Oriwo v Republic (Criminal Appeal E029 of 2024)
[2025] KEHC 10939 (KLR) (1 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10939 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E029 OF 2024

JM OMIDO, J

JULY 1, 2025

BETWEEN

MICHAEL OTIENO ORIWO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement, conviction and sentence of Hon. R.M. Oanda, Senior Principal Magistrate delivered/imposed on 12th June, 2023 in Winam Sexual Offence Case No. E002 of 2021, Republic v Michael Otieno Oriwo)

JUDGMENT

1. In this judgement, the names and details of some witnesses have been withheld to protect their identities. I will in so doing refer to those witnesses by the use of their initials.

2. This appeal emanates from the judgement, conviction and sentence of Hon. R.M. Oanda, Senior Principal Magistrate delivered/imposed on 12th June, 2023 in Winam Sexual Offence Case No. E002 of 2021, *Republic v Michael Otieno Oriwo*.

3. The Appellant Michael Otieno Oriwo was charged in the principal count with the offence of attempted rape contrary to Section 4 of the *Sexual Offences Act*, Cap 63A Laws of Kenya (erstwhile Act No. 3 of 2006).

4. As is instructive from the charge sheet, the particulars of the offence were that on 3rd January, 2021 at 1700hrs at [Particulars Withheld], Muhoroni Subcounty within Kisumu County, the Appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of FAO (name withheld, hereinafter referred to as "the survivor") an adult aged 21 years.

5. The Appellant was in the alternative count charged with the offence of committing an indecent act with an adult contrary to Section 11(1) of the *Sexual Offences Act* Cap 63A Laws of Kenya. (The proper provision is Section 11A of the *Sexual Offences Act* and not Section 11(1).

6. The particulars of the offence in the alternative charge were that on 3rd January, 2021 at around 1700hrs at [Particulars Withheld], Muhoroni Subcounty within Kisumu County, the Appellant unlawfully and intentionally touched the vagina of FAO an adult aged 21 years with his penis.

7. The Appellant pleaded not guilty to both counts and a full trial was conducted. The prosecution case was founded on the evidence of 6 witnesses. The defence evidence comprised the sworn testimony of the Appellant and that of his witness.

8. At the close of the trial, the Appellant was convicted on the principal charge and sentenced to serve 10 years imprisonment.

9. The grounds of appeal presented by the Appellant *vide* the Petition of Appeal dated 13th May, 2024 upon which the Appellant seeks to upset the conviction and sentence, may be summarized as follows:

    a. The Appellant was not accorded a fair hearing as his constitutional rights to a fair trial were violated.

    b. The learned trial Magistrate erred in law by failing to appreciate that the critical elements of the offence of attempted rape were not proved to the required standard.

    c. The learned trial Magistrate erred in law by failing to appreciate that there were material contradictions and inconsistencies in the prosecution witnesses' evidence that vitiated the case against the Appellant.

    d. The sentence that was imposed by the learned trial Magistrate was manifestly excessive.

10. The Appellant proposes that the instant appeal be allowed, the conviction be quashed and the sentence of 10 years imprisonment be set aside.

11. This court directed that the appeal be canvassed by way of written submissions. Both the Appellant and the Respondent filed their respective submissions.

12. This being a first appeal, this court has a legal duty to re-analyze, re-evaluate and re-assess the evidence adduced in the lower court so as to come up with its own conclusions while bearing in mind that it did not have the benefit of seeing or hearing the witnesses when they testified (see *Okeno v Republic* [1972] E.A.

13. In *Pandya v Republic*[1957] EA 336, the court, while addressing the duty of the first appellate court in a criminal appeal, stated as follows:

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury, the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not

which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

14. In *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal, while addressing itself to the same duty, held that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

15. Similarly, in *Victor Owich Mbogo v Republic*, [2020] eKLR, the Court of Appeal observed as follows:

> " It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify."

16. Now to the evidence before the trial court, the first prosecution witness was MOO (PW1), a welder by occupation. The witness testified and told the trial court that on 3rd January, 2021, he set off to look for the survivor, who was her daughter, who had not returned home by 2030hrs, which was unusual, after leaving to fetch firewood.

17. While looking for the survivor, PW1 met a woman who told him that she had heard a woman's cries emerging from a certain house and directed PW1 to the Appellant's brother's house, in which the Appellant was residing, which was locked from the outside. PW1 saw the survivor on the bed, through the window.

18. The witness then sought the assistance of three neighbours and the survivor was rescued from the house when the door was broken open. She was found on the bed, looked tired and had an injury on her head and shoulder. She was bleeding and told those who rescued her that the Appellant had beaten her up and had tried to rape her. The witness said that there was blood in the living room.

19. PW1 told the trial court that the Appellant arrived shortly at the scene and asked those who were present what they were doing at his house, stating that the matter was purely between him and the survivor, whom he said he had been disciplining.

20. PW1 and the other neighbours took the survivor to hospital for examination and treatment. The matter was reported to the area chief and the police.

21. Upon being cross examined by the Appellant, PW1 told the trial court that that the Appellant had cut the survivor the with a panga.

22. EOD testified as the second prosecution witness (PW2) and told the trial court that he was a village Administrator, [Particulars Withheld]. The witness narrated the events of 3rd January, 2021 and stated that on that day PW1 went to his house and asked the administrator if he had any reports of where his daughter – the survivor – was. PW2's response was in the negative. PW1 left.

23. PW2 told the trial court that about 40 minutes later, PW1 returned to his house and informed PW2 that there were screams from a house belonging to the Appellant's brother, who was away in Nairobi,

which was locked from the outside. He sought PW2's assistance to reach the owner of the house for permission to break in, as the keys were with the Appellant, who was not present.

24. The witness stated that when the door of the house was broken into, the survivor was found inside, on a bed. She had a cut on the head. PW2 then informed the area chief and the matter was thereafter reported to the police.

25. The witness told the trial court that the Appellant arrived at the scene shortly after the house had been broken into. He was drunk and furious. The witness pointed out the Appellant before the trial Magistrate as the man who was residing in the house.

26. On being cross examined by the Appellant, the witness told the trial court that the house belonged to the Appellant's brother who resided in Nairobi and that it is the Appellant who was taking care of the house.

27. Police Constable Allan Kipchirchir Kerich testified before the trial court as PW3. His evidence was that on 5th January, 2021, he was at Ombeyi Police Patrol Base when received the report from PW1 and the area chief, who were accompanied by members of the public, that the survivor had been violated on 3rd January, 2021. The officer issued a P3 form to the survivor, who had injuries. The P3 was later completed after the survivor had been examined and treated.

28. The survivor, FAO, testified through a sign language interpreter, as she was a person living with disability. She identified a certificate of birth that indicates that she was born on 18th March, 1999.

29. In her testimony, the survivor told the trial court that on 3rd January, 2021, the Appellant's grandmother called the survivor and asked her to go and greet her.

30. The survivor told the court that the Appellant told her that he wanted to sleep with her and she declined. The Appellant then took a panga and "slapped" her with it and cut her on the side of the head. He then assaulted her by hitting her severally and tore away her clothes. She attempted to scream for help but the Appellant threatened her. He then pushed her onto a bed that was in the house and continued beating her up. The Appellant then left the survivor in the house, locking the door as he left. The attempts by the survivor to open the door were not successful.

31. The survivor's further testimony was that the Appellant returned moments later while crying and asked her to forgive him and told her that he would marry her. He then embarked on beating the survivor again while demanding to have sex with her, which the survivor declined.

32. The survivor told the court that she was later rescued by neighbours and taken to hospital where she was examined and treated.

33. Upon being cross examined by the Appellant, the survivor explained that a lady neighbour rescued her.

34. Nelson Mandela, a clinical officer stationed at Ahero Subcounty Hospital testified as PW5. The witness told the trial court that on 4th January, 2021, the survivor was sent by the police to the facility where PW5 worked, with a request that PW5 examines her and completes her P3 form. The survivor had changed clothes but presented to PW5 a dress that she had worn the previous day, which had a tear at the neck. She stated that a person known to her had attempted to rape her the previous day.

35. The witness proceeded to examine and treat the survivor, who was 21 years of age, and filled in her P3 form. The survivor had bruises and tenderness on the forehead, bruises around the lower abdomen, swelling on the shoulder region and around the thighs. Her genitalia was normal. The approximate age of injury was 12 hours. The witness produced PW4's P3 and PRC forms.

36. PW6, Corporal Duke Nyasato of Ombeyi Police Patrol Base testified and produced the survivor's certificate of birth which indicated her date of birth as 18th March, 1999.

37. The prosecution closed its case at that stage and in its ruling rendered on 27th April, 2023, the trial court reached a finding that the prosecution had made out a prima facie case against the Appellant and he was placed on his defence.

38. In his sworn testimony in defence, the Appellant told the trial court that he was a mason and a resident of Ombeyi ward.

39. The Appellant stated that on a date that he did not specify in the month of January, 2021, he visited a friend at Russia Hospital and thereafter went to Ahero where he took alcohol and got very drunk. He later found himself in police custody and could not recall what had happened.

40. On being cross examined, the Appellant stated that what the evidence by the prosecution witnesses was possibly true. He confirmed that the house where the incident is said to have happened belonged to his brother, who was at the time away in Nairobi.

41. The Appellant called his spouse, RA as his witness. The defence witness told the trial court she took the Appellant, on a date that she did not specify, to Russia Hospital to see a friend. On leaving the hospital, the Appellant went and took alcohol and got very drunk. He was later apprehended. The witness did not know the reasons for the Appellant's arrest.

42. The defence case was closed at that stage.

43. Upon considering the evidence of the six prosecution witnesses, the Appellant's sworn testimony and that of his witness, the learned trial Magistrate found that the prosecution had satisfied all the ingredients of the offence of attempted rape and thus had proved its case beyond reasonable doubt and convicted the Appellant on the principal charge. The Appellant was subsequently sentenced to serve 10 years imprisonment. He preferred the instant appeal, being aggrieved by the conviction and sentence.

44. I have considered the grounds of appeal, the filed submissions, the evidence adduced before the trial court and the lower court's record in its entirety, I will deduce the issues that I am now tasked to determine which culminate in the question whether the prosecution proved the offence of attempted rape beyond reasonable doubt, as follows:

    a. Whether the trial Magistrate erred in law in finding that the offence of attempted rape had been proved beyond reasonable doubt.

    b. Whether the Appellant's constitutional right to a fair trial was violated, and the effect of the violation, if any, to the trial court's conviction and sentence.

    c. Whether the sentence imposed was manifestly harsh or excessive.

45. Inevitably, this court after determining the issues stated above must satisfy itself that all the ingredients of the offence of attempted rape were proved against the Appellant beyond reasonable doubt, as is the requirement in law.

46. I will deal with the issues, seriatim.

47. The first issue for me to address is whether the trial Magistrate erred in law in finding that the offence of attempted rape had been proved beyond reasonable doubt.

48. In the case of *Abraham Otieno v Republic* [2011] eKLR this court (Makhandia J, as he then was) set out the ingredients of the offence of attempted rape as follows:

> " For an offence of attempted rape to be deemed to have been committed under the Section, the prosecution must prove that the culprit acted in such manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards the goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but does not go the whole hog because of factus interveniens, that would be good evidence of attempted rape. Alternatively, if the culprit without expressing his intentions verbally gets hold of the victim, fondles her, removes her clothes including her pants and also undresses himself in preparation thereof but for one reason or another something happens which compels him to stop, again that would be good evidence of attempted rape."
>
> (Underlined emphasis).

49. In *Moses Kabue Karuoya v Republic* [2016] eKLR, Mativo, J (as he then was), stated as follows regarding the ingredients of the offence of attempted rape:

> " ...I reiterate that the key ingredients of the offence before me can be summarized as follows, namely,
>
> (a) intent to commit the offence; from the evidence tendered, I find that intent was established. The second requirement is
>
> (b) the accused must begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve. Evidence tendered is that the appellant knocked her down, lied on her, lowered her panty & forcefully opened her legs. Lastly the accused must
>
> (c) do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence."

50. In his submissions, the Appellant reiterated his defence that he was drunk and had no knowledge of the events that led to his arrest and arraignment. The Appellant thus did not challenge the evidence of the prosecution witnesses, particularly that of the survivor, as he stated that he had no recollection of what transpired on 3rd January, 2021, for the reason that he was in a drunken stupor. As a matter of fact the Appellant told the trial court that what the prosecution witnesses said was possibly true. There is no other contrary evidence as to what transpired other than that of the survivor and the other prosecution witnesses.

51. The Appellant proffered before the trial court the position that he was drunk to an extent that he did not know what transpired on 3rd January, 2021. Noteworthy is the fact that the Appellant, going by his defence, self-intoxicated himself. What does the law say about intoxication?

52. Section 13 of the *Penal Code* provides as follows:

> " 13(1 Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and:-
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person, or
>
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
>
> 3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and the *Criminal Procedure Code* relating to insanity shall apply.
>
> (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
>
> (5) For the purposes of this section "intoxication" includes a state produced by narcotic or drugs."

53. The key question is whether intoxication prevented the accused from forming the specific intent required to commit the offence of attempted rape.Attempted rape, is a specific intent offence and it requires the prosecution to prove that the accused intended to commit rape and took substantial steps toward its commission.Intoxication cannot therefore be a defence unless the party raising that defence negates the specific intent to commit the crime.

54. In the present case, the Appellant did not, before the trial court, demonstrate that intoxication negated his intent to commit the offence of attempted rape. The fact that he beat up the complainant on twice, locking her up in his brother's house in between the beatings while demanding to have sex with her, forcefuly removed or tore her clothes, warned her, with threats, not to shout for help is sufficient proof that he had the intent to rape her. The defence of intoxication does not, in the premises, hold water.

55. In his written submissions, the Appellant fronted the position that the evidence presented by the prosecution did not prove beyond reasonable doubt that the Appellant made an attempt of penetrating the vagina or anus of the survivor.

56. Through the authorities of Abraham Otieno (*supra*) and Moses Kabue Karuoya (*supra*), I have above have outlined the ingredients that the prosecution must establish in order to prove the offence of attempted rape.

57. The evidence of the survivor, which as have said was not challenged by the Appellant, was that the Appellant locked up the survivor in the Appellant's brother's house, beat her up, forcefully undressed her by tearing her clothes while demanding to have sex with her but the survivor resisted.

58. In my view, the acts of beating up the survivor, forcefully undressing her while demanding that she has sex with him clearly shows that the Appellant had the intent of committing the offence and proceeded to put that intent into execution.

59. The evidence of the survivor was further that she attempted to scream for help but was threatened by the Appellant. It is clear to me that the only reason as to why the Appellant did not have his way was the fact that the survivor resisted.

60. Medical evidence that was produced by the clinical officer showed injuries that the survivor sustained while resisting, which corroborates her evidence. The evidence of the survivor's father that the Appellant had locked her up in his brother's house also corroborates the survivor's version. Needless to state, the Appellant was known to both the survivor and his father and was therefore well identified by recognition.

61. To that then, I am satisfied that the prosecution proved all the ingredients of the offence of attempted rape against the Appellant.

62. The second issue for me to determine is whether the Appellant's constitutional right to a fair trial was violated, and the effect of the violation, if any, to the trial court's conviction and sentence. In this regard, the Appellant's submissions were that his right under Article 50(2)(j) of the *Constitution* were violated. The said Article provides as follows:

50(2) Every accused person has the right to a fair trial, which includes the right—

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

63. The Appellant's contention was he was not informed in advance of the evidence the prosecution intended to rely on, and did not have reasonable access to that evidence, as he was not supplied with the statements that the witnesses recorded and the exhibits that were produced in support of the prosecution case, and that as such, his right to a fair trial was compromised, to his prejudice.

64. I have carefully gone through the trial court's record and there is no where it was recorded by the court that the Appellant was supplied with copies of the witness statements and documentary exhibits that the prosecution intended to rely on.

65. The Court of Appeal in the case of *Simon Ndichu Kahoro v Republic* [2016] eKLR, while addressing itself to a similar situation in which the Appellant claimed that he had not been granted reasonable access to the evidence that the prosecution intended to adduce, stated as follows:

> "We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the *Constitution*, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case."

66. In *Hussein Khalid & 16 Others v Attorney General & 2 Others* [2019] eKLR the Supreme Court explained that an accused person has a minimal obligation to inform the court that he has not been supplied with the evidence that the prosecution intends to rely upon, and ask for the same. The court stated thus:

> "...Indeed, it is salutary practice for the trial Court to satisfy itself that an accused person has all the reasonable facilities for his defence and the prosecution discloses all documents

before commencement of trial. However, an accused person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. This minimum obligation on the accused person triggers the court's duty to ensure the documents are supplied before commencement of the trial."

67. It is instructive from the record of the trial court that he prosecution case proceeded until 11th April, 2023 when the same was closed. Not a single time did the Appellant raise the issue of the statements. As a matter of fact, the issue was first raised on appeal. The trial court's record bears it that whenever the matter came up for hearing, the trial court sought to find out from the Appellant whether he was ready to proceed and he confirmed that he was ready on all occasions.

68. The foregoing being the case, it is my view, in the circumstances of this case, that the violation was not substantive as no prejudice was occasioned upon the Appellant, who indicated to the trial court that he was ready to proceed with the trial every time the matter was for hearing.

69. The authority of *Hussein Khalid* (*supra*) provides the jurisprudence that an accused person has the minimum obligation to bring it to the attention of the trial court that he has not been supplied with the witness statements and documentary exhibits, which the Appellant failed to do.

70. We have also seen from Simon Ndichu Kahoro (*supra*) that not every every breach of Article 50 of the *Constitution* should automatically result in an acquittal of an accused person.

71. Thus, my view is that by proceeding with the prosecution's case to its finality, cross examining the prosecution witnesses and even giving his defence and calling a witness, the Appellant implicitly confirmed to the trial court that he was ready and happy to proceed with the case as he did.

72. The next issue for determination is whether the sentence of 10 years imprisonment imposed on the Appellant was manifestly harsh or excessive.

73. The sentence for the offence of attempted rape is provided for under Section 4 of the *Sexual Offences Act*. Let us look at the said provision of statute:

> 4. Attempted rape
>
> Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.

74. The trial court's record indicates that the Prosecution Counsel informed the court that the Appellant was a first offender. Before he was sentenced, the Appellant was accorded an opportunity to mitigate and told the trial court that he had a stomach ailment that required treatment.

75. In sentencing the Appellant, the learned trial Magistrate rendered himself as follows:

> " I have considered accused's plea as a first offender but the offence is serious. (The) Woman accused attempted to take advantage of is a person living with disability. A message needs to be sent out there.
>
> Accused was trying to make good his threat of having sex with a person living with disability.
>
> A deterrent sentence needs to be imposed. I order that he be imprisoned for 10 years imprisonment (sic).

Right of appeal 14 days."

76. Under Section 4 of the *Sexual Offences Act*, the minimum sentence for the offence of attempted rape is 5 years imprisonment. The law provides that the sentence may be enhanced to imprisonment for life.

77. The trial court considered the fact that the Appellant was a first offender. The fact that the survivor was a person living with disability was also considered by the trial court. The evidence for the prosecution was clear that the Appellant employed significant violence against the survivor, a vulnerable person, who the society is supposed to protect. Offences against vulnerable victims are generally considered to be of an aggravated manner and I cannot in the premises fault the trial court as the sentence meted was not in the circumstances harsh or excessive.

78. But then, the Appellant complains that in sentencing him, the learned trial Magistrate did not take into consideration the time that the Appellant spent in custody as his trial proceeded.

79. Section 333(2) of the *Criminal Procedure Code* provides thus:

> 333(2) Subject to the provisions of Section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

80. It is instructive from the record that the Appellant took plea on 5th January, 2021 and remained in custody until 23rd April, 2021, when he was released on bond. That was a custodial period of 108 days.

81. It is also indicative from the record that the Appellant jumped bail and failed to attend court for his trial from 15th November, 2021, when a warrant for his apprehension was issued, to 28th February, 2023. His bond was cancelled on 28th February, 2023 and he remained in custody until 12th June, 2023 when he was sentenced. That was another custodial period of 104 days.

82. In total thus, the Appellant was remanded in custody for 212 days. The period during which he remained in custody ought to have been considered. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR held that: -

> " "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody...".
>
> (Underlined emphasis).

83. According to *The Judiciary Sentencing Policy Guidelines*:

> " The proviso to Section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

(Underlined emphasis).

84. I am therefore in agreement with the Appellant that although the sentence of 10 years imprisonment was not manifestly harsh, the same was excessive in the sense that the period of 212 days that the Appellant remained in custody was not taken into account by the trial court. The appeal on sentence succeeds on that ground.

85. The upshot then is that the appeal on conviction is dismissed. On the basis of the reasons I have stated above, I allow the appeal on sentence, only to the extent that 212 days that the Appellant remained remanded in custody shall be deducted from the sentence of 10 years imprisonment that was imposed by the trial court.

86. This file is closed.

DELIVERED (VIRTUALLY) DATED AND SIGNED THIS 1ST DAY OF JULY, 2025.

JOE M. OMIDO

JUDGE

Appellant: Present.

For Respondent: Ms. Muema, Prosecution Counsel.

Court Assistants: Mr. Juma & Mr. Ngoge.