



**Republic v Mohammed & another (Petition 39 of 2018) [2019] KESC 48 (KLR)
(15 March 2019) (Judgment) (with dissent - MK Ibrahim & SC Wanjala, SCJJ)**

Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR

Neutral citation: [2019] KESC 48 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 39 OF 2018

**DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG,
SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

MARCH 15, 2019

BETWEEN

REPUBLIC APPELLANT

AND

AHMAD ABOLFATHI MOHAMMED 1ST RESPONDENT

SAYED MANSOUR MOUSAVI 2ND RESPONDENT

*(Being an appeal from the Judgment of the Court of Appeal delivered
at Nairobi on 26th January 2018 in Criminal Appeal No. 135 of
2016 and pursuant to the leave granted on 28th September 2018)*

Supreme Court on the admissibility of evidence in criminal proceedings; Distinction between admissions and confessions

Reported by Mathenge Mukundi

Evidence Law - evidence – admissibility of evidence – claim that information given to the police by an accused person that led to the recovery of the RDX explosives - whether such information was admissible only under section 25A or also under the provisions of section 111(1) of the Evidence Act - whether evidence emanating from a suspect leading to discovery of further evidence could be equated with a confession under section 25A of the Evidence Act - Evidence Act, Cap 80, sections 25A and 111

Statutes – interpretation of statutes – interpretation of section 25A of the Evidence Act on confessions generally inadmissible and section 111 of the Evidence Act on the burden on accused in certain cases - whether there was an apparent conflict between sections 25A and 111(1) of the Evidence Act, with respect to evidence obtained by the police from an accused person - Evidence Act, Cap 80, sections 25A and 111

Evidence Law - evidence – circumstantial evidence – chain of the circumstantial evidence – claim that any person other than the accused persons had access to a crime scene where explosives were placed - whether the fact that any



person other than the accused persons had access to a crime scene where explosives were placed, broke the chain of the circumstantial evidence on record and meant that anyone else could have committed the crime

Brief facts

The respondents were Iranian nationals who came to Kenya on June 12, 2012 on a tourist/business survey visa. During the tour they stayed in a hotel in Mombasa for five days, where they visited various places at the coast, they later travelled to Nairobi and spent a few days. While on their way back to Iran, they were arrested by the Anti-Terrorist Police Unit on allegations of being in Kenya on a terrorism mission.

The respondents were later charged before the Chief Magistrate's Court, at Nairobi with the following offences: committing an act intended to cause grievous harm contrary to section 231(f) of the Penal Code, preparation to commit a felony contrary to section 308 (1) of the Penal Code and being in possession of explosives namely *Cyclotrimethylenetrinitramine (RDX)* contrary to section 29 of the Explosives Act. The respondents pleaded not guilty to all the charges but upon trial, they were convicted as charged and sentenced to life imprisonment on the first offence, 10 and 15 years to the second and third offences respectively. The sentences were ordered to run concurrently.

Aggrieved by that conviction and the sentence imposed upon them by the Magistrate's Court, the respondents appealed to the High Court, as the first appellate court. Upon re-evaluation of the evidence on record, the High Court upheld the findings of the trial court on the respondents' conviction. It, however, allowed their appeal against sentence holding that the respondents, having been charged with what essentially constituted inchoate offences in that their intentions were nipped in the bud, the sentence of life imprisonment was excessive. Consequently, the High Court set aside that sentence and substituted it with a composite term of fifteen years' imprisonment.

The respondents were aggrieved by the High Court's findings and moved to the Court of Appeal on a second appeal. The Court of Appeal allowed their appeal, quashed their conviction and set aside the sentence. It was that decision which provoked the Supreme Court appeal by the State.

Issues

- i. Whether information given by an accused person that led to discovery of RDX explosives could be equated to a confession in terms of sections 25 and 25A of the Evidence Act.
- ii. Whether evidence emanating from a suspect leading to discovery of further evidence could be equated with a confession under section 25A of the Evidence Act.
- iii. Whether there was an apparent conflict between sections 25A and 111(1) of the Evidence Act, with respect to evidence obtained by the police from an accused person.
- iv. Whether the fact that any person other than the accused persons had access to a crime scene where explosives were placed, broke the chain of the circumstantial evidence on record and meant that anyone else could have committed the crime.

Relevant provisions of the Law

Evidence Act (cap 80)

Section 17 - Admissions defined generally

An admission is a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned.

Section 25 - Confession defined

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

Section 25A - Confessions generally inadmissible

(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.

(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

Section 111(1) - Burden on accused in certain cases

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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

Held

1. It was a common practice and standard operating procedure in the criminal investigations for the police to confront the suspects with any report they received about the suspects' commission or involvement in the commission of a crime and demand an explanation. If the explanation the suspect gave led to the discovery of further evidence or exhibits, the evidence should be admitted though with corroboration for a conviction to be sustained. Hence, the information that was volunteered by the 1st respondent that led the police to the recovery of the RDX explosive was generally admissible without invoking section 25A or section 111(1) of the Evidence Act.
2. Where there was a confession an accused person would acknowledge the commission of an offence and could be convicted on the basis of that acknowledgement alone but in the case of an admission the accused person would acknowledge a fact from which guilt could be inferred but additional evidence would be needed to prove the commission of an offence.
3. It was never the appellant's case that the respondents had confessed to committing the offences that they were charged with. The appellate court therefore, could not rely 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. Hence, the Court of Appeal erred in equating the information given by the 1st respondent that led to discovery of RDX explosives to a confession in terms of sections 25 and 25A of the Evidence Act.
4. There was no apparent conflict between sections 25A(1) and 111(1) of the Evidence Act. The two sections related to different scenarios and would result in different effects. Section 25A(1) was applicable only to the information obtained by the prosecution during the interview and interrogations of the suspects during criminal investigations, whereas, section 111(1) dealt with the burden of proof and only came into play in the trial when the prosecution had proved, to the required standard of beyond reasonable doubt, that the accused person had committed an offence and part of the prosecution case comprised of a situation only within the knowledge of the accused person so that if he did not offer an explanation, he risked conviction.
5. Circumstantial evidence was like any other evidence. Though, its probative value should be reasonable, and not speculative, inferences ought to be drawn from the facts of a case. In contrast to direct testimonial evidence, it was conceptualized in circumstances surrounding the disputed questions of fact. Circumstantial evidence should never be given a derogatory tag. For a conviction to be sustained on the basis of circumstantial evidence, the chain of events had to be so complete that it established the culpability of the respondents, and no one else, without any reasonable doubt.
6. There had to be no other co-existing circumstances weakening the chain of circumstances relied on and the circumstances from which the guilt inference was drawn had to be of definite tendency and to



- precisely point toward the guilt of the respondents. The appellant proved that the respondents visited the country on a tourist/business survey visa and upon their short stay in the country they neither visited any tourist destination nor met with any investor. The only place they visited thrice was where the RDX explosives were recovered in a freshly dug hole, at which, they had been seen at dusk by golfers at a spot where it was rare to find members of the public at that time. Upon being asked by the golfers what they were doing there at that time, they casually stated that they were “looking”. The golfers left them there at around 6:30pm in the evening.
7. Although the golf course was not fenced or guarded and it was possible for any member of the public to have entered it and to place the RDX where it was found, that did not break the chain of events. The respondents did not offer any plausible explanation for their three visits at the spot where the RDX explosives were recovered or on how the 1st respondent obtained the information that he volunteered to the police and led to the recovery of the explosives.
 8. The respondents vehemently dismissed the alleged admission as a fairy tale concocted by the police to incriminate them. However, upon consideration of the record, and particularly the trial court’s finding that there was no evidence on record to support the accused’s claim that after his arrest he was drugged and that he only came to his senses while in court, as well as the statement by the 2nd respondent that the police treated them well, the trial court and the first appellate court’s finding that the 1st respondent indeed led the police to the discovery of the RDX explosives, was correct. The act of the 1st respondent that led the police to where the RDX explosive was discovered was an admission of the respondents’ possession of that explosive. The police did not know the respondents. The police said that they acted on intelligence information. The use of intelligence or informers’ reports was standard and common practice and the police were not obliged to disclose their informers as that would hamper crime detection in Kenya.
 9. All the aspects of the evidence on record corroborated the appellant’s case that the 1st respondent led the police to the scene where the RDX explosives were dug out. That considered alone precisely pointed to the respondents as the people who planted the RDX explosives at the scene where they were found. There was no evidence of anyone else having previously planted anything in the Mombasa Golf Course and more specifically in the vicinity of Hole No. 9 where the RDX explosive was discovered. The respondents visited that spot at least thrice, the last visit having been a day before the recovery of the RDX explosive. Had the Court of Appeal considered all these factors, it would have come to a different conclusion.
 10. The Court of Appeal erred in holding that any admission made outside section 25A of the Evidence Act was inadmissible. It also erred in holding that the conviction in the case was based solely on circumstantial evidence. The 1st respondent’s act of leading the police to Hole No. 9 on the Mombasa Golf Club course where the RDX explosive was dug out, was an admission of a material fact which, coupled with the circumstantial evidence on record sealed the respondents’ guilt. In the circumstances the appeal had merits.

Dissenting opinion

Per M K Ibrahim, SCJ (dissenting)

1. It was imperative that the rationale for the enactment of section 25A of the Evidence Act was not lost. The reason behind its enactment showed why it was not in conflict with section 111 of the Evidence Act. The enactment was prompted by the raging debate at the time of enactment which brought serious concerns as to the capability of the police to extract confessions without resorting to means that led to gross miscarriage of justice and grave human rights violations. Generally, confessions made by the accused person were not admitted in evidence unless they were made strictly in accordance with the law.
2. The 1st respondent had special knowledge of where the substance was buried. The substance was buried in a hidden place. The only inference that the court could draw from the evidence adduced by the



- appellant was that it was the respondents who had buried the substance in the place where it was found. That was circumstantial evidence. The law regarding circumstantial evidence was that the court had to consider whether the exculpatory evidence adduced by the prosecution was inconsistent with the innocence of the accused and pointed to no one else other than the accused as the persons who committed the offence. The appellant established that it was the 1st respondent who escorted the police to the specific spot at the golf course where the explosive substance was recovered.
3. In reaching its decision, the High Court drew conclusions from the circumstantial evidence adduced by the prosecution and not the accused's confession, for no confession was on record. The High Court concluded that both direct and circumstantial evidence placed the respondent within the proximity of the area where the RDX was buried and later recovered.
 4. The evidence of the appellants' possession of the RDX was purely circumstantial because no witness saw them in possession of the substance or placing the same in the golf course. The evidence was emphatic that other than being at the golf course, the appellants were not in physical possession of any luggage or parcel. There was no other circumstantial evidence tying or linking the appellants to the RDX, the easy accessibility, without let or hindrance, of the golf course entailed strong co-existing circumstances that were capable of destroying the inference of guilt on the part of the appellants.
 5. The evidence was purely circumstantial and was not enough to prove the case as against the respondents to the required standard, which was proof beyond reasonable doubt. While the police evidence was that the 1st respondent was the one who led them to the spot at Mombasa Golf Club where the RDX was discovered, that evidence was used to equally convict the 2nd respondent. That aspect was not picked up by either of the superior courts and was another reason militating against the case against the respondents. The prosecution evidence was never water-tight.
 6. With respect to public interest, it was a fact that Kenya had been a victim to several terrorist attacks, with the recent one being the Dusit Hotel Complex Attack. As a result, public interest and awareness in matters concerning terrorism had increased. Any alleged association of individuals with acts of terrorism was a matter that the public really frowned upon. Hence as expected, the matter attracted a lot of public interest and media coverage. To the public, the fact that the respondents were Iranians charged with acts of terrorism was enough to have them convicted and sentenced.
 7. The court was required to strike a balance between the public's interest and expectations on one hand, and the constitutional principles applicable within the criminal justice system on the other, the most fundamental principles being the presumption of innocence and the rule of law. The public's perception on the seriousness of an offence should never be a factor in determining the guilt of an accused or his acquittal. There was a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important constitutional protections of the accused persons became.
 8. The presumption of innocence served not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore did not add anything new or special to the balancing exercise. Although, the public resented and abhorred the respondents' acquittal by the Court of Appeal, in determining the matter, the court should only focus on issues that were before the Court of Appeal and the law. The gravity of the offence and the public sensitivity of the issue(s) ought not to be given emphasis to the exclusion of very important constitutional provisions and fundamental rights and freedoms, which the Constitution guaranteed to all persons, especially within the criminal justice system.
 9. The chain of circumstantial evidence was broken and the evidence on record was not watertight or conclusive enough to sustain a conviction of the two respondents. The fact that the Golf Course was an open area, was not fenced and was accessible to any member of the public created a reasonable doubt as to the guilt of the two respondents in respect of the offence in question.



10. The court would have upheld the final orders of the Court of Appeal, which quashed the respondents' conviction and set aside the sentence hence leading to their acquittal.
Per S C Wanjala, SCJ (dissenting)
11. The High Court and Court of Appeal interpreted sections 25A and 111(1) of the Evidence Act, as if they dealt with the same genre of evidence; confessions and admissions. The superior courts perceived a conflict between the two, in terms of the admissibility of certain evidence obtained from a suspect during investigations. However, the two sections of the Evidence Act did not deal with the same family of evidence. In fact, they were so unrelated, that there could hardly be any conflict between them.
12. A correct reading of sections 25A and 111 of the Evidence Act showed that the two did not address similar, or even related evidentiary issues. Section 25A of the Evidence Act dealt with the process of searching for, collecting and admissibility of evidence. The process took place before a person was formally charged with a criminal offence, hence the requirement that a confession or admission should be made before a judge, a magistrate or a police officer not being an investigating officer of the rank of inspector. Once charged, then the question of whether his confession or admission of fact was admissible arose. Section 25A mainly regulated the investigative process. Once a person was formally charged, he became an accused person, but the information he could have given, or a confession or admission he could have made during investigations, had to be subjected to the requirements of section 25A and any other related provisions of the Evidence Act, dealing with questions of admissibility of evidence, be it a confession or an admission.
13. Section 111 (1) of the Evidence Act, did not address the process of searching for, collecting, or admissibility of evidence. The section dealt with the question of burden of proof in certain circumstances. The opening words of the section read "when a person is accused of any offence, the burden of proving....". In other words, the section placed the burden of proving that an accused person was exempted from, or fell within an exception to the offence with which he was charged on him. For example, an accused person could have pleaded the defence of diplomatic immunity, and consequently, that he was exempted from the criminal charge. It had nothing to do with a confession or an admission of a fact, tending to the guilt of an accused. It was actually the other way round, meaning facts that would have brought an accused person within an exception, or qualification to, or exemption from, the law creating that charge.
14. Information provided by a suspect, which led to the discovery of material evidence did not fall within the provisions of section 111(1) of the Evidence Act. Such information was of course relevant to the process of collecting evidence. However, if the information had the character of an admission or confession, it had to fall under the provisions of section 25A of the Evidence Act, for the latter, regulated the admissibility of a confession or any admission of a fact intending to the proof of guilt.
15. It was no longer in question that for circumstantial evidence to justify the inference of guilt, it had to be watertight, in that the exculpatory facts had to be incompatible with the innocence of the accused. The circumstances taken cumulatively, should form a chain so complete that there was no escape from the conclusion that within all human probability, the crime was committed by the accused and none else. The burden of proving the completeness of the chain always remained on the prosecution, it never shifted to the accused.
16. The evidence on record indicated that the golf course was not fenced or guarded and that it was possible for any member of the public to have entered it and placed the RDX where it was found. In the absence of any other circumstantial evidence tying or linking the appellants to the RDX, the easy accessibility, without let or hindrance, of the golf course was strong co-existing circumstance that was capable of destroying the inference of guilt on the part of the appellants. All that the court ought to have done was to satisfy itself whether, the evidence on record supported the finding of guilt beyond any reasonable doubt. The evidence relied upon by the prosecution was not water-tight enough to prove the guilt of the accused beyond reasonable doubt.



17. Appeal would have been dismissed and the judgment of the Court of Appeal upheld.

Appeal allowed.

Orders

- i. *The judgment and orders of the Court of Appeal made on January 28, 2018 were set aside.*
- ii. *The conviction by the trial court of the respondents and the High Court decision were affirmed.*
- iii. *The respondents to serve the remainder of their imprisonment term after which they shall be repatriated to their country.*

Citations

Cases

Kenya

1. *Abanga alias Onyango v Republic* Criminal Appeal 32 of 1990 - (Explained)
2. *Board of Governors, Moi High School, Kabarak & another v Bell & 2 others* Petition 6 & 7 of 2013 & Civil Application 12 & 13 of 2012 (Consolidated); [2013] KESC 12 (KLR) - (Explained)
3. *Caroline Wanjiku Wanjiru & another v Republic* Criminal Appeal 87 of 2012; [2015] KEHC 4046 (KLR) - (Explained)
4. *Douglas Thiongo Kibocha v Republic* Criminal Appeal 335 of 2006; [2009] KEHC 1818 (KLR) - (Overruled)
5. *Joseph Otieno Juma v Republic* Criminal Appeal 214 of 2009; [2011] KECA 64 (KLR) - (Explained)
6. *Kennedy Ottieno Odeny v Republic* Criminal Appeal 100 of 2007; [2008] KECA 38 (KLR) - (Explained)
7. *Kipkering Arap Koskei & Another v R* (1949) 16 EACA 135 - (Explained)
8. *Mary Wanjiku Gichira v Republic* Criminal Case 21 of 1997; [1998] KEHC 59 (KLR) - (Explained)
9. *Milton Kabulit & 4 others v Republic* Criminal Appeal 340 of 2012; [2015] KECA 105 (KLR) - (Overruled)
10. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Explained)
11. *Musili Tulo v Republic* Criminal Appeal 30 of 2013; [2014] KECA 412 (KLR) - (Explained)
12. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR) - (Explained)
13. *Republic v Daniel Kanduthu Wanjobi* Criminal Case 69 of 2003; [2006] KEHC 748 (KLR) - (Explained)
14. *Republic v Elly Waga Omondi* Criminal Case 24 of 2012; [2015] KEHC 4612 (KLR) - (Explained)
15. *Republic v Maalim Komora Godana & another* Criminal Case 4 of 2006; [2006] KEHC 3492 (KLR) - (Explained)
16. *Republic v Michael Muriuki Munyuri* Criminal Case 71 of 2010; [2014] KEHC 2660 (KLR) - (Explained)
17. *Republic v Peter Kariuki-Muibau* Criminal Case 7 of 2006; [2007] KEHC 2684 (KLR) - (Explained)
18. *Sawe v Republic* Criminal Appeal 2 of 2002; [2003] KECA 182 (KLR) - (Mentioned)
19. *Steyn v Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Explained)
20. *Thoya Kitsao Alias Katiba v Republic* Criminal Appeal 123 of 2014; [2015] KECA 172 (KLR) - (Explained)

South Africa

1. *Mahlalela v S* (396/16) [2016] ZASCA 181 (28 November 2016) - (Mentioned)
2. *S v Coetzee and Others* (CCT50/95) [1997] ZACC 2; 1997 (4) BCLR 437; 1997 (3) SA 527 (6 March 1997) - (Explained)
3. *S v Reddy & others* (416/94) [1996] ZASCA 55 (28 May 1996) - (Explained)

United Kingdom

1. *R v Taylor Weaver and Donovan* (1928) 21 Cr. App. R 20 - (Explained)
2. *Teper v R* [1952] AC 480 - (Explained)

India



1. *A Nagesia v. State of Bihar* AIR 1966 SC 119 - (Explained)
2. *Hanumant v The State Of Madhya Pradesh* AIR 1952 SC 343; 1953 CriL J 129; 1952 1 SCR 1091 - (Explained)
3. *Palvinder Kaur v. State of Punjab* AIR 1952 SC 354 - (Explained)
4. *Ram v State* AIR 1959 All. 518 - (Explained)
5. *Saboo v. State of U.P.* AIR 1966 S.C. 42 - (Explained)

Texts

1. Bacchini, S., (Ed) (2011) *Concise Oxford English Dictionary* New York: Oxford University Press 12th Edn
2. Barker, I., (Ed) (2011) *Circumstantial evidence in criminal cases* Bar News: The Journal of the NSW Bar Association , Winter 2011: pp 32-39.
3. Couturier, MP., (2016) *Circumstantial evidence should not be overlooked by Claims Adjusters* Toronto: McCague Borlack LLP: September 2016
4. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn pp 53, 636
5. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn Vol 17 paras 13 and 14
6. Jowitt, WA., *et al* (Eds) (1977), *Jowitt's Dictionary of English Law* London: Sweet & Maxwell, 4th Edition, Vol 1, p 418
7. Mano, M., Roja, R., (Eds) (2018) *A comparative study between admission and confession* International Journal of Pure and Applied Mathematics, Volume 120. No 5 2018,1207-1216
8. Richardson, WP., (1928) *The Law of Evidence* Jerome Prince, 3rd Edition p 268
9. Wigmore, JH., (1970), *Evidence in Trials at Common Law, Issue 2* Little, Brown: James H. Chadbourn Edn, 4th Revised Edition

Statutes

Kenya

1. Constitution of Kenya articles 49(1) (b), (d); 50 2(a), (4); 163(4)(b) -(Interpreted)
2. Criminal Law (Amendment) Act, 2003 (Act No 5 of 2003) In general - (Cited)
3. Criminal Procedure Code (cap 75) section 361(1)(a) -(Interpreted)
4. Elections Act (cap 7) section 85A - (Interpreted)
5. Evidence Act (cap 80) section 21; 24; 25A; 26; 27; 29; 31; 111(1); 119; part II, III - (Interpreted)
6. Evidence (Out of Court Confession) Rules, 2009 (cap 80 Sub Leg) In general- (Cited)
7. Explosives Act (cap 115) section 29 -(Interpreted)
8. Penal Code (cap 63), sections 231(f); 308(1)-(Interpreted)
9. Security Laws (Amendment) Act, 2014 (Act No 19 of 2014) In general -(Cited)
10. Statute Law (Miscellaneous Amendments) Act, 2007 (Act No 7 of 2007) In general -(Cited)
11. Supreme Court Rules, 2012 (Repealed) (cap 9B Sub Leg) rule 24(2) -(Interpreted)

JUDGMENT

I. Introduction

1. Before the court is a petition of appeal dated October 26, 2018 premised upon the provisions of article 163(4)(b) of the [Constitution](#). It was filed pursuant to this court's order dated September 28, 2018 granting the State, (the appellant), leave to appeal having certified the matter as being of general public importance. In the petition, the appellant seeks orders that the Judgment of the Court of Appeal (Kihara Kariuki, M'Inoti and Murgor, JJA), delivered at Nairobi on January 26, 2018 in Criminal



Appeal No 135 of 2016 be set aside and that the order of acquittal of the respondents issued by that court be reversed and their conviction by the trial court be upheld.

II. Litigation Background

(a) At the Magistrate's Court

2. The respondents are Iranian nationals who came to Kenya on June 12, 2012 on a tourist/business survey visa. Upon arrival at Jomo Kenyatta International Airport at Nairobi, they took a local flight to Mombasa and checked in at the Royal Castle Hotel where they had been booked for 10 days by the Teheran Golfers Travel Agency. They, however, checked out of that hotel on June 16, 2012, after five days and flew to Nairobi where they stayed at the Laico Regency for three days. On June 19, 2012, while on their way to the Jomo Kenyatta International Airport to catch a return flight back to their country, they were arrested by the Anti-Terrorist Police Unit on allegations of having come to Kenya on a terrorist mission.
3. The respondents were later charged before the Chief Magistrate's Court, at Nairobi with the following three (3) offences:
 - i. Count 1: Committing an act intended to cause grievous harm contrary to section 231(f) of the *Penal Code*. The particulars of that offence were that on or before the June 20, 2012 at Mombasa Golf Course along Mama Ngina Drive in Mombasa Municipality within Mombasa County, jointly with others not before Court, [the respondents] put an explosive substance namely Cyclotrimethylenetrinitramine (RDX) at the said Golf Course with intent to cause grievous harm to the golf players;
 - ii. Count 2: Preparation to commit a felony contrary to section 308(1) of the *Penal Code*. The particulars were that on or before the June 20, 2012 at Mombasa Municipality within Mombasa County, jointly with others not before court they were found armed with 15 kilograms of cyclotrimethylenetrinitramine (RDX) in circumstances that indicated that they were so armed with intent to commit a felony namely grievous harm; and,
 - iii. Count 3: Being in possession of explosives contrary to section 29 of the *Explosives Act*, cap 115 Laws of Kenya. The particulars were that on or before the June 20, 2012 at Mombasa Golf Course along Mama Ngina Drive in Mombasa City within Mombasa County, jointly with others not before Court, [they] had in their possession 15 kilograms of RDX explosive for unlawful object.
4. The respondents pleaded not guilty to all those charges but upon trial, they were convicted as charged and sentenced to life imprisonment on the 1st count, 10 years imprisonment on the 2nd count and 15 years imprisonment on the 3rd count. The sentences were ordered to run concurrently.

b) Before the High Court

5. Aggrieved by that conviction and the sentence imposed upon them by the Magistrate's Court, the respondents appealed to the High Court on the grounds, *inter alia*, that their right to a fair trial had been flouted as the trial Magistrate was not impartial and their defences were ignored; that the trial Magistrate ignored contradictions in the prosecution case; that the trial Magistrate failed to apply the established legal principles in drawing inferences from circumstantial evidence; that far from establishing their guilt, the circumstantial evidence on record exonerated them of the offences for which they are charged; that their conviction was unfounded as it was not supported by the evidence on record; and that the sentences imposed upon them were harsh and excessive.



6. Upon hearing of the appeal and, as the first appellate court, upon re-evaluation of the evidence on record, the High Court, (Kimaru J.) upheld the findings of the trial Court on the respondents' conviction. It, however, allowed their appeal against sentence holding that the respondents, having been charged with what essentially constituted inchoate offences in that their intentions were nipped in the bud, the sentence of life imprisonment was excessive. Consequently, the learned Judge set aside that sentence and substituted it with a composite term of fifteen years imprisonment.

(c) Before the Court of Appeal

7. Though victorious in some way, the respondents were still aggrieved by the High Court's findings and moved to the Court of Appeal on a second appeal. Before that court, they raised 19 grounds of appeal which their counsel condensed into six broad grounds: that the High Court erred by sustaining their conviction on insufficient and contradictory evidence; by relying on circumstantial evidence that did not unerringly point to the respondents as the only persons who could have placed the RDX at the golf course; by holding that the RDX was an explosive within the meaning of the *Explosives Act*; by finding that the respondents were in possession of the RDX explosive; by failing to hold that the respondents were denied a fair trial as guaranteed by article 50 of the *Constitution* and the *Criminal Procedure Code*; and by imposing upon the respondents an illegal and manifestly harsh and excessive sentence.
8. After hearing, the Court of Appeal allowed their appeal, quashed their conviction and set aside the sentence. It is that decision which has provoked this appeal by the State.
9. After lodging the notice of appeal, the State filed before the Court of Appeal an application under article 163(4)(b) of the *Constitution* for certification that its intended appeal involved matters of general public importance. Upon hearing, the Court of Appeal dismissed that application prompting the State to seek a review before this court under article 163(5). As stated, in our ruling of September 28, 2018, we granted the State leave and thus paved the way for the filing of this appeal.

(d) Before the Supreme Court

10. The appeal before this court is premised on six grounds being:
 - (a) That the Court of Appeal erred in law by failing to [properly] interpret [the] provisions of sections 25A, 111(1) and 119 of the *Evidence Act* ... [thus] arriving at the [erroneous] decision that the evidence leading to the discovery of the explosive was inadmissible.
 - (b) That the Court of Appeal erred in law by equating evidence proceeding from a suspect leading to discovery with a confession under section 25A of the *Evidence Act*.
 - (c) That the Court of Appeal erred in law and fact by failing to analyze and interrogate the evidence that clearly indicated that it was the provisions of sections 111(1) and 119 of the *Evidence Act* that were relevant and not section 25A of the *Evidence Act*.
 - (d) That the Court of Appeal erred in law and fact by failing to interrogate and find that [the] circumstantial evidence adduced during trial was watertight and inconsistent with the innocence of the respondents herein.
 - (e) That the Court of Appeal erred in law and fact by holding that the repeal of section 31 of the *Evidence Act* effectively brought under section 25A of the *Evidence Act* evidence proceeding from a suspect that leads to recoveries.



- f) That the Court of Appeal erred in law and fact by failing to recognize the mandate of the police to detect and prevent crime and present suspects to court with evidence from interviewing suspects as a standard operating procedure in criminal investigations.
11. By a Ruling delivered on September 28, 2018 aforesaid this court certified this Appeal as one raising matters of great public importance under article 164(3)(b) of the Constitution and rendered itself thus:

“(22) It’s a matter of common notoriety that this country has, in the past suffered several horrendous terrorist attacks. As a result we have lost hundreds of innocent Kenyans and thousand left were maimed and seriously injured with personal disabilities and permanent scars. Due to the nature of the terrorist attacks, the Kenyan public has for a time lived in fear and felt insecurity in their own motherland. The crime of terrorism undermines our National security as well as the peace and tranquility of the people of Kenya and all others who live within our borders. Consequently, and on the principles this Court set out in the cases of cases of Hermanus Phillipus Steyn v Giovanni Gneccbi-Ruscione, Sup Ct Appl No 4 of 2012 [2013] eKLR, Peter Oduor Ngoge v Hon Francis Ole Kaparo & 5 others [2012] eKLR (Supreme Court Petition No 2 of 2012) and Board of Governors, Moi High Cool, Kabarak & another v Malcom Bell [2013] eKLR, as well as rule 24(2), of the Supreme Court Rule 2012, we find that the applicant has made out a case for review of the Appellate Court’s orders of February 16, 2018 denying the applicant leave to appeal to this court. We therefore hereby allow prayers 2 and 3 of the amended application and find that the intended appeal involves a matter of general public importance and accordingly substitute the Court of appeal’s order declining certification with one granting the State leave to appeal against the Court of Appeal Judgment acquitting the respondents and ordering their immediate repatriation.

(23) Having allowed the main ground of this application that the intended appeal involves a matter of general public importance, we do not need to consider the other grounds as to whether the net effect of the judgment of the Court of Appeal will affect the investigations of all criminal cases and transcends this particular case; whether information given by a suspect leading to discovery of material evidence in a case is inadmissible unless it is a confession regularly recorded as the Appellate Court held an issue that has a significant bearing on all criminal investigations in this country; whether or not courts are entitled to draw inference/ presumptions from facts arising from confessions as provided for under section 119 of the Evidence Act; the apparent conflict between sections 25A and 111(1) of the Evidence Act and what amounts to a confession under section 25A of the Evidence Act; and that the intended appeal has a significant bearing on the public interest with respect to criminal matters which the Court of Appeal in its ruling of 16th February, 2018 failed to consider. The issues will also be considered in the intended appeal itself. ”

This Judgment is being rendered in the above context.

III. Appellant’s Submissions

12. In support of his stated grounds of appeal, on December 3, 2018, counsel for the appellant filed their written submissions. Counsel for the respondents filed theirs on December 10, 2018.
13. Highlighting their written submissions, learned counsel for the appellant, Mr. Gatonye assisted by Messrs. Okello and Ondimu, submitted that interrogation or interviewing of suspects during criminal investigations is a standard operating procedure recognized by both the Police Standing Orders and the Judges Rules. In the course of those interrogations, at times suspects volunteer information which may not only unravel the mystery in crimes but may also lead to discovery of exhibits or further evidence. In



the appellant's view, the repeal of section 31 of the Evidence Act does not therefore outlaw evidence that proceeds from a suspect that leads to discovery of crucial information or exhibit(s) as such information does not necessarily amount to a confession to trigger the application of section 25A of the Evidence Act.

14. According to the appellant, volunteer of such information simply means that the suspect has personal knowledge of it and, notwithstanding the repeal of section 31 of the Evidence Act, the information is evidence admissible under Sections 111 and 119 of that Act. Accordingly, the appellant contended, the prosecution evidence in this case fell under the provisions of sections 111 and 119 and not under section 25A, of the Evidence Act. On that premise, the appellant faulted the Court of Appeal for equating any information from a suspect that leads to discovery with a confession that must satisfy the provisions of section 25A to be admissible.
15. The appellant cited to us the case of Douglas Thiong'o Kibocho v. Republic [2009] eKLR, a decision that was affirmed in Milton Kabulit & 4 Others v. Republic [2015] eKLR, in support of its submission that there is a conflict between section 25A on the one hand, and sections 111 and 119 on the other. The appellant therefore urged us to find that the repeal of Section 31 means that the law is now silent on the admissibility of information obtained from suspects that leads to discovery. The appellant, however, suggested that such volunteered information and/or discovered evidence should not be the sole basis for founding a conviction. Instead, the court should look for corroborative evidence that tends to establish the truthfulness of such information and discovered evidence.
16. While appreciating the established principles on the application of circumstantial evidence as enunciated in the case of Abanga alias Onyango v Republic, Cr App No 32 of 1990 and many others, the appellant argued that the circumstantial evidence adduced in this case was watertight. It submitted that, taken cumulatively, the evidence of PW2, PW7, PW14 and PW17 not only places the respondents at the scene of recovery of the RDX explosive but also forms a complete chain that leaves no doubt that the two respondents had knowledge of where the RDX explosive was hidden and eventually recovered. With that discovery, the appellant contended that under sections 111 and 119 of the Evidence Act, the burden of proof shifted to the respondents to give a reasonable explanation of how they came into possession of the said substance. Having failed to do so, the circumstantial evidence in this case is inconsistent with their innocence.
17. The appellant further argued that the Court of Appeal having dismissed the ground of Appeal relating to the respondents' possession of the RDX explosive, its finding that there was no other evidence "tying or linking the ... [respondents] to the RDX", and that "the easy accessibility, without let or hindrance, of the golf course were strong co-existing circumstances that were capable of destroying the inference of guilt on the part of the [respondents]" is untenable. The appellant contended that to uphold that Court of Appeal decision will be catastrophic as it will hamper police investigations of criminal cases in this country and render detection of crime difficult if not impossible.
18. On those submissions, the appellant urged us to allow this appeal, reverse the acquittal of the respondents by the Court of Appeal and uphold their convictions.

IV. Respondents' Submissions

19. In response to those submissions, the respondents through their counsel, Mr Ahmednassir Abdullahi, SC, assisted by Mr Omwanza Ombati, dismissed this appeal as unmeritorious. They submitted that the burden always rests with the prosecution to prove the case against an accused person beyond reasonable doubt. No duty or burden is thus imposed on an accused to prove his innocence.



20. Referring us to the case of *Thoya Kitsao Alias Katiba v Republic* [2015] eKLR, counsel for the respondents urged that the repeal of Section 31 and introduction of section 25A were not accidental. Those changes “were intended to address the then egregious abuse and irregularities arising from confessions taken by the police.” The respondents applauded the Court of Appeal’s finding that what is clear from the said changes “...is that section 31 of the *Evidence Act* or a variation thereof was not re-enacted, meaning that information from an accused person leading to discovery of evidence is not admissible outside a confession....” They contended that the law as it stands now on admissibility of confessions is pegged on Section 25A of the *Evidence Act* and the rules made thereunder. In this case therefore, the evidence, if any, against the respondents fell under the provision of Section 25A of the *Evidence Act* and not Sections 111 and/or 119 of the Act.
21. The respondents further dismissed the appellant’s contention that there is a conflict between sections 25A and 111 of the *Evidence Act* as not only misconceived but also dangerous and illusory. They said that such a contention is dangerous because it seeks to whittle down the plain provisions of section 25A of the *Evidence Act*. That in light of the history of torture of suspects by the Kenyan Police, giving any opportunity or creating any confusion on what is too plain will take us back to the dark ages of that history. In any event, the respondents added, article 50(4) of the *Constitution* now prohibits such processes and procedures.
22. The respondents also submitted that the appellant’s contention of a conflict between the two sections is also illusory because section 111(1) does not shift the burden of proof to the accused person. They contended that the section addresses the evidential shift of offering an explanation by way of defence that occurs in some situations once the prosecution discharges its initial burden of proof to the required standard. And in many instances, they said section 111 exonerates completely an accused person once the explanation or answer required from him can be discerned from the evidence already adduced by the prosecution. In the case of evidence obtained through an illegal confession, that evidential shift doesn’t arise once the confession is thrown out.
23. The respondents furthermore referred us to the case of *Republic v. Michael Muriuki Munyuri* [2014] eKLR cited with approval in the case of *Abanga alias Onyango v. Republic*, Criminal Appeal No 32 of 1990 and several other local as well as comparative foreign authorities and urged us to find as untenable the appellant’s submission that the circumstantial evidence adduced in this case was watertight and inconsistent with the respondents’ innocence. They also referred us to the case of *Joan Chebichii Sawe v Republic* [2003] KLR and urged that when a case rests entirely on circumstantial evidence, to found a conviction, such evidence must not only be cogently and firmly established, but the inculpatory facts must also unerringly point to guilt and “be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt.” They added that suspicion however strong, cannot provide a basis for inferring guilt. Conviction can only be based on proven evidence. They cited the case of *Mary Wanjiku Gichira v Republic* Criminal Appeal No 17 of 1998 (unreported) in support of that submission. In conclusion of their submissions on this point, the respondents cited to us the decision of the Supreme Court of South Africa in the case of *Daniel Mabhlalela v S* (396/16) [2016] ZASCA 181 (28 November 2016) and argued that for an inference of guilt to be permissible on the sole basis of circumstantial evidence, it should not only be based on proved facts, but it has also to be the only reasonable inference from those facts, to the exclusion of all other reasonable inferences.
24. The respondents argued in addition that an accused is always presumed to be innocent till proven guilty. Quoting from paragraphs 13 and 14 of *Halsbury’s Laws of England* 4th edition Vol. 17, counsel submitted that the legal burden of “...establishing the facts and contentions which will support a party’s case,... remains constant throughout a trial.... it is the burden of establishing the facts and



contentions which will support a party's case. If at the conclusion of the trial he" fails to establish those facts to the required standard of proof, he will lose.

25. There is also no contention, the respondents submitted, that the respondents were not found with the RDX explosive when they were arrested or searched. Furthermore, none of the witnesses claimed that he saw the respondents bury anything in the Golf Course. Neither PW7, the taxi driver who took the respondents to the golf course area nor PW14, Simon Mwangi, who saw them standing at the edge of tee box No 9 within the Golf Course, said he saw the respondents bury anything in the vicinity. In the circumstances, the prosecution case rests entirely on circumstantial and not direct evidence. As such, the respondents faulted the trial court and the learned Judge of the High Court for relying on an intelligence report which was not produced in the trial proceedings and its veracity tested during trial to make out a case that it was the respondents who buried the explosive where it was found intending to retrieve it later for terrorist use. They contended that the evidence on record does not support that contention.
26. On those submissions, the respondents urged us to dismiss this appeal.

V. Analysis

27. Having considered the grounds of appeal and these rival submissions, we find that the issues that fall for our determination in this appeal are:
- (a) whether, despite the repeal of section 31 of the *Evidence Act*, information given to the Police by a suspect leading to discovery of material evidence and such discovered evidence is admissible under the provisions of section 111(1) of the *Evidence Act*;
 - (b) whether information given to the Police by a suspect leading to discovery of material evidence in a case is admissible only under section 25A of the *Evidence Act*;
 - (c) whether the Court of Appeal erred in equating evidence proceeding from a suspect leading to discovery with a confession under section 25A of the *Evidence Act*.
 - (d) whether there is an apparent conflict between sections 25A and 111(1) of the *Evidence Act*;
 - (e) whether the Court of Appeal's decision in this case will hamper Police investigations and render detection of crime impossible;
 - (f) whether the respondents' conviction was based purely on circumstantial evidence and if so, whether the circumstantial evidence on record in this case unerringly pointed to the guilt of the respondents.
28. The first issue whether, despite the repeal of section 31 of the *Evidence Act*, information given to the Police by a suspect leading to discovery of material evidence and such discovered evidence is admissible under the provisions of section 111(1) of the *Evidence Act*, can be considered together with the second one of whether information given to the Police by a suspect leading to discovery of material evidence in a case is admissible only if it is recorded as a confession under section 25A of the *Evidence Act*.
29. On these two issues, counsel for the appellant submitted that in the course of their criminal investigations, Police interrogate suspects who at times volunteer information which may not only unravel the mystery in crimes but may also lead to discovery of exhibit(s) or further evidence. In the appellant's view therefore, the repeal of Section 31 and introduction of section 25A of the *Evidence Act* does not outlaw evidence that proceeds from a suspect and which leads to discovery of crucial information or exhibit(s). They argued that to uphold the Court of Appeal position that information given by a suspect leading to discovery of material evidence in a case is inadmissible unless it is a



confession regularly recorded, will hamper all criminal investigations in this country. They cited the Court of Appeal decisions in the cases of *Douglas Thiong'o Kibocho versus Republic* [2009] eKLR, and *Milton Kabulit & 4 Others v. Republic* [2015] eKLR in support of that submission.

30. Counsel for the respondents, on the other hand, dismissed that submission as not only dangerous but also misconceived. They argued that it is dangerous because it seeks to subvert the clear words of section 25A of the *Evidence Act* and take us back to the dark period of torture of suspects by the Kenyan Police to extract confessions from them. They cited the Court of Appeal decision in the case of *Thoya Kitsao Alias Katiba v Republic* [2015] eKLR in support of that submission.
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:

"...a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned."

Black's Law Dictionary, defines an admission as:

"Any statement or assertion made by a party to a case and offered against that party; an acknowledgment that facts are true."¹

32. Section 25 of the *Evidence Act* defines a confession in the following terms:

"A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."

Black's Law Dictionary, defines a confession as:

"A criminal suspect's oral or written acknowledgement of guilt, often including details about the crime."²

In addition, learned author John H. Wigmore, defined a confession as:

"... an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or some essential part of it."³

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

¹ *Black's Law Dictionary*, 9th ed. (Bryan A Garner, ed.) (St. Paul, MN: West Group, 2004), p.53).

² [Supra] p.338).

³ John H. Wigmore, *Evidence in Trials at Common Law* s.821, at 308 (James H. Chadbourn ed., 4th rev.ed.1970).

⁴ William P. Richardson, *The Law of Evidence* s 394, at 268 (3d ed. 1928).



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.

34. Because the Indian Evidence Act is in pari materia with ours, Indian case law on the distinction between admissions and confessions is instructive and persuasive. In Saboo v. State of U.P. AIR 1966 SC 42 in which the accused was charged with the murder of his daughter-in-law with whom he had always been quarreling, was seen on the day of the murder going out of the house, saying words to the effect: “I have finished her and with her the daily quarrels.” That statement was held to be a confession relevant in evidence. The Indian Supreme Court determined that “a confession is a statement made by an accused admitting his guilt” whereas “an admission is the species and confession is the sub-species.” This invariably means that all confessions are admissions but the converse is not true.
35. In the cases of, Palvinder Kaur v. State of Punjab, AIR 1952 SC 354 and A Nagesia v. State of Bihar, AIR 1966 SC 119, the Supreme Court of India propounded that a confession is a direct acknowledgement in clear terms by an accused person that he committed the offence for which he is arraigned.
36. In Ram v State, AIR 1959 All. 518, the Indian Supreme Court was even more succinct on the distinction between an admission and a confession:

“19. The acid test which distinguishes a confession from an admission is that where conviction can be based on the statement alone, it is a confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission.”
37. The distinction between the two has also been the subject of many scholarly works. As learned authors M Mano and K Roja, stated,

“The term confession and admission were coined for evidentiary value and courts have attempted to clear the difference between them. A confession is an acknowledgment by a party in terms to express his guilt in a criminal case. An admission is a statement of facts from which the guilt may be deduced and which takes towards proof of the guilt.”⁵
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.
39. These distinctions can therefore be summarised as follows:
 1. A confession untainted by any legal disqualification may be accepted as conclusive in itself of the matters confessed. An admission however, pursuant to section 24 of the Evidence Act, is not conclusive proof of the matters admitted though it may operate as an estoppel.
 2. A confession is a direct admission of guilt while an admission amounts to inference about the liability of the person making the admission in the cause.
 3. A confession always goes against the person making it. An admission may sometimes be proved by or on behalf of the person making the admission as stated in section 21 of the Evidence Act.
 4. Confessions are made in criminal cases while admissions are made in both criminal and civil cases.

⁵ M.Mano, K.Roja, “A comparative study between admission and confession,” International Journal of Pure and Applied Mathematics, Volume 120. No 5 2018,1207-1216.



5. Confessions must be voluntary but admissions need not be voluntary.
 6. Confessions can only be made by the accused, admissions can be made by any person.
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.
41. Before its repeal, section 31 of the *Evidence Act* provided that,
- “Notwithstanding the provisions of sections 26, 28 and 29 of this Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”
- Sections 26 and 27 deal with confessions and admissions obtained by inducement, threat or promise or those made after the inducement or threat has been removed. Section 28 was repealed by Act No 5 of 2003.
42. Section 25A(1) on its part provides that,
- “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 .”
43. The issue as we have stated is whether an admission which is received outside the provisions of section 25A is admissible. In the cases of *Kennedy Otieno Odeny v Republic* [2008] eKLR and *Thoya Kitsao Alias Katiba v Republic* [2015] eKLR, in which confessions were not made in strict compliance with section 25A, they were held inadmissible. However, in the cases of *Douglas Thiong’o Kibocho v Republic* [2009] eKLR, and *Milton Kabulit & 4 others v. Republic* [2015] eKLR, the Court of Appeal held that the repeal of section 31 did not outlaw evidence received under section 111(1) and went ahead to admit admissions made in those cases under that section.
44. In this case, the prosecution claimed that upon being confronted with intelligence reports that the respondents had an explosive which they had hidden somewhere in Mombasa County, the 1st respondent led Police to the Mombasa Golf course where they had hidden the RXD explosive. The prosecution further asserted that the 1st respondent’s said act of leading the Police to the recovery of the RXD explosive is testimony of the respondents’ personal knowledge of the presence of the RXD explosive at the spot where it was found and that is admissible under Section 111(1).
45. Section 111 reads:
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.

2. Nothing in this section shall—
 - a. prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
 - b. impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or
 - c. affect the burden placed upon an accused person to prove a defence of intoxication or insanity.” (emphasis added)
46. In the above context, it is our view that, while confessions under section 25A are often made to the Police during investigations, as counsel for the respondents argued, section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved, to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only “within the knowledge” of the accused person so that if he does not offer an explanation, he risks conviction. Such a situation would arise, for instance, in a murder case where part of the prosecution case is that, prior to the deceased’s death, the accused person is the one who was last seen with him. This being our view, we find that the Court of Appeal erred in its decisions in the said cases of *Douglas Thiong’o Kibocho versus Republic* [2009] eKLR, and *Milton Kabulit & 4 Others v. Republic* [2015] eKLR that admissions made to Police in the course of investigations are admissible under section 111(1) of the *Evidence Act*. As stated, that section cannot be invoked at the investigation stage but in the hearing of the defence case in the course of the trial when necessary.
47. Assuming for a moment that the 1st respondent indeed led the Police to the recovery of the RDX explosive, is that information admissible? In other words, despite the repeal of section 31 of the *Evidence Act*, is information given to the Police by a suspect leading to discovery of material evidence generally admissible? We think it is.
48. We agree with the appellant that it is a matter of general public importance that the Police are given the freedom to carry out investigations with a view to detecting crimes. We also agree with it that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews, Police are entitled to confront suspects with any report they may have received about the suspects’ commission or involvement in the commission of a crime and demand an explanation. In response, a suspect may offer an explanation. If it happens that the explanation the suspect gives is an admission of a material, ideally the Police are required to invoke the provisions of section 25A of the *Evidence Act*. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd if admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in section 25A (1) of the *Evidence Act*, are admissible. In



- the circumstances, we find that in its holding that “information from an accused person leading to discovery of evidence is not admissible outside a confession....”, the Court of Appeal equated evidence proceeding from a suspect leading to discovery to a confession.
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*. As such, we disagree with the appellant’s contention and the Court of Appeal decisions in (*Douglas Thiongo Kibocha v Republic* [2009] eKLR and *Milton Kabulit & Others v. Republic* [2015] eKLR) that there is an apparent conflict between sections 25A(1) and 111(1) 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.
 50. In this case, on the basis of the testimonies of the Police Officers, Sgt. Kennedy Musyoki, PW1, John Mulusi Mulaulu, PW2, PC Moses Wachira, PW5, CIP Charles Ogeto, PW13, and the Investigating Officer in this case, Sgt. Erick Opagal Okisai, PW17, the prosecution case is that the Police received intelligence reports that the respondents, who had purportedly come to Kenya as tourists and businessmen exploring opportunities for business in Kenya, were actually terrorists. When the Police confronted them with the intelligence report that they (the respondents) were in possession of an explosive which they had hidden in Mombasa County, the 1st respondent offered and led the Police to a spot within Hole No 9 in the Mombasa Golf Club golf course along Mama Ngina Drive where they found the RDX explosive.
 51. The respondents vehemently dismissed the alleged admission as a fairy tale concocted by the Police to incriminate them. However, upon consideration of the record, and particularly the trial court’s finding that there was no evidence on record to support the accused claim that after his arrest he was drugged and that he only came to his senses while in Court, as well as the statement by the 2nd respondent that the Police treated them well, we concur with the trial Court and the first appellate court that the 1st respondent indeed led the Police to the discovery of the RDX explosive in the Mombasa Golf Club golf course along Mama Ngina Drive. That act of the 1st respondent leading the Police to the Mombasa Golf Club where the RDX explosive was discovered was an admission of the respondents’ possession of that explosive. That being our view, it follows therefore, and we find that the Court of Appeal erred in holding that the respondents’ conviction was based solely on circumstantial evidence. It was partly based on that admission and the circumstantial evidence on record corroborates that admission as we shall shortly demonstrate.
 52. That in effect partly disposes of the last issue in this appeal of whether the respondents’ conviction was based purely on circumstantial evidence.
 53. While the prosecution concedes that, other than the respondents’ admission of their possession of the RDX explosive, it has no direct evidence of their culpability, it contends that, even on its own, the circumstantial evidence on record in this case is watertight and unerringly points to the respondents’ guilt. As stated, the respondents on their part vehemently dispute the alleged admission, and asserted that their conviction was based solely on circumstantial evidence which did not unerringly point to their guilt.
 54. Before we considered the other issues in this appeal, we need to be clear on the definition and application of circumstantial evidence.



55. The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is “indirect [or] oblique evidence ... that is not given by eyewitness testimony.” It is “[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact.”⁶ It is also said to be “[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence....”⁷
56. On its application, circumstantial evidence is like any other evidence. Though, it finds its probative value in reasonable, and not speculative, inferences to be drawn from the facts of a case,⁸ and, in contrast to direct testimonial evidence, it is conceptualized in circumstances surrounding disputed questions of fact⁹, circumstantial evidence should never be given a derogatory tag. Jowitt’s Dictionary of English Law, 4th Edition, states thus of circumstantial evidence:
- “... with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused’s fingerprints, ... [or where there is] a ... DNA match between the accused’s control sample and genetic material recovered from the scene of the crime ...”
57. This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence “is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”¹⁰
58. However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court “should proceed with circumspection when drawing firm inferences from circumstantial evidence.”¹¹ The court should also consider circumstantial evidence in its totality and not in piece-meal.¹² As the Privy Council stated in *Teper v. R* [1952] AC at p. 489 “Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.”
59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant¹³, reasonable and not speculative¹⁴, but also, in the words of the Indian Supreme Court,

⁶ *Jowitt’s Dictionary of English Law*, 4th Edition, Vol. 1, P. 418.

⁷ *The Black’s Law Dictionary*, 9th edition, page 636 [2015].

⁸ Marie-Pier Couturier, “*Circumstantial evidence should not be overlooked by Claims Adjusters*”.....available at; [mccagueborlack.com/emoils/articles/possessive.html]

⁹ *Jowitt’s Dictionary of English Law*, 4th Edition, Vol. 1, p. 418

¹⁰ See *R v Taylor Weaver and Donovan* (1928) 21 Cr. App. R 20.

¹¹ *Teper v R* [1952] A.C. 480 PC as [489]

¹² *S v Reddy & others* 1996 (2) SACR 1 (A)

¹³ *Jowitt’s Dictionary of English Law*, 4th Edition, Vol. 1, P. 418.

¹⁴ Barker, Ian. *Circumstantial evidence in criminal cases* [online]. Bar News: The Journal of the NSW Bar Association , Winter 2011: 32-39. Availability: < https://search.informit.com.au/documentSummary;dn=597461518818069;res=IELHSS > _ ISSN: 0817-0002. [cited 19 Feb 19].



“the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established...”¹⁵ As was stated in the case of *Kipkering Arap Koskei & Another v. R* (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the “... 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, ...”

60. As was further stated in the case of *Musili v Republic* CRA No 30 of 2013 (UR) “to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no one else without any reasonable doubt.” The chain must never be broken at any stage.¹⁶ In other words, there “must be no other co-existing circumstances weakening the chain of circumstances relied on”¹⁷ and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused.¹⁸ “Suspicion however strong, cannot provide a basis for inferring guilt.”¹⁹
61. With these principles in mind, we remind ourselves of the fact that we are not the first appellate court in this matter. We are not even the second. We are the third. As such, we are constrained by section 361(1)(a) of the *Criminal Procedure Code* to consideration of points of law only.
62. In that regard, in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, while dealing with section 85A of the *Elections Act* which limits appeals in election disputes to a matter of law only in more or less the same way section 361(1)(a) of the *Criminal Procedure Code* limits second appeals in criminal cases to consideration of points of law only, this court defined what points of law are. It stated that the limitation to matters of law only does not mean that an appellate court “has to shut its eyes to the evidence on record.” It added that “where the appellant claims that ... [the conclusions of the trial court] were based on “no evidence”, or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were “so perverse”, or so illegal, that no reasonable tribunal would arrive at the same” it is a point of law for the appellate court to have a panoramic view of the evidence on record and determine if the conclusions of the trial court are in tandem with that evidence.
63. In the above context, it is a matter of common notoriety that our country has suffered several terrorist attacks. The terrorist attacks on the American Embassy on August 7, 1998; at the Westgate Shopping Mall on September 21, 2013; at Garissa University on April 2, 2015; and recently at Dusit Complex, killed several people and left some maimed and many others seriously injured not to mention the trauma those attacks caused and continue to cause to the families of the victims as well as the general fear they have caused to the Kenyan public. The bombing of the USA Embassy on August 7, 1998 did not bring down the building that housed the American Embassy but, as stated, its effect is being felt up to this day. In this case, PW16, Catherine Sarah Murambi, a bomb expert, testified that the Cyclotrimethylene trinitramine (RDX) that the respondents were allegedly found in possession of is one of the most lethal explosives used in warfare, which, if detonated, could bring down a building as huge as the Times Towers, Nairobi.

¹⁵ In the case of *Hanumant vs The State Of Madhya Pradesh*, AIR 1952 SC 343, 1953 CriL J 129, 1952 1 SCR 1091

¹⁶ *Mwendwa versus Republic* [2006] 1KLR 133.

¹⁷ *Joan Chebichii Sawe v Republic* [2003] eKLR.

¹⁸ *Abanga alias Onyango v Republic* CRA No 32 of 1990 (UR).

¹⁹ *Mary Wanjiku Gichira v Republic* (Criminal Appeal No 17 of 1998) (unreported).



64. This calls for vigilance of all Kenyans including Judges and Judicial Officers. For Judges and Judicial officers, their vigilance has to be within the confines of the rule of law. They cannot, for instance, act on public outrage of the offences of terrorism and ignore the law. While they must jealously guard an accused person's right to a fair trial, the courts should equally guard public interest by ensuring that those who commit or plan to commit terrorist offences do not escape punishment.
65. In this case, the trial court found that although the Golf Course was open and unfenced, the respondents' visit at least thrice to Hole No 9 on that course was not coincidental but testimony of people who had a "purpose" at that spot. On consideration of the entire evidence on record, the trial court concluded that the 1st respondent indeed led "the police officer to where RDX was recovered" leaving it with no option but to draw an inference that the respondents either planted or were privy to the planting of the explosive where it was found.
66. On appeal, upon re-evaluation of the evidence on record, the High Court upheld the trial court's said decision. However, on further appeal, the Court of Appeal held that "from the evidence on record, the golf course was not fenced or guarded and that it was possible for any member of the public to have entered it and place the RDX where it was found. In the absence of any other circumstantial evidence tying or linking the appellants to the RDX, the easy accessibility, without let or hindrance, of the golf course was strong co-existing circumstances that were capable of destroying the inference of guilt on the part of the appellants."
67. The appellant has faulted the Court of Appeal on this finding and urged us to overturn its decision and restore those of the trial and High Court. Given the restriction imposed on the second (and by implication the third appellate court) by section 361 of the *Criminal Procedure Code*, to what extent should we engage with the evidence on record?
68. As stated in the *Munya* Case (*supra*) this Court should not "re-examine the probative value of the evidence tendered at the trial court, or ... calibrate any such evidence, especially calling into question the credibility of witnesses." The *Concise Oxford English Dictionary* defines the term "calibrate" to mean "correlate the readings of (an instrument) with those of a standard in order to check the instrument's accuracy, [or] adjust (experimental results) to take external factors into account or to allow comparison with other data." It is clear from this definition that what the *Munya* authority forbade is a re-examination of evidence with a view to reconsidering its probative value. That is different from a consideration of the record to determine if the trial court's conclusions are in tandem with the evidence on record.
69. In this case, our duty therefore, like that of the second appellate court, is to determine whether or not the conclusions of the trial court that the respondents were in possession of the RDX explosive that was recovered from the Mombasa Golf Club golf course are in tandem with the evidence on record. Since we are a third appellate court and as the appellant has challenged the findings of the second appellate court, it follows that our consideration of this issue should in the same vein determine if the Court of Appeal's decision is grounded on the evidence on record. In other words, we should determine which of the three lower courts' decision is in tandem with the evidence on record.
70. An overall consideration of the evidence on record in this case shows that one day in June 2012, Dennis Kamanga Kamau (PW7), a taxi driver, was called by the Royal Castle Hotel to go and take two of its customers to tourist places. He went to the hotel and took the respondents to a Temple tourists visit in Mombasa but they didn't like it. He then took them to Haller Park in Bamburi but they did not enter because they said it was expensive. They asked to be taken back to town and on the way they requested to be taken to Mama Ngina Drive which they did not seem to know where it was. On arrival at Mama Ngina Drive, the respondents asked PW7 to stop near a kiosk where they alighted from the car and



- walked into the golf course about 300 meters away where he lost sight of them. They returned after about 10 minutes. PW7 then dropped them at Darfus Hotel where PW7 suggested they would have a good meal for lunch and they parted company at about 1.00 pm.
71. The following day, PW7 was again called from the Royal Castle Hotel to take the respondents to Shimba Hills. Instead of going to Shimba Hills, the respondents asked to be taken to the place they had visited the previous day along Mama Ngina Drive. PW7 drove and parked near the same kiosk where he had parked the previous day, but the respondents did not come out of the vehicle. After a short stay there, PW7 drove them to Darfus Hotel where he left them having lunch. As agreed, at 3 pm, he picked them from the Royal Castle Hotel and took them to the Airport.
 72. PW14—Simon Mwangi Wambugu, a member and Chairman of Mombasa Golf Club which is traversed by Mama Ngina Drive, testified that on June 15, 2012 at about 6.30 pm, when he was playing golf with friends, he saw two gentlemen standing near Hole No 9. As it was unusual to find members of the public at that spot, he asked them what they were doing there and the 1st respondent said they were “looking.” PW14 then remarked that the 1st respondent sounded “Turkish” and he said “Yes”. PW14 and his colleagues took about 5 minutes to hit their balls from that spot after which they proceeded on and left the respondents still standing there.
 73. Both Charles Ogeto (PW13) and Erick Opagal Okisai (PW17) testified that upon interrogating the respondents, the 1st respondent led them to a thicket near Hole No 9 at the Mombasa Golf Club course where they recovered a RXD explosive from a freshly dug ground.
 74. Bearing in mind that Mombasa Golf Club course is an open place, at face value, the above evidence of PW7, PW13, PW14 and PW17 would leave one with the possibility that someone else would have planted the RDX explosive near Hole No 9. However, upon a careful consideration of the entire evidence on record, the scenario changes.
 75. From the record, it appears the respondents were visiting Kenya for the first time. They came into the country on a tourist cum business visa. According to the 1st respondent, because he has a heart problem, his doctor advised him to tour for pleasure in order to relax. It is instructive that during their visit to Kenya, the respondents never visited any known tourist site save a Temple frequented by tourists on Mombasa Island, Haller Park and Shimba Hills but they never actually entered any of those places although they were there.
 76. The 1st respondent also claimed that they came to Kenya to explore the possibility of starting a tourist business with chartered flights bringing tourist to Kenya. There is nothing on record to show that they held any meeting with any member of the business community in Kenya. There is also nothing to show that they visited any tourist operator in either Mombasa or Nairobi.
 77. As stated, from Haller Park in Bamburi, the respondents asked to be taken back to the city and on the way, they requested to be taken to Mama Ngina area. They did not seem to know where that was. On arrival, they requested PW7 to park near a kiosk close to the golf course and they got out of the car and walked to the golf course. They returned after about 10 minutes. It is curious that on the following day they asked PW7 to take them back to Mama Ngina Drive area again. On arrival, PW7 parked at the Ferry area but they asked to be taken to the same spot they had visited the previous day but this time round they did not come out of the vehicle. Why?
 78. Since Zentime Juma (PW3) said the respondents checked out of Royal Castle Hotel on June 16, 2012, and PW7 said he drove them on two consecutive days, it means they used his services on 15th and June 16, 2012. On these two days PW7 was with them from about 9.00 AM to 1.00 pm but on the second day he was with them again from 3.00 PM when he picked them from the Royal Castle Hotel and



- dropped them at the Airport at about 4.00 PM. Since PW7 did not say he took them to the scene on the first day at around 6.00 PM, it means that after leaving them in Darfus Hotel at about 1.00 pm on 15th June 2012, they used some other means to the scene where Simon saw them at about 6.30 PM.
79. PW14 said he left the respondents at Hole No 9 at about 6.30 pm, a dark spot at night where members of the public had no reason to visit. Another member and treasurer of the Mombasa Golf Club, Mark Gichu Mbua (PW15) confirmed that fact. True, the Golf Course was open and could be accessed by the public but what business did the respondents have to visit Hole No 9, an isolated spot on the Golf Course thrice? What business did the respondents have to visit that isolated spot at dusk? PW14 said he left the respondents at that isolated spot at 6.30 pm and does not know what time they left. As PW7 was not with them on this occasion, we do not know what time they left.
80. The Police did not know the respondents. What reason would they have to plant an explosive on them? And this may look unimportant but it is not: the 1st respondent said they carried one suitcase. Wycliffe Museli Komu (PW4), a receptionist at Royal Castle Hotel Mombasa, said they stayed in one room (Room No 320) at the Hotel. They were booked at the Royal Castle Hotel for 10 days, but they left after 5 days allegedly because the 1st respondent was bereaved, a day after they had been seen at dusk and left at an isolated place in the golf course. On the day of departure from Mombasa, they asked to be taken to the same spot but they did not get out of the vehicle. What was the purpose of that visit? This is near the same spot at Hole No 9 that the Police—Charles Ogeto (PW13) and Erick Opagal Okisai (PW17)—said the 1st respondent led them to and they recovered the RDX explosive from a freshly dug place as PW15 confirmed.
81. Police said they acted on intelligence information. As the Court of Appeal observed in the case of *Joseph Otieno Juma v. Republic*, [2011] eKLR, use of intelligence or informers' reports is standard and common practice. The Police are not obliged to declare their informers as that will hamper crime detection.
82. All these aspects of the evidence on record go in to corroborate the prosecution case that the 1st respondent led the Police to the scene where the RDX explosive was dug out. We thus find that, considered alone, the circumstantial evidence on record in this case nonetheless unerringly points to the respondents as the people who planted the RDX explosive at the scene where it was dug out. There is no evidence of anyone else having previously planted anything in the Mombasa Golf Course and more especially in the vicinity of Hole No 9 where the RDX explosive was discovered and which the respondents visited at least thrice, the last visit having been a day before the recovery of the RDX explosive from that spot. Had the Court of Appeal considered all these factors, we are certain it would have come to a different conclusion.
83. For these reasons, we find that the Court of Appeal erred in holding that any admission made outside section 25A of the *Evidence Act* is inadmissible. It also erred in holding that the conviction in this case was based solely on circumstantial evidence. As we have found, the 1st respondent's act of leading the Police to Hole No 9 on the Mombasa Golf Club course where the RDX explosive was dug out, was an admission of a material fact which, coupled with the circumstantial evidence on record seals the respondents' guilt. In the circumstances, we find that this appeal has merit and we accordingly allow it.

VI. JUSTICE MOHAMMED IBRAHIM'S DISSENTING OPINION

84. I have carefully read and considered the judgment of the majority and the dissenting opinion of my Brother, Justice Wanjala. I totally agree with the opinion of Justice Wanjala, particularly the emphatic distinction he draws as regards sections 25A and 111 of the *Evidence Act*. However, I do not agree with



the Majority's findings and the final orders on the basis of the issues I have raised herein. The facts of this matter are elaborately set out in the majority judgment and I find no use rehashing them.

A. The Rationale of the Enactment of Section 25A of the Evidence Act

85. While my Brother Justice Wanjala has aptly drawn the distinction between sections 25A and 111 of the Evidence Act, it is imperative that the rationale for the enactment of section 25A is not lost. The reason(s) behind its enactment speaks more to the fact why it could not have been made so as to be in conflict with section 111.

86. Section 25A was first enacted in 2003 via The Criminal Law (Amendment) Act, No 5 of 2003. By then it read as follows:

“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.”

87. Clearly, this amendment meant that confessions could only be admissible when made in court. The mischief for its enactment was to protect and safeguard the rights of suspects, coming from a chequered history of violations of rights of accused where confessions were extracted through torture by the police. This history was well captured by the High Court, Ouko J (as he then was), in Republic v. Maalim Komora Godana & another [2006] eKLR, thus:

“The matter at hand calls for the interpretation of section 25A of the Evidence Act. I have not been able to find any decision on the matter.

Given its novelty, therefore, it is imperative that the position of the law in the period preceding the amendment of the Evidence Act by the Criminal (Amendment) Act (No 5 of 2003) be revisited. Act No 5 of 2003 introduced section 25A and repealed sections 28, 30 and 31. Section 28 provided that a confession could be obtained from an accused person while in police custody only in the presence of a magistrate or a police officer of the rank of inspector and above.

Sight must not be lost of the mischief intended by the amendment to section 28 and the introduction of section 25A. These legislative developments were clearly prompted by the raging debate at the time which brought serious doubts as to the capability of the police to extract confessions without resorting to means which would lead to gross miscarriage of justice and grave human rights violations. But a casual glance at the provisions of section 29 which was not repealed reveals that the above mischief was not achieved. It retained a provision under which a confession made to a police officer of the rank of inspector and above or to an administrative officer exercising magisterial powers and acting in the capacity of a police officer, is admissible

88. Further in Republic v. Peter Kariuki Muibau [2007] eKLR, Muga Apondi, J stated thus:

“Thirdly, I do not subscribe to the view that by Magistrates recording confessions, then they will form part of the police investigation team. At this stage, one has to appreciate the legal, historical and political context under which the amendments were promulgated in 2003. Prior to that period, there was a lot of hue and cry due to the torture and intimidation that was being meted out to suspects in police custody. It was not uncommon for suspects to appear in Court while badly battered by some police officers. When the new regime came into power, it sought to curtail and eliminate human rights abuses within the police



cells. Besides the above, despite the fact that section 29 of the Evidence Act, cap 80 was not repealed, the same cannot be used to lose sight of the drastic changes that have been brought by section 25(A). The broader picture explicitly shows that junior officers of below the rank of an Inspector of Police cannot record any lawful and valid confessions. That was the effect of the amendments that were brought by the Criminal Law (Amendment) Act No 5 of 2003.”

89. However, from the onset, this amendment seems to have created a difficult, more so coupled with the repeal of section 31 of the Evidence Act. In this regard, Okwengu, J (as she then was), in Republic v. Daniel Kanduthu Wanjohi [2006] eKLR, excluding evidence of an accused which she found to be a confession rendered herself thus:

“First section 25A of the Evidence Act as amended by Act No 5 of 2003 states as follows:-

“25A 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.”

A confession is defined in section 25 of the Evidence Act as:

“A confession comprises of words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonable be drawn that the person making has committed an offence.”

In this case the Accused was alleged to have been interrogated by PW 13 after which he led P.W.13 and PC Haro to the scene of the murder to a flowerbed outside the house where a blood stained panga was recovered. That in effect is conduct which taken in conjunction with other facts may reasonably lead to the conclusion that the Accused person committed an offence. It falls squarely within the definition provided in section 25 of the Evidence Act. Now section 25A of the Evidence Act provides that such a confession is only admissible in evidence if it is made in court! That obviously is an absurdity. As was observed by my brother Ouko J in High Criminal Case No 4 of 2006 (Malindi) Republic v/s Maalim Komora Godana & Another (2006) e KLR.

“Only a judicial as opposed to extra judicial confessions can be received by court. Judicial confessions are those which are made in court in the due course of judicial proceedings, where a suspect makes unequivocal plea of guilty to a charge under the protecting caution and oversight of the judge or magistrate.”

90. The learned Judge continued thus:

“Moreover, in this case the police were still in the process of investigating the crime which had just been committed and the conduct of the Accused was therefore an extra judicial confession. Again I would echo my brother Ouko J in the above cited case that:

“It is inconceivable for judges or magistrates to be involved in receiving extra – judicial confessions otherwise than in proceedings before them. The court cannot abandon its constitutional mandate of an independent and impartial arbiter to descend in an arena where that independence and impartiality may be blurred. To ask magistrates to record confessions of suspects in matters yet to be taken to court is to ask them to be part of the police investigation team.”



Notwithstanding the practical difficulties in the application of section 25A of the *Evidence Act* this court cannot use the evidence of the recovery of the bloodstained panga as against the Accused person as the same was not obtained in accordance with section 25A of the *Evidence Act*. This interpretation is reinforced by the repeal of section 31 of the *Evidence Act* by Act No 5/03. That section 31 of the *Evidence Act* previously provided:-

“Notwithstanding the provisions of section 26, 28 and 29, when any fact is deposed to as discovered in consequences of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

Under the above section the evidence leading to the recovery of the panga would have been admissible in evidence. The repeal of section 31 however now means that such evidence leading to recovery is not excluded from the general provisions relating to the admissibility of confessions.

In my considered view, the amendments introduced by the statutes law miscellaneous amendment Act No 5 of 2003 to the *Evidence Act* may have been well intentioned however they have resulted in an awkward and embarrassing situation in that the court is forced to ignore very material evidence tending to establish the guilt of the Accused thus dealing a death blow to an otherwise good case. At the same time it is evident that the amendments have become an impediment to the proper administration of justice as it is evident that courts cannot participate in the taking of extra judicial confessions. This is providing a loophole through which many good cases can be lost. The legislature would therefore be well advised to reconsider these provisions of the law.”

91. Parliament must have heeded the above call for via *The Statute Law (Miscellaneous Amendments) Act No 7 of 2007*, there was an insertion added to section 25A, so that it now read as follows:

“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 Chief Inspector of police, and a third party of the person’s choice”.

92. Clearly, the 2007 amendment re-introduced the recording of a confession before a police officer, other than the investigating officer, but one who is not below the rank of Chief Inspector of police. Subsection (2) which provided for the making of rules to govern the making of a confession other than in court was also enacted. It provides thus:

“25A

- (2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”



93. This section was actualized upon the gazette of *The Evidence (Out of Court Confessions) Rules, 2009* on March 27, 2009 by the Attorney General (Amos Wako) via Legal Notice No 41 of 2009. These Rules were elaborated on in *Republic v Elly Waga Omondi* [2015] eKLR thus:

“The law governing confessions in Kenya is the *Constitution* of Kenya 2010; the *Evidence Act* (cap 80); the Evidence (out of Court Confessions) Rules, 2009 and case law. Article 49 of the *Constitution* guarantees an arrested person certain rights including the right to be informed promptly, in language that the person understands, of the reason for the arrest; the right to remain silent and the consequences of not remaining silent; to communicate with an advocate, and other persons whose assistance is necessary and not to be compelled to make any confession or admission that could be used in evidence against the person. The law is very clear that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice (see article 49(4)).

The right of an accused person to a fair trial is guaranteed under article 50(2) of the *Constitution* of Kenya 2010. Of particular relevance to us is article 50(2) (1) which guarantees him/her a right to refuse to give self-incriminating evidence.

Generally confessions made by an accused person are not admissible in Kenya unless when they are made strictly under the law. But what is a confession? section 25 of the *Evidence Act* defines a confession as follows:

“A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

Section 25 of the *Evidence Act* was amended by Act No 5 of 2003 and Act No 7 of 2007 by inserting into the Act section 25A which reads as shown below:

25A

- (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 Chief Inspector of Police, and a third party of the person’s choice.
- (2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

The rules envisaged under (2) above are known as the Evidence (out of Court Confessions) Rules, 2009 hereinafter the Confessions Rules. Under these rules, specifically under rule 4 the rights of an accused are specified. This Rule requires the recording officer to ensure that the accused person chooses his preferred language of communication; is provided with an interpreter free of charge where he does not speak Kiswahili or English; is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or



degrading treatment or punishment; is informed of his right to have legal representation of his own choice among others.

Rule 4(2) requires the recording officer to ensure that the accused has not been subjected to any form of torture and rule 4 (3) requires the recording officer to ask the accused person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

In addition to this, the Confessions Rules require the accused to be informed of the option to record his own statement in his preferred language or to have it recorded for him (rule 7); the option to clarify or add anything in the statement after the same has been recorded (rule 8) and the requirement to administer a caution before recording the statement (rule 5). In addition to the legal provisions on this issue, there are numerous pronouncements by judges on the subject of extra-judicial confessions.”

94. In *Caroline Wanjiku Wanjiru & another v Republic*, Criminal Appeal No 87 of 2012 it was emphasised thus:

“All confessions therefore not made in court must be obtained in accordance with the *Evidence (Out of Court Confession) Rules* 2009. There is no room for admissibility of a confession without the necessary safeguards of the law as provided under sections 25 to 32 (inclusive) of the *Evidence Act* and under the *Evidence (Out of Court Confession) Rules* .

95. It is worth noting that via *The Security Laws (Amendment) Act, 2014* No 19 Of 2014, section 25A was slightly amended by the deletion of the words “Chief Inspector” and substituting therefor with the word “Inspector”. So that, the confession before the police is now to be made to a person not below the rank of Inspector of police unlike the earlier provision that required a person not below the rank of Chief Inspector of Police.
96. It clearly emerges that section 25A of the Act was introduced by Parliament to address a legitimate concern. The provision was amended twice by Parliament (in 2007 and 2014) and on both occasions, had there been any conflict between it and section 111, Parliament would have remedied it.

B. What issue did the High Court Deal with in its Judgment?

97. Secondly, as stated by Brother Judge, Justice Wanjala in his dissenting opinion, this Court has to exercise its jurisdiction under Article 163(4)(b) of the *Constitution* only on issues that were before the High Court and moved to the Court of Appeal. The Court is now replete with case law that in exercise of its appellate jurisdiction, this Court cannot decide matters at the first instance. Consequently, in determining this matter, I have endeavoured to examine the real issues before the superior Courts.
98. Upon conviction and sentencing by the Magistrate Court, in the High Court during the first appeal by the respondents in this matter, the issue was whether there was evidence that connected the accused to the crime or not. The High Court was categorical that at play was reliance on circumstantial evidence. The issue of confessions was never at play. The High Court stated thus:

“The second issue for determination is whether the prosecution adduced evidence which connected the appellants with the crime. It was clear from the evidence adduced by the prosecution witnesses that the prosecution relied on both direct and circumstantial evidence in their bid to secure the conviction of the appellants. Counsel for the appellants argued



that the prosecution had not adduced any evidence to connect the Appellants with the commission of the crime. Is this the position?”

99. Upon evaluation of the evidence on record the High Court stated thus:

“The Appellants have argued that there was no evidence adduced by the prosecution witnesses which connected them with the crime. On re-evaluation of the evidence adduced by the prosecution witnesses, it was clear that the prosecution established that it was the 1st appellant who escorted the police to the golf course along Mama Ngina Drive in Mombasa where the RDX was found buried in the ground. The 1st appellant showed the police the specific place on the ground where the explosive substance was buried. This court holds that the 1st appellant had special knowledge of where the substance was buried. The substance was buried in a hidden place. The only inference that this court can draw from the evidence adduced by the prosecution is that it is the Appellants who buried the said substance in the place where it was found. This is circumstantial evidence. The law regarding circumstantial evidence is that the court must consider whether the exculpatory evidence adduced by the prosecution is inconsistent with the innocence of the accused and points to no one else other than the accused as the persons who committed the offence. In the present appeal, the prosecution established that it was the 1st appellant who escorted the police to the specific spot at the golf course where the explosive substance was recovered.”

100. It clearly emerges that the High Court in reaching its decision, drew conclusion from the circumstantial evidence adduced by the prosecution and not the accused’s confession, for no confession was on record. It concluded thus:

“This court therefore holds that both direct and circumstantial evidence places the appellants within the proximity of the area where the RDX was buried and later recovered.”

C. What was the basis of the Judgment of the Court of Appeal in this matter?

101. Moving to the Court of Appeal, I have asked myself whether that Court regarded the evidence in this matter as confession or circumstantial evidence. In its judgment, the Court of Appeal considered the crux of the appeal as being the evidence of the appellants’ possession of the RDX. It stated thus:

“Turning to what we consider to be the crux of this appeal, we have already noted that the evidence of the appellants’ possession of the RDX was purely circumstantial because no witness saw them in possession of the substance or placing the same in the golf court. The evidence of PW 7, the taxi driver and PW 14, the golfer at Mombasa Golf Club, was emphatic that other than being at the golf course, the appellants were not in physical possession of any luggage or parcel.”

102. The appellate Court then interrogated the law as regards circumstantial evidence and the principles for its application, the core being that, “the circumstances taken cumulatively, should form 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.” It then interrogated the evidence on record and found that, contrary to the findings of the trial Court and the High Court, there were co-existing circumstances that broke the chain of circumstantial evidence making that evidence not conclusive enough. It stated thus:

“We agree with the appellants that from the evidence on record, the golf course was not fenced or guarded and that it was possible for any member of the public to have entered it and place



the RDX where it was found. In the absence of any other circumstantial evidence tying or linking the appellants to the RDX, the easy accessibility, without let or hindrance, of the golf course was strong co-existing circumstances that were capable of destroying the inference of guilt on the part of the appellants. ”

103. On that basis, the appellate Court disabused the lower courts (trial Court and High Court) reliance on the fact that it is the accused who had led the police to where the RDX was found. This, the appellate Court stated was wrong given the introduction of ‘ section 25A’ of the *Evidence Act*. In any event the Court of Appeal was emphatic that as to whether there was confession on record was not an issue. It stated thus:

“In this appeal, it was never the prosecution’s case that the appellants had confessed to committing the offences that they were charged with . Accordingly we are satisfied that the two courts below erred in admitting the evidence that allegedly led to the discovery of the RDX.”(Emphasis added)

104. Consequently, having examined the two decisions of the superior Courts, I entertain no doubt that this matter was decided purely on circumstantial evidence and not on admission of a confession. As rightly observed by the Court of Appeal in its judgment, the prosecution’s case was never based on a confession from either of the accused but circumstantial evidence. While the High Court found that the circumstantial evidence sufficient, in that, it placed the accused at the scene of crime, the Court of Appeal found that the chain of that evidence broke. Hence it was not conclusive enough as there were other circumstances such as the accessibility to the golf course by any member of the public given lack of a fence.
105. I therefore find no difficult in disagreeing with the Majority in their regarding the evidence on record as conclusive under section 111. The evidence was purely circumstantial which I find not enough to prove the case as against the respondents to the required standard, which is proof beyond reasonable doubt. It is also imperative to note that while the Police evidence is that the 1st respondent is the one who led them to the spot at Mombasa Golf Club where the RDX was discovered, that evidence was used to equally convict the 2nd Respondent. This aspect was not picked up by either superior Courts and I find it to be another reason militating against the case against the Respondents. The Prosecution evidence was never water-tight.

D. The Law vis-à-vis Public Interest and Opinion

106. Lastly, I would like to address an issue that came to the fore in the cause of the hearing and determination of this matter. This is the place of public interest, opinion and perception in judicial decision making. It is a fact that this country has been a victim to several terrorist attacks, with the recent one being the ‘ Dussit Hotel Complex Attack’ . As a result, the public interest and awareness in matters concerning terrorism has increased. Any alleged association of individuals with acts of terrorism is a matter that the public really frowns upon. Hence as expected, this matter attracted a lot of public interest and media coverage. To the public, the fact that the Respondents were Iranians charged with acts of terrorism was enough to have them convicted and sentenced. But how should the courts deal with public interest when deciding matters before them?
107. Courts are required to strike a balance between the public’s interest and expectations on one hand, and the constitutional principles applicable within the criminal justice system on the other, the most fundamental principles being the presumption of innocence until proven guilty and the Rule of Law. The public’s perception on the seriousness of an offence should never be a factor in determining the guilt of an accused or his acquittal. Addressing this balancing dilemma, Sachs J in his concurring



opinion in the Constitutional Court of South Africa case of *S v Coetzee and others*, (CCT50/95. [1997] ZACC 2, stated thus:

“ 220. Much was made during argument of the importance of combatting corporate fraud and other forms of white collar crime. I doubt that the prevalence and seriousness of corporate fraud could itself serve as a factor which could justify reversing the onus of proof. There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.”

108. Consequently, while the public may resent and abhor the respondents’ acquittal by the Court of Appeal, in determining this matter, this Court only focusses on issues that were before the Court of Appeal and the law. The gravity of the offence and the public sensitivity of the issue(s) are not given emphasis to the exclusion of very important constitutional provisions and fundamental rights and freedoms, which our *Constitution* guarantees to all persons, especially within the criminal justice system.
109. In this matter, the fact that the Respondents are foreigners charged with a serious offence should not impede the Court in upholding equality before the law and treat them differently under such important laws like section 25A and 111 of the *Evidence Act*. In judging them, we should interpret our laws for posterity so that similar cases of terror involving citizens of Kenya receive the same treatment. Our evidence law should be settled, certain and predictable, so that other equally serious cases like murder, robbery with violence, rape, corruption among others, that involve Kenyans are decided in similar matters.

E. Conclusion

110. In conclusion therefore, I am of the view that the Court of Appeal correctly found that the chain of circumstantial evidence was broken and the evidence on record was not watertight or conclusive enough to sustain a conviction of the two respondents. The fact that the Golf Course was an open area, was not fenced and was accessible to any member of the public created a reasonable doubt as to



the guilt of the two respondents in respect of the offence in question. This is on the basis of section 111 of the *Evidence Act*, which provides:

“ 111

- (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 defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”(Emphasis added)

111. The easy accessibility to the Golf Course by anyone due to lack of any fence or other security hindrance or measures persuades and convinces me of the lack of proof of the guilt of the respondents as accused. I am convinced of the existence of a reasonable doubt in favour of the respondents due to the break in the chain of the circumstantial evidence. Consequently, I would have upheld the final orders of the Court of Appeal, which quashed the respondents’ conviction and set aside the sentence hence leading to their acquittal. However, as the Majority is of a contrary opinion, there is the Judgment of the Court.

VII. JUSTICE SMOKIN WANJALA’S DISSENTING OPINION

A. Introduction

112. This is an extraordinary appeal in that, rarely (if at all) in the history of our modern criminal justice system, has an acquitted person, been detained by an Appellate Court, at the behest of the State, pending appeal against his acquittal. On the contrary, it has been the practice for a convicted person to be released on bail pending appeal, as long as he satisfies the court, that such release is legally justifiable. However, circumstances surrounding this particular case, were such that, this court had no option but to take the unprecedented action, of ordering the detention of the respondents herein, following their acquittal by the Court of Appeal.
113. The facts are as outlined in the majority Judgment. The respondents are Iranian nationals, who were arrested, tried and convicted of various offences under sections 231 and 308 of the *Penal Code* and section 29 of the *Explosives Act*. The offences of which they were convicted were acts of “terrorism”, an abominable travesty, which has been repeatedly perpetrated against our country. Being nationals of a country with which Kenya has no Extradition Treaty, meant that the respondents, had to be detained, pending appeal by the State, as their return, once released, could not be guaranteed. Indeed, as we demonstrated in our Ruling, the action of detaining an acquitted person was not without precedent elsewhere.



B. A Matter of General Public Importance

114. The Appeal is brought pursuant to the provisions of article 163(4)(b) of the Constitution, which provides that:

“Appeals lie from the Court of Appeal to the Supreme Court in any other case in which the Supreme Court or Court of Appeal, certifies that a matter of general public importance is involved...”

115. In Hermanus Phillipus Steyn v Giovanni Gneccbi-Ruscone; App No 4 of 2012 [2013] eKLR, this court laid down the governing principles, to be applied in determining whether, an appeal is to be admitted as one involving a matter of general public importance. The main governing principle is that, for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the court that the issue to be canvassed on appeal is one the determination of which, transcends the circumstances of the particular case, and has a significant bearing on the public interest.

116. The Court also stated that, if a matter meriting certification as one of general public importance, is one of law, the intending appellant must demonstrate that, a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the court or courts below. Where the said point of law arises on account of any contradictory decisions of the courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions.

117. On both limbs of the certification criteria, we were satisfied that the appeal merited admission. There is no doubt that the determination of this case transcends the case at hand and has a significant bearing on the public interest. Already, the Ruling allowing the detention of the respondents, notwithstanding their acquittal by the Court of Appeal will operate as a reference point in future, where foreign nationals are convicted of serious international crimes. Of significance also, is that this appeal involves a substantial question of law, and this is: whether there is a conflict between sections 25A and 111 (1) of the Evidence Act.

C. Is there a Conflict Between Sections 25a and 111 (1) of the Evidence Act?

118. The High Court and Court of Appeal have interpreted sections 25A and 111(1) of the Evidence Act, as if they deal with the same genre of evidence, i.e. confessions and admissions. Because of this approach, the superior courts perceive a conflict between the two, in terms of the admissibility of certain evidence obtained from a suspect during investigations. However, in my view, the two sections of the Evidence Act do not deal with the same family of evidence. In fact, they are so unrelated, that there can hardly be any conflict between them. To illustrate, let us look at what these sections provide.

Section 25A of the Evidence Act provides:

“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.”

(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies



make rules governing the making of a confession in all instances where the confession is not made in court.”

119. Section 31 of the *Evidence Act*, was repealed by *Criminal Law (Amendment) Act, No 5 of 2003*; which introduced section 25A. A further *Statute Law (Miscellaneous Amendments) Act, No 7 of 2007* inserted a new portion to section 25A so as to allow the admissibility of confessions and admissions under certain conditions. The history and rationale of section 25A have been comprehensively recounted by my brother Justice Ibrahim in his dissenting opinion at paragraphs 84-95 of this Judgment.
120. The foregoing two amendments did not, nor could they purport, to repeal section 111(1) of the *Evidence Act*. The reason the Miscellaneous Amendments did not repeal section 111(1) of the *Evidence Act*, is precisely because, the latter and section 25A do not regulate the same genre of evidence. The repealed section 31 provides as follows:
- “Notwithstanding the provisions of sections 26, 28 and 29 of this Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”
121. Therefore, section 31 allowed the admission of evidence discovered as a consequence of information given by an accused person, whether such information amounted to a confession or not. In other words, this Section allowed the admission of both confessions and admissions leading to the discovery of evidence.
122. On the other hand, while the earlier version of Section 25A disallowed the admissibility of confessions and admissions, the current version makes the admissibility conditional. Towards this end, any confession, or admission shall not be admissible and cannot be proved against the accused person unless the same is made before a Judge, a Magistrate or before a police officer, other than an investigating officer, being an officer not below the rank of an Inspector of Police.

Section 111 of the *Evidence Act* on the other hand, 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.
- (2) Nothing in this section shall:
- a. prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the accused is charged; or
 - b. impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or



- c. affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”
123. A correct reading of sections 25A and 111 of the *Evidence Act* clearly shows that the two do not address similar, or even related evidentiary issues. section 25A of the *Evidence Act* deals with the process of searching for, collecting and admissibility of evidence. This process takes place before a person is formally charged with a criminal offence, hence the requirement that a confession or admission should be made before a judge, a magistrate or a police officer not being an investigating officer of the rank of Inspector. Any information leading to the discovery of material evidence is an event that takes place before a suspect is formally charged. Once charged, then the question of whether his confession or admission of fact is admissible arises. section 25A mainly regulates the investigative process. Once a person is formally charged, he becomes an accused person, but the information he may have given, or a confession or admission he may have made during investigations, must be subjected to the requirements of section 25A and any other related provisions of the *Evidence Act*, dealing with questions of admissibility of evidence, be it a confession or an admission.
124. On the other hand, section 111(1) of the *Evidence Act*, does not address the process of searching for, collecting, or admissibility of evidence. This section deals with the question of burden of proof in certain circumstances. The opening words of this Section read “when a person is accused of any offence, the burden of proving....”. In other words, the section places the burden of proving that an accused person is exempted from, or falls within an exception to the offence with which he is charged on him. For example, an accused person may plead the defence of diplomatic immunity, and consequently, that he is exempted from the criminal charge. Or an accused person charged with the offence of rape, may lead evidence to the effect that he is underage and incapable of committing the offence of rape. He could also lead evidence to the effect that his sexual organs are either non-existent or dysfunctional. By the same token, an accused person charged with murder or any other offence may raise an alibi, in which case, he will lead evidence to the effect that at the time and place he is supposed to have committed the offence, he was out of the country. In all these situations, the burden of proving his diplomatic status, his age or state of sexual organs, or the facts constituting his alibi lies on the accused person. This is what section 111 means by “the burden of proving any fact especially within the knowledge of such person....”. It has nothing to do with a confession or an admission of a fact, tending to the guilt of an accused. It is actually the other way round, meaning facts that would bring an accused person within an exception, or qualification to, or exemption from, the law creating that charge.
125. My understanding of these two sections means that section 25A does not oust or in any way revise the provisions of section 111(1) of the *Evidence Act*. It also means that the provisions of section 111(1) cannot be applied to create an exception to the provisions of section 25A of the *Evidence Act*. There can be no conflict between the two, since they deal with different legal scenarios. In the circumstances, I am not therefore persuaded by the argument by Counsel for the appellant that information provided by a suspect, which leads to the discovery of material evidence falls within the provisions of section 111(1) of the *Evidence Act*. Such information is of course relevant to the process of evidence collection, otherwise, how else would the police or intelligence agencies be able to build and mount a case against a suspect? However, should this information acquire the character of an admission or confession, it must fall under the provisions of section 25A, for the latter, regulates the admissibility of “a confession or any admission of a fact intending to the proof of guilt...”

D. Circumstantial Evidence

126. Having discounted the applicability of section 111(1) of the *Evidence Act* to the case at hand, I am left with the task of determining whether, the circumstantial evidence on record, was adequate, without



more, to secure the conviction of the accused. The majority judgment's restatement of the meaning, and utility of circumstantial evidence in a criminal trial is in my view comprehensive enough. It is no longer in question that for circumstantial evidence to justify the inference of guilt, it must be watertight, in that the inculpatory facts must be incompatible with the innocence of the accused. The circumstances taken cumulatively, should form 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. The burden of proving the completeness of this chain always remains on the prosecution, it never shifts to the accused. It is in this regard that I must part ways with my colleagues who have rendered the majority judgment. As the Court of Appeal observed, the evidence on record indicates that the golf course was not fenced or guarded and that it was possible for any member of the public to have entered it and place the RDX where it was found. In the absence of any other circumstantial evidence tying or linking the appellants to the RDX, the easy accessibility, without let or hindrance, of the golf course was strong coexisting circumstances that were capable of destroying the inference of guilt on the part of the appellants.

127. I am also of the opinion that the Majority's evaluation of the evidence on record goes well beyond what an Appellate Court, not to mention a third Appellate Court should do. All that this court ought to do is to satisfy itself whether, the evidence on record supports the finding of guilt beyond any reasonable doubt. In agreement with the Court of Appeal, I am not convinced that the evidence relied upon by the prosecution was watertight enough to prove the guilt of the accused beyond reasonable doubt.
128. In doing so, I am not insensitive to the fact that our country, has suffered innumerable acts of terrorism, which have been satanically planned, and executed with ruthless bestiality against innocent people. Such heinous crimes, must be harshly punished. The law enforcement agencies, charged with the duty of tracking down those who commit such horrible crimes and cause so much pain and grief, must not be hampered in any way, as they go about their noble duties. Yet courts of law, must still remain true to the safeguards that have been put in place, by the Constitution and the law to ensure that the public interest and the rights of an accused person are both safeguarded at the altar of justice.
129. On these grounds, I would have dismissed this appeal, and upheld the Judgment of the Court of Appeal. But as the Majority is of a contrary opinion, theirs, is the Judgment of the Court.

Viii. Conclusion and Final Orders of the Court

130. This is a unique judgment. It has broken new ground in a matter certified as raising matters of great public interest as stated elsewhere above. By it, we have clarified issues that should guide lower courts in the discharge of their mandate in determining criminal cases.
131. For reasons stated above, the final Orders to be made are as herebelow –
- a. This appeal is hereby allowed.
 - b. The judgment and orders of the Court of Appeal made on January 28, 2018 are hereby set aside.
 - c. The conviction by the trial court of the respondents and the High Court decision are hereby affirmed.
 - d. The respondents shall serve the remainder of their imprisonment term after which they shall be repatriated to their country.

It is so Ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2019.



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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

