



**Muia v Republic (Criminal Appeal E061 of 2024)
[2025] KEHC 14739 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E061 OF 2024
KW KIARIE, J
OCTOBER 22, 2025**

BETWEEN

PAUL MASILA MUIA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E033 of 2022 of the Senior Principal Magistrate's Court at Tawa by Hon. S. Jalang'o –Senior Principal Magistrate)

JUDGMENT

1. Paul Masila Muia, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on the 19th day of September 2021, at [Particulars Withheld], Mbooni East sub-county, within Makueni County, he caused his penis to penetrate the vagina of S.N.K., a girl twelve 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. The learned trial magistrate erred when he convicted the appellant on a defective charge sheet; he equally fell into error when he failed to consider the fact that the complainant and her mother, with whom she was living, never made any report of the complainant against him to the police.
 - b. The learned trial Magistrate erred in law and in fact in relying on the prosecution's evidence that was characterized by contradictions and inconsistencies, and failing to note that the doctor's report proved that no defilement had occurred at all.



4. The state opposed the appeal through Nyakibia Mburu, 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 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

7. An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:
 - a. That there was penetration of the complainant's genitalia;
 - b. That the accused was the perpetrator; and
 - c. The age of the complainant was below eighteen years.

These ingredients were restated in *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR as follows:

Going by this definition of defilement, I agree with Mr Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

8. These are the ingredients that the prosecution must prove against an accused person.
9. The copy of Certificate of Birth of S.N.K (PW1) indicates that she was born on the 9th day of July 2009. As of the 19th day of September 2021, she was twelve years and two months old. Her age was therefore proven.
10. According to the complainant, the appellant asked her to give him a book, and in the process, he pulled her into the house. He then took her to the bed and removed her clothes. When he inserted his penis into her vagina, she began to cry. Her mother came in to find out why she was crying, and the complainant was so frightened that she told her grandmother what the appellant had done to her.
11. C. N. (PW2) is the complainant's mother. She stated that, when she was returning home, she heard someone whimpering. Upon investigating, she found the complainant locked inside the appellant's house. The appellant unlocked the house and left. Later, the complainant revealed what the appellant had done to her. She took her to the hospital for examination.
12. When Victor Mutuva (PW5) examined her, he found the external genitalia swollen and oedematous. The hymen was not broken, and he concluded that there was no penetration.
13. The evidence on record indicates that there was no penetration, but there was an attempt to do so. The culprit was identified as the appellant. He ought to have been convicted for the offence of attempted defilement under section 9 (1) of the *Sexual Offences Act*.
14. 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.

15. 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.
16. For an attempted offence to be committed, the actions complained of must pass the “but for” test.
17. 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.
18. 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.
19. 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.
20. 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 proved against the appellant. I therefore quash the conviction for the offence of defilement contrary to section 8 (1) as read with section 8(3) of the *Sexual Offences Act*. The same is substituted with a conviction for the offence of attempted defilement under section 9 (1) of the *Sexual Offences Act*.
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

