REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 33 OF 2012.

ABDURAHAMAN ABDULLAHI …….....APPELLANT.

VERSUS

REPUBLIC…… RESPONDENT.

(Being an appeal from the original conviction and sentence of T. Nzyoki – PM in Criminal Case No. 627 of 2010 delivered on 24th February, 2012 at Lodwar.)

J U D G M E N T.

1. The appellant, **Abdulrahman Abdullahi,** was charged with unnatural offence, contrary to section 162 (a) read with section 162 (2) of the penal code, in that on the 11th September, 2014, in Turkana West District, intentionally and unlawfully had carnal knowledge of I A, a boy aged ten (10) years against the order of nature.

Alternatively, the appellant was charged with indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act.

2. After trial, the appellant was convicted on the second alternative count and sentenced to ten (10) years imprisonment.

Being aggrieved by the conviction and sentence, the appellant filed the present appeal on the basis of the grounds contained in his petition of appeal dated 29th February, 2011. He appeared in person at the hearing of the appeal and relied on his written submissions.

3. The Learned Prosecution Counsel, **Mr. Kimanthi**, opposed the appeal on behalf of the state/respondent by relying on the evidence on record and submitting that the appellant was clearly identified by the witnesses in broad daylight and that the evidence was sufficient to establish the alternative charge.

On sentence, learned prosecution counsel, submitted that it was lawful. He urged this court to dismiss the appeal.

4. Having considered the appeal on the basis of the supporting grounds and the submissions by both sides, the duty of this court was to re-visit the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

5. In that regard, the court has considered the evidence availed by the prosecution through it's eight (8) witnesses (i.e. PW1 to PW8) together with the evidence availed by the appellant in his defence.

With regard to the main count, there was insufficient evidence to establish that the complainant child (PW1) was sodomised. Indeed, the medical evidence availed by the doctor (PW2) was more in support of the defence in disproving the main count.

This court agrees with the findings of the learned trial magistrate with regard to that main count.

6. With regard to the alternative count, the findings of the doctor (PW2) viewed against the evidence of PW3, 4 and 5 disproved the alleged act of indecency against the complainant by the appellant.

If there was no sodomy, it followed that the appellant did not indecently assault the complainant by touching his genital organ. The anus is part of the buttocks but not a genital organ.

7. The particulars of the alternative count were thus not established for a sound conviction of the appellant on that count.

Consequently, this appeal is allowed with the result that the conviction of the appellant by the learned trial magistrate is hereby quashed and the sentence set aside. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

[Delivered and signed this 22nd day of April, 2015]

J.R. KARANJA.

JUDGE.