



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 140 OF 2011

(From original conviction and sentence in criminal case no. 557 of 2010 of the Senior Resident Magistrate's Court at Kilifi before Hon. R. K. Ondieki- SRM)

KENGA KITSAO SOBAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Kenga Kitsao Sobaya the Appellant was charged with committing unnatural offence contrary to Section 162 (b) of the Penal Code. The particulars stated that on 22nd day of June, 2010 at Kikambala village Junju location in Kilifi District within Coast Province had carnal knowledge of an animal namely a cow.
2. Following a full trial he was found guilty and convicted by the learned Senior Resident Magistrate sitting at Kilifi. He was sentenced to 14 years imprisonment on 2nd June, 2011.
3. He now appeals to this court against both conviction and sentence. He has raised seven grounds of appeal as follows;

“1. That the learned trial magistrate erred in law and fact by convicting and sentencing me in reliance of hearsay evidence.

2. That the learned trial magistrate erred in law and fact by convicting me without putting into consideration that I was not caught with nothing in criminal law.

3. That the learned trial magistrate erred in law and fact without finding that the alleged animal examined by the required veterinary officer to prove the allegation.

4. That the learned trial magistrate erred in law and fact when convincing I the appellant without putting into consideration that the complainant was never supported by any other material evidence.

5. That the learned trial magistrate erred in law and fact by not seeing that the investigation officer never sisted the loqus and quo.

6. that the learned trial magistrate erred in law and fact by admitting allegations

without considering the height of the alleged animal in relation to my lower limbs height.

7. That my defense was very firm and strong.”

4. Evidently, the grounds target the adequacy of the prosecution evidence at the trial. In support of the grounds the Appellant made written submissions highlighting the fact that without the testimony of the veterinary officer there was no proof of the alleged offence.
5. The State through Mr. Nyongesa opposed the appeal pointing out that the Appellant was caught in the act molesting the complainant's cow on the material night. Secondly, that the sentence was proper, and not excessive.
6. As the first Appeal Court, this court is obligated to re-evaluate the evidence of the trial and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify (see **Okeno vs R [1972] KLR 19**).
7. The prosecution case was delivered through three witnesses. The complainant is Beatrice Ingoki (PW1) she is a resident of Kikambala, a farmer and employee of the Ministry of Agriculture. She had a zero grazing unit in her homestead. One 22nd June, 2010 she was roused from sleep at 1.00am by noise emanating from the said unit. She stepped out to inquire only to find the Appellant in flagrante delicto engaged in an unnatural act with her calf. The Appellant held his shorts in his hands. He was naked waist-down. When PW1 raised an alarm the appellant tried to escape but was caught by neighbours. He was escorted to Kijipwa Police Station and later charged.
8. In his defence, the appellant gave a sworn statement. He said he was a casual laborer at Kikambala. That he was on the way from Kikambala when he was intercepted by a vigilante group on claims that he had had an unnatural act with a cow. They doused him in diesel before taking him to the police station.
9. Regarding the adequacy of the prosecution evidence, the trial court considered the evidence of PW1 and PW2 and emphasized that the Appellant was found in flagrante delicto, naked. PW1 said the Appellant held his short/trouser in his hand. This was confirmed by PW2 who on responding to PW1's alarm found the Appellant naked but for a shirt.
10. The court did consider the Appellant's defence although it misdirected itself by seeming to require an explanation for the Appellant's presence at the *boma* and stating:

“In the absence of any explanation by the accused the court will take the explanation by the complainant. (PW1) as satisfactory.” This amounts to shifting the burden of proof on the Appellant contrary to the established principle that the burden of proof lies with the prosecution.
11. That the appellant was found in the complainant's *boma* at 1.00am is not in dispute. The complainant stated that the Appellant was caught in the act but she did not elaborate. The Appellant was half naked. The short/trouser may not have been produced but it is evident that the appellant was in a state of undress. The witnesses PW1 and pw2 who admittedly had not previously disagreed with Accused would have to be malicious perverts to falsely implicate the Appellant in the commission of such an offence, merely because he was found in the *boma* or as he says going about his lawful business.
12. One would imagine that if the Appellant was not naked and was found while dressed up in or close to the *boma*, the most reasonable accusation would be attempted theft. As it is both PW1 and PW2 say he wore no short or trouser when found. PW1 says he was caught red-handed. The Appellant's defence was a denial that cannot stand the overwhelming evidence of PW1 and PW2. It was properly dismissed.

13. The Appellant has complained that an adverse inference ought to be made as other members of the vigilante group were not called to testify. There is no requirement in this case that a certain number of witnesses be called (See Section 145 of the Evidence Act). Secondly, it is PW1 who first saw the Appellant and raised an alarm. He tried to flee but was restrained. He admitted he was in the compound during cross-examination. The court considered and rightly dismissed his defence. There was no reason for the witnesses PW1 and PW2 to falsely accuse him.
14. The veterinary officer's testimony would have established whether the calf had been actually molested. In the absence of such evidence, I think it was safer to record a finding under Section 163 of the Penal Code. The evidence on record supports a conviction for an Attempted Unnatural Act contrary to that section. I do therefore quash the conviction for the charge under Section 162(b) and substitute therefor a charge of Attempted Unnatural Offence contrary to Section 163 of the Penal Code. The sentence provided thereunder is seven years imprisonment.
15. The Appellant's antecedents were not proved before the court and he was not asked to mitigate. That is irregular. The sentence of 14 years imprisonment is hereby set aside. The sentence is hereby reduced to the period already served. Unless otherwise lawfully held, the appellant will be at liberty.

Delivered and signed at Malindi this **9th** day of **December, 2013** in the presence of the Appellant, Miss Mathangani for State

Court clerk - Mwebi

C. W. Meoli

JUDGE