Barasa v Republic (Criminal Appeal 17 of 2019)
[2022] KEHC 13460 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 13460 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 17 OF 2019

DK KEMEI, J

JULY 29, 2022

BETWEEN

DANIEL WEKESA BARASA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable Chief Magistrate dated 2ndJanuary, 2019 in Bungoma Senior Resident Magistrate's SO Criminal Case No. 5 of 2017)

JUDGMENT

1. The appellant, Daniel Wekesa Barasa, was charged before the Bungoma Chief Magistrate's court in Sexual Offences Case No 5 of 2017 with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that the appellant, on diverse dates between January 9, 2017 and January 12, 2017 at [Particulars Withheld] village in Bungoma Central Sub-County within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of MNK, a child aged seventeen years. The appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006 the particulars being that on diverse dates between January 9, 2017 and January 12, 2017 at [Particulars Withheld] village in Bungoma Central Sub-County within Bungoma County intentionally and unlawfully caused his penis to come into contact with the vagina of MNK, a child aged seventeen years against her will. In his judgement, the learned trial magistrate found that the appellant did not commit the offence with which he was charged in the main charge. It was the learned trial magistrate's finding that the evidence was overwhelming against the appellant and therefore proceeded to convict him on the alternative charge and sentenced him to serve fifteen (15) years imprisonment.

2. Being dissatisfied with the conviction and sentence, the appellant has lodged the instant appeal based on the following supplementary grounds:

i. That, the learned trial magistrate erred in law and fact by failing to analyse that despite the amendment of the charge after three witnesses had testifies, they were never recalled to be re-examined contrary to section 214 of the *Criminal Procedure Code.*

ii. That the learned trial magistrate erred in law and fact by failing to consider that one of the major ingredients that is penetration was not proved to the required standard.

iii. That the learned trial magistrate erred in law and fact by failing to analyse that section 8(5) of the *Sexual Offences Act* No 3 of 2006 was contravened as seen by the magistrate on the demeanour, assessment and body physique of PW3 as exhibited before court.

iv. That the learned trial magistrate erred in law and fact by failing to consider that the appellant was accorded an unfair trial contrary to article 25, 27, 50(1), (2) (p) (g) (h) and 49 (1) (f) of the *Constitution*

v. That a clinical officer, witness PW5 was never recalled to testify due to the prosecution apprehension that he would testify to the detriment of their own case.

vi. That the present case was delayed excessively contrary to article 50 (2) (e).

vii. That the mandatory minimum 15 years sentence is harsh excessive and unjust contrary to article 50(2) and section 329 of the *Criminal Procedure Code.*

viii. That the learned trial magistrate erred in law and fact by failing to fully comply with the requirement of section 211 of the *Criminal Procedure Code* by making sure that the compliance is recorded in the court proceedings.

3. On January 16, 2017 the appellant pleaded not guilty and was remanded in custody. In support of its case, the prosecution called six witnesses.

4. According to PW1, No xxxx APC Agaro Buturnago Jumba, the arresting officer, recalled that on January 9, 2017 the mother of the complainant made a report of her missing child at [Particulars Withheld] AP camp and made it known that she was not aware of her whereabouts and that she was a student at [Particulars Withheld]. In the company of other officers, they investigated the report and received information that the complainant had been spotted at xxxx area. On January 12, 2017 they received further information that the complainant was staying with the appellant and embarked on a man hunt for the appellant. They found him at Chebukwa Market on the January 12, 2017 and accompanied him to his house where they found the complainant. They took them to the AP camp at Kabuchai and informed the mother that they had found the complainant. They later took them to Nalondo Police Station and handed them over for more investigation.

   On cross-examination, he stated that they found the appellant at Chebukwa market and who led them to his house where they found the complainant. On re-examination, he stated that it was the accused who led them to where the complainant was.

5. PW2, No xxx APC Ephantus Njeru, investigating officer, recalled that on January 9, 2017 while at the AP camp, the mother of the complainant came to report the missing of her daughter who is the complainant herein. On January 12, 2017 they received a report that the complainant had been found at Ndengelwa and in the company of PW1 they proceeded to Ndengelwa. On their way, while at Chebukwa, they were able to find the appellant and who directed them to a house where the complainant was found. The mother of the complainant was able to identify her daughter and they arrested both of them and took them to Nalondo Police Station. On cross-examination, he stated that he did not enquire as to the owner of the house from where the complainant was found.

6. After a brief voire dire examination, the court formed the view that the complainant understood the meaning of an oath and could therefore tender sworn evidence.

7. According to MNK, the complainant herein, who testified as PW3, testified that she was a form three student at [Particulars Withheld] girls secondary school in 2016. She recalled that on November 7, 2016 she took a child called D to her cousin E. After successfully taking the child and while on her way back home she met the appellant and went with him to his house at Chebukwa but they did not have sex until the following day at 9pm when he removed all her clothes, removed his clothes too and while she was lying down, he laid on her and inserted his penis into her vagina and they did it again. She told the court that they also had sex at Ndengelwa in the house where they were staying on January 2, 2017 at around 4.00 am when the appellant woke her up removed her night dress, removed his clothes laid on her and inserted his penis into her vagina. She testified that she knew the appellant for three months as her boyfriend and that on January 9, 2017 she also had sex with the appellant and again after two days. She stated that the appellant was her husband and his name is DWB. She added that as a wife, she was cooking, taking care of the house and cleaning. She pointed at the appellant in court as the one she had sex with.

8. On May 18, 2017 the prosecution made an application to amend the particulars of the charge sheet and the new charge was read to the appellant for purposes of fresh plea taking. The appellant pleaded not guilty on both the main and alternative charge.

9. PW4, No xxxx PC Isaac Cherogony, the investigating officer, testified that while at the office the appellant, complainant, complainant's mother and two officers (PW1 and PW2) from Kabuchai AP camp came to the station. He was briefed of the issue at hand and immediately commenced investigation. He gave the P3 form and age assessment form and sent PW3 and her mother to Chwele District Hospital to be filled and proceeded to record statements of the witnesses and charged the appellant. After review of the filled P3 form by the doctor, he was convinced that the complainant had been defiled.

10. According to PW5, JNK, the mother to the complainant herein, she recalled on November 7, 2016 PW3 left home to take a small child to Kanduyi and she never came back home. She informed her husband and they went and reported the issue to the chief to assist in looking for PW3. She later received a call from her mother-in-law telling her not to look for her child as she was at Chebukwa with a boy called DB. She immediately instructed her son to go and check and when he returned, he confirmed that indeed PW3 was with the appellant. She called her brother and informed him and went to the home where they did not find PW3 and were informed that they went to Ndengelwa. They quickly proceeded to Ndengelwa where thy found PW3 and took her to Kabuchai Health Centre where she was examined. She produced the birth certificate of PW3 as PEXH.1 and noted that at the time of the incident she was only 17 years old. She identified the appellant in court. On cross-examination, she stated that the appellant was found while in company of the appellant at his house within Ndengelwa area.

11. On July 12, 2018 the appellant prayed for PW5 to be recalled for cross examination as he was not feeling well on the day she testified. The prosecution opposed the application noting that recalling the witness would only cause a delay on the mater. The trial court proceeded to allow the application in the interest of justice and summons were issues to PW5 but she was never cross examined as per the court record.

12. It was the testimony of PW6, TB, clinical officer at Bungoma Referral Hospital, that on January 13, 2017 while at Chwele District Hospital he examined PW3. It was his opinion that PW3 had no hymen, had a whitish discharge and that there was no direct evidence of sexual conduct. He also conducted an age assessment on her by using her dental formula. He observed that it was about three months from

the date of defilement to the date he filled the p3 form and it was not easy to ascertain if the defilement happened on the alleged day. He tendered in evidence the treatment notes as PEX3, the P3form as PXH6 and the age assessment form as PEXH5. On cross-examination, he stated that he would not be able to ascertain that the complainant had been defiled.

13. At the close of the prosecution's case, the appellant was found to have a case to answer and was thus placed on his defence whereupon he tendered his sworn evidence wherein he stated that on January 2, 2017 two people asked him to accompany them to a site to work and they took him to a site and as he waited to be given a job a woman came and called him inside the house and the two men left him only to come back in police uniform. He was taken to Nalondo police station and later Bungoma police station and charged. On cross examination, he testified that he lacks an alibi and does not know the complainant and that he is a married man. He told the court that he is 27 years old and with one child.

14. The learned trial magistrate upon consideration of the whole evidence, found that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted him on the alternative count and then sentenced him to fifteen (15) years imprisonment.

15. The appeal was canvassed by way of written submissions. Both parties have filed and exchanged their submissions.

16. The appellant submitted that the respondent failed to prove its case against him beyond reasonable doubt as the evidence of penetration was not proved. He submitted that the complainant as noted by the court has a big body and looked like an adult and that she had tricked him into believing that she was an adult.

17. It was therefore argued that the appellant's appeal herein is meritorious and this court ought to proceed to quash the conviction herein and set aside the sentence.

18. On behalf of the respondent, it was submitted that the appeal ought to be dismissed and the conviction and sentence upheld. It was therefore submitted that the evidence adduced by the prosecution was substantive and sufficient enough to prove the offence beyond reasonable doubt and that the appellant escorted PW1 and PW2 to his house where they found the complainant.

19. It was submitted that the appellant did not tender in evidence nor prove that indeed the complainant deceived him and that it was also his testimony that he had never met the complainant. It was therefore contended that it was impossible that a stranger whom he did not know deceived him.

20. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of *Okeno vs Republic (1972) EA 32* where the Court of Appeal for Eastern Africa stated that:

> ' An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) EA 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala VR [1957] EA 570. It is not the junction of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) EA 424.'

21. This being a case for defilement, what was to be proved are the ingredients of the offence of defilement and in the case of *George Opondo Olunga v Republic [2016] eKLR,* it was stated that the ingredients

of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

22. In this case, the issue of identification has not been challenged in this appeal. The complainant's evidence is that of recognition and has not been disputed. Therefore, the two critical elements that must be proved to sustain a conviction for the offence of defilement under these provisions of the law are the act of penetration and the age of the victim.

23. In regard to the age of the complainant herein, the same is not in dispute, as a birth certificate tendered in court as evidence indicating that the victim was born on January 1, 2000 was produced in court, thus the complainant at the time of commission of the alleged offence was 17 years old.

24. The next element is proving of penetration. 'Penetration' is a term of art and is defined under section 2 of the act to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'.

25. In *John Mutua Munyoki vs Republic [2017] eKLR*, the Court of Appeal in this regard held that:

> ' Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt. The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this court in the case of Arthur Mshila Manga (supra) observed while allowing the appeal that:
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> 'But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.'
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> The court proceeded and stated that:
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> 'From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'
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> As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was

doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant.'

26. The key evidence relied by the courts in rape cases and defilement in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by the medical officer. In this case, since the complainant was a minor, the evidence of the clinical officer is key so as to corroborate such testimonies. I have critically analysed the evidence of PW6 the clinical officer who testified herein. It was his testimony that he noticed that the complainant had no hymen and that she had a whitish discharge and that the pregnancy and HIV tests were negative. I have looked at the P3 Form produced in court as Exhibit 6, the said clinical officers noted that there was no direct evidence of defilement.

27. The sum effect of the above evidence is that it raises doubt as to whether there was actual or partial penetration. It is clear from the P3 form that the hymen was missing.

28. It is also noteworthy that there were no traces of spermatozoa, yet from the P3 form the same indicates that the complainant was examined three months after the ordeal, and that at no point did she shower. Although absence of spermatozoa cannot discount rape/defilement, it adds to speculations in this case. Even though PW3 gave a detailed occurrence of their sexual activities including the dates, time and venue, that in my view cannot be sufficient to prove penetration.

29. It is trite that the benefit of doubt should always go to the accused person. Therefore, in the circumstances it is my finding that the second element of the offence which is penetration was not proved beyond reasonable doubt.

30. The test to be applied inter-alia to the principles in the cited cases elsewhere in this analysis is to be found in the case of *Bassita v Uganda SC Criminal Appeal No 35 of 1995* where the Supreme Court held:

> ' The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.'
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> 'For evidence to be capable of being corroborated it must:
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> (a). Be relevant and admissible *Scafriot {1978} QB 1016.*
>
> (b). Be credible *DPP v Kilbourne {1973} AC 729*
>
> (c). Be independent, that is emanating from a source other than the witness requiring to be corroborated Whitehead J IKB 99
>
> (d). Implicate the accused

31. Consequently, it is my finding that penetration as an element for proof of defilement was not established beyond reasonable doubt and in the circumstances, it is my finding that the prosecution's evidence in this regard is not watertight and proceed to concur with the holding of the trial court.

32. Be that as it may, I will consider whether the alternative charge herein was proved.

33. Having established that there were doubts as to whether there was actual penetration as noted above, this leads to the next question as to whether the appellant ought to be convicted of the alternative charge, which is committing an indecent act with a child. Indecent act is defined in the *Sexual Offences Act* as follows:

> ' Indecent act' means an unlawful intentional act which causes-
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> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) Exposure or display of any pornographic material to any person against his or her will.'

34. The penalty for indecent act with a child under section 11(1) of the *Sexual Offence Act* is an imprisonment term for not less than 10 years as follows:

> ' 11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.'

35. I also take note that the courts are not trammelled by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful. This was reaffirmed in the case of *JWA v Republic [2014] eKLR*, where the Court of Appeal observed: -

> ' We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.'

36. Consequently, be that as it may, in this case the victim was a child of tender years and indeed, before a child of tender years is allowed to testify in court, the court is required to satisfy itself that the child understands the duty of speaking the truth and whether he/she is of sufficient intelligence to allow his/her evidence being taken.

37. This is done by conducting a voire dire examination before the evidence is taken. In the instant case the trial magistrate indeed undertook the same on the complainant and satisfied himself that the witness evidence was tenable, which position I agree with.

38. Thus, I have no doubt as to whether the child was telling the truth on what had transpired. She was categorical that she was defiled by the appellant, a person she knew and even identified at the dock and even referred to him as her husband for whom she took care of, cleaned for and cooked for.

39. The doubts created above on whether there was penetration leads to my conclusion that the appellant based on the evidence tendered, the same is sufficient to convict the appellant for the alternative charge herein, and I therefore find him guilty of the alternative charge of indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. Hence, the finding by the trial magistrate in that regard was quite sound and must be upheld.

40. On the ground of amendment of a charge, the prosecution only amended the particulars of the dates when the alleged defilement act occurred and that the appellant took plea on the amended charge.

41. I am aware of the decision of the Court of Appeal in *Josphat Karanja Muna -Vs- Republic [2009] eKLR* where the appellant complained that he had not been given a chance to recall witnesses who had testified. The court stated: -

> ' On non-compliance with section 214 of the *Criminal Procedure Code*, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on September 29, 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non-compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant.'

42. In this case since the particulars of the charge sheet were simply amended to reflect the term 'diverse dates between January 9, 2017 and January 12, 2017' and a fresh plea was taken by the appellant. I am convinced that the this does not allow the invoking of section 214 of the *Criminal Procedure Code*. In any event, I do not see any prejudice the appellant suffered by the said amendment since the witnesses if recalled would resort to their previous evidence. Further, the testimony of Pw5 if recalled could not in any way alter the findings of the trial court since she was the mother to the complainant and who did not witness the incident thereby leaving out the complainant's testimony and that of the doctor for consideration. Therefore, this ground by the appellant fails.

43. On the ground of the trial court relying on the evidence of PW5 that was not cross examined by the appellant, it is noted that the trial magistrate in his judgement page 51 stated that:

> ' PW5 was JNK and mother of the complainant. She testified on March 26, 2018. On July 12, 2018 the court ordered that she be recalled for cross examination which was not done. Her evidence was therefore not tested by the cross-examination and her evidence is ignored'
>
> This simply means that the trial magistrate disregarded the evidence of PW5 as the same played no role in the conviction of the appellant. The appellant had the opportunity to cross-examine the witnesses but opted not to do so for some witnesses. In any event, her testimony could not in any alter the findings of the court since she did not witness the incident leaving only the evidence of the victim and the doctor for consideration. Hence, this ground must fail.

44. The appellant has also claimed that the trial court did not give him the benefit of doubt under section 8(5) (6) of the *Sexual Offences Act* since the complainant had deceived him as he had presented herself as an adult. The said section provides as follows:

'(5) It is a defence to a charge under this section if-

a. It is proved that such child deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b. The accused reasonably believed that the child was over the age of eighteen years.'

The record of the trial court shows that upon the appellant being placed on his defence, he did not state that the complainant had deceived him to believe that she was an adult. In fact, the appellant categorically denied ever knowing the complainant at any given time. In any event, even if he had known her, he did not state whether he took any steps or measures to ascertain the age of the victim. The appellant's own words in his defence testimony were thus- 'I have never met the complainant. I do not know MNK.' It is thus quite clear that the appellant cannot purport to claim that he ought to be given the benefit of doubt from the defence provided by statute in relation to a stranger whom he did not know. Hence, the appellant's ground of appeal in that regard must fail.

45. Finally, the appellant has claimed that the sentence imposed by the trial court is excessive. Section 11(1) of the *Sexual Offences Act* in which the appellant was convicted provides:

'11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent with a child and is liable upon conviction to imprisonment for a term of not less than ten years.'

It is noted that the appellant was sentenced to fifteen year's imprisonment. The trial court duly considered his mitigation. The prosecution indicated that the appellant was a first offender. The trial court called for a pre-sentence report on the appellant and which recommended for a non -custodial sentence. The trial court pointed out that the statute provides for a minimum sentence and ordered him to serve fifteen years imprisonment. Indeed, the statute provides for a minimum sentence of ten years' imprisonment. It is noted that the appellant was a first offender and which was a factor in sentencing to be considered by the trial court. The trial court ought to have given the appellant the minimum sentence of ten years. To that extent, the appellant's appeal succeeds. The said sentence shall commence from the January 3, 2018 when his bond was cancelled and was placed in custody.

46. From the foregoing observations, it is my finding that the evidence on record is consistent with the commissions of the alternative offence of committing an indecent act with a child. The conviction arrived at by the learned trial magistrate was sound and I see no reason to interfere with it.

47. In the result, the appeal against conviction lacks merit and is dismissed. The appeal against sentence partially succeeds to the extent that the sentence of fifteen years' imprisonment is set aside and substituted with a sentence of ten years' imprisonment which shall commence from the January 3, 2018.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF JULY, 2022.

D. KEMEI

JUDGE

In the presence of:

Daniel Wekesa Barasa appellant

Mukangu for respondent

Kizito - court assistant