REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 98 OF 2013

RODGERS KIPRUTO KIPLAGAT……..……..……..APPELLANT

VERSUS

REPUBLIC……..……..……....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 217 of 2013 Republic v Rodgers Kipruto Kiplagat in the Principal Magistrates Court at Eldoret by Rose Ndombi Resident Magistrate dated 23rd May 2013.)

JUDGMENT

1. The appellant pleaded guilty to a charge of having carnal knowledge of an animal against the order of nature. The particulars were that on the night of 15th May 2013 in Elgeyo Marakwet County, he had carnal knowledge of a three-month old calf. He was sentenced to fourteen years imprisonment.
2. In his *amended* grounds of appeal, the appellant contends that his plea of guilt was *equivocal*. He states that he pleaded out of fear and ignorance of the nature of the offence; and, the fact that it was his maiden appearance in court. He also contends that the charge was not read in a language he understood; that the trial court did not explain the seriousness of the offence; that his defence of intoxication was disregarded; and, that the sentence was manifestly excessive. The appellant states that he is remorseful; that he has learnt his lesson and now undertakes to be a law abiding citizen.
3. The appeal is contested by the State. The case for the State is that the plea of guilt was *unequivocal*. I was implored not to disturb the sentence.
4. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
5. I have carefully studied the records of the trial court. I find that the plea of guilt was *equivocal*. On 16th May 2013 the charge was read in *Keiyo*, a language the appellant *understood*. He answered: *I did it but I was drunk*. The court entered a plea of guilty. I think that was an *error*. Although the appellant was admitting the charge, he *qualified* the plea by alleging that he was *drunk*. The learned trial Magistrate should then have entered a plea of *not guilty*. See *Lusiti v Republic* [1976-80] 1 KLR 585, *Desai v Republic* [1974] EA 416, *Adan v Republic* [1973] EA 445, *Kariuki v. Republic* [1984] KLR 809, *Feisal Adan v Republic*, Mombasa High Court Criminal Appeal 77 of 2008 [2008]eKLR.
6. Further doubt is cast by the proceedings of 23rd May 2013. On that date the *facts* were read to the appellant. There was a *Keiyo* interpreter. The appellant says he was tricked by the *Keiyo* interpreter to plead guilty. The appellant is however recorded as having answered in Kiswahili: *"Ni ukweli"*. The appellant offered mitigation. The record states he said as follows- *"I ask for forgiveness"*

7. In *Adan V. Republic* [1973] EA 445 the key steps of taking a plea were elucidated. *First, the court should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands; secondly, the answer from the accused should be captured as closely as practicable in his own words. If they amount to an admission, a plea of guilty should be recorded;* thirdly, *the facts should be read out. The accused should then be granted an opportunity to dispute or explain the facts or to add any relevant facts;* fifthly, *if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered. If there is no change of plea, a final conviction can then be entered. See also Kariuki v. Republic* [1984] KLR 809.
8. The *multiplicity* of languages used in the present case; the claims by the appellant that he never *understood* the proceedings; and the failure to recognize his *qualified* plea all cast a long shadow of doubt on the plea of guilt. I find in the end that the plea was *equivocal*. It follows as a corollary that the conviction was *unsafe*. I would accordingly set aside the conviction and sentence.
9. It is however evident that the judgment of the lower court is impeached for failure of proper *procedure* of taking the plea; not on the veracity of the evidence. The appellant was convicted *less* than two years ago. The sentence provided under section 162 (b) of the Penal Code is up to *fourteen* years. Considering the gravity and nature of the charge, the appropriate and just course to take is to order a *retrial*. There is no injustice or serious prejudice that will be occasioned to the appellant. The interests of justice dictate it. See *Patel Ali Manji v Republic* [1960] EA 343, *Ratilal Shah v Republic* [1958] EA 3, *Samuel Ngugi v Republic* , Nairobi, Court of Appeal, Criminal appeal 218 of 2007 (unreported), *Hassan Rehman v Republic* [1976-80] 1 KLR 1243, *Abraham Munai v Republic*, High Court, Eldoret, Criminal Appeal 131 of 2012 [2013] eKLR.
10. For all of those reasons, I order that the appellant shall be *retried*. The appellant will be released into police custody. He shall be produced before the Iten Resident Magistrates Court *within* 10 days of the date of this judgment to take a fresh plea and for retrial by any magistrate *except* Rose Ndombi, Resident Magistrate.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 24th day of March 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

Appellant (in person).

Ms. R. N. Karanja for the State.

Mr. J. Kemboi, Court clerk.