



(From original conviction and sentence in Criminal Case No. 328 of 2007 of the Principal Magistrate's Court at Nyahururu -M. T. Kariuki {R.M.})

STEPHEN MBUGUA MUYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of **committing an unnatural offence** contrary to **section 162 (b)** of the **Penal Code**. The particulars of the offence as stated in the charge sheet, were that, on the night of 28th/29th January 2007 at unknown time at [Particulars withheld] village in Nyandarua District within Central Province he had carnal knowledge of an animal, namely (a) sheep. He was tried before the Honourable M. T. Kariuki, Resident Magistrate, Nyahururu, and was convicted. He was sentenced to serve 5 years imprisonment.

Aggrieved by the said conviction and sentence the appellant filed this petition citing the following grounds:

1. THAT the charge was actuated by a grudge between the complainant and the appellant.
2. THAT the learned trial magistrate ought to have considered the appellant's defence of alibi and find it plausible.
3. THAT the conviction was based solely on the uncorroborated evidence of the complainant.
4. THAT the medical evidence adduced at the trial did not confirm that it was, indeed, the appellant who committed the offence.

While arguing his appeal the appellant asked this court to consider that his defence of a grudge is supported by the testimony of the complainant. He further argued that the veterinary doctor who examined the victim (*sheep*) ought to have established that the penetration of the sheep was done by a man's penis. The appellant asked the court to consider also that his underpants, which the police alleged to have been blood stained were not produced as an exhibit. He submitted also that the prosecution ought to have called further evidence particularly from other persons who lived with the appellant at the complainant's home, since they too would have witnessed the act if at all it happened.

The State has opposed the appeal urging that there was enough circumstantial evidence to support the complainant's testimony and that the sexual act was confirmed by medical evidence, which was that the sheep's vagina and uterus were found to be perforated and the valve swollen. Counsel submitted that the complainant, (PW1) had heard the sheep bleating in its pen. She took a torch and went to check, only to find the appellant lying on the floor of the sheep pen. She recognized him, being her grandson, and called out his name. He did not answer, which, according to the learned State Counsel demonstrated his guilt and culpability.

It is clear from the record that the appellant was convicted mainly on the evidence of the complainant (PW1) and the Veterinary Officer (PW2) and the arresting officer (PW3). PW1 was the only eye witness and all she saw was the appellant lying “*prostrate*” in the sheep pen when she went to check why her sheep was bleating late at night. The following morning she found the sheep dead with evidence of injuries. At that point PW1 was only concerned with the sheep’s vagina which she noticed was bleeding. She reported the matter to Kipipiri, Kiambogo AP camp. The carcass of the sheep was removed to the camp and later to the Kipipiri Police Station.

PW2 was then instructed by the Police to perform a postmortem on the carcass. His evidence was that an anti mortem examination disclosed haemorrhage on the mouth and nostrils, a puncture wound on the left shoulder, head and rump. The sheep’s vulva lips were also inflamed. There was further haemorrhage in the vagina and the uterus was inflamed. From the above injuries PW2 concluded that the injuries were caused by a blunt object leading to massive loss of blood. He further concluded that the haemorrhage on the vagina and the swelling of the vulva was caused by friction. PW2’s medical report was admitted in evidence as exhibit 1.

According to PW3’s testimony, the complainant had reported to him that she had found the appellant “*mounting a sheep*”, quite contrary to what PW1 told the court. He testified further that when he arrested the appellant his trouser’s fly area was stained with blood but the same was not produced as an exhibit.

In his defence, the appellant denied the offence and stated that he had spent the night of 28th – 29th January 2007 outside the complainants’ home where he lived. The learned trial magistrate dismissed this alibi as shallow, for reasons that the appellant had failed to state the name of the video hall he claimed to have visited that night or the name of the friend he claimed to have been with.

The trial court found that based on the evidence adduced at the trial the offence herein was proved beyond doubt. The same position is taken by the State in opposing the appeal. My own analysis and re-evaluation of the evidence leads me to find otherwise. As correctly submitted by the appellant, no-one saw him commit the unnatural act with the complainant’s sheep. The complainant testified that she found him lying prostrate in the sheep pen. On seeing blood in the sheep’s vagina the following morning, she concluded the appellant had had sexual intercourse with it. The veterinary doctor’s evidence was that, in his opinion, the haemorrhage on the vagina and the swelling of the vulva was caused by friction. He did not say however what object could probably have caused the friction. I agree with the appellant that the prosecution ought to have confirmed if that friction was occasioned by penial penetration for anyone to conclude that, given the circumstances, the appellant can safely be said to have committed the offence with which he was charged, tried and convicted. The medical evidence as tendered did not corroborate the complainant’s testimony which remains purely circumstantial. The same cannot safely sustain the charge and the conviction herein cannot stand. That being the case, the appeal succeeds and is hereby allowed, with the result that conviction is quashed and the sentence set aside.

Consequently the appellant is hereby set at liberty and shall be released from prison forthwith unless he is for other reason lawfully held.

Dated signed and delivered at Nakuru this 23rd day of October, 2009

M. G. MUGO

JUDGE