



REPUBLIC OF KENYA



**Barasa v Republic (Criminal Appeal E034 of 2022)
[2024] KEHC 9767 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E034 OF 2022
WM MUSYOKA, J
JULY 31, 2024**

BETWEEN

AUSTIN BARASA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. PA Olengo, Senior Principal Magistrate, SPM, in Busia CMCSOC No. E072 of 2021, of 22nd September 2022)

JUDGMENT

1. The appellant, Austin Barasa, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(3) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 15th May 2021, at Busia County, he intentionally caused his penis to penetrate the vagina of VO, a juvenile aged 16 years. The appellant pleaded guilty to the charges, and was sentenced to 30 years imprisonment.
2. The appellant was aggrieved with the sentence imposed, and brought the instant appeal, revolving around the fact that he was a first offender not being considered; his mental health not being taken into account; his mitigation not being given weight; and the sentence being excessive.
3. Directions were given on 11th April 2024, for canvassing of the appeal by way of written submissions. Both sides complied.
4. The appellant submits that the sentence violated Article 27(1)(2)(4) of *the Constitution*, as read with Article 50(2)(p) thereof. He cites the *Criminal Procedure Bench Book*, the *Kenya Judiciary Sentencing Policy Guidelines* and *Yawa Nyala v Republic* [2018] eKLR (Odunga, J). He submits that, under section 8(3) of the *Sexual Offences Act*, the penalty prescribed was 20 years.



5. The respondent submits on the right of appeal, in cases of a conviction based on a guilty plea, and cites sections 207 and 348 of the Criminal Procedure Code, Cap 75, Laws of Kenya, Article 50(2)(b) of *the Constitution*, *Olel v Republic* [1989] KLR 444 (Mbaluto, Tanui & Akiwumi, JJ) and *Alexander Lukonye Malika v Republic* [2015] eKLR. There is also a submission on the legality of the sentence. It is averred that the charge, under section 8(3) of the *Sexual Offences Act*, was for victims aged between 12 and 15 years, and the maximum penalty was mandatory 30 years imprisonment, and that the complainant herein was actually aged 16 years, which is covered under section 8(4) of the said Act. It is submitted that there was an aggravating circumstance, in that the victim was mentally challenged, and that justified the imprisonment term of 30 years. It is submitted that discretion was properly exercised at sentencing, and *Wanjema v Republic* [1971] EA 493 (Trevelyan, J) is cited. It is argued that the sentence of 30 years imprisonment was not excessive.
6. The appeal by the appellant is confined to sentence. He had pleaded guilty, and his conviction was based on that plea. That then meant he could not appeal against the conviction, on account of section 348 of the *Criminal Procedure Code*, as explained in *Olel v Republic* [1989] KLR 444 (Mbalukto, Tanui & Akiwumi, JJ). The appeal is, therefore, properly grounded.
7. I understand why the respondent is raising the issue of conviction, for the appellant has not raised it, in his grounds of appeal, as well as his written submissions. The respondent points out that the complainant was 16 years of age, at the material time, and, therefore, the charge ought not have been brought under section 8(3) of the *Sexual Offences Act*, which covers minors aged 15 years and below, but under section 8(4) of the Act, which covers minors in the age bracket of 16 and 17 years. That would mean that the appellant actually pleaded to a charge that was defective. The appellant has not raised that in his appeal, but the respondent has noted it, and has sought to explain it away. The case by the appellant is that the penalty imposed on him, of 30 years in jail, was founded on section 8(3), meant for victims aged 15 and below, yet the victim, in his case, was above 15, and, therefore, impliedly, he should have been charged under section 8(4) of the Act, and, thereafter, he should have been sentenced to a maximum of 20 years. He is right.
8. The bigger issue is that the appellant was made to plead to a defective charge. The charge sheet indicated the complainant to be 16 years, yet the charge was founded on section 8(3), rather than on section 8(4). That was not fatal, and the anomaly could be cured, and should have been cured at the trial. The failure to address that at the trial meant that the appellant was subjected to a higher or stiffer punishment or sentence than should have been the case in law.
9. Is that anomaly curable at this stage? Yes, it is. It can be addressed, without prejudicing the appellant. He conceded to the facts as read to him, but the misstatement of the sentence provision was a matter of law, that the trial court ought to have noted. The role of the appellate court is to audit the trial process, as conducted by the trial court, and to clarify the law. Where anomalies are noted, the appellate court may correct the mistakes, where that is possible, without prejudicing the appellant, or to remit the matter to the trial court for correction.
10. I note that while the respondent acknowledges the anomaly, it does not seek its correction, but rather argues that the conviction was founded on a guilty plea, from which no appeal is permissible. With respect, that position is not tenable. The only time that position would hold would be where the plea-taking process was not faulty. Where it was not flawless, as was the case here, the appellate court would revisit, to correct any anomaly, to obviate a situation where the appellant serves a faulty sentence. The appellant shall be treated as having been convicted under section 8(4) of the *Sexual Offences Act*, rather than section 8(3) of the Act, and the sentence to be considered ought to have been that prescribed under section 8(4) of the Act.



11. There has been quite a bit of development in the area of sentencing in respect of sexual offences. This followed in the wake of the Muruatetu cases, that is to say *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) and *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), where the Supreme Court pronounced on the unconstitutionality of mandatory sentences, and recommended that the High Court address itself to provisions for offences other than murder, which was the only one subject of the Supreme Court decisions. The High Court dealt with the provisions in the *Sexual Offences Act* in the Maingi and Wachira cases, that is to say *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J), where it declared the mandatory sentences, under that statute, unconstitutional, and decreed that trial courts had discretion to consider sentences outside of what was provided in the provisions of that Act. The appellant ought to benefit from the pronouncements in the Maingi and Wachira cases.
12. The other issue is around the mental health statuses of the complainant and the appellant, and whether that should have been a factor in sentencing. The appellant has presented no material on the mental issues that he might have had, as at the date of his sentencing. That should have arisen at mitigation. He did not disclose his challenges then, and he has not disclosed them even now. Of course, where the complainant suffers some element of mental unsoundness, there could be the possibility that the perpetrator took advantage or exploited that condition to have his way with the victim, and it could be a factor to be taken into account at sentencing. The fact of the mental challenges of the complainant was raised when the appellant was initially arraigned, and the court ordered for an assessment be done on the complainant. The fact of the mental health of the complainant was also mentioned in the facts that were read out to the appellant, and which he confirmed to be true.
13. I would agree with the respondent, that the offence was aggravated. I have taken note of the fact that the complainant had mental challenges. The appellant did not even take advantage of that to lure her into the sexual act, he is said to have had forcibly grabbed her, removed her trousers and innerwear, and proceeded to defile her. He used brute force to have his way with the complainant. Given that background, I find that the trial court properly exercised discretion, and I shall not interfere with the sentence imposed. I find and hold that the appeal has no merit, with respect to the sentence imposed, and I hereby dismiss it. It is so ordered.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 31ST DAY OF JULY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Austin Barasa, the appellant, in person.

Advocates

Ms. Chepkonga and Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

