IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 26 OF 2015

BETWEEN

BERNARD REUTA MASAKE...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kisii,

(Wakiaga, J.) delivered on 4th February 2015

in

Kisii H C Cr. Appeal No. 119 of 2011)

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JUDGMENT OF THE COURT

1. The appellant, Bernard Reuta Masake, was charged with the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code.** The particulars were that between 21st October 2007 and 3rd November 2007 at Olorbosoito area in Transmara District within Rift Valley Province he unlawfully killed DSK.

2. The deceased was 16 years old girl child and a pupil at *[particulars withheld]*. The appellant was employed as a part time teacher at the school. The deceased used to stay with her father Mr. William Kipteng, a pastor at AIC Kilgoris.

3. The appellant denied the charge and was tried. The prosecution case was founded on circumstantial evidence. PW1, William Lesume Kipteng, the father of the deceased, gave evidence and testified as follows:

> *I was living with my daughter DSK at the church compound but she left on 20th October to go home over the weekend as she was fond of doing. She went home alone. It was on a saturday. She left the house alone. Then on 21st October 2007, on a date I was expecting her to return home to the house I was living in order to go to school on Monday 22nd October 2007, she did not turn up. So I called home but my wife was away. So the other sister answered the call and told me D had done some house chores that morning and left home in the afternoon at 3.00 pm. So I was wondering where she could be. Then I remembered Alex Sindore who was a church mate to D in Oloiborsotio SDA church to find out. He replied they were together on saturday but not that Sunday. So I slept. Then I went to* ***[particulars withheld]*** *to see if she may have slept out and had decided to go to school straight.*
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> *On arrival and before I could ask, the Head Teacher asked me why the child had not turned up in school. I told him I was looking for her in school. Then the Head Teacher called her classmates who said they had been with her on Saturday. Even the accused used to be a teacher at* ***[particulars withheld]*** *and he said he was also with her on Saturday in a crusade at Kilgoris Town.*
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> *So from there, I started looking for the girl. So on 23rd October 2007, I made a report that my daughter was lost. The report was booked and I was told to go home. On return to the house at home, my wife asked me to ask the teacher once more because small children had seen the accused at my home on Sunday. So I went to school and he confirmed that he was in my home on Sunday at 10.00 am to give D a cassette. So we just parted ways…….*

Then on 3rd November 2007 as I was preparing to go to my rural home, the son of my brother Mike Kipteng telephoned me to rush home because something bad had happened. Then before I got on my bicycle I got a second call that I should go to the farm of Pastor Sinkira…...Then as I was going I met an old man who said a letter had been found saying how my daughter had been killed. So I rushed and found many people gathering at a place. I found a letter and my brother Joseph Kipteng read it to me. It was written and addressed to me saying that my daughter refused to do what the author wanted. So they killed her and kept her body in Regina Mbatiany's maize farm. I was so weak when the letter was read to me. The letter concluded as May God rest her soul in peace.

We decided to call the police. We tried to look for the body but we only found bones, hair and clothes. We tried looking for the other pats (sic). We found only the skull with the teeth……I looked at the skull, I confirmed through her teeth that it was the skull of my daughter. The letter was found near the road……

4. PW4 Grace Kipteng testified as follows:

…. On 20th October 2007, I do remember at 5.00 pm D came home from AIC Kilgoris where she used to live with her father. She slept and we woke up on 21st October 2007. She worked upto 1.00 pm. The deceased was my kid sister. She ate food for lunch. There were two small boys known as C aged 9 years…. The other is Daddy, my brother's child. I heard both of them telling D that a teacher known as Bernard had come to ask for her at 10.00 am when they were at the river and that as they came from the river Bernard asked them to tell D to meet him at a posho mill nearby. So D asked them why they never told her early but the boys said they had forgotten. So when D heard that Bernard wanted her she stopped eating. She put on clothes hurriedly and left home to go back to Kilgoris AIC Church where she used to live with our father. Then I gave her cooking fat and cabbage to take to the father's house. She was wearing a maroon blouse and black skirt with white open shoes. Then she went away towards town.

Then on 3rd November 2007 at 10.00 am I received a telephone call from my Dad. He asked me to roll (sic) over to Pastor Ngure's place. I did not know why he told me so. Then I did as directed by Dad. Then I found many people some of them were screaming and crying. Then I asked what was the matter when some women told me that D body's bones had been found in the maize farm. I moved near and saw the clothes she had put on last when she left home. The police came and picked the bones and kept in an envelope….

5. PW 5 Meshack Leteya Kipteng testified that on 19th December 2007 he was at Oloiborsoito SDA church when he saw police officers in a vehicle coming with a long metal rod. That he knew the appellant who was also inside the vehicle. That he saw the appellant pointing at the toilet in the church. That he went to see what the police officers wanted. That the police dipped the long metal rod into the toilet. That shortly afterwards the police officers came with open shoes which he recognized belonged to the deceased.

6. PW 10 CIP David Ngokho Simiyu testified as follows:

*On 3rd November 2007, I recall that while in office I received some information that a small girl aged about 15 to 16 years viz DSK who was a pupil at **[particulars withheld]** Primary School had gone missing and that the remains of the body suspected to be hers had been found in a farm plantation around **[particulars withheld]** …. With other police officers we proceeded to the scene. At the scene we found many people. I asked for the relatives of the alleged child. I found the mother and father of the child. I consoled them and mobilized officers to start searching. Before that we had found a skull suspected to be of a human body with no flesh at all. Around there were some thicket of grass and maize plantation. I mobilized the officers to go on searching for move (sic) evidence. In the maize plantation there was a sign of struggle meaning the disturbance of the soil and falling of the grass. Around that area, there was some stuff which looked like human hair recovered in two places. Also in the area were three pieces of clothe material. One was a blouse. Another one was a skirt and a sphagheti top. Members of the family said these were the clothes the deceased had been wearing before she went missing. There was also a document found there. It had been written. It was giving some information that the girl had been killed because she refused to do what she had been asked to do…….*

In the course of investigation, I received information that Bernard Masake could have been involved…I embarked on looking for the suspect. We took him to Kilgoris. My colleague CIP Thoya talked to Bernard and he confessed he is the one who murdered the girl. He further volunteered and said he had removed the shoes the girl was wearing and dumped them in a pit latrine at a place called Oloiborsoito church. I and my colleagues including Chief Inspector Thoya went to the place. After a long struggle, we managed to retrieve a pair of shoes which were in the pit latrine shown to us by Bernard Masake himself. Members of the family came and identified the shoes as the ones the small girl was wearing when she went missing on the material date……

7. PW12 CP Samson Thoya testified he was the investigating officer in the alleged offence. That he conducted investigation and zeroed on the appellant as one of the suspects. That upon interrogating the appellant, he denied committing the offence. That he then presented the appellant with the report of the handwriting expert. The appellant turned pale, started shaking and sweating, and he dropped on the floor. That after about five minutes without talking, the appellant started making a confession. That because he was the investigating officer, he could not take the confession and so he invited Chief Inspector of Police (CIP) Ali Ndiema to take the confession. That CIP Ali Ndiema informed him the appellant wrote the confession in his own handwriting narrating the events that culminated into the killing of the deceased. That the appellant gave the date of the incident as 21st October 2007 at around 5.30 pm.

8. PW 13 CP Emmanuel Kenga testified in his capacity as Government Document Examiner. He stated he had been trained in Israel and France in document examination. He testified that on 4th December 2007 he received exhibits from Cpl. John Kiragu. Exhibit marked A was the letter/note in dispute that was recovered on the roadside and addressed to a pastor. He also produced in court other exhibits which were known specimens of the handwriting of the appellant. He compared the handwritten documents. Upon examination and comparing the letter/note with the known specimen handwriting of the appellant, he concluded the note was written by the same person who is the appellant.

9. In his defence, the appellant gave an unsworn statement. He stated that on 20th October 2007, he attended a crusade at Kilgoris Town SDA church. On that day, he was with the deceased. That the previous day on 19th October 2007, the deceased had asked him for a radio cassette.

That the deceased did not come to collect the cassette from him. He visited the home of the deceased to look for her. He did not find her. That later on 3rd November 2007 he saw a group of people at a maize plantation where the bones of the deceased were found. That he was later arrested and charged with the offence. He stated that he knows nothing about the offence. That he did not kill the deceased. He denied making a voluntary confession before Chief Inspector Thoya. He denied having knowledge of the shoes that were found at the pit latrine. He did not know where the police got the shoes.

10. Upon considering and evaluating the evidence tendered, the trial magistrate convicted the appellant and sentenced him to life imprisonment. In convicting the appellant, the magistrate in relevant excerpts expressed as follows:

> *It is glaringly emerging that nobody saw the accused person actually committing the offence of killing the late DSK and I find so. The close (sic) incident however that links the accused to the charges in the evidence before the court is that on 21st October 2007 at 10.00 am the accused went to the home of the deceased and found only children and asked them of the whereabouts of the deceased…...the accused also admitted that on 20th October 2007 they were to pass by his house so that the deceased would pick a cassette …...*
>
> *The circumstantial evidence coming out in this case that can link the accused are various. First and foremost, he asked for the deceased person on 21st October 2007 when the deceased was last seen at her rural home. Secondly, he made a confession to PW12 Samson Thoya… The confession statement was produced in court as Exhibit 9…. The confession details how the accused was intending to take away his own life when the deceased wanted to yell at him and he got enraged and grabbed her and suffocated her for 30 minutes until her body gave way loosely. That when the accused realized he had killed her, he locked his door and went to the crusade in Kilgoris town and on return at about 8.00 pm he wondered what he'd do with the body. Hence he took it to Regina Mbatiany's farm where he abandoned it and took home his tie that he had used to tie the deceased's mouth and together with is short trouser and deceased white sandal he put them in a paper bag and went and stashed them in the toilet. The shoes were recovered when the accused led Chief Inspector Simiyu and his team to the SDA toilet at Oloiborsoito church. The deceased shoes were identified by his brother who testified as PW5 Meshack Letaya Kipteng.*
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> *Also accused sample writings were compared with the recovered note marked as Prosecution Exhibit 8 herein and PW 13 a high skilled government handwriting expert found the hands (sic) to be same.*
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> *From the foregoing, I do not believe the accused's testimony that he too was perplexed as to the whereabouts of the deceased's body as anybody else in the village….*
>
> *Following the salient circumstances paraded herein, I am convinced beyond shadow of doubt that they lead and irresistibly point to the guilt of the accused person and I find so*.

11. Aggrieved by the conviction and sentence meted out by the trial magistrate, the appellant lodged a first appeal to the High Court. His appeal against conviction was dismissed. The appeal against sentence was allowed. The learned judge (Wakiaga, J.) set aside the life sentence and substituted it with imprisonment for forty (40) years from the date of the judgment of the trial court.

12. In upholding and affirming the conviction and setting aside the sentence, the learned judge expressed himself as follows:

> *30. From the evidence tendered before the trial court, I find that the evidence of PW5 Meshack Letaya Kipteng corroborated the evidence of PW12 and that all the circumstantial evidence tendered before the trial court including the evidence of PW7, the recovery of a letter written by the appellant as is confirmed by PW13, the recovery of the deceased shoes and body parts of the deceased and her clothes pointed to the guilt of the appellant.*
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> *31. I therefore find that the conviction of the appellant of the offence of manslaughter was safe, the prosecution having proved its case beyond reasonable doubt. I therefore find that the appellant's appeal on conviction lacks merit and is hereby dismissed.*
>
> *33. Having looked at the evidence tendered and the circumstances leading to the death of the deceased, I would allow the appeal on sentence and having taken into account the appellant's mitigation and his age, I would reduce the sentence herein to 40 years' imprisonment from the date of the trial court….*

13. Further aggrieved by the dismissal of his appeal against conviction, the appellant has lodged the instant second appeal to this Court citing the following abridged grounds:

> (i) The judge erred in upholding the conviction of the appellant based on the confession was anchored and founded on the provisions of **Section 25A** of the **Evidence Act** which provision in any event is contrary to and at variance with the holdings of the judge *(sic).*
>
> (ii) That Chief Inspector of Police Ali Ndiema who took and recorded the confession was not called to testify and the admissibility of the confession was contrary to **Section 33** of the **Evidence Act.**
>
> (iii) The judge erred and failed to take into account that the circumstances under which the confession was taken under inducement and intimidation and further erred in failing to find that the confession was inadmissible, illegal, irregular and void for all intents and purposes.
>
> (iv) The judge erred in failing to find that in the absence of a post mortem report attesting to the cause of death of the deceased, the trial magistrate erred in convicting the appellant.

(v) The judge erred and failed to properly re-analyze and re-evaluate the evidence on record.

14. At the hearing of the instant appeal, learned counsel Mr. Oguttu Mboya appeared for the appellant. The State was represented by Senior Prosecution Counsel Mr. Evans Ketoo. Both parties filed written submissions and cited judicial authorities in this appeal.

APPELLANT'S SUBMISSIONS

15. Counsel for the appellant faulted the learned judge in three critical areas. Firstly, it was submitted that **Section 25 (A)** of the **Evidence Act** lays down stringent conditions before a confession can be deemed legally admissible. Secondly, when the appellant's alleged confession was taken, there was no third party present and this rendered the confession inadmissible. In this context, at the time of the alleged confession, the appellant was not requested if he wanted a third party to be present. Thirdly, the confession was procured through inducement, intimidation and unprocedurally.

16. The appellant cited the provisions of **Section 25A (1)** of the **Evidence Act** which stipulates that:

> *(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Inspector of Police,* <u>and a third party of the person's choice.</u> *(Emphasis supplied)*

17. The appellant submitted that when PW12 CP Samson Thoya testified, he neither stated nor confirmed that a third party of the appellant's choice was present when the confession was taken. That failure to ensure a third party was present renders the confession inadmissible. Counsel cited the decision of **Thoya Kitsao alias Katiba – v- R (2015) eKLR** to support the submission that it is the duty of a trial court to consider the circumstances under which a confession is made.

18. It was submitted that in the instant matter, the two courts below erred in failing to consider that a third party was not present. More specifically, that the two courts below erred in failing to take into account that the alleged confession was procured through intimidation, inducement, misrepresentation and undue promise to help the appellant secure a light punishment.

19. Another ground urged in this appeal is the absence of a post mortem report. That the samples of the body parts taken to the Government Chemist have never been returned and thus the cause of death has never been proved. It was submitted that it was incumbent upon the prosecution to prove the fact of death and also to prove the cause of death of the deceased. That the absence of the post mortem report touching on the cause of death renders the appellant's conviction to be unsafe. Citing the case of **Chengo Nickson Kalama – v- Republic (2015) eKLR** it was submitted that to the extent that no post mortem report was adduced, the cause of death was not proved beyond reasonable doubt.

20. The appellant further faulted the judge for finding that the letter or note that was found at the roadside was authored by the appellant. In this context, it was submitted that the judge did not properly evaluate the evidence of PW13, the document examiners to unfold inconsistencies in his findings and report. It was submitted that the judge simply reproduced the evidence of the witnesses and made a mechanical reproduction of the evidence without any serious analysis and re-evaluation of the evidence. That in so doing, the judge overlooked glaring omissions and inconsistencies in the testimony of the various witnesses more importantly, inconsistencies in the testimony of PW 13 the document examiner. For the foregoing reasons, the appellant urged this Court to allow the appeal.

RESPONDENT'S SUBMISSIONS

21. The respondent in opposing the appeal recalled that this was a second appeal that must be confined to matters of law. Counsel urged that the confession by the appellant was properly admissible in evidence. The confession was made before Chief Inspector of Police Ali Ndiema who was not the investigating officer. That the confession was self-recorded by the appellant. That the issue of impropriety of the confession never arose when the prosecution witnesses testified. For the foregoing reasons, it was submitted the confession by the appellant was procured and made in accordance with the law.

22. Responding to the submission that the production of the confession was contrary to Section 33 of the Evidence Act, the respondent submitted that the confession was self-recorded and made by the appellant himself and not the Chief Inspector Ali Ndiema. That **Section 33** of the **Evidence Act** applies to persons who cannot be called as witnesses; that in the instant case, the confession statement was against the interest of the maker and hence it had to be produced by someone else. For these reasons, there was no infringement of the provisions of **Section 33** of the **Evidence Act.**

23. The respondent in opposing the appeal submitted that it is not true there was no post mortem report. That a post mortem report was prepared by Dr. Albert Gachau and produced in court by PW12. That Dr. Gachau made a finding that "the circumstances of death suggest violence prior to death with indicators of homicide."

24. It was further submitted that there was sufficient circumstantial evidence pointing to the guilt of the accused. That the appellant wrote a letter to the father of deceased informing him where to recover the body; that the letter led the police to recover the body at the place stated by the appellant; that the appellant also confessed and led the police to recover shoes at a pit latrine; that all these corroborative items of evidence point to the guilt of the appellant.

25. In concluding its submissions, the respondent urged that the learned judge did not err in re-evaluation of the evidence on record. That the judge aptly re-analyzed the evidence and arrived at independent conclusions and findings.

ANALYSIS and DETERMINATION

26. We have considered the record of appeal as well as submissions made by the appellant and the respondent. This is a second appeal against conviction and sentence. By dint of ***Section 361*** of the ***Criminal Procedure Code****, a second appeal is confined to* matters of law. This Court restated as much in ***Karingo -vs- R (1982) KLR 213*** at p. 219;

> *"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"*

27. In the instant matter, the appellant was convicted on circumstantial evidence. There are very clear parameters that a prosecution should meet when relying on circumstantial evidence. Those parameters were the subject of discussion in the case of **R – v - Kipkering Arap Koske & Another, 16 EACA 135** where it was *inter alia* held that:

> *"In order to justify 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."*

28. In **Teper v. R. (2) AC 480** it was held, "it is necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference." While **Taylor on Evidence (11th Edn.) page 74** state "the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."

29. Bearing in mind that the conviction in this matter is grounded on circumstantial evidence, a pivotal ground urged in the appeal relates to admissibility of the confession made by the appellant. The appellant contends that the confession was inadmissible for three main reasons. Firstly, that there was no third party present when it was made thus violating the provisions of **Section 25A (1)** of the **Evidence Act.** Secondly, the two courts below did not take into account the circumstances the led to the confession in that the confession was not voluntary but was induced and procured through intimidation, misrepresentation and undue influence and lastly that the confession offends the provisions of **Section 33** of the **Evidence Act**. The appellant thus contends that if the confession is excluded, there is no other evidence upon which he can be convicted.

30. The learned judge in considering the admissibility of the confession expressed that:

> *28. It is then clear that the appellant was convicted on purely circumstantial evidence together with the alleged confession by the appellant to PW 12 as recorded by CIP Ali Ndiema. It must be pointed out that the said confession was given to PW 10 who being the investigating officer asked CIP Ali Ndiema to record the same. I would therefore agree with the submission by Mr. Majale for the State that the confession was properly taken under the provisions of* ***Section 25A*** *of the* ***Evidence Act****.*

31. **Section 25A (1) of the Evidence Act** provides as follows:

> *(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.*

32. In the instant matter, the appellant contends that the alleged confession was not made in the presence of a third party of his choice as required under **Section 25A (1)** of the **Evidence Act.** In a persuasive decision, the High Court in **Republic -v- Kibon Kibelion (2018) eKLR** expressed as follows:

> *20. I also notice that the two brothers of the Accused Person who were allegedly present during the recording of the confession denied being present. In the circumstances, it behooved the Prosecution to do more to shore up its claims that the confession was voluntarily recorded. Given the standard of proof in criminal cases – which is the one applicable to the question of admissibility of confessions – on this point alone, I would have held that there were reasonable doubts as the knowing voluntariness of the confession in this case: Two of the three witnesses presented by the Prosecution denied being present during the recording; and the cross-examination done (including the failure to declare them hostile witnesses) did not favourably dispose of this question in favour of the Prosecution.*
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> *21. In addition to these reasonable doubts as to the knowing voluntariness of the confession, as pointed out above, in paragraph 20 of this Ruling, the Recording Officer seems to have failed to adhere to at least two specific categorical due process rules to render the recorded confession admissible as evidence: there was no attempt to inform the Accused Person that he had the right to call any third party to be present during the recording of the confession (here, by his own account, the Recording Officer simply asked the Accused Person's two brothers to be present); and there was no attempt to inform the Accused Person of the right to have a lawyer of his choice present.*
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> *22. These reasons render the Statement recorded by the Accused Person dated 15/11/2015 inadmissible in evidence in his own criminal trial. It is so ordered.*

33. We have considered appellant's contestation and noted the testimony of PW12 CP Samson Thoya who testified that as the investigating officer, he was not in a position to take the confession of the appellant. That he asked Chief Inspector Ali Ndiema to take the confession which was recorded by the appellant in his own handwriting. However, there was no third party present during the recording of the confession. That omission alone is sufficient to discount the confession.

34. In our considered view, even if the confession was discounted, there are other corroborative evidence that points to the guilt of the appellant. Such corroborative evidence includes the testimony of the handwriting expert and the recovery of the deceased's shoes in a pit latrine where the appellant stated the shoes could be recovered. Of relevance is the tale tell conduct when PW12 confronted the appellant with the report of the handwriting expert. The appellant turned pale, started shaking and sweating, and he dropped on the floor. The conduct speaks volumes on the appellant's guilt.

35. A further ground urged in this appeal is that the confession violated the provisions of **Section 33** of the **Evidence Act**. This ground of appeal has no merit. Section 33 of the Act deals with admissibility of statements made by a person who is dead or cannot be found. In the instant matter, the appellant has failed to satisfy us how the provisions of Section 33 of the Act is relevant to the confession admitted in this matter. The appellant has not pointed out how the Section was not complied with. It is simply alleged that Chief Inspector Ali Ndiema in whose presence the confession was recorded was not called to testify. The respondent submitted that the confession was self-recorded by the appellant and it was an admissible statement against the interest of the maker. As we have opined above, even if the confession were to be excluded, there is sufficient corroborative evidence that points to the guilt of the appellant.

36. The other ground urged is that there was no post mortem report produced in court to prove the cause of death; that the cause of death of the deceased is indeterminate and no post mortem report was produced that links the appellant to the death of the deceased. The State rebutted that submission made by the appellant asserting that a post mortem report was prepared by Dr. Albert G. Kachao.

37. We are cognizant of the decision of this Court in ***Ndungu -v - Republic*** **(1985) KLR 487** where it was emphasized that medical evidence on the cause of death is vital in a murder/manslaughter trial unless the cause of death is too obvious. In the instant matter, the appellant strenuously submitted that the absence of a post mortem report was fatal to the prosecution case. We have examined the record of proceedings before the trial court. In a ruling delivered by the trial magistrate, the post-mortem report prepared by Dr. Albert G. Kacaho was held to be inadmissible. In finding the report inadmissible, the trial court observed that since the appellant would want to probe the maker of the document and the doctor could not take the witness stand to produce the post mortem report, the said report was inadmissible. We agree with the appellant that no post mortem report on the deceased was produced. However, the absence of the post mortem report does not cast doubt on the prosecution case.

38. We note that it is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Comparatively, in the Tanzania case of **Republic v Cheya & another (1973) EA 500**, it was stated:

> *"The absence of medical evidence as to death and the cause of it is not fatal because a post mortem report primarily is evidence of two things; the fact of death and the cause of it. However, the fact of death and the cause of it could be established otherwise than by medical evidence."*
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> *(See also Chengo Nickson Kalama v Republic [2015] eKLR, Ndungu v Republic [1985] eKLR and Republic v Frankline Mugendi Miriti & another [2019] eKLR).*

39. Except in borderline cases, laymen are quite capable of giving evidence that a person has died. Where there is evidence of assault followed by a death without the opportunity for a *novus actus interveniens*, a court is entitled to accept such evidence as an indication that the assault caused the death. (See **Kashenda Njunga, Francis Kandonga Kangeya, George Musenga Chikatu, Chimunga Kangol Shamuzala and Oscar Maseke Makuwa v The People (1988-1989) Z.R. 1 (S.C.**). It is not the requirement of the law that the cause of death must be established in every murder case. It is now established law that homicide can be satisfactorily proved without first establishing the cause of death. (See **Seif Selemani v The Republic in the Court of Appeal of Tanzania at Tanga Criminal Appeal No. 130 of 2005**). In a recent decision by the Tanzania Court of Appeal in the case of **Mathias Bundala v Republic, Criminal Appeal No 62 of 2004** (unreported) the court stated:-

> *"…….it is not the requirement of the law that the cause of death must be established in every murder case. We are aware of the practice that death may be proved by circumstantial evidence even without the production of the body of the alleged dead person: (See for instance, LEONARD MPOMA v REPUBLIC (1978) T L R 58).*

40. Persuaded by the merits of the above cited comparative decisions, we find that the absence of a post mortem report in this matte did not dent the prosecution case.

41. A final ground urged by the appellant is that the judge failed in his duty to re-evaluate the evidence on record. That the judge mechanically reproduced the evidence as given by the witnesses without a deeper analysis. That due to failure to properly re-evaluate the evidence on record, the judge failed to detect inconsistencies and discrepancies in the evidence of the prosecution witnesses.

42. In **Dickson Elia Nsamba Shapwata & Another –v- The Republic, CR App No 92 of 2007,** the Court of Appeal of Tanzania stated as follows regarding discrepancies in evidence, which we respectfully endorse:

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."*

43. Further, the law on inconsistencies and contradictions have been stated over and over again. Comparatively, the Uganda Supreme Court in **Bumbakali Lutwama and 4 others, SC Cr. Appeal No. 38 of 1989 (unreported)** citing with approval **Alfred Tejar -v- Uganda Cr. Appeal No. 167 of 1969 EACA** (unreported) held among others that "inconsistencies and contradictions in the prosecution case may be ignored if they are minor or do not point to deliberate untruthfulness on the part of the prosecution witnesses …...".

44. In the instant appeal, the appellant urged that the two courts below did not notice the discrepancies in the testimony of PW 13, the handwriting expert. We have considered the alleged inconsistencies as pointed out by the appellant and we find the same to have no merit. The evidence of an expert witness can in principle be challenged and controverted by the evidence of another expert witnesses which was not the case here. We are thus satisfied that the two courts below duly considered the expert opinion of PW13 and properly arrived at the conclusion that it was the appellant who authored the letter/note to the deceased's father stating where the body of the deceased could be found.

45. In penultimate we consider the ground that the learned judge did not properly evaluate the evidence on record. In our reading of the court's judgment, the judge not only rehashed the testimony of the witnesses before the trial court but succinctly considered and determined that the case before him was purely on circumstantial evidence and the alleged confession by the appellant. The learned judge re-evaluated the testimony of PW5 and PW12 and found they were corroborative. On our part, we are satisfied that the learned judge identified the salient corroborative and circumstantial evidence that pointed to the guilt of the appellant. In so doing, the judge gave weight to the recovery of the letter written by the appellant as confirmed by the handwriting expert as well as the recovery of the deceased shoes in the pit latrine pointed out by the appellant. To this end, we are satisfied that the judge properly re-evaluated the evidence on record.

46. On sentence, the trial magistrate sentenced the appellant to life imprisonment. The learned judge reduced the sentence to a term of imprisonment for forty (40) years. Sentencing is essentially the discretion of the sentencing court. An appellant court will be slow to interfere with the exercise of that discretion unless it is shown that the sentencing court took into account an irrelevant factor or that it failed to take into account a relevant factor, or it applied a wrong principle or short of these the sentence is so harsh and excessive that an error of principle must be inferred.

47. In this matter, the appellant has had the benefit of his sentence being reduced from life imprisonment to a term of 40 years in prison. The mitigation by the appellant was taken into account by the judge and the issue of re-sentencing does not arise. **Section 361(1) (a)** and **(b)** of the **Criminal Procedure Code** provides as follows:-

> *361.(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—*
>
> *(a) on a matter of fact, and severity of sentence is a matter of fact; or*
>
> *(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."*

48. Guided by the provision of **Section 361(1) (a)** and **(b)** of the **Criminal Procedure Code**, the appellant's second appeal against sentence is now a question of fact, it is no longer a question of legality of the sentence. For this reason, this Court has no jurisdiction to review and re-examine the 40 years' term of imprisonment meted on the appellant.

49. The upshot is that this appeal has no merit and is hereby dismissed.

Dated and delivered at Kisumu this 31st day of July, 2019

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR