



**Baraza v Republic (Criminal Appeal E076 of 2023)  
[2025] KEHC 15768 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15768 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E076 OF 2023  
REA OUGO, J  
OCTOBER 28, 2025**

**BETWEEN**

**NELSON WANJALA BARAZA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon R.K  
Langat (PM) dated 11/12/2023 in Sirisia Criminal Case No 23 of 2020)*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.
2. The appellant was convicted of the main charge and sentenced to 45 years' imprisonment.
3. The appellant filed his petition of appeal and amended grounds of appeal. The deciding ground of this appeal is that the trial magistrate erred in law and fact in failing to inform the appellant of the right of representation. It was submitted that his rights under Article 50 (2) (g) and (h) of *the Constitution* were violated. The respondent did not make any submissions regarding this crucial ground of appeal.

**Analysis And Determination**

4. I have carefully examined the proceedings before the subordinate court, and it is clear that the learned trial magistrate did not inform the appellant of his right under Article 50(2)(g) of *the Constitution*. The right to choose and be represented by an advocate of one's choice is a fundamental element of a fair trial. The failure to adhere to this constitutional safeguard invalidates the entire proceedings, thus making the trial null and void. The court in Migori High Court Criminal Appeal No. 44 of 2019, NMT alias Aunty v Republic [2019] eKLR, held that Article 50(2)(g) of *the Constitution* guarantees every accused



person the right to be promptly informed of their entitlement to legal representation by an advocate of their choice. This right is separate from Article 50(2)(h), which obligates the State to provide counsel at its own expense where significant injustice would otherwise occur. The responsibility to inform an accused person of their rights under Article 50(2)(g) rests with the court. It must be fulfilled immediately upon the first appearance of the accused, before any plea is taken. Failure to comply with Article 50(2)(g) constitutes a violation of the non-derogable right to a fair trial and renders the entire proceedings null and void.

5. The appellant faced a serious felony charge, yet the trial court failed to inform him of his constitutional right under Article 50(2)(g) of *the Constitution* to be represented by an advocate of his choice. This omission was a violation of his right to a fair trial, thereby making the proceedings a nullity.
6. Therefore, the court should consider whether to order a retrial. The applicable principles were stated in the case *Fatehali Manji v Republic* [1966] EA 343.

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

7. The appellant was convicted in November 2023, and no prejudice will arise from ordering a retrial. Accordingly, the appeal is allowed, the conviction quashed, and the sentence set aside for non-compliance with Article 50(2)(g) of *the Constitution*. He shall appear before the Senior Principal Magistrate Court in Sirisia no later than 30th October 2025 for the purpose of entering a plea. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28<sup>TH</sup> DAY OF OCTOBER 2025**

**R.E. OUGO**

**JUDGE**

In the presence of:

Nelson Wanjala Barasa -Appellant in person

Miss Matere - For the Respondent

Wilkister C/A

