



**Kinyili v Republic (Criminal Appeal E099 of 2022)
[2025] KEHC 14677 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E099 OF 2022
KW KIARIE, J
OCTOBER 22, 2025**

BETWEEN

JAMES MWANZIA KINYILI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E011 of 2021 of the Senior Resident Magistrate's Court at Makindu by Hon. B Iveri –Senior Principal Magistrate)

JUDGMENT

1. James Mwanzia Kinyili, the appellant herein, was convicted of the offence of attempted defilement contrary to section 9 (1) as read with section 9(2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on the 13th day of February 2020, at [Particulars withheld] village, Makindu sub-county, within Makueni County, he intentionally attempted to cause his penis to penetrate the vagina of F.N.C., a girl ten years old.
3. The appellant was sentenced to ten years' imprisonment. He has appealed against the conviction. He was in person and raised the following grounds of appeal:
 - a. That law points and facts used in the court were all framed and not true. [sic]
 - b. The appellant disputes the sentence imposed by the law court magistrate
4. The state opposed the appeal through Linet Wataka, prosecution counsel. She argued that the prosecution proved its case to the required grounds, and the sentence imposed was legal.
5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their



testimonies. Therefore, I will follow the well-known case of *Okeno vs Republic* [1972] E. A 32 to guide my decision-making process.

6. Section 9 (1) of the *Sexual Offences Act* provides as follows:

A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

7. An attempt to commit a crime is defined in the Oxford Concise Law Dictionary (2nd Edition) as:

Any act that is more than merely preparatory to the intended commission of a crime; this act is itself a crime.

8. For an attempted offence to be committed, the actions complained of must pass the “but for” test.

9. Black’s Law Dictionary, on the other hand, defines the word attempt as follows:

The fact or an instance of making an effort to accomplish something, esp. without success.

Criminal law. An overt act that is done with the intent to commit a crime but that falls short of completing the intended crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for, or following the intended victim or unlawfully entering a building where a crime is expected to be committed.

10. To prove the offence of attempted defilement, the court in *Benson Musumbi v Republic* [2019] eKLR stated as follows:

The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement is as if it were a failed defilement, because there was no penetration.

11. An attempt is usually characterised as an inchoate offence. According to Black’s Law Dictionary, a principal feature of this offence is that it may occur even if the substantive offence is not completed.

12. An offence of attempted defilement, therefore, is established against an accused person when the prosecution has proven the following ingredients:

- a. The age of the complainant;
- b. The overt act committed; and
- c. Positive identification of the assailant.

These are the ingredients the prosecution must prove against an accused person.

13. The complainant testified that she was 11 years old. Her mother, PW2, testified that she was born on 3rd January 2009. Her age was assessed on 13th February 2020, and the report indicated that she was ten. Her age was therefore proven.

14. On the 13th of February 2020, the complainant and her siblings were left at home by their mother, who had gone to attend a burial arrangement meeting. The appellant went to the door and, since the complainant recognised him, she opened it for him. He told them not to fear anything. He went into their mother’s bed and, after a short while, asked the complainant to accompany him to the road where



he had left his bag. When they went to the road, it turned out to be a ploy. He led her to a bush where he attempted to defile her. She struggled and screamed. This is when he released her. He had, by the time, removed her shorts and panties.

15. A.K.D. (PW2) is the complainant's mother. When she returned home, she informed her other daughter that the complainant had gone with the appellant to pick up his bag. She became suspicious and went to look for her. When she found her, the complainant said that the appellant attempted to defile her.
16. CM (PW3) was one of the people who responded to the screams. He found the complainant in a bush, and she said that Mwanzia took her there and attempted to defile her.
17. James Mwanzia Kinyili, the appellant, pleaded an alibi and contended that he was elsewhere and did not commit the offence. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie vs Republic* [1984] KLR, where the Court of Appeal held:

An alibi raises a specific defence, and an accused person who puts forward an alibi as an answer to a charge does not, in law, thereby assume any burden of proving that answer, and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

18. In the instant case, the appellant's alibi was displaced by the evidence on record.
19. After analysing the evidence on record, I find that the prosecution proved its case against the appellant to the required standards.
20. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to do so. *Nelson vs Republic* [1970] E.A. 599 as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewcity* (1912) C.CA 28 T.LR 364.

21. Section 9(2) of the *Sexual Offences Act* provides:

A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

22. The appellant was sentenced to the minimum prescribed sentence. I have no reason to interfere with it. The appeal is dismissed for want of merit.

DELIVERED AND SIGNED AT MAKUENI, THIS 22ND DAY OF OCTOBER 2025

KIARIE WAWERU KIARIE

JUDGE

