Case Number:	Criminal Appeal E003 of 2021
Date Delivered:	25 Nov 2021
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Thripsisa Wanjiku Cherere
Citation:	Isaiah Gitonga v Republic [2021] eKLR
Advocates:	For the State Ms. Mwaniki
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. A.G. Munene - SRM
County:	Meru
Docket Number:	-
History Docket Number:	S.O No. 55 of 2018
Case Outcome:	Conviction quashed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E003 OF 2021

BETWEEN

ISAIAH GITONGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

***(An appeal from the conviction and sentence in* criminal S.O No. 55 of 2018**

in the Chief* Magistrate's Court at Maua *by* Hon. A.G. Munene *(SRM)

on 05.10.2020)

JUDGMENT

The Trial

1. **ISAIAH GITONGA** (***Appellant***) has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (**the Act**). The offence was allegedly committed on 17th November, 2018 against **DN** a child aged 4 ½ years.

Prosecution case

2. The prosecution called a total of five (5) witnesses in support of its case. **PW1, LN** stated that the **co**mplainant who is her daughter was born on 20.06.2014 as shown on her certificate of birth PEXH. 1. She recalled that on 18.11.2018, she traveled home from Nyeri after her father informed her that someone had tried to defile her daughter and found the child in hospital where she was undergoing treatment. **PW2**, complainant, a minor stated that she was with Gitonga in the tea farm when he pricked her private part with a stick and she felt pain. **PW3 HK**, complainant's aunt on 20.11.2019 received a complaint from complainant that Appellant who is their neighbour had pricked her with a stick in her private parts. **PW4 Janet Kathimbali** stated that she had employed Appellant to pick tea leaves for her from 04.04.2018 until he was arrested in November, 2018. She stated that she was staying with the complainant around the material time and that upon receiving a report from PW3 that Appellant had defiled complainant, she escorted the minor to hospital. In cross-examination by Appellant, she conceded that her daughter Jenifer was at home on the day that complainant was allegedly defiled and denied that she owed Appellant any money. Complainant was on 22.11.2018 examined by **Bernice Mutire (PW5)** a clinical officer. She noted that complainant's hymen was freshly torn and the outer genitalia was reddish and swollen which were suggestive of penetrative sexual activity. She produced complainant's P3 form and treatment notes as PEXH. 2 (a) and (b) respectively. **PW5 PC Tabitha Wanjiku**, the investigating officer received complainant's report on 21.11.2018 and after investigations caused Appellant to be charged.

Defence case

3. In his sworn defence, Appellant stated he was a supervisor in a tea farm of one Murungi. He denied the offence and stated that

he was framed by PW4 after he demanded money that she owed him.

4. *In a judgment* dated on *05.10.2020*, Appellant was convicted and sentenced to serve 40 years' imprisonment.

The appeal

5. Aggrieved by this decision, Appellant lodged the instant appeal. From the grounds and written submissions filed on 01.09.2021, Appellant mainly complains that the prosecution case was not proved

6. The state did not file any submissions.

Analysis and Determination

7. It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**).

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the Appellant.

9. Before I delve into the substance of the appeal, I wish to deal with an issue of law which was neither raised by the Appellant nor by the state but which cannot be wished away.

10. In considering the matter of evidence by a child of tender years, the Court of Appeal in **Johnson Muiruri v. R. (1983) KLR 445** held as follows:

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which [case] his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him."

11. The court record reveals that the complainant, a child of about 4 ½ years was the primary witness to the incident. The complainant was not subjected to *voire dire* examination to determine if she was possessed of sufficient intelligent to understand the importance of telling the truth but this aspect seems to have eluded the trial court.

12. Subjecting a witness of tender age to *voire dire* examination is founded under **Section 125 (1)** of the **Evidence Act**, which states: -

"**All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".**

13. **Section 19 (1)** of the **Oaths and Statutory Declarations Act** provides the procedure of receiving evidence of a child in the following terms:

14. **"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".**

15. In the leading case of **Kibangeny Arap Korir v Republic, [1959] EA 92**; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.

16. In a recent decision of; **Patrick Kathurima v Republic, [2015] eKLR**, the Court of Appeal held:

"We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes''.

17. In addressing what age would be appropriate for a trial court to conduct a *voire dire* examination, this court has also considered the holding in the case of **Maripett Loonkomok v Republic [2016] eKLR** where the Court of Appeal reiterated that children under the age of fourteen (14) ought to be taken through a *voire dire* examination and held that:

"The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. The court reiterated the holding in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 where it categorically stated that the definition in the Children Act is not of general application and that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify.

18. The court additionally stated that:

"It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* examination. It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not *per se* vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person."

19. From the foregoing decisions supported by the definition of a child of tender years to be 14 years, I have no good reason to depart from this well-trodden path, as I am persuaded that the purpose of undertaking *voire dire* examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 4 ½ years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances I find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsafe to sustain.

20. Having found that the trial of the Appellant was vitiated by the failure to conduct *voir dire* examination, I need not belabor on the other grounds of appeal. The material placed before the trial court confirms that apart from the issue that *voir dire* examination was not conducted, the available evidence, if it had been received according to law, is substantial and a conviction might well be had upon it.

21. The Appellant was arrested on 22.11.2018 and convicted on 05.10.2020. *A retrial if ordered is unlikely to be affected by non*-availability and possible loss of memory of the witnesses for the reason that *the offence was allegedly committed in November, 2018 which is than three years ago.*

22. Accordingly, I allow the Appellant's appeal, quash the conviction and set aside the 40 years' imprisonment and order that he shall be **retried** before another magistrate other that **Hon. A.G. Munene**.

23. The Appellant shall be presented to the Maua Chief Magistrate's Court on **30th November, 2021** for plea taking and such other and/or further orders that the court might deem fit to grant. Those shall be the orders in the appeal.

DELIVERED AT MERU THIS 25TH DAY OF NOVEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

COURT ASSISTANT - KINOTI

APPELLANT - PRESENT IN PERSON

FOR THE STATE - MS. MWANIKI