



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL APPEAL NO 458 OF 2013**

**REUBEN MBURU KIBAKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from original conviction and sentence in Kigumo SPM*

*Criminal Case No 563 of 2013 – D A Orimba, Ag SPM)*

**J U D G M E N T**

1. The Appellant was charged with the offence of **committing an unnatural act** contrary to **section 162(b)** of the **Penal Code**. It was alleged that on 3<sup>rd</sup> June 2013 at 12 pm at Mbunge village, Gikarangu sub-location in Kigumo District within Murang'a County, he was found having carnal knowledge of a cow. He was on 4<sup>th</sup> June 2013 convicted on his own plea of guilty and sentenced to serve 7 years imprisonment. He has appealed against both conviction and sentence.

2. In his petition of appeal filed on 11<sup>th</sup> June 2013 he has complained that he is a young semi-illiterate person; that he was confused at the time of taking the plea such that he did not “fathom” court procedures; that the language used in court was “too hard” for him to understand; and that therefore, in effect, his plea was not unequivocal. He has also complained that he pleaded guilty because he was threatened by the arresting officers, as a consequence of which he was “full of fear”. As for the sentence, he has complained that 7 years imprisonment was manifestly harsh and excessive in the circumstances. The Appellant handed over to court his written submissions at the hearing in support of his grounds of appeal.

3. Learned State Counsel for the Respondent supported both conviction and sentence. She submitted that the plea was properly taken and was unequivocal; that there was interpretation from English to Kikuyu; that the Appellant admitted the facts given by the prosecution as correct, which facts disclosed the offence charged; and that there was no evidence of any confusion or lack of understanding on the part of the Appellant during plea-taking. As for the sentence, learned counsel submitted that the same was not manifestly harsh or excessive. She pointed out that the maximum punishment provided for the offence is 14 years imprisonment.

4. I have considered the submissions of the Appellant (who was unrepresented) and those of the learned State Counsel. I have also carefully perused the record of the lower court. It is recorded that interpretation from English to kikuyu was provided by a court clerk called **Karanja**. Both Mr Karanja and the Appellant are Kikuyu, going by their names. At the hearing of the appeal the same interpretation

from English to Kikuyu was provided. The Appellant addressed the court in Kikuyu language.

5. The record also discloses that the substance of the charge and every element thereof was stated by the court to the Appellant in the language that he understood, and that on being asked whether he admitted or denied the truth of the charge he replied, "It is true."

6. The prosecutor then gave facts as follows -

**"On 3/6/2013 noon, accused person who is a boda-boda operator was hired by the complainant to take animal feeds to the home of the complainant. He accompanied the complainant to the home. On arrival, he was given some feeds to take to the cows. He went to where the animals were, unzipped his trouser and started having carnal knowledge of the cow.**

**The complainant raised an alarm (and) neighbours came.**

**He was arrested and handed over to the police and later charged with the offence."**

In response to those facts the Appellant said, "Facts are correct."

7. As already seen the Appellant is a Kikuyu and his preferred language before the trial court was Kikuyu. Interpretation from English to Kikuyu was provided to him through a Kikuyu interpreter. I am therefore satisfied from the record of the trial court that the Appellant fully understood the proceedings before that court. The charge was read to him and every element of the charge explained to him in his own language, and he understood the same.

8. The Appellant did not raise any complaint of having been beaten or otherwise tortured or intimidated in any way by the police or anyone else at the time of his arrest, or while he was in custody before he was taken to court. It is an afterthought for him to complain before this court that he did not understand the proceedings, and that he was afraid on account of having been beaten and otherwise tortured by the police.

9. The important issue here is whether or not the facts as given by the prosecution, and admitted by the Appellant, disclosed the offence charged. That offence was committing an unnatural act contrary to section 162(b) of the Penal Code. The particulars of the offence alleged that he was found having carnal knowledge of a cow. The facts given by the prosecutor, in the material part, were that the Appellant went to where cows were at the complainant's home, unzipped his trouser and started having carnal knowledge of a cow. Those facts fully disclosed the offence charged. The Appellant admitted those facts.

10. I am satisfied that the plea was properly taken and was unequivocal. The Appellant was properly convicted upon his own plea of guilty.

11. As for the sentence, the Appellant was only 19 years old when he committed the offence. He was a first offender who pleaded guilty and therefore saved the court's time that would otherwise have been taken up by a trial. A plea of guilty in itself is a sign of remorse. In addition, the Appellant specifically pleaded for mercy.

12. It is true that the offence carries a maximum fourteen (14) years imprisonment. But in this case, to send a 19 year old boy to prison for seven (7) years for this kind of offence, and after he has pleaded guilty, is manifestly harsh and excessive. The court should have considered an alternative punishment rather than imprisonment.

13. The Appellant has now already served nearly one and half years of his sentence. That cannot be undone. I will allow the appeal against sentence and set aside the sentence of seven (7) years imprisonment imposed upon him. I will substitute therefor such term of imprisonment as will enable the Appellant to be set at liberty forthwith unless otherwise lawfully held.

**14.** To summarize, the Appellant's appeal against conviction is dismissed. His appeal against sentence is allowed as set out above. He shall be set at liberty forthwith unless otherwise lawfully held. Those will be the orders of the court.

**DATED SIGNED AND DELIVERED AT MURANG'A THIS 21<sup>ST</sup> DAY OF NOVEMBER 2014**

**H.P.G.WAWERU**

**JUDGE**