

Muthoka v Republic

High Court, at Nairobi November 22, 1984

Abdullah J

Criminal Appeal no 628 of 1984

Criminal law - unnatural offence - defence of frame-up and fabrication. The appellant was found in a compromising position suggestive of an unnatural offence with a cow. He was accordingly charged with the offence committing an unnatural offence contrary to section 162(b) of the Penal Code. The appellant was convicted and sentenced to 4 years' imprisonment and 5 strokes corporal punishment. He alleged fabrications by the women who caught him with his pants literally down. He alleged they framed him due to his warning to one about grazing on some part of the forest he was guarding as a forest guard. He also alleged they were involved in an illicit affair he was aware of hence the concerted effort to destroy him.

Held:

1. What the appellant did may suggest aberration of his mental process requiring psychiatric or sympathetic consideration.
2. It would not be prudent to interfere with the findings of the learned magistrate as who had occasion to hear and see the witnesses and believed them.

Appeal allowed as against sentence. Appeal against conviction dismissed. Cases No cases referred to. Statutes

Penal Code section 162(b) Advocates

P Matu (state counsel) for Respondent.

November 22, 1984, Abdullah J delivered the following Judgment. The appellant was convicted of unnatural offence, contrary to section 162(b) of the Penal Code and was sentenced to 4 years' imprisonment and 5 strokes of cane.

In the evening of March 18, 1983, appellant was seen by PW 1, having intercourse with a cow. She questioned the appellant whose pants were half down, but he did not reply. She shouted for PW 2, the owner of the cow, who had been looking for her. When PW 2 came to the scene, she saw the appellant running away with his pants down. They examined the cow and saw sticky substance coming from her sexual organs. The appellant was arrested the following day.

The appellant claimed that the case is a frame-up because the two women have boyfriends at the camp and he knew the husband of one of them. The learned trial magistrate accepted the evidence of two women and convicted the appellant.

In his petition of appeal, the appellant has reiterated that the case is a frame up, firstly, because he, as a forest guard, he had warned the complainant who used to secretly graze her cow in the forest and secondly, he had warned these women that he could inform their husbands about their proclivity to sexual ventures with his fellow workers. I have, on my part, analysed and evaluated all the evidence before the lower court. The appellant raised the defence of fabrication by these women. The learned magistrate had these women before him, when they testified. He had before him the allegation of frame up, which he

considered. He came to conclusion that the evidence of women was for acceptance. In these circumstances, it would not be prudent to interfere with the findings of the trial magistrate unless they appear on the face of it, perverse. That is not so. In the event, I uphold the conviction.

Although the offence provided a punishment of 14 years with or without corporal punishment, the fact remains that the Penal Code first came into force in 1930, when such sexual observations were viewed with such abhorrence and intolerance that, the punishment provided was severe. In the present circumstances, what the appellant did may suggest aberration of his mental process requiring psychiatric or sympathetic consideration. The appellant a first offender, was working as forest officer whose colleagues were probably enjoying sexual favour, which he did not. It may have been desirable to seek report of the probation officer before imposing such harsh and severe punishment. The appellant has already

served 7 months' imprisonment. That may be a sufficient lesson for him. Having regard to all the circumstances, I reduce the prison sentence to such term as will enable his release forthwith. I set aside corporal punishment.

The appeal is otherwise dismissed.