NO.2993

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC.CRIMINAL APPEAL NO.125 OF 2010

JOHN MUTUKU MWANZIA.....PPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Cr. Case No.142 of 2010 in the Principal Magistrate's Court at Makueni by E.M. Nyakundi on 7th April, 2010)

JUDGMENT

John Mutuku Mwanzia hereinafter "**the appellant**" was on the 7th April, 2010 arraigned before the principal magistrate's court at Makueni on two counts. The first and main count was that of unnatural offence contrary to section 162 (a) of the Penal Code. The particulars of the offence were that on 24th December, 2009 in Makueni District within the Eastern Province, the appellant had carnal knowledge of **K.K** against the order of nature.

The 2nd and alternative count was that of indecent act with a child contrary to section 11(1) of the Sexual offences Act, the particulars being that on the same day and place, the appellant intentionally and unlawfully did indecent act to a child namely **K.K** aged 10 years by touching his private parts.

The appellant entered plea of not guilty on the main count, but a plea of guilty on the alternative count. Upon pleading guilty to the alternative count, the prosecutor gave the facts as follows:

"....that on 24.12.2009 at about 10.00 a.m., the complainant in this case was sleeping in his mother's house as he was feeling unwell; in K. location. The Accused went t to the house and found the complainant sleeping. He persuaded the complainant to go to his house so that the Accused could roast some maize for the complainant. The complainant refused but the Accused insisted. The complainant woke up and the Accused pulled the complainant to the nearby bushes, removed the complainant's long trousers and proceeded to have canal knowledge of him against the order of nature i.e. sodomised him. When he finished the Accused promised to buy the complainant bread. The complainant aged 10

years returned to his mother's house. During the act, the accused had covered the complainant's mouth and could not scream. Later in the day, the mother of the complainant came home and the complainant informed her of what had happened. The complainant called accused and asked him why he had done so and he alleged to have been drunk. He had the accused tied up, but the accused managed to escape and ran away. The matter was reported to the chief. About a day later, Complainant was taken to hospital on 31st December, 2009. But there was no evidence of sodomy, as he had already healed. The Clinical officer concluded in the report that 12 hours had elapsed since the act and early assessment was necessary. The accused person was arrested on 4th April, 2006, escorted to Kangundo Police Station where he was charged with the present offences. The complainant also complained that in the process of sodomy, the accused fondled his penis."

Upon the appellant accepting that the aforesaid facts were true, the trial court consequently convicted him on his own plea of guilty and proceeded to jail him for fifteen (15) years. It is against this conviction and sentence that the appellant lodged the instant appeal on the grounds that the evidence given by the complainant's mother was not sufficient to find a conviction, that there was no evidence placing him at the scene, that he was not given an opportunity to cross-examine the complainant and her witnesses and finally that he was convicted for an offence he never committed. From the record, the above grounds of appeal are non-starters. The appellant having been convicted on his own plea of guilty, there was no formal trial where the prosecution called witnesses. No evidence having been taken, the issues, as to whether the evidence was sufficient, denial of cross-examination or evidence placing him at the scene does not therefore arise.

When the appeal came up for plenary hearing on 17the November, 2011, **Mr. Mukofu**, learned State Counsel appeared for the State, whereas the appellant appeared in person. The appellant then indicated that his appeal was limited to sentence only. In other words, the appellant abandoned his appeal on conviction but elected to pursue the appeal on sentence instead. In support of such appeal, the appellant submitted that the sentence imposed was manifestly harsh and excessive. He also prayed for leniency.

On his part, **Mr. Mukofu,** conceded to the appeal on sentence on the grounds that the appellant being a first offender, the sentence of fifteen years imposed was manifestly harsh and excessive.

Much as the appellant abandoned his appeal on conviction, it is still the duty of this court as a first appellate court to reconsider the proceedings before the trial court and satisfy itself whether the conviction was proper in law before proceeding to deal with the issue of sentence if at all.

As already stated, the appellant was convicted on his own plea of guilty on the alternative count of Indecent act with a child. In this alternative count upon which the appellant was convicted, it was alleged that the appellant intentionally indecently assaulted the complainant by touching her private parts.

Indecent act is defined in Section 2(1) of the Sexual Offences Act, as:

" ***any intentional act which causes any contact between the genital organs of a person, his or her breasts and buttocks with that of another person and/or exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration".***

So that, for a conviction to be founded on this count, the Prosecution must prove that the appellant's genital organs had contact with genital organs of the complainant, her breasts and or buttocks without penetration and/or that he exposed or displayed any pornographic material to the complainant. On the stated facts none of the foregoing happened. All that seems to have happened to the complainant was that he was sodomised. Sodomy entails penetration. As already defined, an Indecent Act is that act which brings into contact the genital organs of two persons albeit unlawfully but does not include an act which causes penetration. To the extent that the appellant "***pulled the complainant to the nearby bushes; removed the complainant's long trousers and proceeded to have carnal knowledge of him against the order of nature i.e. sodomised him ..."*** does not amount to Indecent Act as defined and understood in law. The trial magistrate may have assumed, and wrongly so in my view, that by sodomising the complainant, the appellant genital organs must have come into contact with those of the

complainant. This was a criminal trial where the prosecution must prove its case beyond reasonable doubt. There is no room therefore, for assumptions and speculation. It was the prosecution to state in the facts categorically that the appellant's genital organs came into contact with the complainant's genital organs, breasts and or buttocks, but that there was no penetration. Since the facts led did not support the charge preferred, the appellant accepted facts which did not at all support the charge. Indeed the facts testify to the main count. The plea as taken therefore was not unequivocal.

That being my view of the matter, I would allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and **delivered** at Machakos, this **30th** day of **November**, 2011.

ASIKE-MAKHANDIA

JUDGE