



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NUMBER 139 OF 2011**

**FERESIO NJERU NJERU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Siakago 766 of 2010 by S.M. Mokuu  
PM on 03.08.11)*

**JUDGMENT**

The appellant was charged with the offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act and an alternative charge of an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. He was convicted of the main charge. During the hearing, the prosecution called four witnesses, that is PW 1, the clinical officer, PW 2, the child, PW 3, the child's grandmother and PW 4 the investigating officer.

The learned Magistrate conducted a voire dire of the child whose age was estimated to be about 3 ½ years. He concluded that the “witness is somehow knowledgeable. She shall give unsworn statement.”

PW 1 proceeded to give unsworn testimony of the felonious incident and it is upon her testimony that the appellant was convicted. The Magistrate having considered that her testimony was corroborated by the other evidence.

What is of concern though is that the appellant was not given an opportunity to cross-examine the child, who was the only witness who gave incriminating and direct evidence against him. I think this vitiates the entire proceedings and as such, the conviction and sentence are quashed.

As this is a relatively recent matter, I direct that there shall be a retrial of the appellant.

**D.A.S MAJANJA**

**JUDGE**

**15.10.13**

**Court:**

Judgment read and delivered in open court this 15<sup>th</sup> day of October, 2013

**D.A.S MAJANJA**

**JUDGE**

**15.10.2013**

In the presence of

M/S Aluda for state

Appellant

Njue – Court clerk.