Barasa v Republic (Criminal Appeal E048 of 2024)
[2025] KEHC 13842 (KLR) (3 October 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E048 OF 2024

WM MUSYOKA, J

OCTOBER 3, 2025

BETWEEN

RAVINE BARASA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against conviction and sentence, in Malaba PMCSOC No. 43 of 2023, of 7th November 2024, by Hon. AZ Ogange, Resident Magistrate, RM)

JUDGMENT

1. The appellant was convicted of defilement, contrary to section 8(1)(3) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. He had denied the charge, and a trial was conducted, where the prosecution presented 5 witnesses.

2. The minor complainant, PW1, who was mentally challenged, testified through an intermediary, PW2. According to him, the appellant defiled him at a mango farm, by inserting his penis, the appellant, into his anus, the minor complainant. PW2, the intermediary, testified that the minor had disappeared from home, and she began to look for him. When he was traced and brought home, he had soil on his head, his trousers were dirty, he had dirt in his anus, his walk was distorted and he kept farting. He kept saying Pogba, meaning the appellant, had done bad manners to him. He took them to a mango farm, where they noted that the soil was disturbed, as if there had been some activity. He was taken to hospital, and later to the police station.

3. PW3 was the local administrator for the area, to whom the report was made, and the appellant handed over to. He testified that the appellant admitted the act to him, whereupon he escalated the matter to the police. PW4 was the clinician who attended to PW1. PW5 investigated the matter.

4. The appellant was put on his defence. He opted not to testify or adduce evidence.

5. Judgement was delivered on 7th November 2024. It was found that the offence had been proved to the required standard. The appellant was sentenced to serve 20 years' imprisonment.

6. The appellant was aggrieved, hence the appeal. The grounds are that there was a mistrial, with respect to the language used at trial, as manifested by the fact that the appellant never talked during trial; failure to avail an interpreter for the benefit of the appellant; failure of the court to frame issues and resolve contradictions in the evidence; finding the appellant unremorseful; imposing a harsh sentence; the evidence did not reached the threshold to sustain a conviction; and the conviction was against the weight of the evidence.

7. Directions were given on 17th June 2025, for canvassing of the appeal by way of written submissions. None of the parties filed written submissions within the given timelines.

8. Several issues arise for determination: whether the appellant was entitled to be provided with an interpretation, whether there were contradictions in the evidence, whether the appellant was unremorseful, whether the sentence imposed was harsh, and whether the offence was established beyond reasonable doubt.

9. The first issue is about one of the fair trial rights enshrined in Article 50(2) of *the Constitution*. It is stated in paragraph (m), as the right "to have the assistance of an interpreter ... if the accused person cannot understand the language used at the trial." The argument herein is that the appellant was unable to follow and participate in the proceedings, given that the proceedings were conducted in a language with which he was not familiar, and the trial court ought to have taken steps to provide an interpreter.

10. The languages of the court are English and Kiswahili. These 2 are the national languages. However, not every person, within the borders of Kenya, is conversant enough with both, to facilitate having proceedings conducted exclusively in either of them. Foreigners, for example, from countries and territories where the 2 languages are not spoken; or even locals, for English came to Kenya from the United Kingdom, while Kiswahili is a mixture of Arabic and some Bantu languages. English is traditionally learnt in school. Kiswahili is also learnt in school, and within the community, for those who are not Swahili or from the Bantu communities from which Kiswahili emerged. The reality, then, is that not every person in Kenya, whether citizen, resident or foreigner, would be comfortable enough to be tried in either of the 2 languages.

11. The law is alive to that challenge, hence the constitutional provision in Article 50(2)(m). That provision is reinforced by section 198 of the Criminal Procedure Code, Cap 75, Laws of Kenya, which states the official languages of the court to be English and Kiswahili, and provides for interpretation, where evidence is taken in a language that the accused person or an Advocate, in the matter, is not conversant with.

12. Article 50(2)(m) of *the Constitution* places language, and communication in general, at the heart of criminal proceedings, with respect to access to criminal justice. A court, seized of a criminal trial, is obligated, by Article 50(2)(m), to properly locate or place language and communication at the pedestal, even as it goes through the motions of procedure and substance. From the outset, the trial court should be sensitive to and worry about language and communication, in terms of whether the accused person is conversant with the languages of the court, and, if not, what ought to be done, to ensure that there is effective communication between the court, the accused person and the other actors in the process.

13. I would reiterate what I have stated in other decisions, that the trial process is about the accused person. I concede that the complainant is also a critical person, given that he or she is the initiator of the process, geared to obtain redress for him or her, through the State, for criminal wrongs done to him or her. The trial process is for the benefit of the victim, but it is also about the person that the victim accuses.

Critical attention ought, also, to be given to the accused. A balance must be struck, to ensure protection of the rights and interests of both the accuser and the accused. There is always the risk that the accused is an innocent person, caught up in the process. He could be a victim of mistaken identity, or it could be the case of a person who found themselves at the wrong place and at the wrong time, or a "fall guy" for offences committed by others, or a victim of pure witch-hunt and malice.

14. I raise this because there are often complaints or concerns, from sections of society, that the law gives undue focus to the rights of accused persons, or over-protects them, at the expense of the victims of the crime. This mindset is influenced by the thinking that every person who finds himself in court, facing some criminal charge, is a criminal. However, *the Constitution* holds that such a person is to be presumed innocent, of what he is accused of, until proven guilty. It is true, a lot of the persons who stand charged in court, with offences, are criminals or offenders, who have committed the offences they are charged with. It is also true that many of them are innocent people, who are victims of circumstances. Scrupulous observance of *the Constitution* and the law is meant for the protection of such innocents.

15. The first item of business for the trial court, in criminal cases, should be to consider the fair trial rights of the accused person before them, even before the trial commences in earnest. To enable the accused person fully participate in his trial, he should have the benefit of being on equal terms with the prosecution, and this is where language and communication is key.

16. The trial is about the accused person. At the end of it, the accused person, should he be convicted, would bear the consequences, regardless of his innocence. The trial is mounted to obtain justice for the complainant or the victim of the offence charged, but the person, at the centre of it all is the person accused. So, the trial is about the accused person. It is him that the outcome will sting. The consequences could be grim. It could mean death, if the offence is a capital one. It could mean loss of liberty for a very long time. It could also mean deprivation of property.

17. It is on account of these grim consequences that the trial court should endeavour to ensure that the accused person is able to fully participate in the proceedings. Full participation would require that the accused person understands the charges that he faces, that is to say that he understands what he is accused of having done. Secondly, that he understands the process that he is going to be taken through, and the consequences at the end of it, should he be convicted. Thirdly, that he understands his rights during the course of the trial, that is his entitlements for the purpose of the trial. Most of these are set out in Article 50(2) of *the Constitution*. Fourthly, that he has prior access to the material to be presented or being presented in court as evidence, and to understand what that material is about. Fifthly, that he understands what the witnesses are saying, sufficiently, to enable him pose relevant questions to them, which advance his defence, among others.

18. I reiterate, that the trial is about the accused person. He should be able to understand what is going on in court, and to participate in it. He cannot afford to be a spectator or bystander in his own trial. This should be the case even where the accused person has the benefit of legal representation.

19. So, what happened here? The appellant was arraigned on 12th July 2023. Interpretation was provided in English and Kiswahili. The language used in reading the charges is not indicated, but it could safely be presumed that it was English, with a translation into Kiswahili. The appellant was recorded as responding to the charges in Kiswahili. There was an amendment of the charges, which prompted a fresh re-reading of the charges to the appellant, on 11th March 2024, and the appellant was recorded as responding in Kiswahili. The proceedings were thereafter conducted entirely in English and Kiswahili, or so it would appear.

20. The record is silent on whether the trial court sought to know from the appellant, at arraignment, the language that he was familiar with, and which he was comfortable with, for the purposes of the trial. There is nothing on record indicating that he had chosen Kiswahili.

21. The case by the appellant, from his petition of appeal, is that he did not participate in the proceedings, and he could not, as he had language challenges.

22. The record reflects that, other than denying the charges, the appellant acceded to everything that was suggested by the prosecution. When the prosecution proposed an adjournment on 17th October 2023, he did not oppose it. When the prosecution indicated that it was ready with the case on 5th December 2023, the appellant said he was also ready, and when, later the same day, the prosecution sought adjournment, he did not object. When the matter came up on 5th February 2024, and the prosecution sought adjournment of the matter, the appellant did not object. When the matter came up for hearing on 11th March 2024, and the prosecution indicated that it had witnesses, and was, therefore, ready to proceed, the appellant indicated that he was also ready. When the prosecution proposed to have the testimony of the complainant taken through an intermediary, he did not oppose. He expressed no objections to whatever the prosecution proposed on 16th May 2024, 1st July 2024, 29th July 2024 and 30th August 2024. When he was placed on his defence, on 27th September 2024, he said he would not offer evidence, and would await the determination by the court.

23. The actual hearing was conducted on 11th March 2024, 16th May 2024 and 1st July 2024. The appellant only cross-examined the complainant, and the intermediary, briefly. He posed only 1 question to the clinician, but he did not ask the Assistant Chief and the detective any questions.

24. Looking at the record, one would be tempted to agree with the appellant, that he did not quite participate in the proceedings, given that he asked only a few questions to some of the witnesses, and did not cross-examine the rest at all, because he did not have the capacity to, as he had a language challenge. He did not file written submissions, in this appeal, and I cannot tell the language he would have preferred to use at trial, but the court was obliged to establish whether he was comfortable with the language being used. He appears to have been an ordinary villager, who, probably, had had no prior interaction with the court. The language to be used in court by him should have been the very first consideration, otherwise the court risked going through the motions of a trial, with an accused person who was handicapped, in not fully understanding what was happening, and in his inability to fully engage with the witnesses presented by the prosecution. The trial court ought to have been more cautious, given the seriousness of the charges he faced, which exposed him to a minimum sentence of 20 years imprisonment. He was entitled to being able to fully understand what was going on, sufficiently to enable him confront his accusers.

25. In view of that, I doubt that he had a fair trial.

26. Coupled with that is the fact that the record is silent on whether the rights under Article 50(2)(g)(h) of *the Constitution*, which are about the right "to choose, and be represented by, an advocate, and to be informed of this right promptly;" and "to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly." Both rights are to be communicated to an accused person "promptly." I understand that to mean at arraignment, before anything else is done, such as the charges being read. That constitutional directive to the court was not adhered to. The trial court did not communicate those rights to the appellant at all, leave alone "promptly."

27. The right under Article 50(2)(h) applies to an indigent accused person, and the appellant appears to have been one. Secondly, the charge exposed him to a long term in jail, and that should have triggered an

evaluation into whether "substantial injustice would otherwise result." There are additional demands on the trial court, stated in the *Legal Aid Act*, Cap 16A, Laws of Kenya, which was passed to operationalise Article 50(2)(h). The trial court did not do that which is commanded of it by the *Legal Aid Act*, particularly in section 43 thereof, which sets out the duties of the court in that regard.

28. Are these non-compliances fatal? I believe they are. They are provided for by *the Constitution* of Kenya, which is the supreme law of the land. Whatever *the Constitution* declares or commands cannot be the subject of negotiation. Article 2(1) declares that *the Constitution*, being "the supreme law" of the Republic of Kenya, "binds all persons and all State organs at both levels of government." That would include a court seized of a criminal trial. At Article 2(4), it declares that "Any law ... that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid." The trial of the appellant, in Malaba SPMCRC No. E040 of 2023, was not in conformity with Article 50(2)(g)(h)(m) of *the Constitution*, and, therefore, it was invalid.

29. Can there be a cure to an anomaly, arising from the non-compliance with Article 50(2)(g)(h)(m) of *the Constitution*, by section 382 of the Criminal Procedure Code, which is on the effect of an error in criminal proceedings not founding basis for review, unless the same has occasioned a failure of justice. That provision only cures the process prescribed in the Criminal Procedure Code. It can be of no application to processes and principles stated in *the Constitution*. I reiterate the supremacy of *the Constitution* according to Article 2 of *the Constitution*. Under Article 2(4), *the Constitution* cannot be contradicted by legislation, and where a contradiction or inconsistency, of such kind arises, it is the legislation which ought to give way, and not *the Constitution*.

30. The other grounds of appeal turn on substantive issues, around evidence, burden and standard of proof, among others. There would not need to consider those others, given my conclusions above. There was no compliance with Article 50(2)(g)(h)(m) of *the Constitution*, and section 43 of the *Legal Aid Act*, which meant that the trial of the appellant was not fair, to the extent that these fair trial principles were not complied with. That amounted to a mistrial, which I hereby declare. I order that he be re-tried.

31. Consequently, I hereby quash the conviction of the appellant, in Malaba SPMCRC No. E040 of 2023, and set aside the sentence imposed on him. He shall be set free from prison custody, to be handed over to the police, who shall present him before the court at Malaba, for re-trial, by a court constituted by a magistrate other than Hon. Ogange, RM. Orders accordingly.

DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA, ON THIS 3rd DAY OF OCTOBER 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Ravine Barasa, the appellant, in person.

Advocates

Mr. Antony Onanda, instructed by the Director of Public Prosecution, for the respondent.