Barasa v Republic (Criminal Appeal E004 of 2024) [2025] KEHC 9674 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9674 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E004 OF 2024

MS SHARIFF, J

JUNE 30, 2025

BETWEEN

JAMES WANYOYI BARASA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

A. Background

1. The Appellant herein 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. The particulars being that on the 6th day of June 2023, at about 1.00 p.m. at (particulars withheld) village, Malakisi location in Bungoma West Sub-County within Bungoma County, he intentionally caused his penis to penetrate the vagina of V.S a child of 4 years.

2. In the alternative charge, the Appellant was charged with the offence of committing an indecent act contrary to Section11(1) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on the 6th day of June 2023, at about 1.00 p.m. at (particulars withheld) village, Malakisi location in Bungoma West Sub-County within Bungoma County, he intentionally and unlawfully touched the vagina of V.S a child aged 4 years with his penis.

3. The Respondent called three (3) witnesses in support of its case and in his defense, the Appellant gave a sworn testimony, but did call one witness.

4. At the conclusion of the trial, the trial court made a finding that the Respondent had proved it's case against the Appellant beyond reasonable doubt. The Appellant was convicted and sentenced to serve Forty (40) years in prison.

B. Appeal

5. Aggrieved by the conviction and sentence, the Appellant filed his Petition of Appeal in which he raised the following grounds of appeal:

   a. That the trial Court erred in law and fact by convicting the Appellant on circumstantial evidence that did not meet the required legal standards.

   b. That the trial Court was biased against the Appellant by convicting him by relying on hearsay information that was not collaborated by either the Prosecution and/or evidence on record.

   c. That the trial Court erred in law and fact by shifting the burden of proof to the Appellant contrary to the provisions of the law.

   d. That the trial Court erred in law and fact by misapprehending the facts and applying wrong legal principles causing miscarriage of justice.

   e. That the trial Court erred in law and fact by failing to analyze the entire evidence and form sound judicial conclusion causing miscarriage of justice.

   f. That the trial Court erred in law and fact by failing to find that the Prosecution's case was wrought with fatal discrepancies and contradictions which raised doubts that ought to have been resolved in favour of the Appellant.

   g. That the trial Court erred in law and fact by failing to believe the Appellant's defence without giving cogent reasons for doing so, leading to a miscarriage of justice.

   h. That the Appellant state that his constitutional rights were infringed during the arrest and arraignment in Court and that the trial Court erred in law for failing to protect him.

6. He prayed that this Court allows his appeal in its entirety.

7. The appeal was canvassed by way of written submissions. Both parties complied.

8. As a first appellate Court; I shall re-evaluate and reassess the evidence afresh and arrive at my own independent conclusions. I am however reminded that unlike the trial Court, I neither saw nor heard the witnesses and give due regard for that. See Okeno v R. (1972) E.A. 32.

C. Evidence tendered at the trial court

C.i Respondent's Evidence

9. PW1 told the Court that she was the grandmother of the 4 years old Complainant. According to her, on 6th June 2023, the Complainant went to school but came back home for lunch very late. On inquiry, the Complainant kept quiet and she beat her up. She told the Court that she noticed blood in the Complainant's genitalia and that the Complainant revealed to her that she was defiled by a teacher, James, and lead her to the Appellant herein. She took the Complainant to the hospital. She told the Court that she knows the Appellant as he is a neighbor. On cross-examination, she told the Court that the Complainant leaves for school at 8.00 a.m. and returns home for lunch at noon but on 6th June 2023, the Complainant came back home at 2p.m. She told the Court that she spoke to another teacher by the name Patrick who informed him that the Complainant had left school on that day at 12.00 noon. She told the Court that it was only after her beating the Complainant and noticing the blood on her pant, did the complainant disclose the name of the person who had defiled her.

10. After a brief voire dire examination, the Court established that the Complainant could tender unsworn evidence. She testified as PW2. It was her evidence that she attends school and knew the Appellant herein. According to her, the Appellant injured her (pointing to her private part-between her leg). She told the Court that she was from school but did not reach home as he took her into a maize plantation. She told the Court that after the ordeal, the Appellant told her not to tell anyone and she went home and told her grandmother, PW1. She made a dock identification of the perpetrator as the Appellant. On cross-examination, she told the Court that she usually goes to school with her elder sister and she was not with her sister when the Appellant defiled her. She told the Court that the Appellant gave her Kshs. 10 which she used to purchase sweets with and that her panty had blood.

11. PW3, John Khisa, testified that he is a clinical officer and that the Complainant visited their facility-Malakisi Health Centre. He established that she was 4 years and 3 months and her grandmother brought her with a history of defilement. On the examination, he noted a pink blood-stained panty, the external genitalia of the Complainant were blood stained with an oozing discharge (affluent pus), the Complainant's labia minora was lacerated and hyperaemic, blood stained and tender on touch. On laboratory examination her urinalysis indicated blood in the urine and no spermatozoa. He formed the impression that the Complainant had been defiled. He produced in Court the Complainant's treatment notes and P3 form as PEXH. 2 and PEXH 3 respectively. Moreover, he conducted as age assessment on the Complainant and established that she was 4 years old. On cross-examination, he told the Court that there was penetration of the Complainant and that the same can occur without breaking the hymen. He noted that the P3 form did not indicate the status of the hymen. On re-examination, he told the Court that he did not handle the Complainant.

12. PW4, No. 96245 PC Kasim Shirako, testified that he is based at Malakisi Police Station and was the investigating officer in the matter. He recalled on 6th June 2023 at 5.30 p.m. a person came in with the Complainant, her grand-daughter, to lodge a defilement report against a person well known to them. He proceeded to issue them with a P3 form and he recorded their statements. This witness testified that upon conducting investigations he established that the Complainant, while heading home, got to the school gate when the Appellant accosted her and gave her ten shillings to buy sweets. She then went and bought the sweets and when she took the same to the Appellant, he dragged her into a maize plantation where he undressed and then defiled her. The Appellant told her to keep it a secret. That when the complainant went home, her grandmother examined her and inquired if she was okay. It was later on at 4 p.m. that her grandmother noticed the blood on the Complainant's pant prompting her to examine her genitalia and she saw blood. The Complainant then divulged to her that the Appellant had defiled her. He told the Court that he visited the scene with the girl and found foot prints on the maize and beans farm indicative that the area had been stepped on. PW4 said that he had arrested the Appellant on 7th June 2023 and proceeded to charge him to Court. He produced the blood-stained pant in Court as PEXH.1. On cross-examination, he told the Court that there was no eye witness and that the Appellant used money to lure the Complainant.

C.ii Appellant's Evidence

13. In his defense, the Appellant denied committing the offence. He testified that on 6th June 2013, he had not met the Complainant herein and that at the date and time of incident he was at Malakisi as he left home at 12.50 p.m. and stayed there till 6p.m. On cross-examination, he maintained that he the Complainant was a total stranger to him. On re-examination the appellant said that PW1 had tendered false evidence.

14. DW2, Vincent Wanyonyi Munyasi, testified that he is a retired teacher and knows the Appellant herein as he is his son. According to him, the charges against the Appellant were false and he recalled on 6th

February 2023, he was at home from morning till 4.30 p.m. and he did not see anything. He told the Court that it was when he left the house at 4. 30 p.m. that he met the guardian of the Complainant who told him that the Complainant had been defiled and that she did not know who did that. He told the Court that the Appellant came back home at 6.00 p.m.

D. Analysis and determination

15. I have considered the Appellant's grounds of appeal, the evidence adduced before the trial Court as well as the rival submissions of parties and the applicable law and the following two issues emerge for determination :-

    i. Whether the Respondent's case against the Appellant was proven beyond reasonable doubt and

    ii. Whether the sentence meted out on the Appellant was excessive and harsh.

Whether the Respondent's case against the Appellant was proven beyond reasonable doubt

16. 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*. The section provides that:

> " (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

17. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    a. Age of the complainant;

    b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    c. Positive identification of the assailant.

18. The critical ingredients of the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant. See the case of Charles Wamukoya Karani Vs. Republic, (Criminal Appeal No. 72 of 2013.

Age of the victim

19. On the issue of age of the Complainant, the latter testified that she was 4 years old. PW3, the Clinical Officer testified that as per the P3 form which he produced as PEXH3, the Complainant had disclosed that she was 4 years. This witness further produced an age assessment report dated 8th June 2023 which placed the age of the victim at 4 years. The victim's grandmother PW1 also testified that her granddaughter was 4 years old at the time of commission of the offence.

20. The Court of Appeal rendered itself on issue of age in the case of Evans Wamalwa Simiyu vs R Criminal Appeal No. 118 of 2013 [2016] eKLR, thus:-

> " As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any

useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

21. As emphasized in the above authority, there is no requirement that age be proved, only by way of a Certificate of Birth. Other evidence such as medical proof, the testimony of the victim's parents or guardian and observation can establish the age of a victim. The inevitable conclusion to be drawn from a wholesome analysis of the evidence of PW1, PW2 and PW3 is that there was ample evidence to prove that the minor's age at the material time was 4 years.

Penetration

22. Penetration is defined in Section 2(1) of the *Sexual Offences Act* as hereunder:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

23. There were no eye witnesses to the commission of the offence and this court takes judicial notice of the fact that sexual offences are ordinarily committed in secrecy. In this instance, the victim testified that the appellant had dragged her into a maize farm and defiled her after have enticed her with Ksh 10 to go and buy sweets. This court places reliance on Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

24. The medical evidence tendered by PW3 corroborated the victim's testimony on the issue of penetration: the P3 form produced as PEXH3 indicated that the Complainant's labia minora was lacerated, hyperaemic, blood stained and tender on touch and he noted some lash bile bone. On laboratory examination her urinalysis indicated blood in the urine and no spermatozoa. He made no comment of the Complainant's hymen but formed the impression that the Complainant was defiled He produced in Court the Complainant's treatment notes and P3 form as PEXH. 2 and PEXH 3 respectively.

25. The victim's grandmother PW1 testified that on the material day, the complainant arrived home for lunch late, at 2.p.m. which time did not conform with the victim's routine. This witness stated that her granddaughter remained mute when she inquired of her whereabouts and it was only after she

had examined her genitalia , saw a blood stained panty and chastised her, did she reveal to PW1 of her defilement by the appellant. Both PW1 and PW2 knew the Appellant as he was the Complainant's teacher.

26. In the case of Mark Oiruri Mose v R [2013] eKLR, the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

27. In this case, it is clear from the evidence adduced before the trial court that the Complainant's evidence was not only credible but adequately corroborated by the medical evidence and the evidence of her grandmother (PW1). Accordingly, the evidence undoubtedly proved that indeed the Complainant had been penetrated.

Identity of the perpetrator

28. As to whether the Appellant was the perpetrator, the Appellant's testimony was that he did not know the Complainant. PW1 testified that the Appellant herein is a villagemate and that the Complainant knew him as her teacher in school. It is thus clear that the Complainant knew the Appellant well and recognized him as the perpetrator hence her testimony that she knew him not was a lie. In the circumstances, I find that the Appellant was properly recognized as the perpetrator of the offence.

29. The Appellant testified that he did not know the Complainant herein or PW2. DW2 told the Court that he gave Kshs. 300/= to the Appellant herein at 12 noon to go pay for the repair of his cellular handset. This is an alibi defence and the Court of Appeal in Erick Otieno Meda v Republic [2019] eKLR had this to say on such defence:-

> " In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt."

30. The Court of Appeal then went on to say:-

> " In considering an alibi, we observe that:
>
> a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."

31. There is no doubt that the Appellant herein raised his alibi defence too late in the day thus giving no room for the Prosecution to test it in any way and the same was simply an afterthought. Moreover DW2 did not accompany the appellant to the place where it is said he went to get his handset repaired, wherefore he cannot account for the activities of the appellant after he had left home at 12 noon, which timing coincides with the time that the victim left school.

32. The evidence led by Respondent placed the Appellant at the scene where the offence was committed on the material date. The identity of the Appellant was that of recognition. The offence occurred during the day. There was no possibility of mistaken identity. The alibi defence does not therefore affect the Prosecution case in any way and it must fail in the circumstances.

33. On the issue that the burden of proof was shifted to the Appellant; Section 36 (1) of the *Sexual Offences Act*, 2006 provides thus:

> " Evidence of medical, forensic and scientific nature
>
> 1. Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

The wording of section 36 (1) above is couched in discretionary terms, rather than mandatory terms. The above provision was a subject of discussion by the Court of Appeal in the case of Robert Mutingi Mumbi Vs Republic, Criminal Appeal No. 52 of 2014 (Malindi) where the appellate Court of Appeal stated:

> "Section 36 (1) of the Act empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. ....DNA evidence is not the only evidence of which commission of a Sexual Offence may be proved."

34. In the case of Martin Okello Alogo Vs Republic [2018] eKLR as cited in the case of Williamson Sowa Mbwanga Vs Republic the Court of Appeal stated:

> " ....As the Court of Appeal of Uganda rightly stated, in the Sexual Offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured.........It is partly for this reason that Section 36 (1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing."

35. The above cited authority elucidates the legal position that a medical examination on the Appellant was not mandatory but discretionary as there are other ways other than medical evidence in the form of DNA evidence, which was not the case herein, to prove the commission of a sexual offence. This ground of appeal must thus fail.

36. The Appellant further impugned the trial court's decision on the ground that the evidence of the Respondent's witnesses was full of contradictions thus discrediting the Respondent's case. In Joseph Maina Mwangi Vs Republic *CA No. 73 of 1992* (Nairobi) Tunoi, Lakha & Bosire JJA held: -

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

37. Each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that, clearly, it will be of little effect and certainly would not necessarily mean that the witness is lying or that his/her testimony cannot be relied on. The Court must consider all the evidence and all the circumstances of the case in totality when making a finding on whether to accept the testimony of a witness either in whole or partly. [See Nyakisia Vs R. E. A. C. A. Crim. App. 35-D-71; -/5/71].

38. This Court has subjected the evidence adduced before the trial Court to a fresh scrutiny and it notes that some of the issues raised by the Appellant to be contradictory is the period of time the Complainant took to notify PW1 of her defilement. In my humble view, the same is neither here nor there as the Respondent only had to prove the elements of the criminal offence herein which in my view, were met.

39. In this case, considering the fact that the weight of evidence adduced by the Respondent outweighed that adduced by the Appellant, it is evident that the Appellant was responsible for the sexual abuse on the Complainant.

40. The Appellant also decried the fact that the trial Court relied on a hearsay information to convict him. It must be appreciated that under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the principle in the cases of Woolmington Vs DPP 1935 AC 462 and Miller Vs Minister of Pensions 2 ALL 372-273.

41. I have re-scrutinized, re-analyzed and re-evaluated the appeal record and I have not encountered any instance where the trial court had placed reliance on hearsay evidence. If at all the Appellant did not want PW3 to tender evidence on behalf of his colleagues, all he had to do was to object to the same.

42. As regards the appellant's evidence the same constituted general denials and DW2, the appellant's father testified that he had spent his whole day at his residence and that he had no witnessed any such happenings. This witness did not go to keep watch at the maize farm, which was the scene of crime. The evidence of the defence did not shake that of the Respondent in any way.

43. In the end, I find and hold that the Respondent proved the offence of defilement against the Appellant herein beyond reasonable doubt and therefore the appeal against conviction fails and is hereby dismissed. The conviction of the Appellant for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* was sound and the same is hereby upheld.

Whether the sentence meted out on the Appellant was excessive and harsh.

44. Under *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner in which the penalty is prescribed shows that, the younger the victim, the more severe the sentence. Therefore, it appears to me that, age

of the victim of sexual offence is an aggravating factor which the court should always consider amongst other factors during sentencing.

45. In this case, the Complainant was of the age of 4 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(2) of the Act which provides:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

46. Sentencing is exercise of discretion by the trial Court which should never be interfered with unless the trial Court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See Shadrack Kipkoech Kogo - Vs - R., and Wilson Waitegei V Republic [2021] eKLR).

47. Also, I note that the sentence was passed on 9th January 2024, and the trial Court in sentencing the Appellant did give him a chance to mitigate but he did not have anything to say to the Court.

48. The trial Court was extremely lenient with the appellant who ought to have been sentenced for life, for that is the prescribed sentence under Section 8(2) of the Sexual Offence Act. Had the Respondent issued a notice of enhancement of sentence, I would have been inclined to consider it. In the absence of such a notice, I will not disturb the decision of the trial court on sentence.

E. Conclusion

49. On the balance I do find that this appeal is devoid of any merit. It is dismissed.

50. This file is marked as closed

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Ms Kibet for the state

N/A by Makokha for the appellant

Appellant present virtually

Peter Court Assistant