REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ITEN
CRIMINAL APPEAL NO. E041 OF 2024

DUNCAN ROTICH MOSOP.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal from the Judgment dated 4/09/2024 delivered in Iten Senior Principal Magistrate's Court Criminal Case No. E1011 of 2023 by Hon. E. Kigen - Principal Magistrate*)

JUDGMENT

1. The Appellant was charged in the said criminal case with the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code.** The particulars were that on 12/09/2023 at unknown time in Siroch Sub-Location in Kamogich Location, within Keiyo North Sub-County, within Elgeyo Marakwet County, he unlawfully killed one **Teresia Kipkorir**.

2. The Appellant pleaded not guilty to the charge and the case then proceeded to full trial in which the Prosecution called 5 witnesses. At the close of the Prosecution's case, the Court found the Appellant as having a case to answer and placed him on his defence. The Appellant then gave a sworn statement and called no other witness. By the Judgment delivered on 4/09/2024, he was convicted and sentenced to 30 years imprisonment.

3. Dissatisfied with the decision, the Appellant, through **Messrs Anditi Odeyo & Co. Advocates,** filed this Appeal on 18/09/2024 against both conviction and sentence. The unnecessarily lengthy Petition of Appeal contains repetitive 12 grounds, which, with better drafting, could have been simply condensed into, at most, 3 or 4. The grounds are as follows:

i) **The learned trial Magistrate erred in both law and fact by overly relying on the evidence of the expert witness PW3 in the absence of tacit expertise on the part of the witness.**

ii) **The learned trial Magistrate erred in both law and fact by overly relying on the evidence of the expert witness PW3 in the absence of a positive estimate as to the proximate time of death.**

iii) **The learned trial Magistrate erred in both law and fact to consider the mitigating factors tabled by defence.**

iv) **The learned trial Magistrate erred in both law and fact by convicting the Appellant on highly contradictory evidence by the prosecution witnesses.**

v) **The learned trial Magistrate erred in both law and fact by convicting him without sufficient evidence and relying on the doctrine of last seen alive.**

vi) **The learned trial Magistrate erred in both law and fact by failing to appreciate that he was a first offender.**

vii) **The learned trial Magistrate erred in law when she failed to follow the properly consider the procedure for taking confessions.**

viii) **The learned trial Magistrate erred in law when she failed to follow the properly consider (*sic*) the prejudicial nature of a reference to a confession by prosecution witnesses without corroboration.**

ix) **The learned trial Magistrate erred in law and fact when she manifestly passed a harsh and excessive sentence to the Appellant.**

x) **The learned trial Magistrate erred in law and fact in his interpretation and application of the law relating to the standard of proof in criminal cases.**

xi) **The learned trial Magistrate erred in law and fact on the assessment, interpretation and application of the laws relating to expert witnesses, doctrine of last seen and hearsay evidence.**

xii) **The learned trial Magistrate erred in law and fact in importing and using conjectures and fanciful theories and not evidence on record as his reasons to acquit the Respondent.**

4. I will now recite the testimonies and/or evidence given by the respective witnesses.

5. **PW1** was **Barnaba Ego**. He testified that on 12/09/2023, he had gone to the "valley" to check on his wife (deceased) who was unwell, and returned home at 4:00 pm, but on 13/09/2023, he received a report that his wife had died. He stated that "his son" (presumably the Appellant) told him that he had gone to check on the deceased but found her dead. He testified that he lives in Mosop while his wife lived in the "valley", that the Appellant is his cousin, and that he did not know what killed his wife. In cross-examination, he stated that he did not know whether the Appellant quarrelled with the deceased, but that it is the Appellant

who went to the homestead of the deceased, and allegedly found her dead, then called people. He stated that after investigations, the Appellant was the one named as the suspect, that the Appellant had disclosed that he had slapped and pushed the deceased, that people heard him say so, and that the deceased had injuries on her face.

6. **PW2** was **Kibiwott Kimaiyo**. He testified that on 13/09/2023 at around 8:00 am, he received a call from one Mathew informing him that the deceased (**PW1's** wife) had been found dead, and who asked him to go and inform the family since he (**PW2**) lived next to **PW1**. He testified that he later met the Appellant and one **Morris** and **Morris** told him that the Appellant had confessed to killing the deceased but the Appellant was afraid that he would be lynched, that he then attended a neighbour's a meeting where he learnt that the Appellant had indeed confessed to killing the deceased, they then called the Assistant Chief who called the police, who came and arrested the Appellant. He stated that the Appellant's father and **PW1** are brothers, so the deceased was like a mother to the Appellant. In cross-examination, he stated some neighbours reported that that they heard the deceased screaming and shouting that somebody wanted to take her beans, and that although the Appellant alleged that he left the home of the deceased at 8.00 pm, according to **PW4**, **Mark** (a son of **PW1**) the Appellant left the home of the deceased at 1.00 am.

7. **PW3** was **Dr. Sharon Anyango,** a Medical Officer at Iten County Referral Hospital. She referred to the post-mortem Report dated 29/09/2023, and testified that she is the one who conducted the post-mortem. She stated that the deceased was an old woman, that external examination revealed multiple bruises on the forehead, a wound on the left eye and on the lower jaw, bruises on both hands, swelling on the head, deep cut wound on the upper lip, and that on touch, she found the nozzle bones fractured with multiple soft tissue injuries. She testified further that internal examination revealed bleeding and brain hematoma around the parietal region. According to her, the probable cause of death was assault to the head, both hands, forehead, the left eye, fracturing of the nozzle bones and bleeding in the head causing haematoma. She then produced the post-mortem Form. In cross-examination, she stated that considering the extent of the injuries, a fall was not likely as the cause of death, since concentration of the injury was in the head, and the injuries indicated that there was a struggle.

8. **PW4** was **Mark Korir**, who testified that he was at home on 13/09/2023 at around 10:00 am, when one **Nicodemus Yator** called him and told him that his (**PW4's**) mother (deceased) had been found dead outside her house in Rimoi. He stated that his father had left

the deceased the evening before in good condition with the Appellant, that on 12/09/2023, he had met the Appellant in the morning who told him that he was taking sacks to the deceased in Rimoi, and that the Appellant returned home at about 10:00 pm and left in the morning. He testified that when he viewed the deceased at the mortuary, he noted that she had marks on her face and was bleeding from the mouth. He stated that at a meeting later at home, where the Appellant was summoned, the Appellant stated that he was in the home of the deceased at night and left in the morning, that the Appellant confessed that he pushed the deceased who fell on a tree, and that he wanted to snatch beans from her. He (**PW4**) stated that with these disclosures made by the Appellant, the village elders called the police who came and arrested the Appellant. He testified that the Appellant lived in Mosop but on that day, he went to Rimoi, that he was a neighbour and he used to help their father with work.

9. **PW5** was **Chief Inspector Joab Otieno**. He testified that on 13/09/2023, he received a report from the Chief, Siroch, that there was a body found, and which turned out to be that of the deceased. He testified that the body had injuries on her left ear and upper lip, and that they took it to Iten County Referral hospital. He stated that they (police) recorded a statement from **PW1**, who was with the husband of the deceased, and who had stated that the Appellant had been left with the deceased on 12/09/2023 selling "*busaa*" (local brew/liquor). He reiterated earlier witnesses' testimony that a meeting was convened on 18/09/2023 in which the Appellant confessed that he had pushed the deceased, that the Appellant was arrested by member of the public, and that the Appellant got annoyed assaulted the deceased because the deceased had alleged that the Appellant had stolen her beans. He testified that he obtained the same information from the Appellant's statement. He reiterated that the deceased was the wife of the Appellant's uncle, and stated that at the scene there were signs of a struggle outside the house with a torn plant (stump) and disturbance, and that the body was found outside the house facing upwards with an injury on the lip and eye, and little blood.

10. As aforesaid, upon close of the Prosecution's case, the Court found the Appellant as having a case to answer and placed him on his defence. The Appellant then gave a sworn statement and called no other witness.

11. The Appellant testified as **DW1.** He stated that on 13/09/2023, he was sent by **PW1** to take charcoal sacks to the deceased, and that when he reached the home of the deceased at 8:00 am, he found her dead. He stated that he called people, the Chief and village elders also came, but that he was arrested and taken to Rimoi Police Station. He claimed that he was

fixed and denied committing the offence. In cross-examination, he confirmed that the deceased was like a mother to him as their fathers are brothers, and that that he used to do casual work for **PW2** (the husband of the deceased). He confirmed that on the stated date, at 4:00 pm, he was with **PW1** and the deceased at her home, that **PW1** left and he remained behind as he was helping the deceased to make *busaa*. He claimed that thereafter he went to Mosop, and that he left the deceased's other customers behind. He stated that he had no grudge with the deceased, and that although he used to live in Mosop, he used to sleep in **PW1's** home.

12. The Appeal was canvassed by way of written Submissions. The Appellant's Submissions is undated but was filed on 22/05/2025, while the Respondent's (State) is dated 5/06/2025.

Appellant's Submissions

13. Counsel for the Appellant, **Mr. Anditi**, submitted that the Prosecution failed to call critical witnesses, and that the trial Court failed to consider that none of the witnesses presented were able to place the Appellant at the scene of crime. He cited the case of **Gerald Ndoho Munjuga v R**. On the issue of confession, he cited the case of **Swami v The Emperor (1939)1 ALL ER 396,** and the case of **Uganda v Yosamu Mutahanzo (1988-90) HCB 4**, and urged that the Appellant's supposed extra judicial statement should not have been used by the trial Court since the witnesses called did not hear the confession first hand, and as such, presented hearsay evidence. He asserted that the statement could not amount to a proper confession since an admission of a gravely incriminating, even conclusively incriminating fact, is not in itself a confession, and a confession must be an unequivocal admission. Regarding the sentence imposed, he contended that the trial Magistrate stated that she had considered the mitigating circumstances urged by the Appellant, but however, there is no objective consideration of what these circumstances were in the body of the Ruling, and that there is no reference to a pre-sentence report. He cited the case of **Francis Muruatetu & another v Rep, Supreme Court of Kenya Petition No. 15 and 16 of 2015**, and termed the sentence excessive and harsh. He also cited the case of **Henry Katap Kipkeu vs. R, Criminal Appeal 295 of 2008**, and the case of **S vs. Malgas 2001 (1) SACR 469 (SCA)**. Counsel then cited **The Kenya Judiciary Sentencing Guidelines of 2023**, and went into a long, but unnecessary, restatement of the law on the offence of manslaughter, without however applying the same to the facts to demonstrate his point. He did the same in respect to the law applicable to circumstantial evidence. Counsel, in conclusion, submitted that the Prosecution case was not free from doubt.

Respondent's Submissions

14. Prosecution Counsel Felix Namasake, on his part, agreed that nobody saw the Appellant assault the deceased, and submitted that, for this reason, the Prosecution relied on "***circumstantial evidence***". He cited several cases restating the law applicable to "***circumstantial evidence***", and submitted that the Appellant was the last person seen with the deceased, a fact confirmed by the Appellant, and who did not allege any intrusion into the deceased's house by any third party. He urged that, considering the injuries suffered by the deceased, the allegation that the Appellant pushed her is inferred, and he therefore could be held responsible for the death unless he provided cogent explanation to extricate himself from the accusation of having had a hand in the death. In respect to this "***last seen***" doctrine, he cited the case of **Republic v Isaac (Criminal Case 19 of 2020) [2020] KEHC 8829 (KLR) (29 May 2025) (Judgment)**, the Nigerian case of **Stephen Haruna v The Attorney General of the Federation (2010) iLAW/CA/A/86/C/2009**, and also **Section 111(1)** and **119** of the **Evidence Act**. On the issue of alleged irreconcilable contradictions, he cited the case of **MW v Republic [2019] eKLR**, and submitted that if at all there was any inconsistency, it might only have been the time, which in any event, does not affect the substance of the case. Counsel also pointed out that the trial Court did not rely on any confession as has been alleged by the Appellant, that the witnesses testified as to what they heard the Appellant say when a meeting was held by the neighbours, and that no evidence of a confession was adduced in Court, and afterall a confession can only be admissible on the terms set out in **Section 25A(1)** of the **Evidence Act**. In respect to the issue of the sentence imposed, he cited the case of **Benard Kimani Gachru v Republic [2002] eKLR** regarding the limits within which an Appellate Court can interfere, and submitted that while the maximum sentence for manslaughter is life sentence, the trial Court imposed 30 years. He urged that the Court considered the Appellant's mitigation, including the fact that he was a 1st offender, that the Court was extremely lenient, and that if at all the sentence is to be interfered with, then it should be enhanced.

Determination

15. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (**see Okeno vs. Republic [1972] E.A 32)**.

16. The issues that arise for determination in this Appeal are evidently the following:

i) **Whether the trial Court properly convicted the Appellant of the offence of manslaughter**.

ii) Whether the sentence of 30 years imprisonment was justified.

17. Section 202 of the **Penal Code** under which the Appellant was charged provides for the offence of murder. The provides as follows:

(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

18. In this case, the death of the deceased and cause thereof are not disputed. The deceased was found dead outside her house on 13/09/2023, and from the post mortem performed by **PW3** (the doctor), the cause of death was concluded to have been "***due to assault to the head, hands, forehead, and eyes resulting into bleeding externally, soft tissue injuries, swelling of the face and fracture of the nasal bones***". The doctor also testified that considering the extent of the injuries, a fall would not be likely as the cause of death, considering that concentration of the injuries was around the head, and there were also signs of a struggle. It is therefore clear that the deceased was killed.

19. The first question is therefore whether there is proof that it is the accused persons who committed the "unlawful act" which resulted into the death of the deceased.

20. As aforesaid, being a criminal charge, the Prosecution bore the duty to prove the charge beyond any reasonable doubt.

21. In this case, it is not in dispute that there was no eye-witness to the killing of the deceased as she was simply found lying dead outside her house, and the autopsy established that the death occurred as a result of assault. The Prosecution case against the Appellant was therefore based primarily on "***circumstantial evidence***". The Prosecution had to therefore satisfy the trial Court that the "***circumstantial evidence***" presented did not simply amount to mere suspicion. This is because, as was held by the Court of Appeal, in the case of **Mary Wanjiku Gichira v Republic 1998 eKLR,** "***suspicion alone, however strong, cannot provide a basis for inferring guilt***", which must be proved by evidence.

22. As to what constitutes "***circumstantial evidence***" and in what manner it can sustain a conviction, the Court of Appeal, in the case of **Ahamad Abolfathi Mohammed & 2 others v Republic (2018) eKLR,** stated the following:

> **"However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -**
>
> > ***"It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."***

23. As to how "***circumstantial evidence***" may be established such that it can sustain a conviction, the Court of Appeal, in the case of **Abanga alias Onyango v Republic Criminal Appeal No. 32 of 1990**, guided as follows:

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**
>
> **(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;**
>
> **(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;**
>
> **(iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else."**

24. The Court of Appeal, again, in the case **of Joan Chebichii Sawe v Republic [2003] eKLR,** the Court observed that

> **"…….. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."**

25. It is therefore generally agreed that for "***circumstantial evidence***" to carry the day, the Prosecution must establish that there are no other co-existing circumstances which could weaken or destroy the inference of guilt. It is also agreed that in a case reliant on "***circumstantial evidence***", each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge (**see Mwangi & Another V Republic (2004) 2 KLR 32**).

26. From the evidence on record, I gather that the Appellant, at the material time, lived at the home of **PW1**, the deceased's husband, at Mosop, Siroch. **PW4**, the son of the deceased together with the Appellant also lived in the same home. The deceased, on the other hand, was living alone at a nearby place described as "Valley" in Rimoi. The Appellant is said to be a close relative of **PW1** and the deceased, as he is supposedly the Appellant's cousin. He used to work for the couple in both homes and would therefore shuttle between the two homes. The deceased used to brew and sell *busaa*, and the Appellant used to assist her in doing so. The Appellant was also the person who "discovered" the body of deceased and called out neighbours.

27. **PW1**, the deceased's husband testified that he visited the deceased at Valley on 12/09/2023, and stayed in the home until about 4.00 pm when he left and returned to Mosop, only to be informed in the morning of 13/09/2023, that the deceased had been found killed, and that it is the Appellant who was said to have found her body. **PW2**, **Kibiwott Kimaiyo**, a neighbour of **PW1**, testified that he learnt of the death of the deceased in the morning of 13/09/2023 at around 8:00 am. He stated that he then met the Appellant with one **Morris**, and that **Morris** told him that the Appellant had confessed to killing the deceased but was afraid that he would be lynched, and that he then went to a neighbours' meeting where he also learnt that the Appellant had admitted to the killing, upon which the deceased was

arrested. He further stated that some neighbours reported that they heard the deceased screaming and shouting that somebody wanted to take her beans.

28. **PW4**, a son of the deceased, testified that he learnt of his mother's killing on 13/09/2023 at around 10:00 am. He stated that his father (**PW1**) had left the deceased at her home in "valley" the evening of 12/09/2023 in good condition with the Appellant. He also stated that on that 12/09/2023, he saw the Appellant in the morning, and the Appellant told him that he was taking sacks to the deceased in Rimoi, and that the Appellant returned home in Mosop at about 10:00 pm on that 12/09/2023 and left in the morning of 13/09/2023, the same morning that the deceased was found killed. He stated that at a neighbours' meeting later where the Appellant was summoned, the Appellant agreed that he was at the home of the deceased at night and left in the morning, that at the meeting, the Appellant also confessed that he pushed the deceased who fell on a tree, and that he wanted to snatch beans from the deceased. **PW4**) stated that with these disclosures made by the Appellant, the village elders called the police who came and arrested the Appellant.

29. **PW5**, the Investigating Officer, confirmed that he established the above witness narratives while carrying out his investigations. He stated that he learnt that the Appellant had pushed the deceased because he got annoyed when the deceased accused him of stealing her beans. He testified that he confirmed the same information from the Appellant when he recorded the Appellant's statement.

30. From the testimonies of **PW1** and **PW5**, the narrative that the deceased and the Appellant tussled over beans that night seems corroborated. The theory that this was the cause of their disagreement leading to the assault therefore sounds plausible.

31. The Appellant, in his defence, claimed that on 13/09/2023, he was sent by **PW1** to take charcoal sacks to the deceased, and that he found the deceased dead when he reached her home at 8:00 am. He confirmed that on 12/09/2023, he was with **PW1** and the deceased at the home of the deceased, and that **PW1** left at around 4.00 pm leaving the Appellant behind with the deceased as he was assisting the deceased to make *busaa*. He claimed that he, too, left thereafter and the deceased remained behind with some customers, and he returned to Mosop where he used to live at **PW1's** home.

32. I however note that the Appellant does not disclose what time he left the home of the deceased in "Valley" and what time he arrived back at **PW1's** home in Mosop. According to **PW4** however, the Appellant arrived home at Mosop at around 10.00 pm at night. In other

parts of trial, he is reported to have returned at 1.00 am. Be that as it may, Appellant did not challenge or deny these allegations. He also did not disclose the name of, or identify any of the customers he alleges to have left behind with the deceased, nor did he call as a witness, or disclose the name of, any person who saw him away from the home of the deceased after 4.00 pm or at any time that night. His movements and whereabouts as between 4.00 pm when **PW1** left him behind at the home of the deceased, and 10.00 pm or 1.00 am when is said to have he arrived back at Mosop therefore remains unaccounted for. He did not offer any himself.

33. From the testimonies recounted above, it clear that the Appellant was the last person to be seen with the deceased, inevitably giving rise to consideration of the doctrine of "***last seen***" which allows the Court to presume that the person last seen with a deceased bears full responsibility for explaining the killing of that deceased. The "***last seen***" doctrine is a combination of circumstantial evidence and application of **Section 111** of the **Evidence Act**. **Section 111(1)**, which casts the burden of proof on the accused person in certain circumstances. It provides as follows:

> **(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**
>
> **Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**
>
> **Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.**

34. The "***last seen***" doctrine is therefore a rule of evidence based on circumstantial evidence that presumes a person last seen with a deceased individual later found killed is responsible for that individual's killing. To avoid being held culpable, the accused person is required to provide an explanation for the circumstances of the death. The doctrine has thus been described, in some quarters, as a negation or exception to the constitutional principle of the presumption of innocence. The "***last seen***" doctrine is therefore applicable where an accused

person was the last person to be seen in the company of the deceased and there is also circumstantial evidence unerringly pointing to the guilt of the accused, and leads to no other conclusion, thus leaving no room for acquittal.

35. In respect to the "***last seen***" doctrine, the Court of Appeal in the case of **Chiragu & Another v Republic (Criminal Appeal 104 of 2018) [2021] KECA 342 (KLR) (17 December 2021) (Judgment)** quoted with approval, the following statement made in the Nigerian case of **Moses Jua v. The State (2007) LPELR-CA/IL/42/2006**:

> **"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."**

36. In this case, in finding the Appellant guilty, the trial Magistrate applied the "***last seen***" doctrine. Considering the evidence before him as recounted above, I am unable to fault the trial Magistrate for reaching that verdict since the Appellant was, indeed, the last person to be seen with the deceased at her home on 12/09/2023 in the evening before she was found killed in the morning of the next day, 13/09/2025, at the same home. In fact, that evidence stands not alone but is corroborated by the Appellant himself in his testimony. As aforesaid, the Appellant was also the person who conveniently "discovered" the body of deceased and called out neighbours. This so-called "discovery" of the body appears to have been a poorly stage-managed stunt by the Appellant pulled with the intention of misleading neighbours. Looked through the lenses of both circumstantial evidence and the "***last seen***" doctrine, I find that the trial Magistrate did not err in finding that the evidence before him put the Appellant as the only person in a position to provide an explanation for how the deceased met her demise, which explanation however the failed to offer. The trial Magistrate cannot therefore be faulted for finding the Appellant's defence account as lacking the cogency sufficient to displace the presumption so created.

37. Counsel for the Appellant put much emphasis in his argument that, in convicting the Appellant, the trial Court relied on a "***confession***" which was inadmissible. The distinction, in criminal matters, between a "***confession***" within the meaning of **Section 25** of the **Evidence Act**, and "***admission***" under Sections **17-24** thereof, was aptly explained by the

Supreme Court in the case of **Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR**, in the following terms:

> **"31. To effectively determine these issues, a distinction must be made between an 'admission' and a 'confession' in the law of evidence. The term "admission" mentioned in section 25A of the *Evidence Act* cannot be lumped together in the definition of "confession." That is clear from the definition of "confession" in section 25 of the same Act. The law relating to 'admissions' is found in sections 17-24 of the *Evidence Act*. section 17 defines an "admission" as:**
>
> **……..**
>
> **33. A distinction clearly emerges from these definitions. As learned authors William P Richardson stated, an admission is an acknowledgement of "*… fact from which the guilt may be inferred by the jury*" while a confession is "*the express admission of guilt itself*."[4] A confession must be obtained in conformity with articles 49(1) (b), (d) and 50(2)(a) and (4) of the *Constitution*, sections 25 to 32 of the *Evidence Act* and *The Evidence (Out of Court Confession) Rules, 2009* for it to be admissible in evidence.**
>
> **…….**
>
> **38. It can be surmised therefore, that a confession is a direct acknowledgement of guilt on the part of the accused while an admission is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction.**
>
> **…….**
>
> **40. From the foregoing, it is one thing to make a statement giving rise to an inference of guilt and another thing to confess to a crime. It is therefore evident that the distinction between a confession and an admission as applied in criminal law is not a technical refinement but one based on a substantive difference of the character of the evidence deduced from each. This is also buttressed by the fact that the law relating to admissions is distinctly set out in Part II (sections 17-24) of the *Evidence Act* and that on confessions is outlined separately in Part III (Sections 25-32) of the same Act.**
>
> **…….**

> **49. The Court of Appeal noted, quite aptly, that it was never the appellant's case that the respondents had confessed to committing the offences that they were charged with. This appeal therefore, cannot turn on section 25A of the *Evidence Act* because the respondents did not make a confession in terms of sections 25 and 25A of the *Evidence Act*. ..... The two sections relate to different scenarios and result in different effects. While, as stated, a confession can of itself found a conviction, when a court is confronted with an admission, which does not amount to a confession under section 25A of the *Evidence Act*, it should not base its conviction solely on such an admission. Instead, it should look for clear and credible corroboration of such an admission."**

38. I may also say that in Kenya, confessions are generally inadmissible under **Section 25A (1)** of the **Evidence Act**. For a confession to be admissible, it must be made in Court before a Judicial Officer, a police officer of Chief Inspector rank or higher (but not the investigating officer), or a third party of the accused's choice. Confessions obtained through inducements, threats, or promises are also inadmissible. For these reasons, there are very specific and strict rules for confessions made to police officers, and how they are to be recorded.

39. Applying the above guidelines to the facts of this case, I agree with Prosecution Counsel, **Mr. Namasake**, that in this case, the trial Court did not rely on any confession as alleged by the Appellant's Counsel. The witnesses simply testified on what they heard the Appellant say at the meeting convened by neighbours and village elders, and in which the Appellant was summoned and grilled. The trial Magistrate then found sufficient corroboration of the Appellant's guilt from separate independent evidence arising from different circumstances. No evidence of any confession was therefore presented before the trial Court, and it never even cited any confession in the terms set out in **Section 25A (1)** of the **Evidence Act**.

40. In light of the above, the Appeal against conviction therefore fails.

41. Regarding sentence, the applicable principles in re-considering sentence by a higher Court were restated by the Court of Appeal in the case of **Bernard Kimani Gacheru v Republic [2002] eKLR**, in the following terms:

> **"It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the 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 the wrong material, or acted on the 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".

42. In this case, the offence that the Appellant was charged and convicted of was manslaughter contrary to **Section 202** of the **Penal Code**, the punishment whereof **Section 205** provides that:

Any person who commits the felony of manslaughter is liable to <u>imprisonment for life</u>.

43. In view thereof, it is clear that the sentence of 30 years imprisonment imposed by the trial Court was within the limits permitted by statute. It was therefore, no doubt, a lawful sentence. This above observation does not however mean that this Court is barred from determining whether the sentence was manifestly excessive or harsh, which I now proceed to do.

44. The Supreme Court, in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR)**, guided that, in sentencing, the following mitigating factors are applicable; **(a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) possibility of reform and social re-adaptation of the offender;** and **(h) any other factor that the Court considers relevant.**

45. I also cite **Majanja J**, in the case of **Michael Kathewa Laichena & another v Republic [2018] eKLR,** in which, quoting the **Muruatetu case (supra)**, he stated as follows:

"The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. …"

46. Similarly, in the case of **Daniel Kipkosgei Letting Vs. Republic [2021] eKLR**, the Court of Appeal pronounced itself as follows;

> **"……. we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ……."**

47. Applying the above principles to the facts and circumstances of this case, I note that, while sentencing the Appellant, the trial Magistrate stated that she had considered the mitigation as well as the fact that the Appellant was a 1st offender. She however, correctly, also considered the nature of the offence and how it was committed, and that the Appellant took away the life of an elderly lady who was defenceless, and whom the Appellant brutally injured leading to her death. The trial Magistrate also correctly considered that the deceased must have undergone a lot of excruciating pain before her demise. I agree with the trial Magistrate since human life is sacrosanct, and for this reason, there must be retribution and action that would serve as a deterrent against commission of similar offences.

48. Nonetheless, I find the existence of mitigating factors tilting in favour of the Appellant. For instance, there is no evidence that the Appellant had the intention of killing the deceased thus the charge for manslaughter, and not murder. He is also said to have admitted his role in the death to neighbours and the village elders. The sentence of 30 years is also evidently quite beyond comparable sentences imposed in cases of comparable nature. I therefore find the above to be mitigating factors which the trial Magistrate may have overlooked and thus failed to take into account. Although the offence the Appellant was convicted of merits a severe sentence, under the above circumstances, I believe that retribution will be best achieved, not by incarcerating the Appellant for an unreasonably long period of time, but by giving him a chance to come out of jail after a reasonable period of time to enable him reform, and to give him a chance to be of benefit to the society, once he is rehabilitated. Considering these factors, I find the sentence of 30 years to be quite harsh and excessive in the circumstances.

Final Order

49. In light of the above, I make the following Orders:

i) The Appeal against the conviction in **Iten Senior Principal Magistrate's Court Case No. E1011 of 2023**, fails. The conviction is accordingly upheld

ii) However, the sentence of 30 years imprisonment imposed by the trial Court is set aside, and substituted with a sentence of 14 years imprisonment.

iii) As the same Appellant had also filed another parallel Appeal, namely **Iten High Court Criminal Appeal No. E041 of 2024**, challenging the same conviction and sentence, that other file is also marked as spent, and is accordingly also marked as closed.

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

……..……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

The Appellant present
Mr. Anditi for the Appellant
Ms. Mwangi for the State
Court Assistant: Brian Kimathi