**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 97 OF 2015**

**JOSEPH MUCHIRI THUITA……. APPELLANT**

**VERSUS**

**REPUBLIC…….…….RESPONDENT**

*(Appeal from the original conviction and sentence in Othaya Senior Resident Magistrates' Court Criminal Case No. 273 of 2015 (Hon. B.M. Ekhubi, SRM) delivered on 21st December, 2015)*

**JUDGMENT**

The appellant was charged with the offence of attempted defilement contrary to **section 9 (1)(2) of the Sexual Offences Act, No.3 of 2006**. The particulars were that on the 1st day of June 2015 at [particulars withheld] village in Nyeri South Sub County of Nyeri county, the appellant intentionally and unlawfully attempted to cause his penis to penetrate the anus of T M W, a child aged 10.

In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to **section 11 (1)** of the said **Sexual Offences Act** in that in that on the 1st day of June, 2015 at [particulars withheld] in Nyeri South sub County of Nyeri county, the appellant intentionally and unlawfully touched the buttocks of T M W a child aged 10 with his penis.

The trial court convicted the appellant of the alternative count and sentenced him to 10 years' imprisonment. It is this conviction and sentence that he has appealed against. On 22nd August, 2016, he filed hand-written submissions in which he incorporated what were referred as "amended grounds of appeal. I understand these grounds to be as follows:

1. The learned magistrate erred in law and in fact in convicting the appellant when the time the offence is alleged to have been committed was doubtful.

2. The learned magistrate erred in law and in fact in convicting the appellant yet there was no eyewitness.

3. The learned magistrate misdirected herself in rejecting the appellant's defence which was not displaced by the prosecution.

The state opposed the appeal and submitted that the offence with which with the appellant was convicted did not require medical corroboration as argued by the appellant. Counsel also submitted that there was no need for an eyewitness in order to convict since the evidence on record was sufficient. On the question of the appellant's defence, it was submitted on behalf of the state that the trial court considered it and gave reasons why it did not believe the appellant.

In order to appreciate the appellant's appeal, it is important for this court consider the evidence on record, evaluate it afresh and come to its own conclusions. It is a mandatory task for this court as the first appellate court as the appellant is entitled to a fresh analysis of the evidence. At the end of this exercise, this court may reach different conclusions from those arrived at by the trial court. This court will, however, bear in mind that the trial court had the advantage of seeing and hearing the witnesses first hand. **(See Okeno versus Republic (1972) EA 32).**

The complainant testified that he was 10 years old and he lived with his grandmother (PW2). On 1st June, 2015, the appellant grabbed him and forced him to his house from where he inserted his penis into his anus. At the time of the offence the appellant shared a home with the complainant's other grandmother who had employed him as a farmhand. It is in this home that the complainant was assaulted from when he went to look for a hammer to repair their chicken house.

He managed to escape from the appellant's grip and even injured himself in the process. He informed his brother and his grandmother whom he lived with. He was taken to the police and subsequently to the hospital for examination.

**A M M (PW2)** testified that the complainant was his grandson and she lived with him. On 1st of June, 2015 at around 6:45 PM the complainant went to his other grandmother to borrow a hammer with which he was to use to fix a chicken house. The appellant worked at the home of this other grandmother. This witness left to go to the shop and when she returned she found the complainant crying; he told her that the appellant had inserted his penis into his anus. He also told her as he escaped from the appellant's grip, he got injured. The witness made a report to police and took the complainant to hospital the following day.

The clinical officer, **Ian Ngumo Warutere (PW3)** testified that indeed he examined the complainant who told him that he had been sodomised. He did not, however, find any injuries on the complainant's anus. Neither did he find any trace of spermatozoa. The complainant had, however, sustained a cut wound on his leg.

The investigations officer corporal **Bernard Kiminza (PW4)** confirmed that indeed the complainant's grandmother **(PW2)** brought the complaint to the police station and the complainant had sustained an injury on his leg. The complainant told him that he had sustained the injury as he was escaping from the appellant.

The appellant gave unsworn statement when he was put on his defence. He stated that he was not even at home when the offence is alleged to have been committed; he testified that he had travelled to his home and only resumed duty on 3rd of June 2015. It is on this particular date that he was arrested and subsequently charged with the offence for which he was convicted. He denied having committed the offence and alleged that the complainant's grandmother had a grudge with him for having rejected her sexual advances. According to him, he was framed because of this grudge.

**Section 11. (1) of the Sexual Offences Act** under which the appellant was convicted reads as follows: -

> ***11.(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.***

The offensive act referred to as "indecent act" is defined in **section 2** of the same Act to mean an unlawful intentional act which causes—

> ***"(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;***
>
> ***(b) exposure or display of any pornographic material to any person against his or her will;"***

The complainant testified that the appellant inserted his penis into his anus. According to the clinical

officer's evidence, the insertion does not appear to have caused any sort of injury to this part of the complainant's body and I suppose it is for this reason that the learned magistrate opted to convict the appellant on the alternative rather than the principal count. He found as a fact that the appellant's penis must have been in contact with the complainant's buttocks.

As far as I can gather from the record, I cannot find any reason why the learned magistrate should have doubted the complainant's evidence. The complainant was a minor whose testimony was clearly unshaken; there is nothing apparent on record to suggest that he ought not to have been believed or that he was not a credible witness.

More importantly, his evidence was corroborated by his grandmother **(PW2)** who send him to collect a hammer from his other grandmother's home where the appellant was engaged as a farmworker. His grandmother who also left to go to a shop came back to find him crying and injured. The complainant testified that he sustained the injury as he escaped from the appellant's house. His grandmother corroborated this evidence of injury.

The clinical officer **(PW3)** also testified that upon examination of the complainant, he established that he had sustained an injury on his leg. The investigations officer **(PW4)** testified along the same lines that he noticed that the complainant had sustained an injury to his leg when he made a report of the assault. The complainant's explanation to him of the circumstances under which he was injured was consistent with what he told his grandmother.

I agree with the learned magistrate's finding that the evidence against the appellant was so consistent that there was no basis whatsoever to doubt that he had committed an indecent act with the complainant.

Coming to his defence, the appellant presented a two-pronged defence; first, he alleged that he had travelled when the alleged offence is said to have been committed and second, that the charges against him were a frameup up because of his rejection of the complainant's grandmother's sexual advances.

The learned magistrate considered both aspects of the appellant's defence and for reasons he gave in his judgment, he dismissed the defence as an afterthought. On the issue of sexual advances, it is true as the learned magistrate established that the appellant never raised this issue when he cross-examined the complainant's grandmother. There was simply no evidence of the complainant's grandmother having sought for such favour from the appellant.

On his alibi, it is true that an accused person does not have to explain his alibi; however, where he raises this kind of defence, it must cast some doubt on the prosecution evidence of his whereabouts at the time of the commission of offence. Simply stating that he was not at the scene of crime when it was committed was not sufficient to displace the prosecution evidence to the contrary. I again agree with the learned magistrate that the alibi was not viable in these circumstances and the learned magistrate was correct in rejecting it.

I am satisfied that the appellant was properly convicted and I find no reason to disturb the conviction or the sentence that was meted against him. Inevitably, I hold that the appellant's appeal does not have any merit and I hereby dismiss it.

**Signed, dated and delivered in open court this 13th day of January, 2017**

Ngaah Jairus

**JUDGE**