REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 104 OF 2013

JACKSON KIRUGA GITHAIGA.....….....….APPELLANT

VERSUS

REPUBLIC…….....…….……RESPONDENT

(Appeal against conviction and sentence in criminal case number 311 of 2013, R vs.Jackson Kiruga Githaiga at Mukurweini Law Courts on 14.8.2013 by Hon. W.Kagendo, SPM).

JUDGEMENT

The appellant was tried and convicted for committing an unnatural offence contrary to Section **162 (b)** of the Penal Code in criminal case number 311 of 2013, Mukurweini. He was sentenced to serve 14 years imprisonment.

It was alleged that on 24th July 2013 at Mihuti village at around 5.00am the apellant had carnal knowledge with a freshman cow. The complainant Ann Wanjiru Nyaga testified that on the material day she woke up at around 5.20 am to milk her cows and as she approached using a spot light, she saw the appellant in the act. She recognized him, he ran away after she raised an alarm, but in the process he dropped a Marvin hat he was wearing which was produced in court. She also identified the appellants clothes which he was wearing at the material time and which were also produced in court.

Dr. Douglas Munge, a VET Doctor examined the cow and noted that the vulva and posterior vagina was mildly inflamed, suggesting a trauma with a blunt, that he noted traces of human hair. He also examined clothes which were said to have been worn by the appellant and he noted traces of the cow's hair which was black and white, a suggestion that the person in question had come into contact with the cow.

PW3, the area assistant chief confirmed that she received the complaint, called AP officers and they proceeded to the appellants home where they found him asleep, next to him were his clothes which they carried and arrested him. The clothes had stains of cow dug. His testimony was corroborated by **PW4** while **PW5** was the arresting officer.

In his defence, the appellant denied committing the offence and insisted that he did not know who picked his clothes while he was asleep. His grounds of appeal can in my view be reduced to one ground, namely, whether, the prosecution proved the offence to the required standard.

The appellant filed written submissions which I have considered. The court granted Counsel for the DPP Miss Chebet three weeks from 9th June 2016 to file her submissions. The three weeks lapsed 30th July 2016 by which time no submissions had been filed, hence I proceeded to write the judgement.

Ingredients of an unnatural offence are that an accused carnal had knowledge with an animal, that the act must be against the order of nature, the act must have been done voluntarily by the accused and there must have been penetration. In *Norweshiwan Iran vs Emperor* was held that the offence requires penetration however little, and that penetration must be proved strictly.

In my view the prosecution evidence proved that there was penetration. I have no difficulties holding that the offence is against the order of nature, and there is sufficient that placed the appellant at the scene of the offence. In short, I am satisfied that the offence was proved to the required standard.

The trial Magistrate sentenced the appellant to serve **fourteen years imprisonment,** the maximum penalty prescribed under the law for the said offence. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously In **ShadrackKipchogeKogovs Republic** the court of appeal stated:-

> *"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"*

The appellant was sentenced to the maximum sentence provided under the law. *"What is the construction of the terms shall be liable?* In searching for the intention of parliament, the first observation to make is that generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty This principle is contained in section **66 (1)** of the Interpretation and General Provisions law which provides:-

> *"Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punished by a penalty not exceeding the penalty prescribed"*

My further observation is that the principle of law in Section **66** aforesaid is entrenched in Section **26** of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence or a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment. In particular, Section **26 (2)** and **(3)** of the Penal Code provides:-

> *(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.*
>
> *(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.*

There is however a proviso to Section **26(3)** that a fine cannot be substituted for imprisonment where the law concerned provides for a minimum sentence of imprisonment. In my view, from the wording and language of Section **26** and **28** of the Penal Code, it is clear that those are general provisions of law which apply not only to the offences prescribed in the penal code but to offences under other written law.

The phrase used in penal statutes *(ie shall be liable to*) was judicially construed by the East African Court of Appeal in **Opoyavs Uganda** where the court said at page 754 paragraph B:-

> *"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning*

require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatorybut provide a maximum sentence only and while the liability existed the court might not see fit to impose it"

I find that the sentence of fourteen years imprisonment prescribed under Section **162** of the Penal Code is not mandatory, and that in determining the sentence, the court has to consider the facts and circumstances of the particular case and in particular be guided by the principles governing the imposition of punishments. The appellant had no previous criminal records.

The Supreme Court of India in **State of M.P. vsBabluNatt** stated that '*the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.'* Moreover, in **Alister Anthony Pareiravs State of Maharashtra** the court held that:-

"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances"

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.

I note that the Appellant has already served one year and eleven months. I think that the sentence of fourteen years was harsh and excessive. **I hereby reduce the sentence to the period already served and order that the Appellant be released forthwith unless otherwise lawfully held.**

Signed, Delivered and Dated at Nyeri this **20th** day of **July** 2016

John M. Mativo

Judge