



**Mwalagho v Republic (Criminal Appeal E011 of 2024)  
[2025] KEHC 916 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 916 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E011 OF 2024  
AN ONGERI, J  
JANUARY 24, 2025**

**BETWEEN**

**ELIAS MWALAGHO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction of Hon. Wangeci (PM) in  
Voi CM Criminal Case No. E924 of 2021 delivered on 8th September 2021)*

**JUDGMENT**

1. The Appellant was charged with committing unnatural offence contrary to Section 162(b) of the Penal Code.
2. The particulars of the offence were that on 21<sup>st</sup> June 2021 at around 0100hours at Ghazi area in Voi Sub County within Taita Taveta County, the Appellant had carnal knowledge of two she goats.
3. The Appellant was charged with a second count of causing grievous harm to Elizabeth Mkamburi on the same particulars as in Count 1 (above).
4. The prosecution evidence in summary was that the complainant who is the Appellant's mother said the Appellant was in the habit of coming home late and having sexual intercourse with the goats in her kitchen.
5. On the material day when the Appellant entered the kitchen and the goats started making noise, the complainant went and woke PW2 (Joseph Mutalaki) who is also her son.
6. The two went and opened the kitchen where they found the Appellant half naked having sexual intercourse of a she goat.
7. They said he had removed his trouser which was hanging in the kitchen.



8. The complainant hit the Appellant with a stick and she ran away and locked herself in her house.
9. The Appellant chased her and broke into her house using a stone and he beat her with a fimbo inflicting grievous injury on her.
10. PW2 went and woke up PW3 (Jefferson Mwandindo) and they went back to the complainant's house where they subdued the Appellant who was assaulting his mother.
11. The matter was reported and the Appellant was arrested and the complainant was taken to hospital.
12. PW4 examined the two goats and found that they had injuries on the vulva and a whitish substance which he said was semen.
13. The Appellant said in his defence that he was home late and since the complainant had told him not to wake her up at night, he proceeded to sleep in the kitchen.
14. The Appellant said at night he was woken up by his mother who attacked him with a piece of wood and in the process of disarming her she got injured accidentally.
15. The trial court found the Appellant guilty as charged and sentenced him to 5 years imprisonment on Count 1 and 10 years in Count 2. The sentences were to run concurrently.
16. The Appellant has appealed to this court on the following grounds:-
  - i. The learned trial Magistrate erred in both law and fact when she misdirected herself.
  - ii. The learned trial Magistrate erred in both law and facts when she shifted the burden of proof from prosecution to the Appellant.
  - iii. The learned Magistrate erred in law when she considered the evidence adduced by prosecution full of massive contradiction.
  - iv. The learned trial Magistrate erred in law in convicting the Appellant on poor investigation adduced by prosecution.
  - v. That the learned trial court Magistrate erred in law fact by convicting him the Appellant to 5 years and 10 years imprisonment and directed to run concurrently without considering that the sentence meted on him was harsh and excessive.
  - vi. That the learned trial court Magistrate erred in law fact by convicting him the Appellant to 5 years and 10 years imprisonment and directed to run concurrently without considering the period spent in remand custody prior to conviction and sentence as requires Section 33 of the CPC.
  - vii. That the learned trial court Magistrate erred in law fact by convicting the Appellant to 10 years imprisonment without considering his reasonable defense.
17. The parties filed submissions as follows in this appeal:- the appellant submitted that the matter was not proved beyond reasonable doubt. The appellant argued that the charges against the accused are defective as it was not in line with the offence. That it was alleged that the complainant was assaulted by the son therefore he should have been charged with assault causing actual bodily harm.
18. The appellant further submitted that the trial court relied on hearsay evidence the investigating officer relied on what the area chief told her. She also did not produce the weapon that the appellant was alleged to have assaulted the complainant with but instead relied on what the villagers had told her.



19. On the charge of unnatural offence the appellant argued that the complainant had locked the appellant out of the house and because he was drunk he decided to sleep in the kitchen where the goats used to sleep. The appellant argued also that the report produced in court in proof of the same did not contain a letter head to ascertain whether the veterinary officer was employed by the government and his qualifications could not be verified.
20. The prosecution alternatively submitted that they provided sufficient evidence for conviction. PW1, testified that on 21/6/2021 at around 1 a.m. she was in her house when she heard goats bleating. She woke up her son by the name Joseph Mtalaki and they went to where the goats were. The goats were at their kitchen. They found the appellant inside the kitchen naked and having carnal knowledge of the goats. She then hit the appellant with a fimbo once in order for him to put to a stop what he was doing to the goats. The appellant turned on her and hit her several times leading to her loss of 2 of her teeth. Neighbours came to her rescue and subdued the appellant. Police officers were called in who rearrested the appellant and took him to the police station. This testimony was corroborated by PW2 and PW3 who witnessed the same.
21. PW4, Boniface Muthengei, testified that he is veterinary officer employed by the County Government of Taita Taveta. On 21/6/2021 he was requested to examine 2 goats. He examined the 2 goats one pure white and the other white with a black neck. Upon examination of the vulva he found that there were injuries traumatic in nature and red in colour. He further opened the vulva and a whitish jelly like fluid came out. He concluded that it was semen an indication that someone had been involved in an unnatural act with the two goats. He produced the report as exhibit 3.
22. The prosecution submitted further that PW5, Dr. Joto Nyawa, a clinical officer from Moi Hospital, testified that PW1 was examined at their facility. She had several injuries including a swollen forehead, right eyelid. Left and right hand were swollen and very painful on touch. Her front teeth were also missing. He assessed the degree of injury as maim. The injuries sustained by the complainant fall within the definition of grievous harm as defined in section 4 of the Penal code.
23. This being a first appeal, the duty of the first appellate court is as follows:- In Kisumu Criminal Appeal 28 of 2009 David Njuguna Wairimu V – Republic [2010] e KLR where the court of appeal stated:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.
24. The issues for determination of this appeal are as follows:-
  - i. Whether the prosecution proved the charges against the Appellant to the required standard.
  - ii. Whether the sentences were excessive.
25. On the issue as to whether the prosecution proved the guilt of the Appellant, I find that the Appellant was found red handed by PW1 and PW2 having sexual intercourse with the Appellant’s mother she goats in her kitchen.
26. The complainant (PW1) as the Appellant’s mother and PW2 as his brother.



27. There is evidence that both knew the Appellant whom they said was in the habit of coming home late drunk and used to lock himself in the complainant's kitchen where the goats were sheltered.
28. I find that there is evidence that the Appellant was hit by the complainant with a stick and he followed her to her house where she had locked herself and he assaulted her with a fimbo causing her grievous harm.
29. I find that the prosecution proved its case to the required standard.
30. I also find that the sentence meted is appropriate.
31. I find that the conviction is secure and the sentence lawful.
32. I dismiss the appeal and uphold both the sentence and the conviction.

**DATED, SIGNED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JANUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOL.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Court Assistant: Maina

The Appellant

