



**Makai v Republic (Criminal Appeal E063 of 2023)
[2025] KEHC 14774 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E063 OF 2023
KW KIARIE, J
OCTOBER 23, 2025**

BETWEEN

ALEX MUTHUNI MAKAI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. E137 of 2019 of the Senior Principal Magistrate's Court at Makindu by Hon. B. Ireri—Senior Principal Magistrate)

JUDGMENT

1. Alex Muthuni Makai, 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 25th day of December 2019, at [Particulars Withheld] village, Nsavi sub-county, within Nyandarua County, he intentionally attempted to cause his penis to penetrate the anus of L.N.T., a girl ten years old.
3. The appellant was sentenced to twenty years' imprisonment. He has appealed against the conviction. He was in person and raised the following grounds of appeal:
 - a. The prosecution's case is replete with monumental inconsistencies and contradictions which would have attracted an acquittal verdict.
 - b. The trial court erred both in law and fact by failing to conduct a holistic scrutiny of the whole evidence on record to base its conviction and sentence.
4. The state opposed the appeal through Omollo Vera, learned counsel, who contended that the prosecution proved its case to the required standards.



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 testify. 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. A copy of the complainant’s Certificate of birth was produced. It states that she was born on December 15, 2010. As of December 25, 2019, she was 9 years old. Her age was proven.



14. The complainant's evidence was that when she sensed the door had been opened, she turned on the lights. She was able to identify the appellant, whom she referred to as Umua. He was already in bed where she and her brother were sleeping. He pulled down her trousers and panties and did the same with his. She felt something hard touching her anus. She stood up, and he was unable to push inside. She screamed and went outside. Daniel tripped the appellant as he was running away. Daniel arrested him, but he managed to escape as they were looking for a rope to tie him.
15. When the complainant was taken to the hospital, she reported a case of defilement via vaginal penetration. The medical evidence presented by Dr Jackson Nzivo (PW5) indicated that upon examination, her vagina was normal, and there was no penile penetration. The doctor did not make any remarks about any attempt to penetrate the complainant's anus. This contradicted the evidence of the complainant and that of her mother (PW2), who testified that when she checked the complainant, she had bruising at the anus. There was no attempt to reconcile these glaring contradictions. The Court of Appeal in the case of *Ndungu Kimanyi vs. Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

The complainant and her mother did not portray themselves as trustworthy witnesses.

16. The prosecution omitted a material witness, Daniel. He is the person the complainant said had tripped the appellant and managed to arrest him. It is alleged that he fled while a rope for tying him was being fetched. The Court of Appeal in the case of *Bukenya vs Uganda* [1972] EA 549 (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

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.

17. I make a finding that had Daniel been called, his evidence was not going to support the prosecution's case.
18. The conviction of the appellant was unsafe. The same is quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT MAKUENI, THIS 23RD DAY OF OCTOBER 2025

KIARIE WAWERU KIARIE

JUDGE

