REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 69 OF 2011

THOMAS GITONGA MAINA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal against Judgement, sentence and conviction in Criminal Case Number 38 of 2010,

R vs Thomas Gitonga Maina at Nyeri, delivered by Ogembo D.O., P.M. on 20.4.2011).

JUDGEMENT

The appellant seeks to quash the conviction and sentence passed against him in criminal case number **38 of 2010** in which he was convicted of the offence of defilement contrary to Section **8 (1)** as read with section **8 (2)** of the Sexual Offences Act.[1] The particulars of the offence were that on the 17th day of October 2010 in Nyeri District within central province, he intentionally and unlawfully did an act which caused his penis to penetrate the vagina of **M W W**, a child aged 4 years.

The appellant faced an alternative charge of indecent assault contrary to Section **11 (1)** of the Sexual Offences Act.[2] It was alleged that on 17th October 2010 in Nyeri District within central province, intentionally and unlawfully committed an indecent act with **M W W** by causing his penis to touch her vagina.

The child's mother testified that at around 2pm on 17th October 2010, **PW3, E N W** called her and informed her that the minor was missing, they searched for her in vain but on the way she received a call that a one Gitonga had been seen holding her hands on the road. She reported the incident at the police station and as she was recording the statement she received a call that the child had been brought by Gitonga's sister. She advised that they bring the child to the police. At the police station, the minor said Gitonga had taken her to the grass and inserted something between her legs. She examined her and saw some watery discharge from her vagina. She took her to Nyeri Provincial General Hospital and the P3 form was completed. Subsequently the appellant was arrested.

As for the minor**, *Voir Dire*** examination was not conducted at all. The magistrate looked at her, she was 4 years old and recorded that *"she is obviously of tender age"* and directed that she gives unsworn evidence in camera. The child stated that *"M W W is my name, I am 4 years old. I go to [particulars withheld] nursery school. I know Gitonga. He is the one seated in court (points to accused). He removed my underwear."* At this point the child stopped speaking and looked scared and had tears coming from her eyes.

PW3 was a class 8 pupil. Though the record does not indicate her age. The magistrate did not conduct *voir dire* examination. Her evidence was that on 17.10.2010 PW1 called them and asked they take a cake to her, that it was the minor who took it but did not return and when she did, she appeared with the accused. That the accused told her to go to her grandmother but when she returned, she did not find the accused and the minor. She notified her mother and they looked for her in vain. Later in the evening the minor appeared with the accused. She confirmed that she knew the accused.

PW4 confirmed that she saw the minor appear with the appellant behind her when the minor was being looked for. **PW 6** aged 15 years and in class 8 confirmed that he saw the appellant holding the minor's hand and they were walking behind him. Again, the magistrate did not conduct *voir dire* examination yet the witness who was a minor.

PW7 a police officer issued the P3 form while **PW8** Dr James Waweru produced P3 form and confirmed that the findings were consistent with defilement.

The accused elected to give sworn evidence which in my view did not address key allegations against him such as whether or not he was the one who was seen with the child. Instead he alleged that he used to give credit to the minors mother and stated that he was put in vehicle, severely beaten, was hospitalized and later charged in court.

The appellant in his written submissions maintained that there was no evidence to support the conviction while learned counsel for the DPP submitted that there was overwhelming evidence and urged the court to uphold both the conviction and sentence.

Three minor witnesses testified in this case and the record shows that the magistrate never conducted *voir dire* examination for all of them. To me this was a serious omission. In *Gabriel Maholi vs R,**[3]* the East African Court of Appeal said in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.

In *Kibangeny vs R***[4]** the Court of Appeal stated that *voir dire* examination should precede the swearing and the evidence, and should be directed to the particular questions whether the child understands the nature of an oath and allowed an appeal for failing to comply with the said requirement.

In the case of *Nyasani s/o Bichana vs R*[5] the court held that failure to conduct a *voir dire* examination is fatal to the prosecution case *where there is no other evidence sufficient enough to sustain a conviction*. A similar position was held in the case of *Hussein Ali Genga vs R*.[6] Thus, I find that the evidence of the three minor children was not properly received and I disregard the said evidence while determining this case.

However, the evidence of **PW1, PW5**, the Doctor and the police officer remains unshaken, clear and convincing and was not rebutted by the defence tendered by the appellant. I find that the said evidence establishes the ingredients of the offence discussed below and the guilt of the appellant to the required standard hence the conviction was safe.

Section **8(1) & (2)** of the Sexual Offences[7] provides that:-

> ***8(1)****A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> ***8(2)*** *A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

Section **8 (1)** cited above provides the key elements of the offence of defilement. These are **"Penetration,"** and **"Child".** The act defines **"penetration"** as partial or complete insertion of the

genital organs of a person into the genital organs of another person while **"child"** has the meaning assigned thereto in the children Act. It is extremely important that we bear in mind the category of persons defined in Section **2** of the act as **'vulnerable person'** which includes a *child.* I find no difficulty in concluding that the minor in this case was a vulnerable person.

Section **8 (1)** defies the offence of defilement and therefore before section **8 (2)** comes into play, the prosecution must prove the offence of defilement was committed. As state above, an important element of defilement is penetration. From the Doctors evidence who testified that the hymen was broken, it is clear that there was penetration. The complainant was aged **4** years. Her age was not disputed. The magistrate noted that the child was tender and unable to communicate and started crying when asked to explain what happened. It is clear that the child was a vulnerable person within the above cited definition.

I am satisfied that the prosecution proved the offence of defilement under section **8 (1)** as read with section **8 (2)** and that the necessary ingredients of the offence as enumerated above where proved beyond doubt.

On the sentence, Section **8 (2)** of the Sexual Offences Act provides that a person guilty of an offence under this section is liable upon conviction to imprisonment for life. This is the sentence prescribed under the law and I find no legal reason to disturb it. The upshot is that this appeal fails and the same is hereby dismissed.

Signed, Delivered and Dated at Nyeri this **13th** day of **October** 2016

John M. Mativo

Judge

---

[1] Act No. **3** of 2006.

[2] Ibid

[3] {1960} EA 86

[4]{1959}E.A.92

{1959} EA 190

[6]HC CR APP NO. 91 OF 2011.

[7] Act No. **3** of 2006