



REPUBLIC OF KENYA



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**Birgen v Republic (Criminal Appeal E001 of 2023)
[2025] KEHC 15313 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E001 OF 2023
E OMINDE, J
OCTOBER 30, 2025**

BETWEEN

ALEXANDER KIPKOECH BIRGEN APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged in Eldoret Chief Magistrate's' Criminal Case No. 2888 of 2018 on four counts.
2. On Count I, the Appellant was charged with abducting with intent to confine contrary to Section 259 of the Penal Code. The particulars of the offence were that between 8th and 9th July, 2018 near Safaricom House Eldoret Town within Uasin Gishu County, with the intent to cause CCJ to be secretly and wrongfully, confined abducted the said CCJ.
3. On Count II, the Appellant was charged with rape contrary to Section 3(1)(a)(b) and (3) of the *Sexual Offences Act*. The particulars of the offence were that between 8th and 9th July, 2018 within Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of CCJ without her consent.
4. On Count III, the Appellant was charged with abducting with intent to confine contrary to Section 259 of the Penal Code. The particulars of the offence were that between 8th and 9th July, 2018 at Soy Sub-Cunty within Uasin Gishu County, with intent to cause CC to be secretly and wrongfully, confined abducted the said CC.
5. On Count IV, the Appellant was charged with Rape contrary to Section 3(1)(a)(b) and (3) of the *Sexual Offences Act*. The particulars of the offence were that between 8th and 9th July, 2018 within Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of CC without her consent.



6. The Appellant pleaded not guilty to all the charges and the case went to full trial in which the prosecution called six (6) witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and put him on his defence under Section 210 of the Criminal Procedure Code. The Appellant opted to give a sworn statement and called 7 witnesses.
7. By judgment delivered on 21st December 2022, the Appellant was convicted on Count I and sentenced to serve 3 years' imprisonment, he was acquitted on Count II, he was convicted on Count III and sentenced to serve 3 years' imprisonment and convicted on Count IV he sentenced to serve 10 years' imprisonment. The Court directed that the sentences shall run consecutively.
8. Being dissatisfied with the decision of the trial Court, the Appellant instituted this appeal on 4th of January 2023, against the conviction and sentence on five grounds reproduced verbatim as hereunder;
 1. That the learned Magistrate erred in both law and facts by convicting the Appellant in Counts I, III and IV to run consecutively without regarding that the said events were found in the same file and more so Count I and III affected one victim.
 2. That the trial Court erred in law and facts by convicting the Appellant, yet failing to hold that the investigation in this instant case was shoddy and shambolic.
 3. That the medical interference in this case was not supportive thus tendering the conviction unsafe.
 4. That the learned trial Magistrate erred in law and fact by convicting him on flimsy and unreliable witnesses of the prosecution.
 5. That the learned trial Magistrate erred in disregarding the Appellant's plausible defence.

The Evidence

9. PW1 was RT, she testified that she is a nurse by profession. That she is based in Uasin County and is a resident of Kimumu drips road in Eldoret. She testified that she recalls that the 7th July 2018 was a Saturday and that she was at home where she lived with one CJ who is a cousin to her husband and she also had a house girl by name Jepchumba. She testified that in the morning C who was a KMTC student told her that she wanted to attend the burial of a fellow student who had lost a parent and she allowed her to go. That she he left at 8.00 am and went to Nandi and that later at 2.00 pm C called and told her that she will not be able to come back home on that day but would come the following day.
10. She testified that on Sunday, she read a text message at 7:00 pm, where C said that she was at a cyber and she will return home after she was done with browsing. That she waited until 9:00 pm when she called her to no avail. That shortly thereafter she received a phone call from C's sister who resides in Lodwar who asked her about C.
11. She testified that the following morning C sister called Agnes called her while she was at her place of work and told her that C had called her on phone and informed her that she had been locked inside a lodging at Kaiboi in Nandi and that the person who had locked her in the lodging wanted to kill her. That the person who was with her was one Alex who was a driver to Agnes. She added that Alex had passed by their home while on his way to Lodwar and thus he was well known to her.
12. She further testified that she made a report at Eldoret Police Station about the disappearance of C and the officers advised her to tell C to go and make a report herself. That she went back to work and while at work she received a phone call from a new number 0722868739 and the caller introduced himself



- as Birgen and he asked her if she knew him but she couldn't recall who he was. She told the Court that he inquired about C's whereabouts and she stated that she had left on Saturday to attend a burial and by Monday morning she had not returned to the house.
13. She stated that she then tried to call home to know if C had arrived home but she was informed that she was yet to arrive. She stated that she also thereafter received a second call from the same person, who inquired about C again but she responded in the negative. That he then told her that he wanted to take her to where C was. That she asked him who he was and he told her that he is Alexander Birgen the driver of Agnes, C's sister. She testified that she told him that she was at her place of work and gave him directions to the place and after a few minutes he came to the gate of Uasin Gishu Sub- County hospital.
 14. That he arrived driving a Prado motor vehicle registration number KBB 673J, grey in colour. She then identified him, and that indeed the vehicle belonged to Agnes. That he showed her two mobile phones and a handbag containing books, which she identified as belonging to C. That he asked her to board the vehicle to enable him take her where C was. She stated that she declined to board since she did not know where he was taking her and that she told him that she would require a second person to accompany her since C had told her that she was with a person who had threatened to kill her and so he left.
 15. She told the Court that she waited until 5.00 p.m. and went to the Police Station to make a second report and as she was walking to the station, she received a phone call from her mother-in-law who told her that their house girl had gone missing from the house around 3.30 p.m. and that a neighbour's house girl stated that she had seen Jepchumba speaking with a man who was driving a grey Prado, outside their gate.
 16. She stated that she connected the said vehicle with the one Alexander arrived at her place of work with and stated that Alexander also knew her residence. She told the Court that she then called her husband who had travelled to Nakuru and informed him of what had happened. She testified that the husband then came at around 6:00 pm and he too went to make a report at the Police Station. That as they were at the station she received a phone text message from the same number that Alexander Birgen had used to call her and that the message read as follows;

“ok - huyu ninamchinja sahai yeye”. That there was also a second message which read “Jepchumba kwisha.....pia namtafuta C” and a third message which read “ambia yeye niko nayeye mpaka ni hakikishe she is dead, “Penye nitampata niapo”.
 17. She told the Court that as they were in the station, the husband to Agnes arrived at the same time with her husband. She stated that shortly, as it approached 7.00 pm, C arrived at the station but house girl was still missing. That C explained that she was to return on Sunday when she received a phone call from Alexander who advised her not to board a PSV stating that he will go and pick her up. That they met and the accused asked her to board the vehicle for him to ferry her home and after boarding, the accused took a turn to Nandi and that's how they got to Kaiboi. She testified that he had picked her at Eldoret town and at Kaiboi, the accused took her to a lodging where he raped her. That the matter was taken up by the DCI and with the assistance of her husband and Agnes' husband known as E they started tracing the accused.
 18. She told the Court that the following day, the house girl Jepchumba was traced. That C went to RVVTI and pretended to be stranded. That she called the accused and requested him to go and rescue her and the accused dropped the house girl at Mosoriot and then drove to RVVTI to pick C and that is how the police officers managed to apprehend him. She testified that they went and got the house girl and that the accused had taken her to Kaiboi forest where the accused raped her and that he told her in during



- the ordeal that the target was C and herself and that the two of them had eaten a lot of his money yet she herself had never gotten a penny from the accused.
19. She testified that the accused and C had a relationship and when C wanted to get out of it the accused got infuriated. She testified that the manner in which Jepchumba disappeared is that the accused had returned home and asked what her mother-in-law wants to take and she said milk and he said that he had milk in the vehicle that she went to take from the back seat and as she entered to remove the milk, the accused locked the doors and drove off with her. She testified that they went to the DCI and recorded their statement. She told the Court that she does not know how long the accused had worked as a driver for Agnes. She identified the accused as the person before Court.
 20. The witness basically reiterated her testimony as already herein summarised in cross examination save to add that she confirmed that she knows the Appellant very well as he used to come to her house while on his way to Lodwar.
 21. PW2 Joseph Kiptalam, testified that he is a nurse at MTRH and that PW1 is his wife. That on 9th July 2018 was on his way from Nakuru heading to Eldoret when he received a phone call from his wife (PW1) she told him to go to Eldoret Police Station as there was an issue there. His evidence on what transpired before he came to the scene mirrors the evidence of PW1 as already herein summarised and I will therefore not regurgitate the same.
 22. He testified that after his wife received the text messages while they were at the CID offices, the CID officers took the number and tracked it to Kaiboi trading centre. That the following day, they went straight to Kaiboi, in the company of E who is husband to her cousin in the company of police officers and they stated looking for C at the local AP camp where C had called his wife the previous day and informed her that she had sought refuge. They found C and even as she appeared traumatized she informed them that she was safe. She explained that the hijacker who was the accused wanted to kill her.
 23. He told the Court that thereafter they went round the lodges looking for the accused known as Alexander, but they were not able to get him. That they contacted the Chief of Kaiboi in the company of the police officers and he promised he will assist in tracing the accused and they then came back to Eldoret. That the police officer tried to call the accused but his phone was switched off. That upon arrival at Eldoret, the accused called back on the police officer's number and that the officer told him there was a lady who was trying to reach him. He told Court that they were with C who then called Alexander using a different phone number and told him that she was stranded at Langas and Alexander asked her to wait for him he would come for her. They then went and took strategic positions as the officers laid an ambush.
 24. He testified that Alexander arrived at the scene while driving motor vehicle make Prado KBB 675J grey in colour. C was standing alone. Alexander saw her, stopped and beckoned her to walk up to the vehicle. It is at this point that the officers struck and arrested the accused. That the witness then interrogated him on the whereabouts of Cynthia, whom he had said that he had killed and the accused said that he had dropped her at his grandmother's place at Mosoriot. They went to Mosoriot to a home and found Cynthia in the company of her grandmother where the accused had dropped her. He told the Court that Cynthia appeared traumatized and psychologically disturbed, he tried to inquire from her what had happened and C stated that the accused had raped her and Cynthia too said that she had been raped by the accused and that she did not have any on under wear.
 25. He testified that they then went back to Eldoret Police station from where they were referred to MTRH, where the two girls were examined and treated. That they later recorded their statements on 11th July 2018. That the accused was placed in the cell, the motor vehicle (Prado) was inspected and C's back pack was found in there. There were also knives that were found in the car. That Cynthia told



them that the accused had raped her in the forest. That the accused was actually interested in raping and killing his wife, but he missed out on her. He told Court that his wife told him that the accused had once came to his home in the company of his cousin Agnes as they were on their way to Lodwar and they accommodated them and that other that they have no other relationship. That after recoding their statements, they went home but did not find C and they thought that something had happened to her, but it emerged that she was alive but Cynthia too run away out of fear for her life. He then identified the accused as the person who was before court.

26. On cross-examination, PW2 reiterated his averments in chief and added that in this case, he did not act in his capacity as a nurse or practitioner but as an aggrieved person and that he is not the one who attended to appellant, who was attended to by a doctor. He stated that he has colleagues at the said hospital but added that Medical officers taken an oath to follow the truth and he had no way of influencing the outcome of the matter.
27. PW3 was C Cheboi Jepkoech, she testified that on 8th July 2018 which was a Sunday, she was in Eldoret town when she received a phone call from Alex the accused herein who is her ex-boyfriend. That he told her that he was in Eldoret for official duties and he asked her if she was busy. She told him that she was arriving in town and was intending to go home at Kimumu and he told her that he was headed to that direction and he offered to give her a lift since he was driving.
28. She stated that they agreed to meet at Safaricom office in town and she went there and found him in motor vehicle KBB 673J a grey Toyota Prado. Inside, there was a second male person. He opened the back left door for her and she boarded. She told Court that the other person was in the front seat and he told her that would drop off the male person first which at Tuskys. He then drove back to the highway and took the Kapsabet road. She testified that she immediately raised a concern and she asked him why he had diverted to the wrong route yet she wanted to go to Kimumu and he shouted back at her and asked her to keep quiet, he crossed Sosian river and pulled out a kitchen knife and he told her if she raised an alarm or makes any further comment, he will stab her.
29. She told the Court that after the male person had alighted, he had ordered her to join him at the front seat and she was now occupying the co-driver's seat. That he then sped off towards the Kapsabet general direction and he was still holding onto the knife. That when they reached Mosoriot he crossed into the direction of Kapket where his home is and he was driving at a very high speed. She told Court that at Kapket they stopped and alighted as she was left inside the vehicle. That shortly thereafter, he came back and drove towards a market centre whose name she couldn't recall and when he stopped and alighted he left her inside the vehicle. She testified that by this time, the Appellant had snatched her phone from her and that she was unable to communicate with anyone. That after about 30 minutes he come with an old man and an old lady and he asked me to greet them but instructed me not to say anything more and that after greeting them they left and they started our way back towards Kapket.
30. She testified that she was scared by his conduct and on their way they found a vehicle which had broken down and he pulled off his vehicle and went to talk to the men who were attending to the vehicle and he stayed with them for around 45 minutes, while she was still locked in the Prado. They reached Kapket centre where they took a turn to Kaiboi centre and when she inquired where he was taking her he said they will use the Kaiboi road to come to Eldoret. That when they reached Kaiboi, he told her that they are not going anywhere and that his mission was to eliminate her, which she understood that to be a threat to her life. That he then went outside and went round to look for a lodging and that he held her by the hand and pulled her towards one of the rooms in the facility and then he forced her into the room and locked it. She testified that at the time, she did not see any other person, that she did not scream since it wasn't clear to her what his intensions were and he had also locked the room from outside.



After some time, she stated that he came back and began asking her why she had left him, why she had rejected him and why did she used to ignore his calls and was not responding to his text messages.

31. She testified that he started making sexual advances at her, which she resisted and he did not manage to have sex with her and after she resisted him successfully That he fell asleep but she did not fall asleep. She added that the Appellant slept until 7:00 am when he woke and went outside and she went and locked herself in the room that they had slept in and when it was quiet outside she opened the door and met some men who told her that the accused was seen with the vehicle. She asked them for a phone phone and one of them gave her the phone and she used it to call her sister Agnes Cheboi and to whom narrated her ordeal. She told Court that her sister asked her to report the matter to the nearest Police Post and she went to Kaoboi Police Post and made her report and stayed there until 5 pm.
32. She stated that Officers called her brother in-law Moses Elim and they explained to him her situation, he sent to her bus fare to Eldoret town and the officers took her to the stage where she took a vehicle to Eldoret and on arrival, she went straight to Eldoret Police station, where she met her cousin in-law and her cousin Chesang. That she was interrogated and her report booked after which they went home.
33. The following morning, she stated that the officers started tracing the accused, they went to Kaiboi in the in the company of the officers but they did not trace him and so they came back to Eldoret Police Station and she gave the accused number to a police officer who traced him, telling him that she was in need of help as she was stranded somewhere and the Appellant said he was available. That one of the officers gave her his phone and she used it to call the accused and she told him that she was at Eldoret Polytechnic stranded and the accused told me to wait for him there. She testified that they went with the officers, she stood somewhere near the institution and the Appellant came driving the Prado, he stopped when he saw her and as he was talking to her the officers came in swiftly and arrested him.
34. She told the Court that at the time, a house girl to her cousin had also gone missing and when the Appellant was interrogated about her whereabouts, he explained that he had dropped her at his grandmother's place at Mosoriot. That they went to Mosoriot and they found the girl by the name Chepchumba at her grandmother's place in Mosoriot. That she was traumatized and complained of pain, however, she was stable but dull. She was interrogated by the police and she stated that she had been subjected to sexual abuse by the accused. She was referred to MTRH, just like herself and the Appellant.
35. She stated that the three of them were examined by the Medical Officers at the Hospital and given the appropriate treatment and thereafter that the Appellant was placed in the cells. She stated that she had been examined to confirm if the accused had sexually assaulted her. That during the incident, they had struggled with the accused and he almost penetrated her vagina with his penis, that he had touched the surface of her vagina but she managed to resist him, that he had made an attempt to and he had removed her clothes as he struggled with her. She told the Court that Chepchumba said that the Appellant had managed to penetrate a vaginal opening. She then identified the Appellant as the one before Court.
36. On cross-examination, she stated that the Appellant used to be her boyfriend, but at the time but they had parted ways. She stated that he was her sister's driver and she had no reason to ignore his call. She told the Court that the vehicle he was driving belonged to her sister Agnes. She stated that he was meant to take her home. That when she entered into the vehicle, he pulled out a kitchen knife that was stationed next to the door of the vehicle and he locked her inside the vehicle and she was not able to get out. She stated that she has used the vehicle as a passenger not as a driver but did not know how the central locking system of the vehicle works. She stated that the accused had taken her two phones and that he had threatened her with the knife and that he said that his intention was to eliminate her.



37. She stated that she had not recovered since she was in the accused's custody and that she got help from some two young men who gave her a phone to call her sister and that they also took her to Kaiboi Police Post where she explained everything to the officers and they took steps to help her. She stated that main investigations into this matter was done at Eldoret Police Station, and that bus fare to Eldoret was sent to her by her brother-in-law. She told the Court that the police officer escorted her up to the stage where she took a vehicle to Eldoret and she met the rest of the team at Eldoret. She stated that at the cyber she was doing her college work but she could not recall the date. She told the Court that much of her research work was done at the said cyber.
38. She stated that the accused made a frantic effort to forcefully have sexual intercourse with her, but she managed to resist him. She told the Court that the accused had brought his penis into contact with her vagina. She stated that she is the one who gave the officers the accused's mobile number and that they had Planned to trick him so that they could arrest him.
39. PW4 was Dr. Michael Kabigen, he testified that he is a medical officer based at MTRH and that he holds a Bachelor Degree in Medicine and Surgery form Egerton University, class of 2018, and that he is based at the Directorate of Reproductive Health and that he worked with Dr. Temet who had filled the P# Form and who was away on study leave for six months and is therefore conversant with his signature and handwriting.
40. He testified that he has a P3 form for a patient know as CJ, who at the time of examination was aged 20 years old and that the medical officer's Reference No. is 0734463. He stated that clothing was not produced for examination. That the patient explained that she has been abducted by a male person from her place of work, who drove her to Kaiboi forest where he raped her under the same vehicle on 9th July 2018 from 6pm till the following day. That at 11 am the next day, he then drove her to Kapngelion Nandi county, to her sister's place. He told the Court that upon examining her on 10th July 2018 at 6pm, he found that the head and neck were normal and that on the thorax and abdomen, there were lacerations on mid chest and back, lacerations on the medial aspect of the thigh and groin areas
41. He further testified that on general examination, there was erythema labia minor and posterior fourchette and hymenal lacerations, there was whitish PV discharge, HIV was negative, HVS there were red blood cells, pus cell per high per fill (HPF), few multi bacteria, moderate epithelial cells, VDRL was negative, DVT was negative, urinalysis-3 pus leucocytes, test of blood-31 which was elected and 21 respectively consistent with rape. That the offence took place on 8th July 2018 and that a blunt object had been used. That the P3 form was signed by Dr. Temet on 13th July 2018. He stamped with the official stamp. He then produced the P3 form as evidence.
42. On cross-examination PW4 stated that as per the P3 form it is only the victim who was examined and that he did not have any evidence if the assailant was also examined. He reiterated that there was whitish discharge from the vaginal opening that showed that she had an infection. He stated that several tests were done and that HVS disclosed that there was bacterial infection, urinalysis too disclosed the presence of an infection. He told the Court that infection in ladies come as a result of having a sexual intercourse with a man and he stated that it is not a must that a man must have a positive finding just like a lady.
43. He stated that tenderness indicates that there is pain and that there was tenderness on palpation. He told the Court that they also take the history of a patient as they treat them and those medical officers are based in the job are able to detect the injuries. He stated that rape means that there was no consent and that on the thighs and the labia minora there were positive marks indicating the of use of force and



- the groin also had injuries and there was positive evidence of rape on the patient and that the patient was given treatment to prevent syphilis, hepatitis and gonorrhoea.
44. He told the Court that is very normal for patients to get treatment and that the treatment is captured in the treatment notes. He stated that trauma to patients depends from one person to another. He stated that the patient was able to articulate her case. He told the court that the clothes which the patient was wearing at the time of the incident were not presented to the doctor. He clarified that the date of the incident was 9th July 2018 and that the P3 form was filed on 13th July 2018.
 45. PW5 was CC she testified that she is a housewife at the moment and that previously she was a house girl at the homestead of Joseph Chesang at Kimumu in Eldoret. She recalled that on 8th July 2018 at around 2 pm she was in the house and a man came and found her with the lady who was with in the house. He told her that he had delivered some items which she was to collect from the vehicle which he had been sent with by her boss and so she went outside with him. He told her to enter into the vehicle and she obliged. That the vehicle which was a Prado. She stated that after she entered, he locked the door of the vehicle and speed off. She was surprised by his actions and asked him what was happening and he ordered her to remain silent and he speed off up to Mosoriot where he stopped.
 46. She told the Court that she had tried to open the door of the vehicle in vain and that at Mosoriot he alighted and locked her inside the vehicle and she unable to get out. She stated that when he returned, he drove the vehicle to Kaboi forest and when he stopped the vehicle she asked him what was happening and he told her that she was not even his target, that he wanted her boss Mama K and that his other target was a lady who was also staying in the same house who was a college student. She told the Court that he said the girl had eaten a lot of his money and that he wanted to get even with them.
 47. She further testified that he then exited from the vehicle and walked around it. That time was now around 6.30 pm and they were in the forest. She stated that while there she asked him what was his intentions were and he asked her to remove her clothes which she declined since he was stranger to her and that is when he brandished a knife which he had kept in a bag and he said he will kill her by stubbing her with the knife. She stated that she feared for her life and pleaded with him not to kill her. She told the Court that the knife was a kitchen knife (shown knife). She then identified the knife and told the Court that it had broken wooden handle. The same was then produced in evidence as MFI-2. She testified that when she noted that he was serious, she had no option but to give in to his forceful demand. That the accused then removed his clothes and forced his erected penis into her vagina. That he forced himself on her and that after the first round he paused and told her that he had sent a message to her boss that he had killed her. That he again had sex with her and he continued that way until morning and that he was raping her inside the vehicle.
 48. She testified that in the morning, he drove the vehicle up to a river and he ordered her to clean the vehicle and when she saw a lady pass by and she made to scream for help he warned her that if she raised an alarm, before help comes her way, he will stab her with the knife. After cleaning the vehicle, she told the Court that he drove to a certain place and the people there were his relatives and when he was asked who she was he claimed that he had only given her a lift.
 49. She testified that thereafter he drove to Mosoriot town and on arrival she told him to allow her alight and pick something from her aunt's place and when he told her that he was based in Lodwar she pretended to agree to accompany him to Lodwar and he waited for her as she went to her aunt's place where she asked for a key to the toilet and since she had not changed her panty, she had some itchiness. She stated that she went to remove the pant and dump it in the pit latrine and that her aunt spoke to her and asked her if she was okay but she didn't want to raise an alarm at the time and so she got out of the toilet and luckily as she got back to the hotel, her boss arrived and they rescued her and they went back



- to Eldoret. That she was later informed that they had tracked using the accused's phone number which he had used to send messages to them and that the signal had directed them to the area where they were.
50. She finalized by stating that they to Eldoret County police station and the matter was booked. She was then referred to MTRH where she was examined by a medical officer and she was issued with a P3 form. She then produced the P3 form (PEXH-1 identified). She told the Court that she had never seen the accused person before the abduction. On cross-examination, she maintained that she was at her employer's place and that it was the accused who came and tricked her into believing that he was delivering some items and that she had never seen him prior to the time that he appeared at the homestead.
 51. She stated that from Mosoriot, the Appellant drove to a forest known as Taboro and that is where he raped her and that he had a bag and that he pulled a knife that was inside and he used it to scare her. She told the Court that the Appellant raped her for a long time and that he made around five rounds of forced sexual activities with her. She stated that the knife which the Appellant had is before Court and that it was recovered at the time of the arrest and that it is the police who kept the exhibits. She added that there were two knives in the bag but could only see the one he used to threaten her.
 52. She told the Court that the Appellant had made phone calls and that she also saw him sending texting messages and that he told her that he had sent text messages saying that he had killed her. She stated that she did not consent to his forceful sexual acts and that he was holding a knife and she had no option than to let him have his way. She told the Court that she had decided to change her panty since it was dirty and she had not changed it for a long time. She stated that she was traumatized by the act he did to her and she denied having a relationship the Appellant.
 53. She stated that C was a college girl who was residing with her at her employers' place and then she was a college student. She clarified that the Appellant had directed her to tell anyone who asked her who she was, that he was only giving her a lift. She stated that she has no reason to testify falsely against the Appellant and that the Appellant was an absolute stranger to her at the time.
 54. PW6 was No. 75909 PC Samson Kimeli, he testified that he is attached to the DCIO Eldoret west and that he took over this matter from his colleague Sevine Karunge who has since been attached to the Kenya Embassy in China and that he is the current investigating officer. He stated that they had jointly investigated this matter with her and he is familiar with the handwriting of the said officer and that he is well aware of the signature.
 55. He testified that on 10th July 2018, a report had been made by one Ruth Tanui and her husband Joseph Chesang that a girl who was then an MTC student named C had been abducted by the Appellant herein. C on her part stated that the Appellant had called her on phone that they meet at Safaricom shop in Eldoret town and that when they met, the accused who had a vehicle offered her a lift to take her to her home at Kimumu and she accepted and that the Appellant instead took Kapsabet road. He stated that on arrival at Mosoriot he took Kaiboi road, that the Appellant took a lodging and led the said girl into the said lodging and the Appellant attempted to rape her, that in the morning, they woke up and the Appellant asked C to open the gate for him and that gave the girl a chance to close the gate and rushed back to the room where she locked herself inside and that the Appellant attempted to get back to C to no avail
 56. He testified that after the accused left, the girl got out and was assisted to go to local AP camp at Kaiboi and that she made a report at Kaiboi AP Camp where one of the officers thereafter gave his phone to C and she called her brother cousin in law Joseph who sent her fare through M-pesa and she managed to travel to Eldoret. He stated that they went to the police station to make a report and that is when it emerged that the Appellant had also abducted the house girl of Joseph. He testified that it is the



Appellant who deceived the house girl and managed to drive away with her and took C to Kaiboi forest where he spent the entire night in the vehicle at Kaiboi forest raping her.

57. He testified that he interrogated both C and C and that the statement of C the housegirl was that the accused had sexual intercourse with her repeatedly on the said night and that the following morning the Appellant drove C to Kapngetich market centre. He stated that it is in between Kaiboi and Mosorit C managed to escape into her aunt's place. He stated that in the meantime investigations by the police where underway and that they gave C Kalinge's phone to call the accused and claim to be stranded and that the Appellant said he was coming from Mosoriot and C should wait for him. He stated that they agreed to meet outside Eldoret polytechnic and they took strategic positions and lay in wait. That shortly the Appellant arrived in a grey Prado whose registration number as given to them was 673J.
58. He testified that as the Appellant started talking to the complainant C, they moved in and introduced themselves and they placed him under arrest. That they conducted a search and found a greenish back pack and inside the bag they found a medium sized kitchen knife. He told the Court that the Appellant had pretended to take C to her residential place, but he instead drove and speed off with her towards the wrong direction, that he threatened her with the knife if she resisted or raised an alarm. He testified that they recorded the statements and issued P3 forms. He added that they went to MTRH for examination and treatment and that their respective P3 forms were filled.
59. He testified that they went to Kaiboi trading centre, they went to a lodging where the Appellant had taken C, they saw the gate and the room and they also went to the forest at Kaiboi. He told the Court that record was then under C and that is the reason the Appellant could not drive ahead and that is why the Appellant elected to park the vehicle and spend the night in the forest.
60. He told the Court that there are no residential places in the forest. He stated that from Kaiboi up to the forest is about 12 KM and it would be an exercise in futility for one to scream and raise an alarm at night from the forest. He testified that there were two knives which were a Maasai sword and a kitchen knife but they only recovered the knife since it was the one that was used to threaten the two ladies. He stated that the Appellant had been employed by a lady to drive the vehicle. He testified that the Appellant confirmed that the bag belonged to him. He then produced the knife as evidence PEX. No. 2 and the Green bag as PEX No.3.
61. On cross-examination he stated that he is the investigating officer in this matter and that he had jointly investigated the matter together with my colleague Kalenge who is away in China. He stated that he visited the scenes in the company of the said officer and that he was present at the time of the Appellant's arrest outside the entrance of Eldoret polytechnic which was on 10th July 2018. He clarified that the Appellant was not arrested on 4th June 2018 and added that if any document shows that, that would be a typing error. He maintained that he was present at the time of the Appellant's arrest and that he was part of the arresting team.
62. He told the Court that they were several officers from the DCI and that the lead investigator was Savine Kalinge. He stated that they recovered two objects that is a kitchen knife and a sword and that they detained 1 knife as an exhibit, since it is the one which was used to threaten the complainants. He told the Court that it is true there were cloths inside the bag, that one of them is the jacket the Appellant was wearing in court and that the same was released to him since he needed it to keep warm.
63. He stated that retained crucial exhibits in the case and that they had availed the same to him in court through a Miscellaneous Application, where they pleaded for extension of time to concluded investigations. He told the Court that they were investigating a complex case and that the application wherein they sought to extend time was MiscApp No.119/2018, and they were granted three days to conclude the investigations. He stated that the Maasai sword was kept in the vehicle and that the



- Appellant said that he kept it as a tool for his security when travelling to Lodwar owing to insecurity in that area.
64. He stated that the knife has been in his custody since the Appellant was arrested and that it is the same knife that he has produced before court. He told the court that there was no need for holding of finger prints for the knife since they had evidence that it was in the Appellant's possession and that there was no need to take any photographs showing the recovery of the exhibits from the Appellant.
 65. He told the Court that at the time of arrest, they were three officers and that he knows one officer called Cheboi who they used to work in the same station, but he has since moved to another station and that it is true they took the Appellant alongside the two girls to hospital for examination and treatment and that all of them were attended to and that they were accompanied by police officers. He conceded that he did not retain any cloth from the complainant for presentation as exhibits. He stated that they had gotten sufficient evidence which is why they charged the accused before court.
 66. He told the Court that the Appellant took advantage of the naivety of the girls and took them to the said locations. He stated that it is true one can open a vehicle from inside, but the girls had no idea how to open the same and escape. He told the Court that in the forest there is nothing the girl could do, that the Appellant was around with a knife and that he had made it clear that if she raised an alarm, he will kill her with the knife. He told the Court that it is true that the Appellant had a phone at the time of arrest but conceded that he did not have custody of the same. He clarified that the Appellant was charged with the offence of threatening to kill and that the charges before court were very clear and that they do not touch on improper use the mobile phone. He stated that they were tracking the Appellant's phone and that the Appellant used to switch it on and off. He told the Court that by the time the Appellant was picking C from Joseph's homestead, the offence was not established.
 67. He stated that the Appellant was arrested near Eldoret polytechnic and that their tracking device gives them a reading of around 600m, not the exact position. He told the Court that for C, the Appellant had attempted to rape her, but she resisted and that according to her he almost penetrated her. He stated that they reached the scene and they saw the tyre marks where the Appellant had parked the vehicle. He told the Court that it was not necessary to take the photos of the same and that the girl identified the scene to them and that the sexual assault was inside the vehicle in the forest.
 68. PW4 Dr. Michael Kabigen, was recalled and stated that he is now before court to give further evidence with respect of C aged 27 years old Reference No. is 0368320. He testified that her clothes were not produced for examination, that she was seen on 10th July 2018, that on the neck, head, thorax and abdomen there was no injury, the ribs too were normal. He told the Court that she came to hospital with a history of having been sexually assaulted/rape by a person well known to her, as per the brief details made by the police. He stated that the general medical history was not captured in the P3 form, it was left blank and the general physical examination is not filled.
 69. He testified that on the head, neck, thorax, abdomen, upper and lower limbs no injuries were noted, that a blunt object was used and that the date of alleged offence is indicated as 8th July 2018 and the degree of injury assessed as harm. He stated that the nature of the offence is rape and that the person examined was about 27 years old. He testified that HIV test was negative, VDRL was negative, PDT was negative, urinalysis revealed traces and there were epithelia cells that is 27 in nature which was high, Hepatitis was negative and that the history and examination findings were consistent with rape. He then produced the P3 form as evidence PEX No.4.
 70. On cross-examination PW4 stated that the victim was seen on 10th July 2018 and that the clothes were not availed for examination and that the medical officer did not document the history. He told the Court that it is the patient who gives the history. He conceded that the medical officer should have



filled the entire form and not leave out certain sections. He told the Court that the probable type of injury was a blunt object and that a male genital organ is an example of a blunt object. He stated that the medication which was administered is not indicated in the P3.

71. He told the Court that treatment is a process and that the same is not limited to administration of drugs. He stated that the degree of injury was assessed as harm and that there were traces of blood in urine. He stated that section C (2) of the P3 form is blank and that there is no indication if there was any discharge or not. He maintained that the role of a medical officer is to examine and treat a patient and not for identification of the alleged perpetrator of the offence. He conceded that he does not have any document to show that the Appellant had been examined and he had not seen any P3 form to that effect. He stated that the presence of epithelial cells at 27 is quite high and that there was friction on the minora.
72. DW1 was the Appellant he testified that he is a driver by occupation and he was aware of the charges he was facing before and that he recalled the testimony of the prosecution witness and he knew that he was in court to give his defence. He stated that he was employed by one Moses Elim and his wife Agnes Cheboi, in the year 2017 in the month of September and that Moses is a medical practitioner and the wife too is such a practitioner. He stated that Agnes is a sister of C, who is one of the complainants herein.
73. That while working for Elim and Agnes he was not been being paid his salary. He alleged that Agnes wanted to have an affair with him. He testified that he called C and they agreed to meet at home. He told her that he wanted to talk with her about the said issues and that at time he was in a relationship with C and that it was C who introduced him to her brother-in-law and sister. He testified that at 11:00 am C arrived home and that he left with C to visit his aunt who was sick and that they also went to see another relative who was suffering from cancer. He told the Court that when they were exiting, he met one Emmanuel in the company of David who boarded the vehicle and they left. He stated that on the way they were stopped by traffic police officers who checked the vehicle.
74. He told the Court that C said she wanted to visit a vent dam, that they took a turn and went to Kapyet, Emmanuel and David alighted and they went around to a local shopping centre and he bought a few foodstuffs. He stated that he had left C with some relatives and that he came back and they asked for a lift and they boarded the vehicle and went to his aunt and that they alighted and met his aunt and were welcomed into the house. He stated that his aunt sent C to pick the phone from the bedroom and she made a call to the daughter Sally who said she had bought the drugs and her aunt asked him to go and pick the drugs from her daughter's place and that Sally gave them the drugs and they drove back.
75. He testified that on the way, Agnes called her on phone and he asked C to answer it and that C was shocked by the phone call because Agnes had told her that he wanted to rape her, that they went and met one Edward on the way, they gave him a lift up to his aunt's place and they gave her the drugs and left. He testified that on the way they met a broken-down motor vehicle, they stopped and helped them in fixing the fault and they drove up to Eldoret. He stated that they agreed to drive C to Kimumu and then continued to Maili nne stage where he dropped Edward and went home.
76. He testified that he went home at around 9:00pm and he met his parents who inquired about the whereabouts of C and he informed them that he had driven her home. He stated that on 10th July 2018, he received a phone call from C, at about 2:00 pm and she told him she was in trouble at Langas, that he drove up to Langas to know what the issue was and at the entrance of Eldoret polyethnic, he stopped and as he was calling C and she responded, she saw him and then came and a police officer who is a cousin to C came and they began to assault him with other officers, they handcuffed him and he



was brought to Central Police Station, in company of C's relatives and a search was done on the motor vehicle and they got a knife and he was placed in the cell.

77. He testified that he was later taken to hospital in the company of C relatives and police officers, that he was injured when he was beaten, that blood samples were extracted from him by Dr. Chesang a brother to C. He told the Court that they wanted to take blood samples, urine samples but he protested and a different doctor came and completed the process. He testified that he was then taken to the DCI office where he was interrogated and on 12th July 2018, he was brought to court and that the officers were given 3 days for completion of investigations and on 16th July 2018 another girl came and she alleged that he had raped her, which was not true. He stated that his phone was taken and it was never returned to him. He testified that he did not commit any offence
78. On cross-examination DW1 stated that Agnes wrote to him messages, that she wanted to force him, into a sexual relationship, that she was telling him that they keep the incidents at the hotel between themselves. He conceded that he never reported anything to Agnes husband and he never made a report to any police station. He maintained that Agnes wanted to force him into a love affair, that she forced him to do an HIV test but he did not make any report to the police and Agnes husband.
79. He stated that on 8th July 2018, he took C to Nandi County, that they went to his aunt's place. He maintained that they did not spend the night there, he drove her back to Eldoret and denied that he took her to Kaiboi shopping centre and he was not aware of any report made at Kaiboi AP Post. He stated that C did not run away, that she lied to her aunt about the alleged incident at Kaiboi.
80. He admitted that he was arrested at Langas while he was driving the Prado vehicle KBB 370J and added that it is only a knife which was recovered in the vehicle, not two. He stated that it is the officer who alleged that there were two knives and denied that the knife was availed as evidence. He told the Court that C and C stated that he had used the knife to threaten them, but that is not true. He stated that he had no bag in the vehicle, had no clothes in the bag and that the bag that was availed wasn't his.
81. DW2 was No. 52613 CPL. Henry Kipkoech Rono, stationed at Soy police station where he performs general duties. He testified that on 8th July 2018 he was admitted at Reale Hospital having been involved in an accident. He stated that the Appellant came with a lady known as CC to see him at the hospital and that the Appellant introduced to her to him as his girlfriend and that they told him that they were proceeding to Nandi to visit one of the Appellant's parents who was sick.
82. He told the Court that a day later he was informed that the Appellant had been arrested with the offence of abduction, the complainant being the lady whom he had gone to see him with at the hospital. He testified that although he was sick, the two herein were friends and he therefore wondered how the same girl was abducted. On cross-examination DW2 stated that he does not know what happened thereafter and that he did not know if the lady was raped or abducted or not.
83. DW3 was David Kiprotich Birigen, who testified that the Appellant is his son. He stated that on 8th July 2018, the Appellant went home at around 9:00 am from Lodwar he was driving a Prado vehicle grey in colour. That he met him at home and he told him that he had been to Kitale with one Agnes a wife to his employer and that they were to get spares for motorcycle for his employer shop and in the evening, the wife wanted to spend the night in the same room but the Appellant was not for the idea so he looked for alternative accommodation.
84. He stated that he spoke to his son and informed him about his uncle who was admitted at Reale hospital and he also told him about her sister in-law Elizabeth who was sick. He testified that at around 11:00 am, CC came home and they talked for a while and the Appellant told him that he wanted to visit Rono and Elizabeth and they left him at home and that in the evening at around 9:00 pm the Appellant



- left Eldoret for Nandi and that he was alone at the time. He stated that she asked where C was and he told him that she had gone to Kimumu, that she was to go to school the next day and they broke for the night.
85. He testified that the following morning they were at home and the Appellant came to call his employer to no avail and that he also called C to no avail and that the following morning, that is on 10th July 2018, they were at home until 2:00 pm when C called the Appellant on phone and said she was at Langas, then Eldoret polytechnic, that she was needed protection and wanted Alex to go and see her and that the Appellant left in the motor vehicle.
86. He stated that at 3:00pm, he tried reaching the Appellant on phone to no avail and at 5pm Alex called him on another phone and he told him he had been arrested and taken to Eldoret Central police station. On cross-examination DW3 stated that he does not know what happened to Alex and C thereafter. He did not know Cynthia and she did not know if anything happened to Cynthia.
87. DW4 was Sally Cheptoo Birgen who testified that the Appellant is her son and that on 8th July 2018, in the afternoon, her late mum called her and told her that Alexander asked her where C was, that she wanted some drugs from where she works. That after sometime, the accused and C arrived and spent some time with her and then she took him to school to visit his sister. On cross-examination DW4 she told the Court that the Appellant is her cousin. She stated that C came with Alex but she did not know the circumstances under which she came.
88. DW5 was Ziporah Birgen testified that the Appellant is her cousin. She stated that on 8th July 2018, she was with her elder sister when her mum called and said that Alex had been with a vehicle and he wanted him to get medicine. She testified that the Appellant came with C and that they visited her sister in school and got the medicine and left. On cross-examination DW5 stated that her elder sister is Sally. She stated that they came at around 3:00 pm and they stayed for a short while and went to school, that they left at around 3.30 pm but she did not know where they left for and also did not know what might have happened thereafter.
89. DW6 was Edward Kipkoech Tanui testified that the Appellant is his neighbour. He stated that on 8th July 2018, he was at home and at around 3:00 pm, Alex met him and he asked him to wait for him and that at around 5pm. That the Appellant gave him a lift to Eldoret. He testified that at 5:00 pm, they came and started their journey to Eldoret and on the way they met a broken-down motor vehicle and the Appellant alighted and helped in fixing the same. He testified that they left and dropped a girl who was in the vehicle at Kimumu and he then dropped him at his place. On cross-examination DW6 stated that he does not know what happened on 9th July 2018. He stated that in the vehicle, there was a lady inside the vehicle.
90. DW7 was Emmanuel Anzimbo, he stated that he knows the Appellant herein. He stated that he the Appellant gave him a lift. He stated that the Appellant had a girl in the vehicle. He stated that they alighted and he left them to continue with the journey. On cross-examination DW7 he stated that he was with Birgen a fellow boda-boda rider when the Appellant gave them a lift to Kapyet, that the Appellant had a Prado and that they had flagged him and he stopped. He told the Court that there was an unknown girl in the vehicle. He stated that he alighted at Kapyet at around 1:00 am and he did not know what went on later.

Hearing of the Appeal

91. The Appeal was canvassed vide written submissions. The Appellant filed his submissions on 9th April 2025 while the Respondent through Prosecution Counsel, S.G. Thuo, filed on 9th May 2025.



The Appellant's Submissions

92. The Appellant submitted that the Charge sheet was defective for failing to disclose the timelines of the alleged offences. The Appellant relied on Section 137(f) of the Criminal Procedure Code. It is important for the court to point out at this early stage that this issue of a defective charge was not at all one of the grounds of the appeal filed. However, it will suffice it to say that I have nonetheless considered the charges as drawn in the impugned charge sheet received in court on 16th July 2018 and my perusal of the same has not revealed any defects at all as alleged.
93. The Appellant maintained that the charges of abduction were not proved beyond reasonable doubt. The Appellant submitted that based on the evidence of PW5 and the charges brought against the Appellant by prosecution, the facts of the case do not disclose the offence of abduction for reasons that there is no evidence of permanent confinement that amounted to total lock down. From the evidence on record, the Appellant submitted that PW5's testimony from the word go seemed to suggest that she voluntarily without unnecessary force accepted and agreed to accompany the Appellant.
94. The Appellant faulted the trial Court for not considering his defence. The Appellant submitted that from the sentiments by the trial Magistrate in his judgment, it is very clear that he had a formed opinion and therefore he was there to assist the prosecution to build up his case and prejudice the accused.
95. The Appellant faulted the trial Magistrate for relying on medical evidence that was not credible. The Appellant submitted that the trial Court heavily relied on the testimony of PW4 which lacked consistency and credibility. The Appellant further submitted that the doctor testified that the medical findings were inconclusive in proving penetration by the Appellant and that the same evidence formed the basis for discharging the Appellant on Count II but the Court relied on the same evidence to sustain a conviction on Count IV.
96. The Appellant maintained that there were glaring variations in dates reported by witnesses as against the initial police report. The Appellant submitted that the conflicting testimonies of PW3 and PW5 as well as the initial complaint recorded at the police station, raise significant doubts about the credibility and reliability of the prosecution case.
97. The Appellant contended that PW3 alleged that she was abducted and raped on 8th July 2018, PW5 in her testimony corroborated PW3's claims stating that she was abducted and raped on the same date as PW3, however the police records reveal that PW5 reported her abduction as occurring on 9th July 2018, a day after PW3's incident. The Appellant maintained that this inconsistency is not minor or immaterial.
98. The Appellant contended that the P3 Form that was tendered by him contradicted the claim of recent sexual activity. He submitted that that he tendered a P3 Form as evidence which indicated the absence of any genital discharge or other signs suggestive of recent sexual activity.
99. Finally, the Appellant submitted that the period spent in custody was not considered and that the sentences to run concurrently as the 3 offences stem from a single transaction. The Appellant in this regard cited Section 333(2) of the CPC and submitted that he was arrested on 4/6/2018 and he remained in custody until his conviction on 22/12/2022, a total of 4 years and 6 months. The Appellant urged that this prolonged period in custody must be factored in his sentence. He relied on the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR, in regard to the issue of the time spent in remand custody.



The Respondent's Submissions

100. Counsel submitted that the State discharged its duty in proving the Counts of abduction with intent to confine to the required legal standards. Counsel observed that elements to prove a count of abduction were discussed in the case of *Singh v Republic (Criminal Appeal E034 of 2021) [2023] KEHC 20506(KLR)* on 21/7/2023 as:
 - a. The complainant abducted was compelled by force or induced by any deceitful means to go to any place.
 - b. That the abduction was by the appellant
 - c. The abduction was with the intent to cause that person to be secretly and wrongfully confined.
101. Counsel submitted that the aforementioned elements were met in the matter in question and added that it was proved and not shaken at cross examination that both CCJ and CC were lured to board Prado motor vehicle KBB 673J only for the appellant to speed off after locking the victims inside, both towards the general direction of Nandi County without their consent, and were also threatened with a knife. The identity of the appellant was beyond doubt and by holding the victims in secluded places such as a deserted lodgings and a remote forest point to the fact that he intended to hold the victims secretly.
102. To prove the offence of rape, Counsel submitted that the prosecution was required to prove that: there was penetration of the complainant's genitalia, that the complainant did not consent or the consent was obtained by force; and positive identification of the accused.
103. In regard to penetration, Counsel submitted that according to Dr. Michael Kabigen (PW4), the complainant CC had tenderness on her thighs and groin, pain on her chest and back, erythematous labia majora and posterior fourchette and that there was also a high level of epithelial cells which he interpreted to be signs of friction in the vulva. Counsel observed that all these drove the medic to conclude that there were signs of sexual activity and he produced the P3 Form and treatment notes as Exhibit 1. Counsel urged that this medical evidence corroborates the complainant's testimony that she was penetrated
104. On the issue of lack of consent, Counsel submitted that the complainant CC testified that the Appellant threatened her with a kitchen knife, ordered her to remove her clothes and then forced his erect penis inside her. Counsel argued that that in fact in her cross-examination, she testified that the appellant made around five rounds of forced sexual activities with her. Counsel urged that the fact that a medic found her with injuries to the genitalia and the groin corroborates this rendition.
105. On the issue of identification, Counsel submitted that the complainant CCJ testified that they had known the Appellant as her estranged boyfriend and driver of employed by her sister Agnes to drive the grey Prado KBB 673J. Counsel further submitted that the second Complainant CC was equally lured into the same motor vehicle she knew was owned by a relative to CCJ and she also testified that the Appellant had informed her that he worked at Lodwar where she knew Agnes resided.
106. According to Counsel therefore, the Appellant was someone who was very well known to the witnesses and that thus makes it a case of recognition rather than identification of a stranger. Recognition Counsel submitted is, as was said in the case of *Reuben Taabu Anjononi v Republic (1980) eKLR*, more reliable and more believable than identification of a stranger.
107. In response to the seven grounds set out in the Appellant's submissions, Counsel submitted that the trial Magistrate discussed the Appellants defence from page 148 paragraph 2 to page 153 paragraph



17. Counsel argued that nothing has been put before the court to doubt the P3 produced and neither has the Initial Police Report been annexed herein to suggest any disparities in the dates and time of the offences. Counsel maintained that he has not seen any document ruling out recent sexual activities of the Appellant and the Court shall agree with him on this one. Lastly Counsel submitted Section 333(2) of the Criminal Procedure Code was considered at paragraphs 4 and 5 of page 169.

Analysis and Determination

108. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that as was held in *Okeno v Republic* [1972] EA 32. In this regard I have summarised herein, considered and analysed the evidence which was tendered in the trial court by both the appellant and the prosecution in compliance with this duty.
109. I have also read the impugned judgement of the Hon Trial Magistrate and in my considered opinion, based on the grounds of appeal as filed and herein reproduced, the written submissions on behalf of the parties herein, and my summation of the said evidence, it is my considered opinion that the issues for determination are as hereunder;
- a. Whether the prosecution proved its case beyond reasonable doubts
 - b. Whether the Trial Magistrate failed to consider the Appellant's defence.
 - c. Whether the sentence by the trial magistrate was excessive and unjustified in the circumstances of the case.
 - d. Whether the sentences ought to run concurrently
 - e. Whether the Trial Court considered Section 333(2) of the Criminal Procedure Code when passing sentence
110. The Appellant faced a charge of abduction contrary to Section 256 as read together with Section 259 of the Penal Code in Count I and Count III. Section 256 of the Penal Code defines the meaning of abduction as follows: -
- Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person.
111. Section 259 of the Penal Code defines abduction as follows: -
- Kidnapping or abducting with intent to confine Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years
112. The elements of the offence are that the person abducted must be compelled by force, or be induced by deceitful means, so that the person moves from one place to another with the intent by the person seeking to so abduct them that they be secretly and wrongfully confined. It is trite law the burden of proof rests with the prosecution and the standard of proof is that of beyond any reasonable doubt. (See *Stephen Nguli Mulili v Republic* [2014] eKLR). This court therefore needs to satisfy itself that the evidence adduced by the prosecution witnesses in support of the prosecution case has sufficiently established the existence of all these ingredients beyond reasonable doubt for the conviction on Counts I and II to be sustained.



113. These elements were discussed by the court in *Wright Kinyatta v Republic* [2021] eKLR where the learned Judge held as thus:-

“.....However, my reading of Section 256 indicates in my opinion, that the key ingredient in kidnapping and abduction is the forceful compelling of an individual or using of deceitful means to induce a person to go from any place. See, *Phidesio Nthiga Kithumbu v Republic* [2014] eKLR”

114. In Count II and Count IV the Appellant was charged with the offence of rape. He was however found not guilty and acquitted on Count II and found guilty and convicted on Count IV and sentenced to a term to 10 years' imprisonment. Section 3(1) of the *Sexual Offences Act* states that a person commits the offence of rape if;

He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;

- a. The other person does not consent to the penetration; or
- b. The consent is obtained by force or by means of threats or intimidation of any kind.”

115. With regard to counts II and IV this court needs to be satisfied that the evidence of the prosecution witnesses has sufficiently established that there was penetration, there was absence of consent, and even assuming there was consent by virtue of the fact that sexual intercourse between the parties took place, that the said consent was obtained by force or by means of intimidation and threats. And of course, with respect to all the four counts, the said evidence must establish beyond all reasonable doubt that the Appellant was the perpetrator.

116. On what the key ingredients of the offence of rape are, the Court of Appeal in the case of *Republic vs. Oyier* [1985] KLR 353 had this to say;

- “ 1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”

117. I have carefully considered the evidence as I have herein above summarised in its entirety as against the grounds of appeal raised and also alongside the impugned judgement. I find the evidence in support of the offence of abduction as charged in counts I and II and the offence of rape as charged in count IV to be cogent, consistent, and very well corroborated in regard to the allegation by the prosecution that the accused by use deceitful means forcibly abducted and spirited away the complainants from Eldoret to Mosoriot where he secretly and wrongfully confined them and then proceed to attempt to rape the first complainant and succeeded in raping the second complainant.



118. The court further notes that this evidence was in fact also corroborated by the Appellant's witnesses who in their evidence confirmed that the Appellant was indeed in the company of C the 1st complainant on the dates it has been alleged that the appellant abducted her. From my reading of the impugned judgement, I also am satisfied that the Trial Court did consider all the evidence, and including the evidence proffered by the Appellant in his defence.
119. I have also considered the evidence of the PW4 who testified on behalf of the doctor who examined the complainants as well as the P3 Forms produced and I am satisfied that the said evidence was cogent and reliable, and that it did support the evidence of the complainants as narrated to court on which one of them was penetrated and by the Appellant and which one was not.
120. Further, the ground of appeal that there was medical interference with the evidence, has not been elaborated upon and has also not been supported by any evidence at all and from my consideration of the prosecution evidence in its entirety, I did not come across any evidence than can even remotely be construed to indicate that there was any interference with the medical evidence to lend credence to this ground. Based on this evidence and the testimony of C, the Trial Magistrate rightly found that the offence of rape in Count II was not proved and acquitted the accused accordingly.
121. In light of the above therefore, the court is satisfied that the Hon Trial Magistrate rightly applied himself in relying on the said evidence in his finding of guilt and subsequent conviction of the appellant on Counts I, III and IV. I therefore confirm and uphold the same.
122. On the Appeal against sentence, the Appellant was sentenced to 3 years' imprisonment on each of Counts I and III, and to 10 years' imprisonment on Count IV. The Court directed that the sentences run consecutively.
123. The court is mindful of and alive to the fact that sentencing is a discretion of the trial court but even still, that court is obligated to look at the facts and the circumstances of the case in its entirety so as to arrive at an appropriate sentence. The court in this matter is guided by the principles set out in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR (supra) where it was stated as follows:
- “It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
124. The Trial Court ordered that the sentences run consecutively. However, this Court observes that all the offences are based on a series of one transaction. The offence of abduction occurred at the same time, and in the same circumstances that the offence of rape occurred. This court takes into account the fact that when an accused is charged with more than one offence based on a series of the same transaction, the rule of thumb is that the court in sentencing adopts a concurrent sentence, unless there are exceptional circumstances calling for the imposition of consecutive sentences.



125. This was the reasoning of the court in the High Court case of *Nganga v Republic*, Criminal Appeal No. 882 of 1975 (1981) KLR 530, 531 where Trevelyan J & Sachdeva AgJ held that

‘Concurrent sentences should have been awarded for this one criminal transaction.’

126. In the trial Court, the Hon Magistrate did not express any reasons for imposing consecutive sentences. Even as this Court appreciates the seriousness of the charges that the Appellant is faced with, the court considers that because the Trial Court did not give its reasons then this is a proper case wherein the court ought to interfere with the sentence imposed. In this regard, the Appellant’s appeal on this ground is allowed, the direction that the sentences run consecutively is now hereby set aside and the court orders that the sentences imposed run concurrently. The sentence of 10 years’ imprisonment takes precedence over the 3 year sentences and the Appellant sentence is now hereby revised to a total term of 10 years’ imprisonment on all the three counts.

127. Lastly on the ground of appeal as under Section 333(2) of the Criminal Procedure Code the said section provides as hereunder

“Subject to the provisions of section 38 of the Penal Code 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.”

128. This is a mandatory provision of the law as per its wording and as was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR. The Applicant herein was arrested on 4th June 2018 and was sentenced on 22nd December 2022. I have perused the proceedings of sentencing and I note that the Hon Trial Magistrate in meting out the sentences clearly stated that he has considered the time spent during the trial and noted that the accused was in remand custody during the entire period.

129. In this case, having considered the proceedings of the Trial in passing sentence, I am satisfied that the period the Appellant spent in remand was already considered in line with the provisions of Section 333(2) of the Criminal Procedure Code, and the Appellant cannot therefore benefit twice from the said provision.

130. It is so ordered. Right of Appeal 14 days.

READ DATED AND SIGNED AT ELDORET ON 30TH OCTOBER 2025

E. OMINDE

JUDGE

