



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 21 OF 2013

STEPHEN MUTHEE WAKUTHIYE APPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT
AT WANG'URU (E.K. NYUTU– S.R.M) IN CRIMINAL CASE NO. 35 OF 2012 DELIVERED
ON 1ST AUGUST 2012)**

JUDGMENT

The charge facing the appellant in the lower Court was that of unnatural offence contrary to **Section 162 (b) of the Penal Code** the particulars being that on 10th day of January 2012 at Murubara village in Kirinyaga County he had carnal knowledge of an animal namely a cow.

After hearing the evidence of five (5) prosecution witnesses as well as the appellant, the trial magistrate Honourable E.K. NYUTU (S.R.M) delivered a judgment on 1st August 2012 in which he found the appellant guilty and sentenced him to five (5) years imprisonment. It is against the conviction and sentence that the appellant has now moved this Court on appeal listing five (5) grounds of appeal where he accuses the magistrate of relying on hearsay and deciding against the weight of evidence thus rendering the conviction un-safe. In his oral submissions however, the appellant seems to dwell mostly on the sentence which he says was harsh.

This being a first appeal, I have to re-evaluate the evidence and reach my own conclusions to determine whether the conviction was safe. In doing so, however, I must remember that I do not have the benefit of seeing or hearing the witnesses testify see – **PETERS VS SUNDAY POST 1958 E.A. 424.**

The evidence against the appellant was that on the morning of 10th January 2012, the complainant found his cow tied to a tree by the legs which was un-usual as he normally ties it by the horns. Next to the cow, he recognized the appellant's clothings and Identity card which were produced in evidence. So the accused was traced and upon his arrest, he was taken to Simon Kariuki (PW5) a Clinical officer who upon examining him found that he had cow dung on his private parts. The cow was examined by Dr. Catherine (PW4) who confirmed that the cow's vulva was swollen reddish and had bruises and she concluded that there was evidence of bestiality.

Ms Kambanga for the state supported both the conviction and sentence.

The complainant did not actually see the appellant committing the unnatural offence with the cow.

Indeed there was no direct evidence on that. However, there was evidence that the complainant found his cow tied by the legs onto a tree and next to it were the appellant's clothings and Identity card. The appellant did not explain how his clothings came to be next to the cow although with respect to the Identity card, he said it was taken by the Village elder. And with regard to the finding of cow dung on him, he says he was made to sit on the ground which had cow dung. But he does not state that he was naked all this time and so there can be no other explanation of how cow dung came to be found in his private parts unless he was committing an unnatural offence with the cow.

The evidence of Ms Catherine (PW4) was that upon examining the cow, she found that indeed an act of bestiality had been committed on the cow. In cross-examination by the appellant, he said:-

“ The vulva was swollen, reddish and had bruises. A pregnant cow has a swollen vulva but on (sic) the present case, the vulva had bruises and is (sic) reddish. I concluded that there was evidence of bestiality due to the presence of reddening, swelling and bruises on the vulva”

Being a doctor, Catherine was a witness in the class of an expert whose evidence the Court was at liberty to accept or reject – ONYANGO VS REPUBLIC 1969 E.A 362. The trial Court accepted her evidence and this Court sees no reason to depart from that finding. The appellant did not offer any explanation as to how his clothings came to be found next to the cow upon which an unnatural offence had just been committed as confirmed by the Doctor. That evidence, together with the presence of cow dung on appellant's private parts was sufficient circumstantial evidence upon which the trial magistrate's finding of guilt could be justified. I find no merit in the appeal against conviction and dismiss it.

On sentence, the appellant was sentenced to a jail term of five (5) years in August 2012. He says he is now reformed and has learnt a trade and is even sitting for his K.C.P.E exams this year. He is a first offender. I reduce the sentence to three (3) years. The appeal is allowed to that extent only.

B.N. OLAO

JUDGE

17TH OCTOBER, 2013

Coram

B. N. Olao – Judge

CC – Muriithi

Appellant present

M/S Omayo State Counsel present

COURT: Judgment delivered this 17th day of October 2013 in open Court.

M/S Omayo State Counsel present

Appellant present

Muriithi Court clerk present.

Right of appeal explained.

B.N. OLAO

JUDGE

17TH OCTOBER, 2013