



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRA NO.12B OF 2018

GEOFFREY KIPROTICH KIGEN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence by Hon. Rugut in Kericho CM Cr. No.2022 of 2018)

JUDGMENT

1. The appellant was convicted in the Magistrate's Court at Kericho of committing an unnatural act contrary to section 162(B) of the Penal Code.
2. The particulars of the offence were that on 9/7/2018 at unknown time at Cheimen sub-location, Kaboro Location in Belgut sub-county within Kericho County unlawfully had carnal knowledge of an animal namely a cow.
3. On pleading guilty he was convicted and sentenced to serve 10 years imprisonment.
4. He has now come to this court on appeal on sentence. He filed his initial appeal in 2018. Before the appeal was heard however, he filed amended grounds of appeal which he relied upon. The grounds of appeal are as follows-
 - a) **I pray that my sentence be reviewed with regard to Article 50 (2) of the Constitution in that the sentence is severe and heavy and was as a result he prays for a lesser sentence.**
 - b) **He is a breadwinner to his family and that he was a single parent's child.**
 - c) **He is a sick person suffering from an eye infection.**
 - d) **That he wants the court to be sympathetic and review the initial sentence and substitute it with a lesser one.**
 - e) **He is a first offender.**
5. The appellant also filed written submissions which he relied upon and elected not to highlight the same.
6. Learned Principal Prosecution Counsel, Ms Keli in response submitted that the sentence was lawful as the maximum sentence for the offence was 14 years imprisonment but the magistrate gave him 10 years imprisonment after taking all relevant facts including the pre-sentencing report into account, which was unfavourable because the community was hostile to him due to his bad character. Counsel lastly submitted that the court considered the proper guiding principles in sentencing the appellant.
7. In response to the Principal Prosecuting Counsel's submissions, the appellant maintained that he wanted a review of the sentence.
8. This being an appeal from a lay person, though it is on sentence only, I will address the issue of his conviction. With regard to conviction, I have perused the record of the trial court. The charge was read to the appellant and he stated that it was true. Facts were then given by the prosecution and he admitted the same. He was thus convicted. I note that though nobody witnessed him committing the offence, his slippers and inner pant were recovered at the scene, and the appellant admitted the facts and was convicted. He merely said in mitigation that he was too drunk and nobody saw him commit the offence, so he did not deny committing the offence.
9. In my view, from the conviction of the appellant was proper, as the requirements for taking a plea of guilty by a trial court enumerated in the case of **Adan vrs Republic [1973] 445** were substantially followed by the trial court, and the accused admitted unequivocally to

committing the offence .

10. The appellant has come to this court an appeal against sentence. The maximum sentence for an offence under section 162 of the Penal Code is 14 years imprisonment. The trial magistrate considered a pre-sentencing report prepared by the Kericho Probation Officer before sentencing the appellant to 10 years imprisonment. The appellant was treated a first offender as the prosecution did not allege any previous conviction.

11. Sentencing is an exercise of discretionary power by a trial court. An appellate court should be slow in interfering with the exercise of such discretion unless the trial court has applied wrong principles or the sentence is manifestly low or manifestly high as to cause an injustice.

12. In the present case, the trial magistrate took into account the presentence report done by the Probation Officer, Kericho on 27/7/2018. That report was unfavourable to the appellant in that it was recorded that the community were hostile to him because of his previous conduct, the relevant part of which reads as follows:-

“Neighbours interviewed reported that it was not the first time the offender committed a similar offence. The said community is fed up with the offender’s character. They are of the opinion that the offender be given a deterrent sentence.”

13. In sentencing the appellant, the magistrate stated as follows-

“Having considered the mitigation, the information on the background check, nature, circumstances and the provision of the law with respect to the offence admitted by the accused person, the accused person is hereby sentenced to 10 years imprisonment.”

14. In my view, the information background check referred to by the magistrate was the presentence report prepared by the Probation Officer, Kericho. There was nothing wrong with taking the contents of that report into account in sentencing. However, the information on the appellant’s previous conducts in my view should not have unduly influenced the trial court in sentencing him because the persons who made the allegations were not mentioned and there is no information that such previous incidents were reported to any authorities like the chief’s office. It has to be borne in mind that the prosecution said that he is a first offender. In my view therefore the trial court unduly gave weight to the allegations on the appellant’s previous conduct which could not be verified. In those circumstances I find that the sentence of 10 years imprisonment for a first offender whose maximum sentence was 14 years was excessive. I will thus interfere with sentence imposed and order that the appellant will instead serve 5 years imprisonment.

15. Consequently, I allow the appeal on sentence. I set aside the sentence of 10 years imprisonment handed down by the trial court. In its place I order that the appellant will instead serve 5 years imprisonment from the date on which he was imprisoned by the trial court.

Dated and delivered at Kericho this 22nd day of July 2019.

in the presence of accused, Mr. Ayodo for the State and Langat court Assistant.

George Dulu

JUDGE