



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKUENI**  
**CRIMINAL APPEAL NO. E006 OF 2023**

**JOHN MUSYOKI MUTETI.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. Case No. E033 of 2021 of the Principal Magistrate's Court at Kilungu by Hon. E. M. Muiru–Principal Magistrate)*

**JUDGMENT**

1. John Musyoki Muteti, 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 26<sup>th</sup> day of October 2021, at Katikomu village, Wautu location, of Makueni County, he intentionally attempted to cause his penis to penetrate the vagina of G.M.M., a girl nine years.
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 did not consider that the victim's evidence was not admitted in accordance with the law.
  - b) The learned magistrate erred in failing to observe that the doctor and the investigating officer, who were crucial witnesses, were not called.
  - c) The learned trial magistrate failed to consider the appellant's defence as the same was reasonable to create doubt on the prosecution's case.
  - d) The conviction was based on circumstantial evidence, which was insufficient to sustain a conviction.
4. The state opposed the appeal through Mr. Victor Kazungu, prosecution counsel. He contended that the offence was proved to the required standards.

5. This court is the first 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. In **Benson Musumbi v Republic [2019] eKLR**, the court considered what needed to be proven regarding the elements of the offence of attempted defilement. It 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 typically characterised as an inchoate offence. According to **Black’s Law Dictionary**, a principal feature of this crime is that it can occur even if the substantive offence is not successfully consummated.
12. An offence of attempted defilement, therefore, is established against an accused person when the prosecution has proved 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 9 years old. Though no documents to support her age were produced, the trial magistrate observed that she was indeed a child and proceeded to conduct a voir dire before taking her evidence. I am satisfied that the complainant, at the time of the alleged offence and the trial, was a child.
14. The complainant testified that she had gone to fetch some water from a river. The appellant removed her pants and defiled her. She felt pain. L.K. went for her rescue.
15. L.K. (PW2), who was fetching water on the upper side of the river, testified that when she noticed what the appellant was doing to the complainant, she raised an alarm that attracted a woman. The appellant ran away.
16. After analysing the evidence on record, I find that the prosecution proved that an attempted defilement occurred.
17. In cases of attempted defilement, it is not necessary to call a doctor since there was no penetration.
18. The appellant raised an alibi defence. 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.**
19. In the instant case, the prosecution's evidence displaced the alibi defence of the accused.
20. The upshot of the foregoing analysis is that the appeal lacks and is hereby dismissed.

**Delivered and signed at Makueni, this 21<sup>st</sup> day of October 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**