REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 5 OF 2018

EDWIN KIPTOO……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 964 of 2015 delivered on the 14th day of March, 2016 by Hon. E. Kigen, RM]

JUDGMENT

1. The appellant who was convicted and sentenced for imprisonment for 5 years for unnatural offence contrary to section 162 (b) of the Penal Code for having *"carnal knowledge of an animal named a sheep"* challenged the sentence as excessive and prayed that the Court considers that he had served 3 years and one month and remained with only 6 months to go for full implementation of the sentence.

2. The appellant did not challenge his conviction.

3. The DPP did not oppose the appeal and having considered that the appellant had served *"a substantial portion of the sentence urged the Court to reduce the sentence to the time that he has already served."*

4. As I have held previously, the Court should show sympathy with the obviously diseased offenders who commit unnatural offences and promote their treatment rather than punishment for their crimes. See ***KBT HCCRA NO. 46/2017 Ezekiel Kiplimo Kiplagat v. R***. where the Court said:

> *"While deterrence may play a part in discouraging such "vice", a more engaging mode of treatment of the offender bearing in mind his obvious character deformity must be adopted punishing such offender for his criminal act, which ought to be encouraged and facilitated to seek psychiatric treatment and counselling. I consider that a sentence of including long prison term does not allow for such intervention. I would agree that the church (representing all religions, faiths and organizations) and the community are responsible for changed socialization of persons growing up in these societies so as to shun and overcome unnatural sexual tendencies and psychological dispositions, as the appellant indicated to the trial court he is sane but sanity is not the issue here.*
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> *On comparative review of previous decisions of the court, I have found the High Court decision in* ***Muthoka v. R*** *[1984] KLR 1 where Abdullah J, considered section 162 (b) Penal Code case of unnatural offence with a cow where the offender had been sentenced by the trial Court to 4 years imprisonment [5] strokes of corporal punishment, and held that*
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> *"Although the offence provided a punishment of 14 years with or without corporal punishment, the fact remains that the Penal Code came into force in 1930, when such sexual observations were viewed with such abhorrence and intolerance that, the punishment provided was severe. In the present circumstances, what the appellant did may suggest observation of his mental process psychiatric or sympathetic consideration. The appellant is a fast offender, was working as forest officer whose colleagues were probably enjoying sexual favour, which he did not. It may have been desirable to seek report of probation officer before imposing such harsh and severe punishment. The appellant has already served 7 months imprisonment. That may be a sufficient lesson for him. Having regard to all the circumstances, I reduce the prison sentence to such term as will enable his release forth will corporal punishment."*
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> *In* ***Peter Maina Kimani v. R*** *Nairobi HCCR. Appeal No. 45 of 1982 where the appellant had [2] previous Sexual Offences convictions, Muli & Brar, JJ. reduced the custodial sentences of five years for the four years imprisonment to commit unnatural offence under section 163 of the Penal Code .*
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> *In this case the appellant having being the first offender of the offence of unnatural offense with an animal contrary to section 162 (b) of Penal Code and having considered that the appellant has served 4 years of his 10 years sentence since 2/12/13, I would find as Abdullah J . held in* ***Muthoka v. R****, supra , that the imprisonment period already served has been sufficient deterrent lesson.*

Taking into account the psychiatric support and treatment which life on the outside may facilitate for the appellant, I find the ten years sentence excessive."

5. The appellant was sentenced on 16/3/16 and with remission on his 5 year sentence translates to 40 months (3 years and 4 months) of which he has at the date of this judgment served almost 3 years (only 25 days shy). He has, however, been in custody since arrest on 2/12/2015, that is, 3 years and 2 months.

6. The appellant has demonstrated by certificates in Arc Welder Grade III and Religious Studies that he may be on the road to recovery from alcohol abuse which he pleaded for this offence.

7. The Court considers that using this acquired skills, the appellant shall be able to reintegrate in society and reform into profitable occupation in welding and carpentry as certified by Prison Authority. The Court accepts the invitation by the appellant and the DPP to allow the appellant seek his rehabilitation outside of Prison.

Orders

8. Accordingly, for the reasons set out above, pursuant to section 354 (3) (b) of the Criminal Procedure Code the Court reduces the sentence to the time actual served so that he is released from custody forthwith.

Order accordingly.

DATED AND DELIVERED THIS 21ST DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.