



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 13 OF 2017

MOSES FUNDI NJERU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal case No.159 of 2015 of the Chief Magistrate's Court at Embu)

JUDGEMENT

The appellant was charged with a count of unnatural offence contrary to section 102(b) of the Penal Code. The particulars of the offence are that the appellant on the 27th day of January, 2015 at [particulars withheld]village Kiriari sub-location within Embu County, had canal knowledge of a sheep. He was convicted and sentenced to serve seven (7) years imprisonment.

The grounds of appeal are that:-

- 1. The appellant pleaded not guilty to the charge.***
- 2. The prosecution evidence is uncorroborated, inconsistent and contradicting. No exhibit was produced.***
- 3. No prosecution witness identified the appellant as the person who committed the offence.***
- 4. There was a grudge involving Ksh.5000 debt between the complainant and the appellant.***
- 5. The trial court erred both in law and fact by rejecting the appellant's defence through weak reasons.***

The appellant contends that there was a grudge between himself and the complainant. PW1 owed him Ksh.5000 that is why she framed him. The offence was allegedly committed on 27.1.2015 at 2.00pm and he was arrested on the same day at 4.00pm at his home. PW2 did not see the appellant running away from PW1's home. It is also submitted that the appellant was arrested even before the sheep was examined by an expert. The sheep was examined the following day on 28.1.2015 at mid-day. All along the sheep was in the hands of PW1. Money could have exchanged hands before the sheep was examined. The appellant and the complainant's houses are about one kilometer apart. The appellant was simply framed.

The appellant further submit that he pleaded not guilty to the charge. The burden of proof was on the prosecution to prove its case. PW1 could have used her hands to penetrate the sheep. The appellant's defence was not considered.

The state opposed the appeal. Miss Nandwa submitted that PW1 testified how she saw the appellant commit the offence with her sheep. She described how the appellant held the sheep's legs as he performed the unnatural act. PW2 observed the sheep and found that it was bleeding from its private part. PW3, a veterinary officer confirmed the act of penetration. PW1 did not create the case against the appellant due to the alleged debt. The appellant's defence was considered.

This is a first appeal and the Court has to evaluate the evidence afresh and make its own conclusion. **PW1, MERCY WANJA NJIRU** was the complainant. On 27.1.2015 she returned home from work at 2.00pm. She found the appellant making love with the sheep. She shouted at him and he ran away. The appellant had held the sheep by its legs as he performed the unnatural act. She informed PW2 who went to her home. She had no grudge with the appellant.

PW2 SELASIO MUGENDI was at home on 27.1.2015 at about 4.00pm. PW1 called him. She is his neighbour. She informed him that

the appellant had had sex with her sheep. PW2 went to the appellant's home and arrested him. Members of public assisted him in arresting the appellant.

PW3 ROSEMARY BIRO NJERU is a Veterinary Officer. On 28.1.2015 she was in their office at Manyatta town when PW1 went there with the sheep and a letter from the police. She examined the sheep and concluded that it had been penetrated. The sheep had slippery discharge with blood coming out. PW4 Corporal **JOSEPHAT OMACHARI** was stationed at the Manyatta Police station. The case was reported on 27.1.2015. He got a report that someone had been arrested for defiling a sheep. He went to the scene and found the appellant had been tied near the sheep's pen. PW1 explained to him what happened. He investigated the case and had the appellant charged with the offence.

In his sworn evidence, the appellant testified that he is a casual labourer. He denied committing the offence. He was framed as PW1 had a grudge with him. PW1 had his debt and she refused to pay. PW1 owed him Ksh.5000. He had paid her the money on 7.5.2014. There was no witness present when he paid her the money. They then differed at the shopping center.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence of PW1 is that she found the appellant holding the sheep's legs and committing the offence. PW1 is the only eye witness. The appellant's contention is that PW1 had a grudge with him. She owed him Ksh.5000. The appellant's evidence is that he gave PW1 the money on 7.5.2014. The offence was committed on 27.1.2015. This is a period of over seven(7) months. The evidence of PW1 is corroborated by that of PW3, the Veterinary officer who observed the sheep and found that it had been penetrated.

The appellant submitted that PW1 could have penetrated the sheep using her hands. Why would PW1 do that after a period of seven months from the time she allegedly took the money. The appellant's defence was just an afterthought. The trial court correctly considered the appellant's defence and found it not to displace the prosecution evidence. The appellant never reported anywhere including the village elder about the debt. There is no witness who saw him giving out the money. PW1 testified that she had no grudge with the appellant.

The appellant in his submissions greatly dwelt on the issue of existence of a grudge. The evidence clearly shows that there was no grudge. The incident took place on 27.1.2015 and PW1 reported the matter. The prosecution proved its case beyond reasonable doubt. PW3 examined the sheep. She found that the sheep had been penetrated by a stiff and soft object. PW1 saw the appellant committing the offence and shouted at him. The conviction is proper.

Section 162 provides for a sentence of fourteen (14) years imprisonment for the offence of unnatural act. The appellant is a first offender. He was convicted on 24.6.2015. He has by now served almost three (3) years imprisonment. I do find that the period already served is enough punishment for the offence. There is no good reason to extend the punishment to the maximum period of seven years.

The upshot is that the appeal on conviction fails. The sentence of seven (7) years is set aside and replaced with the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and Signed at Marsabit this day of March, 2018

S. CHITEMBWE

JUDGE

Dated, Signed and delivered at Embu this 17th day of April, 2018

F. MUCHEMI

JUDGE