**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 34 OF 2015**

**FRANCIS NTHIGA.....APPELLANT**

***VERSUS***

**REPUBLIC…… ……RESPONDENT**

***(Being an appeal from the original conviction and sentence in 789/14 at Embu Chief Magistrate's Court by Hon. A.G. Munene on 24th April, 2015)***

**JUDGEMENT**

1. The appellant has appealed against his conviction and concurrent sentence of 25 years imprisonment on two counts of committing an indecent act contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 imposed upon him on 24th April 2015 by the court of the Senior Resident Magistrate at Embu.

2. The state through Ms Mbae has supported both the conviction and sentence.

3. The appellant was convicted mainly on the evidence of a minor complainant (PW 1, name withheld) in count 1. He was similarly convicted on the evidence of another minor complainant (PW 2, name withheld) in count 2. PW 1 and 2 were aged 3 and 4 years respectively. By virtue of the provisions of section 19 of the Statutory Oath Declaration Act (Cap 15) Laws of Kenya, the minor children were subjected to a *voire dire* examination. PW 1 and 2 were found unable to give sworn testimony. They proceeded to give unsworn evidence. Thereafter, they were cross-examined by the appellant. PW 1 who was aged 4 years old testified in her unsworn testimony that she was aged four years old and that she knew the appellant. She further testified that she knew the appellant and that he removed her clothes. She testified that the accused *"alimtoa nguo"*. The trial court noted that she testified incoherently and with difficulty. When asked further, what else the appellant did to her, she replied *"alinitoa tu nguo"* meaning the appellant removed her dress. She is recorded to have repeatedly testified incoherently that the appellant *"alinitoa nguo"*. In his judgement the trial court rejected the evidence of PW 1 on account of being unreliable and with it count 2 resulted in the acquittal, although not formally entered in the record.

4. Furthermore, she testified that she felt pain. **This complainant (PW 1)** testified in support of count 2. In addition to PW 1, PW 3 also testified in support of count 1. She was allowed to give unsworn evidence after the trial court conducted *a voire dire* examination and found her to be incompetent to testify on oath. Her evidence was that when they were coming from school in the evening, she saw the appellant on the road leading to the school. The appellant touched her private parts (vagina area) using his hands and as a result she felt pain. Thereafter, she went home and reported this to her mother who in turn reported to the police, after which she was taken for medical examination.

5. The examining doctor (Godfrey Njuki Njiru, PW 2) prepared two medical reports in respect of this two minors. In the case of PW 1, the doctor found that she was aged 4 years. He found that the complainant had bruises on the labia minora and that her hymen was intact. According to his evidence the perpetrators attempted to penetrate the sexual organs of the two minors. He then produced the medical report popularly known as the P3 form as exhibit 1.

6. Dr Godfrey Njuki Njiru also examined the second minor and found her to be aged 3 years old. He found that this minor was undressed and the perpetrators started playing with her private parts. He found no physical injuries on this complainant. However, he found that there were bruises on the opening of the vagina. Finally, he found that there was no sign of penetration. As a result, he took precautionary measures and put this complainant on ARV just like he did with the first complainant. He prepared a report in respect of this complainant which was put in evidence as exhibit 2.

7. There is evidence of another minor who was allowed to give unsworn evidence after the trial court was satisfied that she was not competent to give evidence on oath, following a *voire dire* examination by the trial court. It appears that the evidence of this complainant (PW 4) was not in relation to counts 1 and 2. Her evidence was that when they were coming from school going home they met the appellant on the road. He told them to remove their clothes. He then took them to a shamba of bananas and maize. She further testified that the appellant touched her private parts as a result of which she felt pain. He had removed her uniform and pullover but he did not remove his long trousers. She also further testified that the appellant also touched the private parts of PW 1 and 3 using his hands. She reported this to her mother who in turn reported to the police and as a result the appellant was arrested and was subjected to mob justice.

8. The evidence of chief Samuel Njuki Genshon (PW 9) is that he got information that two men were being beaten by members of public and he was requested to go and rescue them. He called APC (police) Gitonga (PW 10) who arrested the appellant and took him to Itabua police station. It is at that station that No 60211 Sgt Evalyne Wangari re-arrested the appellant and investigated the allegation against him of having sexually assaulted three minors children. At the conclusion of her investigations, she charged the appellant with the offence with which he was convicted.

9. Upon being placed on his defence, the appellant gave sworn testimony and did not call any witnesses. It was his evidence that the complainant (apparently the parent of one of the minors) and her husband along with other people went to his place of employment looking for a person called Josephat Namu. They asked him about the whereabouts of Josephat Namu. In response, he told them that Joseph Namu was at his home. He then told them that he should accompany them as they had something they wanted. They went to Josephat Namu's home.

10. At that home, they broke the door. Joseph Namu came out without a shirt and the people who had accompanied the complainant and his wife said that they had to take him to the chief's office. He co-operated with them and went to the Chief's Office. Along the way, they were ordered to sit down and asked to explain what transpired. Two men in that group of people cut sticks using their pangas and demanded to know the people who were harassing the children. They then proceeded to beat them and he denied knowing the persons who were harassing the children. In the course of being beaten, he was stabbed in the forehead. The complainant's mother, F W (PW 6) forced her child to touch Josephat Namu as one of those two people who were sexually harassing them. It is at that point in time that they were rescued by the Chief.

11. As a first appeal court I am required to re-assess the evidence upon which the appellant was convicted and make my own independent findings. The appellant has raised five grounds of appeal. I find that the major ground of appeal is ground 3, which has the effect of disposing this appeal. In ground 3 the appellant has faulted the trial court in failing to find that sections 212 and 302 of the Criminal Procedure Code were violated. I find that section 212 is in relation to the right of the prosecutor to call rebuttal evidence in response to the unforeseen evidence that an accused adduces suddenly in his defence. It is therefore clear that the provisions of section 212 of the Crminal Procedure Code are inapplicable in this case. I find that ***section 302 of the Criminal Procedure Code*** is in relation to the cross-examination of

the prosecution witnesses who testify in court. I find in this regard that ***section 151 of the Criminal Procedure Code*** provides that every witness who testifies in a criminal case must be sworn. In terms it states as follows: ***"Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath"***.

12. In this regard, I find that the minor witnesses namely PW 1, PW 3 and PW 4 should not have been allowed to testify by giving what the trial court called *"unsworn evidence."* This was improper. After finding that the three minors were not competent to give sworn testimony, they should not have been allowed to give what the trial court called *"unsworn evidence."* It therefore follows that the admission of their evidence is not authorized by law in view of these provisions and should therefore be excluded.

13. The purpose of a *voire dire* examination is to ascertain the competence of a minor to give sworn testimony. The binding nature of the solemnity of the oath ensures that a sworn witness gives truthful evidence. If a sworn witness gives false testimony, such a witness may be charged with perjury which is an offence under section 108 and is punishable for seven years imprisonment in terms of section 110, both of the Penal Code (Cap 63) Laws of Kenya. The solemnity and binding nature of the oath and the sanctions that may be imposed upon a witness who commits perjury are safeguards in favour of an accused person and their absence makes it unsafe to rely on the unsworn statements of PW 1, 3 and 4 The lack of the solemnity of the oath to tell the truth and lack of sanctions that may be imposed on these minor children makes it unsafe to rely on their "unsworn statements". The purpose of the oath and the accompanying sanction in the event a witness commits perjury are intended to protect the trial rights of an accused person as provided for in ***Article 50 of the 2010 Constitution of Kenya.*** The two safeguards namely the oath and the accompanying sanctions cannot be extended to minor children who give what the trial court termed "unsworn" statements.

14. I must point out that as between ***sections 19 of the Oaths and Statutory Declaration Act and section 151 of the Criminal Procedure Code,*** both of which are in relation evidence of children of tender years, I find that the provisions of ***section 151 of the Criminal Procedure Cod***e apply by requiring sworn evidence to be given upon oath. The reason is that the provisions of section 151 are couched in mandatory language and are specific the evidence of minors must be on oath, whereas those of section 19 of the Oaths and Statutory Declaration Act are of a general application.

15. In view of the foregoing finding that the evidence of the three minor children should not have been allowed to make unsworn statements. I further find that the remaining evidence of the mothers of the complainants, that of the doctor and the police officers cannot support the conviction and sentence in counts 1 and 2. The upshot of this is that it is unnecessary to consider grounds 4 and 5 of the petition of appeal because they are moot.

16. In the circumstances, the appellant's appeal against both conviction and sentence is hereby allowed. The conviction and sentence are hereby set aside.

17. The appellant is hereby ordered released unless otherwise held on other lawful warrants.

**JUDGEMENT DATED, SIGNED** and **DELIVERED** in open court at **EMBU** this **22nd** day **SEPTEMBER 2016**

In the presence of the appellant and Ms Mbae for the respondent

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**22.09.16**