



REPUBLIC OF KENYA



KENYA LAW
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**Muyela alias Buba v Republic (Criminal Appeal 4 of 2025)
[2025] KEHC 18866 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18866 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 4 OF 2025
DR KAVEDZA, J
DECEMBER 18, 2025**

BETWEEN

DELVIN MUYELA ALIAS BUBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the ruling of Hon. Casmir Obiero delivered
on 31st July 2025 at Dagoretti Small Claims Case No. E294 of 2025)*

JUDGMENT

1. The appellant was charged with 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. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act. After a full trial, he was convicted and sentenced to serve ten (10) years imprisonment on the main charge.
2. Aggrieved, he filed a petition of appeal challenging his conviction and sentence. He challenged the totality of the prosecution's evidence against which he was convicted. He complained that the trial court failed to consider his defence. He urged the court to quash his conviction and set aside the sentence imposed.
3. As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court and come to an independent conclusion as to whether or not to uphold the convictions and sentences. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).
4. The prosecution's called four witnesses in support of their case. M L(PW2), the victim's mother, testified that her daughter was one and half years old. On the material day, had left the victim sleeping in the house while the appellant remained inside. Upon her return shortly afterwards, she found the door locked from inside. She called the appellant's name and pushed open the wooden window,



- through which she observed the victim awake and seated on the appellant's lap, naked from the waist downwards.
5. PW2 demanded that the door be opened, and the appellant eventually complied. As the victim walked towards her, PW2 noticed the child limping as though in discomfort. Concerned, PW2 sought advice from a neighbour, who suggested the possibility of defilement and urged her to take the victim to hospital without delay.
 6. PW2 followed this advice and, after the hospital visit, informed her brother, C T (PW3), of the incident. PW3 reported the matter to the authorities, including Kangemi Police Station.
 7. John Njuguna (PW1) gave evidence that on 9th August 2024 at 11:00 am, the victim's mother brought the victim to hospital with a history of defilement by her brother. The victim had been picked up while sleeping and placed on the appellant's lap whilst his trousers were lowered. Clinical examination revealed normal labia majora and minora, an intact hymen, and bruising in the vagina.
 8. Corporal (W) Kirika No. 229582 (PW4) was assigned to investigate the complaint. She recorded statements from witnesses, issued a P3 form to PW2, and noted that the appellant had fled from the area. The appellant was subsequently brought into custody by PW3 approximately one week later.
 9. Both PW2 and PW3 described the appellant as a drug addict who frequently exhibited unusual behaviour.
 10. The prosecution, having tendered no cross-examination of its witnesses, applied for the appellant to undergo mental assessment. The application was granted, and the appellant was admitted to Mathare National Teaching and Referral Hospital for observation. After approximately six months, he was certified fit to stand trial.
 11. On 7th April 2025, the court informed the appellant of his right to recall previous witnesses for cross-examination. The appellant indicated that he wished the trial to proceed without recall, expressing confidence that the principal witnesses his siblings, intended no harm towards him.
 12. In his defence, denied being home on the material day and maintained his innocence.
 13. I have considered the evidence before the trial court, the grounds of appeal and the rival submissions. The issue for my determination is whether the Prosecution proved the offence of attempted defilement to the required legal standard.
 14. The offence of attempted defilement is premised under section 9 of the *Sexual Offences Act* as follows: -
 9. Attempted defilement
 - (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
 - (2) 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.
 - (3) The provisions of section 8(5), (6), (7), and (8) shall apply mutatis mutandis to this section.
 15. The term attempt is defined by section 388 of the Penal Code as follows: 1. When a person, intending to commit an offence, begins to put his Intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.



2. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”
16. The ingredients of the offence of attempted defilement were outlined by Kemei J. in the case of Benson Musumbi vs. Republic [2019] eKLR 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, 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.”
17. From the definition above, it follows for a charge of attempted defilement to stand, the Prosecution must prove beyond reasonable the age of the complainant; that the overt act (attempted penetration) was committed; and the identification of the assailant.
18. On the age of the complainant, the prosecution adduced the evidence of a mother who told the court that the complainant was one and half years old. The evidence was not challenged and the court confirmed that the complainant was a child of tender years. I find that this ingredient has been proven beyond reasonable doubt.
19. On the identification of the perpetrator, PW2 (the victim’s mother) provided direct eyewitness testimony. She observed the victim seated on the accused’s lap, naked from the waist downwards, after the door had been locked from within. The victim is the accused’s younger sister, and the incident occurred in their shared home. The accused was well known to PW2 and the victim as a family member. Being a close relative, mistaken identification was impossible. I therefore hold that the accused is the person who committed the alleged act.
20. On the Proof that the overt act was committed, Penetration is defined under section 2 of the [Sexual Offences Act](#) as follows: “Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
21. It follows then that in a case of attempted defilement, the Prosecution must demonstrate that an appellant person took all the necessary steps to begin an act of penetration but was unable to complete the same either at his own volition or through the intervention of another.
22. There must be no penetration but only evidence of its attempt as held by Makau J in David Aketch Ochieng v R, [2015] eKLR as follows:

“For a successful prosecution of an offence of an attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises, or lacerations from complainant’s vagina, and/ or bruises or lacerations of culprit’s genital organ and finding made discharge such as semen or spermatozoa outside the complainant’s vagina or innerwear without there being penetration.”
23. In this case, the prosecution relied on the evidence of PW2 and the clinical findings of PW1. PW2 testified that she saw the victim on the accused’s lap whilst his trousers were lowered and the child was naked below the waist. The victim was observed limping afterwards, raising suspicion of defilement.



PW1's examination on 9th August 2024 revealed normal labia majora and minora, an intact hymen, but bruising in the vagina, consistent with an attempt at penetration that did not succeed.

24. Based on the evidence adduced, I hold that the prosecution proved steps taken by the accused to effect defilement, which however did not result in penetration.
25. In his defence, the accused denied committing the offence and maintained that he was not home on the material day. He also indicated confidence in proceeding without cross-examination of the prosecution witnesses, whom he described as his siblings intending no harm. The trial court considered this stance and found no merit in any defence. PW2 and PW3 had no motive to falsely implicate the accused. Their testimony remained consistent. When weighed against the prosecution case, the accused's position raised no reasonable doubt and was rightly rejected.
26. I therefore find that elements of the offence of attempted defilement were proved beyond reasonable doubt. The trial court's finding of guilt was based on sound evidence, and the conviction was proper and is upheld.
27. On sentencing section 9 of the *Sexual Offences Act* as follows:
 - (2) 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.
28. The appellant was sentenced to serve ten (10) years imprisonment. During sentencing, the court considered the pre-sentence report and exercised discretion. In the premises, I see no reason to interfere with the sentence.
29. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.
Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 18TH DAY OF DECEMBER 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Karimi Court Assistant.

