentence.

Evidence adduced at trial Court

13. This being a first appeal, this Court is invited to look at both questions of fact and of law. The Court is enjoined to analyze the evidence and make its own independent findings bearing in mind that it is the trial Court that had the advantage of seeing the demeanour of the witnesses. See *Okeno v Republic (1972) EA 32*. The evidence adduced at the trial Court is reproduced hereunder as follows: -

Prosecution's Case

PW1

14. PW1 was taken through a voir dire and found competent to testify. She first testified as follows: -

"I am Joyce Kigongo. I stay in Igoki. On a date I cannot recall, I was sleeping when I was woken up by my employees. They told me that Koome, the accused was at the cow shed. I went. I found Koome at the cow shed. His hands had been tied. They told me that Koome was found having carnal knowledge with a cow. I found the cow. The owner of the cow was called and village elders. My son is the owner of the cow. I knew Koome before the incident as he is my grandson. The cow is still alive. That is all."

Cross examination

"I found you at the cow shed. I found you with your hands tied. I found you had been arrested. I found you at the cowshed. I found you at the cowshed that day you came to my house. You were drunk and I told you to go to sleep. You went to abuse other people and later went to the cow. I saw you that day. You had carnal knowledge with the cow. You put the cow at the milking shed and locked it. When I came to the scene you had been tied up. I did not chase your father away and put this case against you so that I can take your land. Your father broke my window and when I came to the police to report, your father ran away. This is not a land case. You had carnal knowledge with a cow. You can take the land case to Court. It is not your first time to have carnal knowledge with cow. That is all."

Reexamination

"I saw. He had carnal knowledge with the cow. It is not true that the case is false. We cannot steal his land. That is all."

PW2

15. PW2 testified as follows: -

"I am Patrick Muthuri. I stay in Meru. I am a labourer. My employer is Moses Mwiti. I take care of his cows. On 24th September 2019 at 12.44 a.m, I heard cows moaning. I went and found the accused having carnal knowledge with a cow. He had put it in the milking shed and was on top of the cow. I normally sleep on top of the cowshed. The electricity bulb was on and I saw him very well. I asked him why he was doing what he did. He did not have his trouser and underpants on. He was then pulled down.

I took him. I tied his hands and called the relevant parties. My employer is Mwenda. He was then arrested and taken to the police. I saw him very well. That is all."

Cross examination

"I was employed by Mwenda since July 2019. The previous lender had left and I was employed. It is not true that the statement says I am a neighbor. It is not true that I sold land to Mwenda. We took you to the chief and a vehicle came from the AP camp. I work at Mwenda. I was not paid to lie in this case. I know your father. I am not aware if your father was chased away from the land. My house is on top of the cow shed. I found you having carnal knowledge with the cow. I called your grandmother. I am the one who tied your hands. That is all."

PW3

16. PW3 testified as follows: -

“I am Joseph Kinyua. I stay in Meru. Sometime in September 2019, I was called by Moses Mwenda. He told me to go to his home as the boy who normally has carnal knowledge with a cow had done it again. I went and found the accused on top of the cow with his hands tied. I found PW1 and PW2 also there. I called the Chief. Chief said we go to the AP camp. Police came and took him. I asked the accused what he was doing and he kept quiet. That is all.”

Cross examination

“I found your hands tied up and you were on top of the cow. I do not know who tied you. I am the area manager. You were drunk. I found you with your hands tied up while on top of the cow. It was the fourth time you were doing the offence. Your family members are tired of your acts. I know PW2 and PW2 is Mwenda’s neighbour. PW2 sleeps at the cowshed on top of the cow shed. I do not know why you took plea on the date you took. It is not true that we plotted this case against you. Why you are not brought to court on Monday. That is all.”

PW4

17. PW4 testified as follows: -

“I am Moses Mwenda. I come from Buuri. I am a business man. On 29th September 2019, I was called by my employee PW2 who takes care of my cows. It was around 1.15. he told me that the accused was on top of a cow and he had removed his clothes, put the cow in the milk shed and had carnal knowledge with it. The investigating officer called PW3 who went to the scene and confirmed. He called the Chief. PW1, my mother also complained. It is not the first time the accused is having carnal knowledge with a cow. PW2 my employee sleeps at the cowshed on top. That is all.”

Cross examination

“You are my nephew. PW2 found you on top of the cow and tied your hands. PW3 took you to the Chief’s camp. It is your actions that brought you to cows. I do not stay in the compound. I stay in Nairobi. Your mother was called several times and you promised to change but you have never changed. You were found on top of the cow. You went under the cow shed and went in. That is all.”

PW5

18. PW5 testified as follows: -

“I am No. 65732 PC Gitonga attached at Meru Police Station doing general duties. On 30th September 2019, we were called to the AP post to go pick a suspect. We went there and picked the suspect. We arrived at Meru Police Station. I later summoned witnesses and took their statements and summoned the veterinary officer. He came and he went to the scene. He satirized the cow and we waited for him to avail the report. When the report came, it confirmed the offence. I decided to charge the accused with the offence. He is in the dock. That is all.”

Cross examination

“I went with the veterinary county officer to the scene and he haired the cow and prepared the report. The doctors report confirmed that the cow had been assaulted sexually. The report confirms you had carnal knowledge with the cow. You came to the police Station on Monday at 1.00 a.m. on Monday during the day, we conducted investigation. I did it within 24 hours. That is all.”

PW6

19. PW6 testified as follows: -

“I am George Mbaya Marete. I am a veterinary surgeon. I work with county government of Meru. I am a surgeon. The case before Court was reported to me. I went and examined the cow. On examination, I found out that the cow was penetrated. It was

active and the valve walls had violent penetration. I signed the report and submitted to the police. I wish to produce the report from the veterinary officer as exhibit 1. That is all.”

Cross examination

“I am Castrol Koome. I stay in Meru. I am a mason. I wish to state that the complainant is my uncle. They do not like me because my father is not around. I have a family and a wife and one child who rely on me. I pray the Court to have mercy on me and forgive me. That is all.”

Reexamination

“I was arrested where the cows were kept.”

Issues for Determination

20. From the evidence adduced at the trial Court, contents of the Petition of Appeal and the submissions by parties, the following issues arise for determination: -

- i) Whether the Prosecution proved their case beyond reasonable doubt.*
- ii) Whether there is reason to disturb the sentence meted out by the trial Court.*

Determination

- i) Whether the Prosecution proved their case beyond reasonable doubt.*

21. Section 162 of the Penal Code provides for Unnatural Offences as follows:

162. Unnatural offences

Any person who—

- (a) as carnal knowledge of any person against the order of nature; or*
- (b) has carnal knowledge of an animal; or*
- (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.*

22. The Court has considered the Prosecution’s evidence as to how the offence occurred. The same occurred in a homestead belonging to PW4. One of PW4’s employees, PW2 testified that on the material night, at 12.44 a.m, he heard the cows moaning and he went to check on them. He testified that he used to sleep on top of the cow shed. That when he went, he found the Appellant on top of the cow having carnal knowledge with it at the milking shed. He testified that the complainant’s trousers were down and he did not have his underpants on. PW2 was the only eye witness.

23. The Appellant has challenged his identification urging that it was dark in the night and that the intensity of light was not indicated. The Court however considers that PW2 testified that there was an electricity bulb and he could thus see clearly.

“The electricity bulb was on and I saw him very well. I asked him why he was doing what he did. He did not have his trouser and underpants on.”

24. The Court considers that electricity light is strong enough unlike that of moonlight or a torch. Indeed, the electricity is enhanced form of lighting and the Court finds that it adequately supplements natural night more so in the dark. This Court is convinced that it

is possible to view the vicinity clearly with electricity light no matter what time of the night. Furthermore, PW2 called PW1 and PW3 who came to the scene and saw the Appellant on top of the cow. The Court also considers that the incident happened in a family homestead and the Prosecution witnesses are related to the Appellant. The Appellant was a grandson to PW1 and a nephew to PW4, the owner of the cow and they therefore knew him well. Furthermore, the Court considers that when cross-examined by the Prosecution, the Appellant confirmed that he was arrested at the cow shed. This Court is therefore convinced that his identification was positive.

25. The Court also considers that there was medical evidence from the veterinary officer (surgeon) who confirm that he was summoned by the investigating officer, PW5 and when he examined the cow, he found out that cow had been violently penetrated. The Court has also observed the report dated 30th September 2019 signed by PW6, Dr. Mbaya which confirmed that the heifer's vulva walls indicated source ulcerations and that ulcerations indicates violent penetration.

26. Although the Appellant has urged that the said veterinary officer did not testify on his qualifications, this Court considers that he did not raise this issue at the trial Court. The Court also considers that PW6 testified to have been a county government official and he was summoned by the investigating officer and this creates an inference that he was qualified. The Court also considers that the report on record which PW6 signed bears the symbol and letterhead for Meru County Government and it has a stamp. This Court thus finds that he was well qualified as a veterinary officer.

27. As to the assertion by the Appellant that the heifer could have been penetrated by a bull, this Court considers that the examination and report were done on 30th September 2019, just a day after the incident and this proximity closely relates that penetration to the Appellant. The Court has also considered that the Prosecution witnesses, including PW1, PW3 and PW5 all alluded to the fact that this was not the first time that the Appellant had had carnal knowledge with a cow.

28. The Court rejects the Appellant's defence of a grudge over a land boundary dispute as an afterthought and incapable of outweighing the strong Prosecution's evidence.

29. The Court ultimately finds that all the ingredients for the offence of Unnatural Act were proved beyond reasonable doubt against the Appellant.

Whether there is reason to disturb the sentence of the trial Court.

30. The leading authority on the question of interfering with sentence is that of ***Wanjema vs Republic***, Criminal Appeal No. 204 of 1970 (1971) EA 493, 494, where Trevelyan J held as follows: -

"An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

31. Section 162 (2) of the Penal Code provides for a penalty of 14 years. The Court, however, considers that a sentence of four (4) years is suitable in the circumstances of the case to enable the Appellant to serve his term and thereafter get an opportunity to be rehabilitated back into society and make his contributions as a reformed citizen. See ***Muthoka vs Republic*** (1984) eKLR 1 (Abdulla J).

Conclusion

32. On the night of 29th September 2019, the Appellant went to the cowshed of their homestead and had carnal knowledge with a cow belonging to PW4. He was caught right in the act by PW2, who tended to the cows and was woken up at 12.44 a.m by the sound of moaning cows. PW2 testified that there was electricity light and he could therefore see clearly and he testified to have seen the Appellant with his pants down, having carnal knowledge of the cow. The Court considers that electricity light was enough enhanced lighting and thus the Appellant's identification was positive. This fact is further confirmed by PW1 and PW3 who went to the scene and saw the Appellant on top of the cow. PW1 was well known to the Appellant as he was her grandson and they all lived in the same homestead and this was therefore identification by way of recognition.

33. The Court also considers that there was medical evidence by the veterinary officer who confirmed that the cow was violently

penetrated. The Court rejects the Appellant's assertion that the veterinary officer's qualifications are questionable for the reason that the Appellant did not raise the issue during trial. Further, the veterinary officer's report was stamped and it was written on the letter head of the County Government of Meru. The Court also rejects the Appellant's assertion that the cow may have been penetrated by a bull because of the proximity of the incident to the date of examination which revealed violent penetration.

34. The Court has also taken note of the fact the PW1, PW3 and PW4, all well known to the Appellant confirmed that this was not the first time that the Appellant was having carnal knowledge with a farm animal. The Court rejects the Appellant's defence of a grudge over a land boundary dispute as an afterthought and incapable of outweighing the strong Prosecution's evidence.

35. As to sentencing, the Court substitutes the sentence of seven (7) years imprisonment with a sentence of four (4) years imprisonment.

ORDERS

36. Accordingly, for the reasons set out above, this Court makes the following orders: -

- i) The Appeal on conviction is declined and the finding of the lower Court on conviction is upheld.*
- ii) The Appeal on sentence is allowed and the Court substitutes the sentence of seven (7) years imprisonment imposed by the trial Court with a sentence of four (4) years imprisonment.*

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF NOVEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S MUTEGI MUGAMBI & CO. ADVOCATES FOR THE APPELLANT.

MS NANDWA, PROSECUTION COUNSEL FOR THE RESPONDENT.



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