



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 112 OF 2014**

**JAMES MBITHI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 232 of 2013 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon M. Chesang (Ag SRM) on 24<sup>th</sup> July 2013)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, James Mbithi, was convicted by M. Chesang, Ag Senior Resident Magistrate on his own plea of guilty for the offence of committing an un-natural act contrary to Section 162 (b) of the Penal Code Cap 63 (Laws of Kenya). He was sentenced to serve fourteen (14) years imprisonment.

2. The particulars of the charge were as follows :-

**“On the 9<sup>th</sup> day of July 2013 at around 12.00 HRS at Mgeno Village, Mwatate Location within Taita Taveta County had carnal knowledge of a She goat.**

3. Being dissatisfied with the said judgment, on 12<sup>th</sup> November 2013, the Appellant filed Mitigation Grounds of Appeal which stated inter alia:-

**1. THAT the Learned Trial Magistrate did not consider the long enmity between him and the Complainant arising from a land dispute.**

**2. THAT there was no medical report to show that the said offence took place.**

**3. THAT there were no eye witnesses to prove that the said offence took place.**

4. The Appellant appeared to have abandoned the aforesaid Grounds of Appeal as he filed fresh Grounds alongside his Written Submissions on 18<sup>th</sup> July 2016. The State's Written Submissions dated 22<sup>nd</sup> August 2016 supported by case law, in response to the new Grounds of Appeal, were filed on 24<sup>th</sup> August 2016.

5. When the matter came up in court on 6<sup>th</sup> September 2016, both the Appellant and the State informed the court that they would rely entirely on their respective Written Submissions as they did not wish to highlight the same. The Judgment herein is therefore based on the said Written Submissions.

## LEGAL ANALYSIS

6. A perusal of the submissions that were relied upon by the parties herein showed that the issues that were placed before this court for determination were ideally:-

**a. Whether or not the Appellant herein was accorded a fair trial.**

**b. Whether or not the Veterinary Report that was adduced by the Prosecutor was admissible in evidence.**

**c. Whether or not the sentence that was meted upon the Appellant was excessive in the circumstances of the case herein.**

7. The court therefore dealt with the issues under the following separate heads.

### I. FAIR TRIAL

8. The Appellant averred that he was illiterate. He submitted that the Trial Court did not warn him of the dangers and consequences of pleading guilty to the Charge. It was his contention that the Learned Trial Magistrate ought to have accorded him enough time and sufficient detail for him to have answered to the said Charge and that failure to do so was a denial of his fundamental right as provided for in the Bill of Rights in Chapter 4 of the Constitution of Kenya, 2010.

9. On its part, the State argued that all the legal principles for taking of a plea were adhered to. It placed reliance on the cases of Job Ntabo vs Republic [2015] eKLR and Adan vs Republic 1973 EA 445 where, in the latter case, it was held that:-

**i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;**

**ii. The accused's own words should be recorded and if they are an admission, a plead of guilt should be recorded;**

**iii. The prosecution should then immediately state the facts and the accused person should be given an opportunity to dispute or explain the facts or to add any relevant facts;**

**iv. If the accused does not agree [with] the facts or raises any questions of his guilt his reply must be recorded and change of plea entered; and**

**v. If there is no change of plea a conviction should be recorded and a statement of the facts relevant to the sentence together with the accused's reply should be recorded.**

10. This court perused the proceedings relating to the plea taking and noted that on the Charge being read to the Appellant in a language that he understood, Kiswahili, he stated as follows:-

**“Ni kweli”** which the Trial Court translated to **“It is true”** and entered a Plea of guilty.

11. When the facts were read to him, he stated as follows:-

**“Nilifanya na siwezi kataa”** which the Trial Court translated into English as the **“Facts as stated are true.”**

12. In his mitigation, he stated as follows:-

**“I pray for leniency. I am an old man and it is the devil who led me to the act.”**

13. The Learned Trial Magistrate ordered that a Probation Report be prepared by the Wundanyi District Probation Office. Having considered the said Probation Report and the relevant law, she sentenced the Appellant to serve fourteen (14) years imprisonment as provided for by the relevant law.

14. It was abundantly clear as the State pointed out, that the Learned Trial Magistrate adhered to all the requirements of taking a plea and rightly entered a plea of guilty against the Appellant herein. The plea was unequivocal and left nothing to the imagination of the Trial Court. In fact, when the facts were read to him, the Appellant stated that he did the unnatural act and he could not deny it.

15. Indeed, the Learned Trial Magistrate was under no obligation to advise the Appellant of the consequences of pleading guilty as he had contended. It was the finding and holding of this court that his fundamental right to fair trial enshrined in the Constitution of Kenya, 2010 was not infringed upon and in that respect, Ground No 1 of his Grounds of Appeal was not merited and the same is hereby dismissed.

## **II. ADMISSIBILITY OF THE VETERINARY REPORT**

16. It was the Appellant's argument that the Prosecutor read and presented the Veterinary Report contrary to the provisions of Sections 33 and 77 of the Evidence Act Cap 80 (Laws of Kenya) as that was not his line of duty and profession. It was his contention that this irregularity resulted in a mistrial and nullified the entire trial which entitled him to an acquittal.

17. On its part, the State submitted that once the Appellant pleaded guilty to the Charge, it was sufficient for the Trial Court to convict and sentence him accordingly. This was the correct position of the law. The Prosecution was under no obligation to call any further evidence and having submitted the said Veterinary Report, no prejudice could be said to be suffered by the Appellant herein as any additional evidence was only superfluous in nature.

18. This very court dealt with a similar question in the case of **Lennox Gabriel Mutundu vs Republic [2015] eKLR**, wherein it rendered itself as follows:-

**“...Once he admitted that he had been found in possession of bhang or *cannabis sativa*, the Prosecution was under no obligation to tender any corroborating evidence to prove what the “green substance” was. The situation would, however, have been definitely different had he pleaded not guilty and he ended up being convicted without the Prosecution having tendered in evidence the said Report.**

19. The above notwithstanding, having pleaded to the Charge, the Appellant was estopped from raising any ground of appeal on facts of the case as can be seen in Section 348 of the Criminal Procedure Code that stipulates as follows:-

**“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”**

20. In this respect, the Appellant's Ground of Appeal No (2) was not meritorious and the same is also hereby dismissed.

## **III. SENTENCE**

21. The Appellant averred that the sentence of fourteen (14) years that was meted on him was harsh and excessive in the circumstances as the offence he was charged with carried a minimum of ten (10) years imprisonment. He stated that this was in breach of his Bill of Rights and Article 354 (6) of the Constitution.

22. The State contended that the sentence was proper as the Appellant had committed an act that was against the order of human nature and public decency, an act that was strongly deprecated against and

ought not to be tolerated in our society. It was its submission that the Learned Trial Magistrate considered the Pre-Sentencing Report and the provisions of the law before sentencing the Appellant herein.

23. This court did not understand the import of Article 354(6) of the Constitution of Kenya, 2010 that was relied upon by the Appellant herein as no such Article exists. Of more relevance was Section 162 of the Penal Code that provides as follows:-

**24. Any person who—**

**(a) has 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(emphasis court):**

25. A reading of the aforesaid Section reveals that the penalty of fourteen (14) years is the maximum sentence prescribed by the law and that a trial court, as did the Learned Trial Magistrate herein, has and had a discretion to sentence the Appellant to a lesser sentence. Indeed, this court was of the considered view that the sentence that was handed down to the Appellant was excessive and ought not to have been the maximum sentence of fourteen (14) years imprisonment for three (3) reasons.

26. Firstly, the Learned Trial Magistrate ought to have considered aggravated circumstances. If for example, an accused person commits un-natural acts with several animals, his sentence cannot be the same as that of a person who has committed an un-natural act with one (1) such animal. An accused person who habitually commits un-natural offences with animals cannot be given the same sentence with a person who had committed the offence once. The sentence the Learned Trial Magistrate meted on the Appellant was not proportionate to the offence that he had committed as it was his first such offence.

27. Secondly, the Appellant pleaded guilty to the Charge right at the outset and saved the Trial Court judicial time in hearing and determining the case. This was also a good reason why he should and ought to have benefitted from a lesser sentence.

28. Thirdly, it was evident from the Pre-Sentencing Report by Mulandi P.M. Community Service Officer Wundanyi that the Appellant had acted in anger because the Complainant's goats had trespassed on his land several times and destroyed his crops. He had chased the goats away from his farm and in a state and/or fit of anger, he decided to sodomise one of the goats. The Learned Trial Magistrate therefore ought to have had due regard to the mental state of the Appellant at the material time.

29. The Appellant was at the time of this decision about sixty two (62) years of age. He was a first offender in respect of the offence that he had been charged with. He had previously been given a non-custodial sentence but the same was for an unrelated offence. His action, though to be abhorred, emanated from a social problem, that of the Complainant's goats trespassing on his farm and destroying his crops.

30. It was evident from the Pre-Sentencing Report that the Appellant was orphaned at a very young age. The Probation Officer rightly pointed out that he was provoked. Although his observations that the Appellant's behaviour could have been a function of a distorted world view and recommended counselling and non-custodial sentence, this court could not conclusively take the said observation hook, line and sinker as it was not clear whether the said Probation Officer was a psychologist or an expert in behavioural conditions.

31. Notably, different courts have dealt with the issue of committing un-natural acts with animals. In the case of **Cornelious Gichovi Ndati vs Republic [2007] eKLR** where Khaminwa J (as she then was) noted that although the maximum sentence of committing an un-natural act with an animal was fourteen (14) years, the sentence of seven (7) years that had been handed down to the appellant therein was excessive in the circumstances of the case and as the appellant therein had been a first offender, she reduced the

sentence to three and a half (3 ½) years.

32. In the case of **Reuben Mburu Kibaki vs Republic [2014] eKLR**, H.P.G. Waweru J also dealt with a similar case of committing an un-natural act with an animal. He observed that while the offence carried a maximum sentence of fourteen (14) years, seven (7) years was excessive considering that the appellant therein, aged nineteen (19) years, had pleaded guilty to the Charge. As the appellant therein had already served a sentence one and a half (1½) years of his sentence, he allowed the appeal and set aside the sentence of seven (7) years.

33. Consequently, bearing the circumstances of this case, this court came to the conclusion that the sentence that was meted upon the Appellant herein was manifestly excessive and harsh leading it to interfere with the same. In that respect, Ground of Appeal No 3 was merited and the same is hereby upheld.

**DISPOSITION**

34. For the reason that the Appellant’s Petition of Appeal lodged on 12<sup>th</sup> November 2013 was partly successful, this court hereby upholds the conviction but sets aside the sentence that was meted upon him by the Trial Court as the same was manifestly excessive and replaces the said sentence with a sentence of three (3) years imprisonment.

35. As the Appellant has already served slightly above three (3) years imprisonment, this court hereby orders that he be set free forthwith unless held or detained for any other lawful reason.

36. It is so ordered.

**DATED and DELIVERED at VOI this 25<sup>th</sup> day of October 2016**

**J. KAMAU**

**JUDGE**

In the presence of:-

James Mbithi..... Appellant

Miss Anyumba.....for State

Ruth Kituva– Court Clerk