



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Tuei v Republic (Criminal Appeal E020 of 2023)  
[2025] KEHC 6321 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6321 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E020 OF 2023  
JK NG'ARNG'AR, J  
MAY 19, 2025**

**BETWEEN**

**EMMANUEL KIPYEGON TUEI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Sexual Offence Case Number 71 of 2020  
by Hon. Kiniale L. in the Senior Principal Magistrate's Court at Bomet)*

**JUDGMENT**

1. Emmanuel Kipyegon Tuei (now Appellant) was charged with the offence of defilement contrary to Section 8 (1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 5<sup>th</sup> February 2020 and 3<sup>rd</sup> October 2020 at [Particulars withheld] Sub Location within Bomet County, the Appellant intentionally caused his penis to penetrate the vagina of B.C, a child aged 13 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that that on diverse dates between 5<sup>th</sup> February 2020 and 3<sup>rd</sup> October 2020 at [Particulars withheld] Sub Location within Bomet County, he intentionally touched the vagina of B.C, a child aged 13 years with his penis.
3. The Appellant pleaded not guilty to the charge before the trial court and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence. The Appellant gave sworn testimony and called one witness in aid of his defence.
4. At the conclusion of the trial, the Appellant was convicted of the offence of defilement and sentenced to serve ten (10) years in prison.



5. Being dissatisfied with the Judgment dated 18<sup>th</sup> April 2023, Emmanuel Kipyegon Tuei appealed against his conviction and sentence.
6. This being the first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court and come to my own independent conclusion and decision. I now proceed to summarize the Prosecution's case and the Appellant's defence in the trial court and their respective submissions in the present Appeal.

#### **The Prosecution's/Respondent's Case.**

7. It was the Prosecution's case that the Appellant defiled B.C (PW1) on diverse dates between 5<sup>th</sup> February 2020 and 3<sup>rd</sup> October 2020. PW1 testified that she used to run away from home to go see the Appellant who was her boyfriend and had sexual intercourse with him on several occasions. PW1 further testified that together with the Appellant, they were arrested at the Appellant's house.
8. Julius Magut (PW4) who was the clinical officer at Longisa County Referral Hospital testified that upon examining PW1, he found PW1 to be pregnant. PW4 further testified that upon further examination, he found that her genitalia had bruises on her labia majora and minora and a laceration at the entry of the vagina. PW4 testified that the findings were consistent with vaginal penetration.
9. The Respondent conceded the Appeal. They submitted that the victim's evidence ought to have been treated carefully since her evasiveness created doubt and such doubt ought to have gone to the Appellant's benefit. That the medical evidence raised doubt as the victim was examined two days after she had been arrested with the Appellant.
10. It was the Respondent's submission that the trial court had indicated that were it not bound by the minimum sentences provided by the Sexual Offences Act, the court would have sentenced the Appellant to three years. That this court should find the period already served by the Appellant as sufficient and release the Appellant.

#### **The Accused's/Appellant's Case.**

11. The Appellant, Emmanuel Kipyegon Tuei (DW1) denied committing the offence. He testified that he was found arrested along the road by police officers and he found the victim (PW1) in the police vehicle. The Appellant further testified that the police officers took him home where he left his luggage and was then booked at the police station where he was told the following morning that he had been seen with the victim.
12. Erick Rono (DW2) testified that he was with the Appellant when he was arrested at around 7 p.m. DW2 further testified that the Appellant wanted to fight the police officers.
13. It was DW2's testimony that he ran and when he called the Appellant the following day, the Appellant informed him that he was at the police station.
14. At the time of writing this Judgement, the Appellant had not filed his submissions.
15. I have gone through and given due consideration to the trial court's proceedings, the grounds of Appeal filed on 28<sup>th</sup> April 2023 and the Respondent's Notice to Concede dated 19<sup>th</sup> March 2025. The following issues arise for my determination: -
  - i. Whether the Prosecution proved its case beyond reasonable doubt.
  - ii. Whether the Defence placed doubt on the Prosecution case.



iii. Whether the sentence preferred against the Appellant was harsh.

**i. Whether the Prosecution proved its case beyond reasonable doubt.**

16. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.
17. Rule 4 of the Sexual Offences Rules of Court 2014 provides 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.
18. No. 90923 PC Patrick Nyoike (PW6) produced a Birth Certificate as P. Exh1. I have looked at the Birth Certificate and it indicated that PW1 was born on 11<sup>th</sup> January 2007. The production and authenticity of the Birth Certificate was not challenged by the Appellant during cross examination. It is my finding therefore that at the time the offence was committed, the victim (PW1) was aged 13 years old.
19. With regard to the issue of identification, the victim (PW1) testified that she knew the Appellant as her boyfriend and that she would run away from her home on several occasions and go to the Appellant's house. When PW1 was cross examined, she repeated that the Appellant was her boyfriend. When the Appellant was cross examined, he acknowledged that PW1 was his girlfriend. This is my view was evidence of recognition and I am guided by Peter Musau Mwanzia v Republic [2008] KECA 92 (KLR) where the Court of Appeal held: -  

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.....”
20. Further, the victim (PW1) testified that they (PW1 and Appellant) were arrested at the Appellant's house. This testimony was corroborated by Robert Kimutai Keter (PW3), Calph Kirui (PW5) and No. 90923 PC Patrick Nyoike (PW6) who all testified that they found the Appellant with PW1 in his house and arrested them.
21. From the evidence above, it was clear that the Appellant was placed at the scene of crime by the victim, PW3, PW5 and PW6. I am also clear that the victim and the Appellant were linked romantically and such kind of relationships can only be classified as personal. Therefore, I have no reason to disbelieve or doubt that the Appellant was identified by the victim (PW1) as the perpetrator of the offence.
22. Flowing from the above, I am satisfied that the Appellant was positively identified by the victim (PW1). There was no possibility of mistaken identity.
23. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.
24. Penetration can be proved through the evidence of the victim corroborated by medical evidence. In the instant case, I shall carefully evaluate the victim's testimony and the medical evidence tendered.



25. B.C (PW1) testified that she engaged in sexual intercourse with the Appellant on several occasions between 5<sup>th</sup> February 2020 and 3<sup>rd</sup> October 2020. When PW1 was cross examined, she testified that she had sexual intercourse with the Appellant and the Appellant did not force her to engage. She further testified that she had stayed with the Appellant for five days before they were arrested. While conceding to the Appeal, the Respondent cited the evasiveness of the victim during her testimony as a reason why her testimony should be disregarded. I have relooked the victim's testimony and I have found that the victim was consistent that the Appellant was her boyfriend and had engaged severally in sexual intercourse with him. Her testimony remained uncontroverted during cross examination. I therefore disagree respectfully with the Respondent's submission.
26. On the medical evidence, Julius Magut (PW4), a Clinical Officer at Longisa County Referral Hospital testified that he examined the victim (PW1) and found that her genitalia showed bruises on her labia majora and minora and a laceration at the entry of the vagina. PW4 further testified that the findings were consistent with penetration. PW4 produced the PRC Form and a P3 Form as P. Exh 3 and 4 respectively. I have gone through the PRC Form and the P3 Form and both confirm the findings as testified by PW4. I accept the medical evidence presented by PW4 that there was penetration.
27. In light of the above and in addition to the victim's testimony, it is my finding that the victim (PW1) was penetrated by the Appellant.
28. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

**ii. Whether the Defence placed doubt on the Prosecution's case.**

29. The Appellant's (DW1) defence was aptly captured in detail earlier in this Judgment. He denied committing the offence and testified that he was arrested by police officers and found the victim (PW1) in the police vehicle. When he was cross examined, he acknowledged that the victim was his girlfriend and they were arrested in his house. He later contradicted himself by denying that the victim was his girlfriend and that he was arrested along the road. Eric Rono (DW2) testified that he was with the Appellant when the Appellant was arrested.
30. From the analysis of the above, the Appellant's testimony was contradictory and it placed doubt in this court's mind. The Prosecution's case was that the Appellant was arrested with the victim in his house and this was backed up and corroborated by the victim, PW5 who was the Assistant Chief and PW6 who was a police officer. They all confirmed that they found the Appellant with the victim in his house, a fact which the Appellant admitted then later denied.
31. Having considered the testimonies of DW1 and DW2, it is my finding that the testimonies are weak and as a whole, did not cast any doubt on the Prosecution's case which I have already found proven.

**iii. Whether the sentence preferred against the Appellant was harsh.**

32. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles.
33. The penal section for this offence is found in section 8(3) of the [Sexual Offences Act](#) which states that: -  
A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
34. As earlier stated, the trial court sentenced the Appellant to serve 10 years imprisonment.



35. In the face of mandatory minimum sentences as prescribed above by section 8(3) of the *Sexual Offences Act*, it has been held that courts should have discretion in sentencing after considering the circumstances of the case and the Accused's mitigation. The Court of Appeal in *Dismas Wafula Kilwake v Republic* [2019] KECA 5 (KLR) held: -

“Here at home in a judgment rendered on 14th December 2017 in *Francis Karioko Muruatetu & Another v. Republic*, SC Pet. No. 16 of 2015, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the *Penal Code* is unconstitutional. While appreciate that the decision had nothing to do with the *Sexual Offences Act*, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences.....

..... In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing.”

36. I have considered the circumstances of this case and the fact that the victim was aged 13 years old at the time the offence was committed. The Appellant was rightly convicted.

37. Flowing from the above, it is my finding that the Appeal against conviction has no merit. I hereby affirm the Appellant's conviction.

38. I find no reason either to interfere with the sentence imposed. Accordingly, the Appeal is dismissed.

**JUDGEMENT DELIVERED, DATED AND SIGNED THIS 19<sup>TH</sup> DAY OF MAY, 2025.**

.....

**J.K.NG'ARNG'AR**

**JUDGE**

Judgement delivered in the presence of the Appellant and Mr. Njeru for the state. Siele/Susan (Court Assistant).

