



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CRIMINAL APPEAL NUMBER 181 OF 2009**

**KIOKO KIMATA MUTUKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against conviction and sentence in criminal case No.298 of 2007 in the Principal Magistrate's Court Makueni by Hon. F. N. Nyakundi Ag. P. M. dated 28<sup>th</sup> October, 2008)*

**JUDGMENT**

The appellant, **Kioko Kimata Mutuku** was charged before the Principal Magistrate's Court at Makueni with one count of unnatural offence contrary to section 162 (a) of Penal Code. The particulars of the offence were that on the 4<sup>th</sup> June, 2007 in Makueni District within Eastern Province he had unlawful carnal knowledge of **M.M** against the order of nature. He denied the offence.

At the trial, the case for the prosecution was that on 4<sup>th</sup> June, 2007 the complainant, **M.M** (PW.1) was herding cattle at about 11.00 a.m. when he took them to watering point. There he met the appellant who was also herding cattle. PW.1 asked the appellant if it was possible for him to get him a puppy. The appellant told him that there were puppies, where he worked. They proceeded there and they saw four puppies. The appellant identified one to him. The appellant then informed him that he would show him how to keep the puppy alive. He removed the trouser of PW.1, then penetrated his anus using his penis. When he was through, PW.1 ran away and met one, **Joel Katunge (PW.4)** on the way. He explained to him what had happened and he was advised to report to his mother, the incident. Instead he reported to PW.2 **M.W (PW.2)**, his grandmother. It is PW.2 who had sent him to herd cattle. Apparently, PW.2 and saw him at about 1.00 p.m. with dusty clothes and upon asking him what had happened he told her that he had been sodomized by a neighbour. The incident was then reported to the police. **Loise Ndole** was present when PW.1 reported to PW.2 what had happened to him. PW.4 **Joel Katunga** whom PW.1 met on the way immediately after the incident stated that he did see PW.1 on 4<sup>th</sup> June, 2007 while at his kiosk and that PW.1 reported to him that he had been sodomized and named the culprit as the appellant.

PW.5 **Boge Eugene** a Clinical Officer at Makueni District Hospital examined both complainant and

appellant following the incident. He stated that upon examining PW.1 he found lacerations on the anal orifice, no bleeding but confirmed an unnatural act had taken place and assessed degree of injury as grievous harm. He also stated that he examined the appellant too but made no findings.

PW.6 **P.C. Joseph Mugo** of Kavumbu Police Post received the report of the incident from PW.1 on 4<sup>th</sup> June, 2007 at 4.50 p.m. and booked it. At the same time, the appellant was brought by members of the public. He escorted both the complainant and appellant to Kathonzweni Dispensary and later to Makueni District Hospital for treatment. He thereafter issued P3 forms to both which were later filled. Following further investigations he preferred the charge against the appellant.

Upon being placed on his defence, the appellant elected to give an unsworn statement and did not call any witnesses. He stated that on 27<sup>th</sup> July, 2007 he was herding cattle with PW.1. PW.1 asked him for a puppy and he told him that though the dog at the home where he had been employed had given birth, the puppies were too young and he should wait. PW.1 then left only for some ten people to come to him, one of them being PW.4 **Joel Katunga**. They arrested him and questioned him about what he had done to PW.1 and he told them that PW.1 had only asked for a dog but they beat him, in a bid to force him to admit that he had committed the offence.

The learned magistrate duly evaluated the evidence on record and came to the conclusion that the appellant had committed the offence. She accordingly convicted him and sentenced him to fifteen (15) years imprisonment. The appellant was aggrieved by the conviction and sentence. He lodged an appeal to this court and in the petition of appeal he raised the following grounds:-

***“1. That the learned magistrate erred in law and in facts in convicting me for an offence which was not proved beyond reasonable doubt.***

***2. That the learned magistrate erred in law and in facts by meeting (sic) out sentence which is manifestly excessive against the appellant.***

***3. That the learned magistrate erred in law and in facts in deciding the case against the weight of evidence.....”***

However, pursuant to the provisions of section 352 (2) of the Criminal Procedure Code, **Lenaola J**, summarily rejected the appeal having been satisfied that the same had been lodged without sufficient grounds or complaint.

The appellant was undeterred. He successfully challenged the summary rejection of his appeal in the court of appeal. On 11<sup>th</sup> February, 2011 the Court of Appeal held thus:

***“All in all, we think that there cannot in any event, be a summary rejection of an appeal in a situation where it is apparent that an unlawful sentence had been imposed by that court. For these reasons, we uphold the appeal and set aside the order of summary rejection of the appeal dated 14<sup>th</sup> January, 2010. The appeal is accordingly remitted to the superior court with a direction that the court it shall admit the appellant’s appeal for hearing and determination according to law”.***

This is how then the appellant found himself before me on 14<sup>th</sup> February, 2012. On that occasion, the appellant surprisingly opted to abandon the appeal on conviction but pursue the appeal on sentence instead. In support thereof he submitted that the sentence imposed was manifestly excessive. He also prayed for leniency.

**Mrs. Gakobo**, learned Senior State Counsel submitted that the appellant was sentenced to 15 years imprisonment for an offence which carries a maximum sentence of 21 years. The court took into account the fact that the appellant was a first offender. Accordingly, the sentence should not be interfered.

From the onset and as per the decision of the Court of Appeal, I must say that the sentence imposed by

the trial court appears to me to have been unlawful. It is apparent to me that where the unnatural act is done without the consent of the complainant, the sentence which ought to have been imposed should have been 21 years but the trial court had imposed a sentence of 15 years as stated above. In this case, it is obvious that the offence was committed without the consent of the complainant who was carnally known. Accordingly, the proviso to section 162 of the Penal Code came to play. That proviso is to the effect that:

***“..... provided that in the case of an offence under paragraph***

***(a), the offender shall be liable to imprisonment for twenty one years if...***

***(b) the offence was committed without the consent of the person who was carnally known.....”***

Bearing in mind the foregoing, I do not think that it is legally possible to entertain the appellant's appeal on sentence. I would have been minded to enhance the same, but since I did not warn the appellant of that possibility, I will leave it at that.

For the foregoing reason, I uphold the sentence with the consequence that the appeal is dismissed.

**Ruling dated, signed and delivered at Machakos, this 29<sup>th</sup> day of February, 2012.**

**ASIKE-MAKHANDIA**

**JUDGE**