

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 228 OF 2010

ALFRED M'MBIHI ATONYA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence arising from the sentence of [T.N. BOSIBORI, R.M.] dated 25.10.2010 in Criminal Case No. 978 of 2010 in the Senior Resident Magistrate's Court Vihiga)

J U D G M E N T

The appellant was charged with the offence of unnatural offence contrary to **section 162(b)** of the **Penal Code**. The particulars of the offence are that the appellant on the 23.10.2010 at Kapsengere village in Vihiga District within Western Province had carnal knowledge of an animal namely a sheep. The appellant pleaded guilty to the charge and was sentenced to 7 years imprisonment.

The grounds of appeal are that the plea was not unequivocal, that the trial court did not establish the language the appellant was conversant with and the conviction is unsafe. Further that there was no medical report to prove the alleged offence and that the sentence is excessive. Mr. Wekesa, counsel for the appellant submitted that the court did not explain to the appellant the effect of pleading guilty. The plea was taken in English and Kiswahili but does not indicate whether the appellant understood the same. Counsel urged the court to order a re-trial. On her part, Miss Opiyo, learned State Counsel, opposed the appeal and submitted that interpretation was made and the appellant understood the charges. The appeal should be dismissed.

The record of the trial court shows that the charge and its ingredients were read to the appellant in Kiswahili language and that the accused understood Kiswahili. The accused responded in one word, "true". Counsel for the appellant contends that the appellant does not understand English and could not have used the word true. The trial court seems to have interpreted the appellant's response from Kiswahili to English and there is no evidence that the appellant did not understand the charges when he responded to them. The facts were also explained to the appellant and he confirmed that the facts were true. I do find that the appellant understood the charge and was convicted on his own plea of guilty.

The facts indicate that the sheep was presented before the court. The complainant who was the owner of the sheep found her sheep missing and heard it making noise from the maize plantation. She checked and saw the appellant having sex with the sheep. It is not clear from the fact whether the appellant was having sex or attempting to have sex with the sheep as there was no medical evidence that was produced to confirm that fact. There was need for a veterinary doctor to have examined the sheep so that the court could have concluded with finality that indeed there was an unnatural offence committed. The fact that the appellant pleaded guilty to the charge did not remove the burden on the part of the prosecution to prove that indeed the offence took place. Given the absence of proof that the sheep was sexually assaulted, I cannot conclude that the unnatural offence occurred. A plea of guilty is part of the case and unless the facts prove the case then the accused ought to be acquitted should the proof fail to establish the offence committed. One is charged an offence of being in possession of cannabis sativa (bhang), there should be proof that the recovered item was indeed bhang as it could have been a normal cigarette. In the current situation where no evidence was taken, the court ought to have called for a medical report.

I do find the appeal to be merited and the same is allowed. The appellant shall be set at liberty

unless otherwise lawful held.

Delivered, dated and signed at Kakamega this 18th day of February 2014

SAID J. CHITEMBWE

J U D G E