



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 6 OF 2016

JACKSON KOREJA PARASOLOI APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence in Kilgoris PMCR NO. 1 of 2013) (Hon. M. Munyendo - RM.)

JUDGMENT

(1) The appellant, **Jackson Koseja Parasoloi**, was convicted and sentenced to twenty (20) years imprisonment by the Resident Magistrate at Kilgoris for the offence of defilement, contrary to **S. 8(1)** read with **S.8 (3)** of the Sexual Offences Act. It was alleged that on diverse dates between the 25th and 31st December 2012, at [particulars withheld] area, Transmara West District, he defiled M M K, a child aged fifteen (15) years.

(2) Being dissatisfied with the conviction and sentence, the appellant preferred two separate but similar appeals i.e Appeal No. 6 of 2016 and Appeal No. 14 of 2016. These were consolidated for hearing as one appeal after it was realized that separate files were opened due to a filing error at the registry.

This file, Appeal No. 6 of 2016, became the lead file for the purpose of the consolidation.

(3) The grounds in support of the appeal are contained in the petition of appeal filed herein on 13th May 2016.

In essence, the appellant complains that his conviction by the trial court was based on evidence which was insufficient and unreliable. He appeared in person at the hearing of the appeal and relied on his written submissions in support of the appeal.

(4) The Learned Prosecution Counsel, **M/s Mbelete**, appeared for the State/Respondent and opposed the appeal on the basis of the grounds contained in her written submissions filed herein on 26th April 2017.

The Learned Prosecution Counsel, while contending that the appellant's conviction was sound and lawful expressed reservation on the sentence meted out against the appellant on account of the age of the complainant which according to her, was not clearly ascertained by the evidence availed.

(5) This court, having considered the grounds for the appeal and the rival submissions for or against the appeal had a duty to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Okeno Vs. Rep (1972)EA 32** and **Soki Vs.**

Rep (2004)2 KLR 21).

(6) In that regard, the prosecution case was briefly that the complainant, **M M K (PW 1)**, was at the material time aged about fifteen (15) years and a primary school pupil at [particulars withheld] Primary School. She was at her home on the 25th December 2012, at about 8.00 pm when she prepared tea for her brother E and the appellant.

(7) After taking tea, the appellant left the house and was escorted up to the gate by the complainant's brother who also left the scene and proceeded to a nearby centre. However, the appellant returned to the homestead and stood at the gate from where he called the complainant. She heeded to the call and the two proceeded to a hill which was about 200 metres away.

(8) It was at a bush on the hill that the appellant allegedly threatened the complainant, pushed her to the ground and proceeded to defile her for about two hours. Thereafter, he took her to his neighbour's house where they spent the night. They proceeded to the homestead of one Kalasing'a on the morning that followed and remained there for some days before proceeding to the home of one Ole Kalena where they stayed for five days prior to going to Masurura.

(9) Throughout their stay at the said homes, the appellant and the complainant continued to engage in sexual relationship. They were later found by the complainant's brother and apprehended.

They were taken to Kilgoris Police Station from where the complainant was taken for medical examination at the Trans-Mara District hospital. She was examined by a clinical officer, **Julius Munyendo(PW 5)**, who thereafter compiled and signed the necessary P3 form (P.Ex 2).

(10) The complainant's mother **K K (PW 2)**, confirmed that the appellant was one of the visitors at her home on the 25th December 2012. She suspected him when the complainant on that date went missing from home up to the 31st December 2012, when she was found with him (appellant) at Masurura.

The complainant's brother, **D L K (PW 3)**, learnt of the disappearance of the complainant from home and together with others embarked on searching for her. They located her with the appellant on the 31st December 2012, at Masurura. It was then that the area chief, **Paul Kiptikoi (PW 4)**, arrived at the scene and took the two to the area's D.O office from where they were handed to the police.

(11) The chief had been notified of the disappearance of the complainant on the 26th December 2012.

PC James Ngunjiri (PW 6), investigated the case and later preferred the present charge against the appellant.

The defence by the appellant was a denial and a contention that he was at Migori on 25th December 2012, and returned home on 27th December 2012. He implied that a land dispute between his family and that of the complainant led to his arrest and arraignment in court.

(12) All the foregoing evidence was considered by the trial court which arrived at the conclusion that the complainant (PW 1) was at the material time a minor aged fifteen (15) years and was indeed defiled on various occasions from the 25th December 2012 to 31st December 2012.

The trial court also concluded that the appellant was the person responsible for defiling the complainant.

(13) In this court's opinion, the prosecution's obligation was to fully establish the material ingredients of the offence of defilement by showing that the complainant was a minor at the material time and that she was sexually assaulted on the material dates by the appellant.

With regard to the complainant's age, there was nothing from her relatives including the mother (PW 2) and brother (PW 3) to show that she was aged 15 years old as alleged. Her mother could not recall the

date and year of her birth.

(14) The complainant herself had nothing to show that she was fifteen years old and a primary school pupil. That age appears to have been placed on her by the clinical officer (PW 5) who indicated that she was between 15 to 16 years old.

However, his opinion on the age was not supported by any evidence and was therefore inconclusive.

The trial court apparently relied on the clinical officer's assessment of the complainant's age to hold that the complainant was a minor aged fifteen (15) years old.

(15) Being inconclusive and lacking proper or cogent supporting evidence, the clinical officer's assessment of the complainant's age was unreliable and did not therefore establish or prove that the complainant was a minor at the material time. In the circumstances, it could not be said that the offence of defilement was committed against her. The most likely offence was that of rape but the evidence herein strongly suggested that she was a willing partner in all the sexual escapades and as such, even the offence of rape could not arise.

(16) There was strong and credible evidence from the complainant showing that her sexual partner was the appellant and that he enticed her to leave her home and accompany him to various places for a sexual sojourn. She willingly accepted his plans and played along and if that was not so, then her brother E and their various hosts such as one Kalasinga and one Ole Kalena would have been called to testify for the prosecution and indicate otherwise.

(17) So, even if the appellant was with the complainant on the material dates there was no credible and sufficient evidence to show that he committed any sexual offence against her. He denied having been with her on the material dates but it was obvious that he lied in order to entangle himself from a difficult situation. Let him be advised that one does not need to lie to be a winner or secure an advantage.

(18) For all the foregoing factors, it is the ultimate conclusion of this court that the charge against the appellant was not proved by the prosecution beyond any reasonable doubt. His conviction by the trial court was therefore unsafe and is hereby quashed. The sentence imposed upon him is set aside with the resultant effect of setting him at liberty unless otherwise lawfully held.

[Delivered and signed this 15th day of June, 2017].

J.R. KARANJAH

JUDGE

In the presence of

State Counsel - Mr. Imbali

CC Mohe

Appellant present in person