



REPUBLIC OF KENYA



**Nundu v Republic (Criminal Appeal E055 of 2023)
[2024] KEHC 925 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E055 OF 2023
RE ABURILI, J
FEBRUARY 1, 2024**

BETWEEN

BRIGHTON OBONYO NUNDU APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the conviction and sentence by the Hon. S.O.
Temu delivered on the 5th May 2023 in the Senior Principal
Magistrate's Court in Nyando in Sexual Offence Case No. E078 of 2022)*

JUDGMENT

Introduction

1. The appellant herein Brighton Obonyo Nundu 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 23rd of December 2022 at Awasi location in Nyando sub-county within Kisumu County he intentionally caused his penis to penetrate the vagina of M.B.A. a child aged 10 years.
2. Following the appellant's plea of not guilty, the prosecution called four witnesses in support of its case while the appellant, upon being placed on his defence, gave his unsworn statement and denied committing the offence.
3. The trial court after considering the evidence adduced by both parties found that the prosecution had proved their case against the appellant beyond reasonable doubt. The trial court proceeded to sentence the appellant to serve 50 years' imprisonment.



4. Aggrieved by the trial court's conviction and sentence, the appellant filed his Petition of Appeal dated 9th May 2023 setting out the following grounds of appeal:
- i. That the pundit magistrate erred in law and fact by failure to observe that the prosecution had failed to establish or prove their case to the required standard of cogent proof beyond reasonable doubt which failure occasioned injustice.
 - ii. That the learned trial magistrate misdirected himself by failure to observe that there was no full proof of identification, penetration and age which failure to prove such occasioned a miscarriage of justice.
 - iii. That the magistrate made a non-direction as to the failure of the prosecution side to summon their crucial/vital/essential witness to testify.
 - iv. That the trial magistrate erred in law by failure to observe that I was given an unfair trial contravening Article 50 of *the Constitution* hence prejudiced.
 - v. That the trial magistrate erred in law by misapprehending that evidence of the victim as trustworthy notwithstanding that there was no other evidence that emerged for corroboration hence misguided.
 - vi. That the trial magistrate erred in law by failing to observe that the evidence adduced was inconsistent and inadequate to base on to convict hence bad in law.
 - vii. That the trial magistrate erred in law on the face of the record by imposing on me a harsh and excessive sentence of 50 years imprisonment overlooking the principal law of nature to grant a less severe or an appropriate sentence therein.
 - viii. That the assault case had no sufficient evidence.
 - ix. That the trial magistrate erred in law and fact by failure to evaluate my cogent alibi defence but shifted the burden of proof on me hence prejudice.
5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. It was submitted that the trial magistrate erred in law and fact as the evidence adduced by PW1,2,3 & 4 failed to prove the prosecution's case beyond all reasonable doubt to sustain a conviction for the alleged offence of defilement.
7. The appellant submitted that none of the ingredients of defilement were proved by the prosecution. It was further submitted that the trial magistrate convicted and sentenced the appellant on the wrong principles of law and even went further to sentence the appellant to 50 years' imprisonment.
8. The appellant further submitted that the trial court made an error in law when it rejected his defence which created doubt in the prosecution case and instead relied on section 124 of the *Evidence Act* to convict. Reliance was placed on the case of Nguli Mulili v R [2014] eKLR where it was held inter alia that an accused shall not be liable to be convicted on the basis of the evidence of a victim unless such evidence is corroborated.



9. The appellant submitted that the trial magistrate breached his constitutional right to a fair trial under Article 50 (2) of *the Constitution* by denying him the opportunity to recall a witness specifically PW3 & PW4 whose testimonies were given in English yet the appellant only understood Dholuo.

The Respondent's Submissions

10. On the age of the complainant, the Respondent submitted that the Birth Certificate indicated that the complainant was born on the 23rd December 2012 and was thus 10 years old, which evidence was corroborated by the testimony of PW2, the complainant's guardian.
11. On penetration, it was submitted that the same was proved by medical evidence adduced by PW3, the clinical officer who examined the complainant, which evidence was corroborated by the complainant's evidence.
12. As regards the identity of the perpetrator, it was submitted that the complainant testified that it was the appellant who took her to his house where he defiled her under threat that he would cut her with a panga and further that the appellant was her neighbour.
13. The respondent submitted that the sentence passed on the appellant was lenient as the trial court took into consideration the appellant's mitigation. It was further submitted that the sentence was commensurate to the serious offence considering that the prescribed sentence under the law is life imprisonment.

Role of the Court

14. As first appellate court; I am under a duty to re-evaluate and reassess the evidence afresh and arrive at my own independent conclusion. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See *Okeno v R*. [1972]E.A. 32

Evidence before the Trial Court

15. Revisiting the evidence adduced before the trial court, PW1 the complainant gave an unsworn testimony that on the 23.12.2022 she was in the house mopping when the appellant entered and approached her but she told him to wait until she finishes her mopping. It was her testimony that the appellant held her firmly by her right hand and told her not to scream otherwise he would kill her.
16. It was the complainant's testimony that the appellant took her to his house which was about 30 metres away and the appellant informed her that he wanted to do something with her and asked her to go and sit on the bed but she responded by telling him that she wanted to go and finish her work prompting the appellant to carry her to the bed and informed her that he would use the panga if she screamed.
17. The complainant testified that the appellant removed her pant as well as his trouser which he lowered to his legs then proceeded to "put his urinating thing and entered it into her urinating part." It was her testimony that the appellant did not put anything on his penis prior to defiling her. She testified that she felt pain and cried. It was her testimony that the appellant finished and stood at the door while his brother, Otieno, was outside removing clothes from the wire. She testified that she wanted to call out to Otieno but the appellant threatened to beat her if she did not go home.
18. It was the complainant's testimony that she went home, finished her chores then went to where her mother was and her mother escorted her to Ayucha hospital and later to the police station. The complainant testified that her mother tried to look for the appellant that night but was not successful



- and only found him the following morning. The complainant testified that she was born on the 23.12.2012. She further testified that the appellant was a neighbour and was well known to her.
19. In cross-examination the complainant reiterated her testimony.
 20. PW2, the complainant's sister testified and corroborated the complainant's testimony stating that on the 23.12.2022 she had left her daughter and the complainant at home and proceeded to work. It was her testimony that the complainant came to her place of work and informed her of the appellant's actions. She testified that she took the complainant to Ayucha Hospital from where they were referred to Ahero Hospital. She further testified that she went to Awasi Police Station and reported the incident. It was her testimony that the distance from her house to that of the appellant was not big, about 300 metres. PW2 testified that she had known the appellant for over 5 years. She testified that the complainant was born on the 23.12.2012.
 21. In cross-examination, PW2 stated that the doctor stated that the complainant was defiled and that she bled.
 22. PW3, the clinical officer from Ahero Hospital who examined the complainant testified that on examining the complainant, he became aware from the complainant that she was defiled by a person known to her. He testified that the complainant's clothes had blood stains. He further testified that she had injuries to the labia majora and labia minora which were bruised. PW3 testified that there was fresh blood oozing from the vagina and the hymen was not intact. It was his testimony that penetration was caused without a condom but that there were no spermatozoa seen. He produced the P3 form as PEX3. In cross-examination, PW3 stated that he did not examine the appellant.
 23. PW4 No 248759 PC Woman Eunice Afwande testified that on the 23.12.2022 the complainant and her mother went to the police station and reported the incident of defilement and that the following day, they went and arrested the appellant at his brother's residence. It was her testimony that they took the appellant to his house but he refused to open the door forcing them to break in where they found a spear and a panga. It was her testimony that the minor was turning 10 on the day of the incident having been born on the 23.12.2012 as was evident from the Birth Certificate she produced as PEX1.
 24. Placed on his defense, the appellant gave sworn testimony denying the charges brought against him. The appellant gave an alibi that on the 21.12.2022, after returning from work, the complainant minor approached him with an offer for clearance at her home which he indicated he would do on the 22.12.2022.
 25. It was his testimony that on the 22.12.2022, he proceeded to PW2's home where PW2 showed him where he was to clear and she paid him Kshs. 200. He testified that he worked from 10am to 4pm when he completed the work. The accused testified that the following day, he went to PW2's house at 10am for the balance of Kshs. 500 but PW2 became violent forcing him to go back home.
 26. The accused testified that on the 24.12.2022, he went back to PW2's place to pursue payment of the balance due to him but PW2 failed to give him the money so he went to his brother's house where he stayed and at 10am, police officers went, assaulted and arrested him then took him to his home where they sought entry into his house but as he did not have the key, the police broke in through the roof and came out with a spear and panga. He testified that he was later taken to the police station where he stayed for 4 days before he was presented to court.
 27. In cross-examination, the appellant denied knowing the complainant and stated that he saw her for the first time in court but admitted that he knew PW2 who was his neighbour for the past 3 years. It was his testimony that PW2 pointed him out to the police.



Analysis and Determination

28. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions filed by both parties to this appeal. The issues for determination are:
- i. Whether the appellant's right to a fair trial was violated;
 - ii. Whether the prosecution proved its case against the appellant beyond reasonable doubt; and
 - iii. Whether the sentence imposed on the appellant, of fifty years' imprisonment was excessive and harsh.

Whether the appellant's right to a fair trial was violated

29. The first issue for determination is whether the appellant was given a fair trial under Article 50 of *the Constitution*. The right to a fair trial lays the foundation for all trials and minimum guarantees that accused persons are entitled to in so far as ensuring the protection and promotion of the rights are concerned. This right to a fair trial cannot be limited.
30. The broad band rights under these Article 50(2) of *the Constitution* relate to (b) right to be informed of the charge, with sufficient detail to answer it. (c) To have adequate time and facilities to prepare a defence. (g) To choose and be represented by an advocate and to be informed of this right promptly (h) 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 (m) To have assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.
31. Section 208 of the Criminal Procedure Code records provides that:
- “(1). If the accused person does not admit the truth, of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence if any
 - (2). The accused person or his advocate may put questions to each witnesses produced against him.”
32. The right to a fair trial is also entrenched as a fundamental human right in a number of international and regional instruments i.e. UDHR – Article 10, ICCPR Article 4 and the African Charter on Human and Peoples Rights at Article 7. The motion of a right to a fair trial under Article 50 of *the Constitution* or in the international or regional instruments embodies broader list of specific rights than those prescribed in the outlined articles.
33. I have considered the appellant's lamentation that his right to fair trial was violated by the trial court, specifically that the trial court denied his request to recall PW3 & PW4, whose testimonies were in English and yet he understands dholuo.
34. It is not enough for the appellant to allege violation of *the Constitution*. A burden is placed on him to demonstrate, with a reasonable degree of precision, the manner in which his rights or the rights of others under these provisions of *the Constitution* have been or are threatened with violation. The person complaining of such violation is required to set out precisely the Articles of *the Constitution* alleged to have been infringed and the manner of such infringement-see *Anarita Karimi Njeru vs Republic* [1979] 1 KLR 154 and that of *Trusted Society of Human Rights Alliance vs Attorney General and 2 Others* [2012] eKLR.



35. In the instant appeal, there is no record in the proceedings of the appellant making an application to recall PW3 & PW4. All that is evident is that on the 6.2.2023 prior to the testimony of PW4 being taken, the appellant made an application to start the trial afresh which application was denied by the trial court on the grounds that the accused had been present in court throughout the trial so far and that he had participated fully by cross-examining all the witnesses.
36. This court observes from the trial court record that there were two court interpreters in court namely- Nelly and Chebet and that the languages used in court were English, Kiswahili and Dholuo, according to the Coram of the Court on the dates that the two witnesses, PW3 and PW4 testified. The trial court record also shows that during the said proceedings, the appellant's ability to understand the proceedings was not diminished as he cross-examined the prosecution witnesses. Even the court indicated that the appellant cross examined PW3 in Dholuo and that when PW4 testified, the appellant stated that he had no questions for the witness in cross-examination. PW4 was the investigating officer in the case.
37. The appellant cannot therefore turn around and tell this court that his right to a fair trial was violated and that he was denied an opportunity to recall witnesses whose evidence he did not understand, which application he failed to make before the trial court and further, as explained hereinabove, the appellant was well conversant with the proceedings which he took part in.
38. Accordingly, I find that this ground of appeal remained unsubstantiated and is thus dismissed.

Whether the prosecution proved its case against the appellant beyond reasonable doubt

39. The appellant was charged, tried, convicted and sentenced under section 8 (1) s read with section 8(2) of the [Sexual Offences Act](#) which creates the offence of defilement and stipulates that:
 - “(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (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.”
40. To sustain the conviction for the charge of defilement under the above provisions, the Prosecution needed to prove the following essential ingredients of the offence of defilement, namely:
 - a. That the Complainant was, at the material time, was a minor and her age was proved to be below 11 years
 - b. That there was penetration of the complainant's genitalia and,
 - c. That it was the appellant who caused the said penetration of the complainant's genitalia with his penis.
41. On the age of the complainant, there appears to be no serious contention that the victim was 10 years-old at the material time. The complainant testified that she was born on the 23.12.2012 which testimony was corroborated by the testimony of her sister PW2 and further supported by the Birth Certificate produced as PEx1 showing that the victim was born on the 23.12.2012 thus by 23.12.2022 when the offence is alleged to have taken place, she was 10 years old and that was on her 10th birthday.



42. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:
- “Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”
43. Rule 4 of the Sexual Offences Rules of Court Rules is explicit that:
- “When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.”
44. The Prosecution in this case produced the best evidence before the lower court to prove the complainant’s age. That evidence cannot be faulted and was not controverted.
45. On penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as:
- “The partial or complete insertion of the genital organs of a person into the genital organ of another person.”
46. In *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.”
47. In the instant case the victim offered unsworn testimony that the appellant was the one who defiled her and that he did so while threatening to kill her. The complainant testified that the appellant “put his urinating thing and entered it into her urinating part “and that she felt pain and cried. It was her testimony that even as she left the appellant’s place, the appellant threatened to beat her if she informed his brother who was outside removing clothes from the wire. The complainant testified that the appellant threatened her with a panga. She testified that after the incident, she went to PW2’s work place and that she was taken to hospital.
48. Her testimony was corroborated on the first part by PW2 who testified that on the material date, the complainant went to her work place and informed her of the incident after which PW2 took the complainant to hospital where she was examined and found to have been defiled.
49. On the second part, the complainant’s testimony was corroborated by PW3 who examined her following the incident and noted that the complainant’s clothes had blood stains, that she had injuries to the labia majora and labia minora which were bruised, that there was fresh blood oozing from the vagina and that the hymen was not intact all signifying that the complainant had been defiled.
50. I am alive to the provisions of Section 124 of the *Evidence Act* where it is clear that a trial Court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (See *George Kioyi V R* Cr. App. No. 270/2012 (Nyeri) and *Jacob Odhiambo Omumbo V. R.* Cr. App No. 80 of 200 (Kisumu).)



51. In the instant case, the complainant who testified as PW1 gave an unsworn testimony. The law relating to unsworn statements was well expressed by Emukule, J in the case of *Mercy Kajuju & 4 Others v Republic* [2009] eKLR as follows:

“I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence....”

52. In *Amber May v The Republic* [1999] K.L.R. 38, it was held that unsworn statement has no probative value notwithstanding the provisions of Section 211(1) of the Criminal Procedure Code. On Appeal against that decision and reported as *May v The Republic* [1981] KLR. 129, the Court of Appeal held, inter alia that:

“1. That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.

2. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya)”

53. It is clear from the trial court record that the trial magistrate undertook a detailed *voire dire* examination of the complainant, and formed the opinion that she did not appreciate the nature or solemnity of an oath and she therefore allowed her to testify without being sworn.

54. The evidence of a child under the age of 14 may be received even if it is not on oath, provided that the court is satisfied, after conducting a *voire dire* examination, that the child possesses sufficient intelligence and understands the duty to tell the truth. In the present case the child was ten years old on the dot. Such a child is defined in Section 2 of the Children’s Act as a child of tender years, that is, a child under the age of ten years.

55. In *Oloo v R* (2009) KLR, the Court of Appeal held that:

“In our view, corroboration of evidence of a child of tender years is only necessary where such a gives child unsworn evidence. (See *Johnson Muiruri v Republic* (1983) KLR).....

...in law, evidence of a child given on oath after *voire dire* examination requires no corroboration in law but the court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it”. (Emphasis supplied)

56. From the evidence adduced before the trial court, the complainant’s unsworn testimony was adequately corroborated by the evidence adduced by the other prosecution witnesses.

57. Weighed against the evidence presented by the prosecution was the evidence adduced by the appellant who gave an alibi in which he claimed that he was arrested following a disagreement with PW2 over monies she owed him for cleaning of her compound.



58. The evidence of penetration of the complainant was overwhelming and there was fresh evidence of the child bleeding from her vagina. A disagreement between the appellant and PW2 over money owed cannot in itself defile a child. I find that penetration was proved beyond reasonable doubt.
59. As to whether the appellant was the perpetrator, the complainant testified that the appellant was a neighbour whom she knew as he lived near their place. The complainant was able to describe the appellant's house in details including the presence of a spear and panga therein which testimony was corroborated by the testimony of PW4 who testified that they found a spear and a panga when they broke into the appellant's house following his refusal to open it. The minor reported the incident immediately she left the appellant's house and even stated how she saw his brother called Otieno removing clothes from the line and wanted to tell him of what had happened to her but the appellant threatened her so she went away and told PW2. That evidence remained uncontroverted. From the record, it is evident that the appellant was well known by the complainant. The offence took place in daylight. In the circumstances I find that the appellant was properly recognized as the perpetrator of the offence.
60. The appellant pleaded that there were inconsistencies and contradiction in the testimony of the prosecution witnesses. he however does not say what contradictions there were in the said evidence.
61. The Court of Appeal of Kenya in the case of Richard Munene v Republic [2018] eKLR stated inter alia that only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.
62. Accordingly, it is my finding that there were no contradictions and inconsistencies sufficient to create doubt in the trial court's mind as to the appellant's guilt. Consequently, this ground of appeal fails and is dismissed.
63. The appellant attempted in his defence to put up an alibi. In the case of R v Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145 it was held as follows:
- “If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”
64. That is precisely what happened in this case. The plea of alibi certainly was never even part of the cross-examination issues raised at the trial by the appellant. I am not persuaded, as the trial court did that the appellant alibi defence addressed any aspect of the case against him of defiling the victim. In my view, the appellant's alibi defence was an afterthought The trial court rightly dismissed it. It is dismissed.
65. The appellant also raised the issue that the prosecution failed to call crucial witnesses to prove their case specifically. In the case of *Bukenya v R* (UGC 1952), the court addressed itself thus:
- “(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
- (ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.



- (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

66. In the case of Donald Majiwa Achilwa and 2 other v R [2009] eKLR the Court stated as follows:

“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See *Bukenya & Others v. Uganda* [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference.”

67. I am however alive to the fact that there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides that:

“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

68. In the case of *Keter v Republic* [2007] 1 EA 135 the court held inter alia that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

69. Similarly, it is my considered view that in the instant case, the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. The trial court was in my opinion not at liberty to determine which witnesses are sufficient to prove the prosecution case. Accordingly, I find this ground of appeal not merited and I dismiss it.

70. The upshot of all the above is that I find that the prosecution proved their case against the appellant beyond reasonable doubt. I uphold the appellant’s conviction for the offence of defilement as charged and dismiss his appeal against conviction.

On whether the sentence imposed on the appellant which is 50 years imprisonment was excessive

71. The appellant has impugned the sentence of 50 years’ imprisonment imposed on him by the trial court. He argues that the sentence is manifestly harsh. The role of this court in an appeal is not to interfere with the discretion of the trial court on the sole ground that the sentence meted out is severe, unless it was manifestly excessive. The Court of Appeal of East Africa stated in *Wanjema v Republic* [1971] EA 494 that:

“An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case”



72. The sentence provided for under section 8 (2) of the *Sexual Offences Act* is as follows:
- “A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction to imprisonment for life”
73. The sentence is mandatory if a child is aged eleven years or less, and in this case, the child was found to be a ten-year-old child. Before sentencing the appellant, the trial magistrate heard and considered his mitigation. In his mitigation, the appellant seemed to not be remorseful and stated that he had a blind brother at home. The trial court called for a social inquiry report which was filed by the probation officer to guide her in sentencing.
74. It is thus clear that the appellant was given a chance to mitigate hence it cannot be said that his right to mitigation was violated or that the trial court was not alive to the Francis Muruatetu decision which held that mandatory death sentence is unconstitutional to the extent of its mandatoriness as it deprives the trial court of the discretion to mete out appropriate sentence having regard to the mitigation and circumstances of the offence. The trial magistrate, in my humble view, properly exercised her discretion in sentencing the appellant by taking into account the mitigations, and the circumstances of the case.
75. However, considering that the appellant is aged 50 years old as at the time of his conviction, it is unlikely that he will serve 50 years in prison and make it 100 years which in itself is life imprisonment as the life expectancy even among healthy people in Kenya is below 70 years. In the circumstances, I shall interfere with the sentence imposed, set aside the 50 years imprisonment and substitute it with thirty years imprisonment to be calculated from 24th December, 2022 the date of his arrest.
76. In the end, the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent stated above.
77. The lower court file and copy of Judgment to be returned. Signal to issue.
78. This file is closed. I so Order,

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF FEBRUARY, 2024

R.E. ABURILI

JUDGE

