IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, WAKI & NYAMU, JJ.A)

CRIMINAL APPEAL NO. 177 OF 2008

BETWEEN

PETER MOTE OBERO ..... 1ST APPELLANT
GIDEON KAMAU MBURU ..... 2ND APPELLANT
AND
REPUBLIC .....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Mwera, J.) dated 31st May, 2007

in

H.C.CR.C. NO. 7 OF 2003)
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JUDGMENT OF THE COURT

On the 15th day of April, 2002 at about 11 p.m., ***John Kamau Muhika***, ("the deceased") was shot dead in his car by unknown assailants upon arrival at the gate of his residence at Maweni Village, outside Taveta town. His wife ***Mary Njeri Kamau (PW4)*** (Mary) who was in their house had responded to the hooting of his car, an Isuzu Trooper, and she went out to open the gate. Their house girl called ***Eva Tadei,*** a Tanzanian national accompanied her. All the security lights at the gate and around the house were on. As Mary opened the gate and the deceased was driving in, she saw three men coming in, one of them holding a gun. The man cocked the gun and Mary screamed. She ducked behind the gate asking the thugs to take the money she had but one of them answered *"We do not want Kamau's money."* The gunman then fired out two shots from the rear of the vehicle as the man near her pulled her and clobbered her on the head. She passed out. She was subsequently taken to Taveta District Hospital where she came to.

The gunshots were heard by a KWS officer (one ***Simon Kilonzo***) who was at his home, not far from the scene, and he informed ***Chief Inspector Andrew Ochieng (PW13)*** (C.I. Ochieng) pointing to the direction of the shots. At that time C.I. Ochieng was on patrol duties in Taveta town accompanied by ***Pc. Hurdley Masese (PW7)*** (Pc. Masese) and other officers from Taveta Police Station. They headed to the area at about midnight and found the motor vehicle with the deceased still seated in the driver's seat but bleeding from his head and chest. They noticed that the right eye had been blown out by a shot which came from behind and that the rear windscreen of the car was shattered. There was also a bullet hole at the deceased's back. C.I. Ochieng found and recovered a bullet head and two empty cartridges from the scene, which he subsequently handed over to the investigating officer, ***Sgt. Omar Mwabumba (PW11)*** (Sgt. Omar).

The scene was placed under guard and Scenes of Crime officers were called from Voi C.I.D Office. They arrived at about 5.30 a.m. that morning (14th April, 2002) led by ***Pc. John Wambua (PW2).*** He took photographs of the scene, the vehicle and the deceased which were produced in evidence. The body was in a sitting position with the head bowed. The vehicle had two bullet holes on the

rear window glass and on the driver's door, while the body had a bullet wound at the back and on the forehead. He confirmed that a bullet had hit the deceased from the rear of the head and came out via the forehead.

The cause of death, in the opinion of ***Dr. Pata*** who carried out the postmortem examination but whose report was produced, without objection, by the investigating officer, was shock due to severe brain damage and bleeding as a result of bullet injury. The body was identified by the deceased's two brothers PW5 and PW6.

Investigations into the killing commenced in earnest through Taveta Police Station by regular police and administration police officers. The first breakthrough came fortuitously from the Tanzanian side of the border at Holili market, which is about 4 Km from Taveta. On the morning of 14th April, 2002, at about 10. a.m. ***Detective Corporal George Sears (PW3)*** (Cpl. George) of Holili Police Station received information that some people in the neighbourhood of Holili had hidden in a house and were not leaving it as food was being brought to them there. They were suspected to be armed. The house they were hiding in belonged to one ***Kasuni*** who was known to Cpl. George as a local resident. He took two other officers, armed themselves and headed for the home. From a distance of about 50m they saw Kasuni hurriedly leaving the house and as they went closer to about 20m another man jumped through a window and disappeared into a nearby bush. They found the house locked and surrounded it. Cpl. George kicked the door open and it fell inside. Thereupon he saw a tall man holding a brief case and ordered him to raise up his hands. He dropped the briefcase and raised his hands. Standing behind the tall man was another man who also raised his hands. Upon searching the two men, the officers found nothing on them. On opening the briefcase however, Cpl. George found several items including some dirty clothes, a woolen mask, 2 torches, one hunter's knife, and more significantly, a gun with 14 rounds of ammunition. They were arrested and taken to Holili Police Station where charges of being in possession of firearms and ammunition were recorded against them. The tall man was ***Peter Mote Osero*** (spelt as Obero) (Mote) and the other was ***Gedion Kamau Mburu*** (Kamau). These are the appellants before us. The two persons were about to be transferred to the Provincial Headquarters in Moshi through Rombo District Headquarters, when word was received at the station from Kenya's Taveta Police Station that some people had killed a person in the area the previous night. Cpl. George advised the Kenyan Police Officers to follow up the matter through Moshi Headquarters.

On 14th May, 2002, the Investigating Officer, Sgt. Omar, together with other officers proceeded to Moshi and were able to record statements from Mote, Kamau, Cpl. George and another officer who has since died. The following day an identification parade was conducted by ***IP. Paul Wambua (PW12)*** and ***Mary*** (PW4) together with the house girl, Eva, pointed out Mote and Kamau as two of the three people they saw at the shooting of the deceased. Sgt. Omar was also given the briefcase recovered from Mote together with the contents therein including the gun which they took to Taveta Police Station. He prepared an exhibits memo for the gun, the live ammunition, the two empty cartridges and the bullet head collected at the scene by C.I. Ochieng and forwarded all of them to the Government Firearms Examiner, ***Mbogo Donald Mugo*** (Mugo). Mugo rendered his report on 24th May, 2002 but it was produced in evidence by another ballistics expert ***Johnstone Musyimi Mongela (PW10)*** since Mugo had attained the retirement age and was no longer in Government service. The report may be reproduced in full:

"The following exhibits were received by me from No. 50973 CPL OMARI MWABUMBA of CID TAITA TAVETA on 21/5/2002

EXHIBITS

1. *One rifle serial number 91329 marked exhibit (A).*
2. *Two cartridge cases marked exhibit (Bi) and (Bii).*
3. *One damaged bullet marked exhibit (C).*

EXAMINATION

I have examined the exhibits referred to above.

Exhibit (A) is a Russian made Simonov self loading rifle serial number 91329 and is in caliber 7.62x39mm. Visual examination of exhibit (A) revealed that the original stocks and hand guard were removed and replaced with home -made ones and that part of the barrel is sawn off.

The rifle is capable of being fired however it does not eject a cartridge case automatically due to the above tempering.
I successfully test fired the same exhibit Simonov rifle by means of four rounds of appropriate caliber ammunition from our stocks.

The test cartridge cases and test bullets were recovered, marked and retained for comparison purposes.

Basing on the above analysis, I formed the opinion that rifle exhibit (A) is capable of being fired and that it is a firearm in terms of the Firearms Act, Chapter 114, Laws of Kenya.

Exhibit (Bi) and (Bii) are two fired cartridge case in calibre 7.62x39mm.

Microscopic examination of the two cartridge cases revealed that they were fired from the same gun.

Further comparative microscopic examination of exhibits (Bi) and (Bii) in conjunction with each of the four test cartridge cases fired from the configuration markings and sufficient matching breach face markings to enable me form the opinion that exhibits (Bi) and (Bii) were fired in the Simonov rifle S/No. 91329 marked Exhibit (A).

Exhibit (C) is a fired bullet in caliber 7.62 mm.

Visual examination revealed the bullet is partly damaged.

However, it is suitable for comparison purpose.

The bullet was microscopically examined and compared in conjunction with each of the four test bullets fired from the Simonov rifle exhibit (A). From the comparisons made I found sufficient matching rifling striations to enable me form the opinion that exhibit (C) was fired from the Simonov rifle S/No. 91329 marked exhibit (A).

(MBOGO DONALD MUGO)

FIREARMS EXAMINER
FOR: DIRECTOR OF CRIMINAL INVESTIGATION*"*

The gun was returned to Tanzania where Mote and Kamau were facing charges for unlawful possession of arms.

In the meantime, on 26th April, 2002, information was received at the District Officer's office at Taveta, that one of the suspects to the crime was sighted at his sister's home in Chala. His name was Daniel Kasuni Kimulu. ***APc. Makori Aberi (PW1)*** (APc Makori) together with another officer were dispatched to effect arrest of the suspect. They went to the house under cover of darkness and introduced themselves. The suspect was not in the main house. On further search they found him hiding under dry grass stored in a goat's pen and arrested him. He was later surrendered to Taveta Police Station where he was identified by Mary as one of the assailants, in an identification parade. He was charged with the offence of murder.

It took sometime before Mote and Kamau were handed over to Kenyan Police. But by May, 2003 they had completed their case in Tanzania and were handed over. They were taken through the process of committal proceedings before a subordinate court for the offence of murder which process was lawful at the time (repealed in July 2003 by **Act No. 5 of 2003**). Ultimately the charges were consolidated and the three persons were tried together for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The trial took place with the assistance of assessors (repealed since October 2007 by **Act No. 7 of 2007**) before Mwera J and the prosecution called 13 witnesses to prove the offence. The

three accused persons testified on oath in their defences; the first one Daniel Kasuni Kimulu contending that he was mistakenly arrested since the right suspect was said to be a resident of Maili Sita in Tanzania known as ***Kasuni Muthoka Kiele***, while he was resident in Lutima area. There was a local elder to support him in that contention and Mwera J, agreed that there may well have been a confusion of identities. He acquitted Daniel Kasuni Kimulu.

Kamau's defence was that he was from Thika but sells food stuffs, maize and beans in Nairobi. On 28th March, 2002 he travelled to Arusha through Taveta to visit his sick sister who subsequently died. On 13th April, 2002, he travelled back and was in Moshi town where he slept in a hotel known as New Castle and paid Tshs.4000 for it. The following morning he boarded a matatu heading towards the Kenyan border in the company of one Josephat and Mote whom he had met earlier on 10th April, 2002 in Arusha where the two were looking for gemstones. Mote was introduced by Josephat as his taxi driver in Nairobi. On arrival at Holili, the said Josephat suggested that they see his in-law nearby, an old man known as Kasuni Muthoka. The said Kasuni made tea for them but left at about 10 a.m. for the local market, leaving the three behind. Shortly thereafter he heard Josephat shout *"thieves"* and saw him jump out of the house. Kamau saw five armed men in civilian clothes surrounding the house. They came in and ordered them to lie down. The people identified themselves as police officers and conducted a search. They took from him Kshs.12,000 and Tshs.60000 together with some gemstones he had. He and Mote were arrested and taken to Holili Police Station where they found Cpl. George. They were interrogated and eventually charged with four robbery cases and unlawful possession of firearms. Those cases were finalized in May 2003 when they were acquitted but were handed over to Kenya Police on suspicion of having committed murder. He recalled an identification parade being conducted in Moshi and some two women purporting to identify him. He said the parade was irregular and he did not sign the parade forms, and in any case the women had been shown to him in advance outside the police station. In sum, at the time of the commission of the alleged offence, he was at Moshi but was unable to produce the receipt issued to him by the hotel saying he did not have it as he had given it out in another case he had in Tanzania.

Mote for his part said he was from Kipipiri but was a taxi operator in the business of selling maize in Nairobi. He had gone to Tanzania through Namanga with his friend, one Josephat Mwema on 9th April, 2002 to trade in gemstones. The following day, 10th April, 2002 they proceeded to Mirenani area in Arusha where they met Kamau who assisted them in getting some gemstones by 13th April, 2002. All three then travelled to Moshi with a view to crossing over to Kenya and spent the night there in New Castle Hotel. The following day they left for Holili but on arrival Josephat asked them to visit his brother-in-law, an old man called Kasuni Muthuria (sic). Kasuni made tea for them at about 10 a.m. and he offered to make lunch for them. He left to go to Holili shops to buy vegetables. Shortly thereafter Josephat shouted "thieves" and suddenly bolted out of the house. Five armed men then confronted them and ordered them to lie down. They complied. Mote had a briefcase there on the table and he was ordered to give it out. It had clothes, a cell phone charger and gemstones. They were arrested and taken to Holili Police Station and locked up. The following day, they were let out of the cells and were shown a gun by the OCS, Cpl. George who claimed it belonged to them. He was beaten up and interrogated about his movements. Finally he and Kamau were charged with four robbery cases and one of possessing a rifle. They completed the trial in May 2003 when they were acquitted but were handed over to Kenyan Police who charged them with the offence of murder. He recalled that on 16th May, 2002 there was an identification parade carried out in Moshi Police Station but which he did not sign for as it was not regularly conducted. In sum, he knew nothing about the alleged murder on 13th April, 2002 as he was in Moshi at the time although he was unable to produce the receipt he was given because he had produced it in another case. He accepted that the brief case produced in evidence was his but denied that it had any gun inside.

The learned trial Judge reviewed the entire evidence on record and summed it up for the two assessors left in the trial, one having died in the course of the trial, and they returned the opinion that Kamau and Mote were guilty as charged. The trial Judge further considered the entire evidence and was of the view that the evidence of ***Mary (PW4)*** on visual identification of the assailants at the scene, and her subsequent identification of Mote and Kamau in identification parades would not be safe to rely on. That is because the circumstances prevailing at the scene were tense and the assailants were

strangers. Furthermore the only other witness on identification, the house girl Eva, was not available to testify as she had returned to Tanzania and disappeared. The evidence of Mary that the assailants were three in number and one had a gun on a sling and fired two bullets was however accepted as truthful. The learned Judge then examined and relied on circumstantial evidence which he found credible and truthful, thus displacing the defences put forward by the two appellants and convicted them accordingly. Upon conviction they were sentenced to suffer death without being given any opportunity for mitigation before sentence. The sentence of death, as confirmed by the appellants and the State Counsel, has since been commuted to life imprisonment by the President.

The circumstantial evidence relied on by the trial court was that the two appellants were arrested several hours after the murder of the deceased in the neighbourhood of the scene of the crime and the court fully believed and accepted the evidence of ***Cpl. George, (PW3)*** which is related above, on the circumstances of their arrest. The court stated in part: -

"This was direct evidence. The court believed Cpl. George. He had no reason to implicate Mburu and Mote in any crime let alone the one they faced here. The men he was told were hiding in a house at Holili and they were suspected to be armed turned out on their arrest to be Mburu and Mote. Neither evidence nor cross-examination plus the defences of these two left this court in doubt as to the possession of the briefcase which contained the gun. They did not say that the house they were in was or was not theirs or explain what they were doing there locked in unless they were consorting together for one reason or another. In this court's view, they were on the spot at Holili. They were arrested with the offending gun. If they were at a Moshi hotel on the night of the murder, which defence story this court did not believe, then they were found with the murder weapon 14.4.2002 – only one day after the murder in a place not too far from the scene. It could not have been by coincidence that some people killed Kamau at about 11 p.m. at Maweni – Taveta and for no explained reason accused 2 and 3 were found with the gun that killed him, the following day hiding in a nearby village. Those people who killed Kamau included accused 2 and 3 plus one other who disappeared in darkness."

The Court also accepted the evidence that the deceased was shot dead in his compound and that he died from a gunshot wound through his head. He fully accepted the evidence of the ballistics expert, Mugo, which came through ***Mongela (PW10),*** and stated in part: -
"The next issue is which gun was used to shoot and kill the deceased. From the evidence borne in the firearms examiner's report (Exh. P-25), the shots were fired from the Russian made gun (Exh. P-9). It was sawn off and thus modified to an extent. But it was capable of firing and the two empty cartridges recovered from the scene together with one damaged bullet came from that gun. One killed Kamau.

Then who had this gun and therefore acted singly or jointly to murder Kamau? In this court's view it was Mburu (A2) and Mote (A3).

The firearms examiner testified and this court accepted that the killer bullet came from the gun which accused 2 and 3 were found with."

The appellants were aggrieved by those findings and are now before us on this first and final appeal. As they expect of us, we must re-evaluate and re-examine the entire record of evidence in order to arrive at our own conclusions in the matter. In doing so however, we must remember, and allow for it, that the trial court which saw and heard the witnesses was a better judge on credibility of those witnesses. Ten grounds were put forward in a supplementary memorandum of appeal filed by learned counsel for the appellants Mr. Michael Sangoro after abandoning the original memorandums of appeal filed by the appellants in person. In the course of his submissions however, Mr. Sangoro abandoned six of the grounds as they turned out to be baseless, and combined four others, essentially ending up with two major grounds of appeal. The four grounds which were combined were as follows:

"1. ***The learned trial judge erred in law by misdirecting himself to the poverty of excuse or explanation by the appellants on their presence in the house in which they were arrested, rather than on the strength and proof of the charge beyond reasonable doubt by the prosecution.***

5. The learned trial judge erred in law in misdirecting the assessors and/or himself or in failing to properly direct them on the dangers of convicting the appellants on circumstantial evidence of a single witness that in any case needed corroboration, but which was not corroborated.

6. The learned trial Judge erred in law in relying on the evidence of the report of the officer who examined the firearm in which the question for the examiner was framed in such a way as to incriminate the appellants.

7. The learned trial Judge erred in law in relying on the evidence of the ballistic expert which went beyond the ordinary scope of opinion evidence of an expert, which is to say, that simply put; the gun s/n 91329 fired or discharged the cartridges producds as exhibits before the High court."

Grounds 1 and 5 were combined and argued as one, while grounds 6 and 7 were also argued as one.
The submissions made on the first ground were that the sole evidence of Cpl George on the recovery of the gun ought not to have been accepted as Mote had denied possession of it and there was evidence that it could not fit into Mote's briefcase. Furthermore, the learned Judge concentrated on criticising the appellants for their failure to prove that they were at the hotel they claimed to have slept when the murder was committed, when there was no duty on the appellant to prove anything as the burden of proof is always on the prosecution. The weakness of the defence rather than the strength of the prosecution case was emphasized by the trial court. At all events, Mr. Sangoro submitted, the defences were truthful and consistent and they ought not to have been dismissed, as they were, for being similar. Finally, Mr. Sangoro submitted that the finding of the gun in possession of the appellant was merely that, direct evidence for such possession, but only circumstantial evidence for the murder of the deceased which found no support elsewhere in the evidence on record. In buttressing his submissions, he cited some authorities including ***SEKITOLEKO V. UGANDA [1967] EA 531, OKETHI OKALE & OTHERS V R [1965] EA 555 (CA);*** and ***PYARALAL MELARAM BASSAN & ANOTHER V R [1960] EA 854***.

In response to those submissions, learned ADPP Mr. Jacob Ondari contended that the case before the superior court turned solely on possession by the appellants of the killer gun and its connection with the fatal shot. As for possession, he submitted, the evidence of Cpl George was fully believed by the trial court and this Court had no reason to impeach that finding. There was no grudge between the appellants and Cpl George, and he only met them for the first time. He had no reason therefore to plant the gun on the appellants. That finding totally destroyed the *alibi* put forward by the appellants that they were elsewhere when the offence was committed.

We have anxiously considered that ground of appeal together with the submissions and authorities cited and we think, with respect, that it is lacking in merit. It is true that the learned trial Judge examined at length the defences put forward by the appellants and rejected them for the reason that they were almost identical and appeared rehearsed. But that is not to say that the Judge was merely concerned with the weakness of the defence case rather than the strength of the prosecution case. The defence case essentially raised an *alibi* which they had no duty to prove. We note from the record that it was not an *alibi* that the appellants raised during their committal proceedings but that is besides the issue. The trial court had to examine, and did examine fairly well, whether the appellants were found in possession of a gun a few hours after the murder of the deceased and he answered that in the affirmative. That fact alone, as correctly submitted by Mr. Sangoro, would not establish that the gun was used in the murder. But it was one of the links in the chain of events and circumstances relied on to prove the offence. In our view, whether or not the appellants were found in joint possession of the gun was a factual issue dependent on the credibility of the witnesses who said so. There was only one witness, Cpl George, and he was found truthful by the court which heard and saw him in the witness box. It is trite law that a single witness can be relied on for proof of a fact as no particular number is required to do so. See ***Section 143*** of the Evidence Act. In the circumstances, it would be difficult for this Court to declare Cpl George untruthful

unless there was a good reason to do so, and we find none. We find on our own evaluation of the evidence recorded that the two appellants were jointly found in possession of the gun which was produced as an exhibit at the trial, and we reject the first ground of appeal.

The second ground of appeal related to the connection of the gun with the killer bullet. Mr. Sangoro strongly attacked the ballistics expert's report which purported to make a positive assertion that the killer bullet was fired from the gun found in possession of the appellants. In his submissions, no ballistics expert or firearms examiner can give positive opinion on cartridges or where they were fired from. In support of that submission, Mr. Sangoro cited the Tanzanian case of ***RAJABU V REPUBLIC*** [***1970] E.A. 395*** which was decided by the predecessor of this Court. In that case, a spent cartridge was found at the scene of robbery in October, 1968. One month later a man was killed by a gunshot during a robbery and a spent cartridge was found at the scene. Three months later the appellant was found in possession of a shotgun. At the trial of the appellant on a charge of murder, a police officer gave evidence identifying with absolute accuracy the cartridge as having been fired from the shotgun found in the appellant's possession. No other evidence connected the appellant with the murder. At the hearing of the appeal text books were produced before the court and relevant passages in such books were reproduced in the judgment. It was held in the end that:-

"(i) The positive identification of the shotgun was wholly unjustified;

(ii) Possession of an article directly connected with a crime may lead to the irresistible inference that the possessor participated in the crime;

(iii) In the circumstances, and in particular the length of the time which had elapsed between the crime and the possession, no irresistible inference could be drawn."

In summarizing the text books placed before it, the court stated:-

"Thus, these very experienced officers state that police officers with years of experience in firearms identification and all the facilities of the most modern laboratory equipment and the advantage of discussion with similar experienced officers are not prepared to identify positively the pin impressions of a cartridge fired from a rifle and are not even prepared to identify the make and model of the weapon which fired a shotgun cartridge."

And on identification of firearms, the text books state:-

"Firing pin impressions are quite often specifically identifiable with the weapon in which firing took place …….. While most firearm examiners have made a study of the shapes and styles of rim fire (particularly the 22 calibre) firing pin marks with a view to determining the probable weapon used, it seems less consideration has been given to centre fire marks."

"Similarly the marking produced on the head of a fired cartridge (shell) often can give valuable information as to the type and make of gun used and often can identify the particular gun when located."

So that, in *Mr. Sangoro's* submission, Mugo, could not say with certainty as he purported to do in his report, that the cartridges and the damaged bullet he examined were fired from the gun found in possession of the appellants. He could only give an opinion which is not binding on the court and which can only be material if it is supported by other evidence on record. In this case, he submitted, the only other evidence in support would have been the identification of the appellants by ***Mary (PW4***), whose evidence was discounted by the trial judge. In the end therefore, there was no irresistible circumstantial evidence which could sustain the conviction, he concluded.

In response to those submissions, *Mr. Ondari* submitted that although the opinion of experts was not binding on courts, such opinions could only be rejected where there was a proper and cogent basis, as

stated by this Court in ***DHALAY V. REPUBLIC*** (***1995-1998) EA 29***. He referred us to the uniqueness of this case in which the gun which discharged the killer bullet was "sawn off" and therefore made the examination exceptional and supportive of the higher positiveness of opinion expressed by the expert. For that reason therefore, he submitted, the ***Rajabu Case*** (Supra) was distinguishable and there was no reason to reject Mugo's opinion. Furthermore, barely one day had elapsed before the arrest of the appellants and recovery of the gun unlike in the ***Rajabu case*** where the gun was found and examined more than three months later. Finally, Mr. Ondari submitted that the circumstantial evidence on record was the best evidence and did not admit of any doubt on the culpability of the two appellants.

Once again we have anxiously considered this ground of appeal and all the authorities cited before us. We agree with Mr. Sangoro that ordinarily there is no scientific basis of a ballistics expert to state with certainty that a particular bullet or cartridge was fired from a particular gun. The learning from respectable textbooks and the holding in the ***Rajabu Case*** support that proposition. The court in that case was particularly irked by the positive assertions made by the firearms examiner in superlative terms thus:-

"He was most assertive and definite in his evidence and stated the identification was made with "absolute accuracy", that there was "no possibility of error", and that the degree of accuracy in respect of the identification of pin impressions of shotgun cartridges was the same as that on the identification of finger prints."

The court was also skeptical about the experience of the officer in that case which they stated was limited, as it did not extend for more than five years, and were of the view that the officer pretended *"to a knowledge which he does not possess and asserted a positiveness which does not exist"*. There was also a long time lapse between the crime and possession of the offending gun.

To the extent that the learned judges of appeal poured contempt on the ballistics expert's report in the ***Rajabu case*** on account of the shortcomings of the officer, and the circumstances surrounding recovery of the gun, we think that case is distinguishable from the case before us. There is no dispute that Mugo was a long serving firearms examiner before his retirement. He was not examining a normal firearm and we have it from ***Mongela (PW10)*** who was also an expert in his own right, that:

"The subject rifle had been sawn off. This gives unique markings to fired ammunition. Those markings became even easier to identify. Exh. P22 – The photograph of M.2 gun it was only for visual comparison.

Fired from another sawn off gun of the same type again the firing marking will be unique to that gun.

No two firearms produce exactly the same markings."

That evidence supports the text book proposition in the ***Rajabu case*** that *"the marking produced on the head of a fired cartridge (shell) often can give valuable information as to the type and make of the gun used, and often can identify the particular gun when located"*. The special features of this gun were examined within a short period and it is our finding that Mugo could, in the circumstances of this case, express a highly positive opinion that the killer bullet was fired by that particular gun. It would nevertheless rank with all other expert opinions which a court of law can reject. But such rejection cannot be capricious or whimsical. As stated in the ***Dhalay Case,*** there must be a "proper and cogent basis" for its rejection. We have re-examined the firearms examiner's report and the testimony relating to the firearm and ammunition submitted to him for examination and we can find no reasonable basis for rejecting his opinion. We reject the second ground of appeal also.

Having accepted the evidence that the gun was in possession of the appellants and that it fired the killer bullet, it is incumbent on us to consider whether the only possible reasonable inference to be drawn from those facts was that the appellants or either of them, with common unlawful purpose fired the weapon which killed the deceased. It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary

before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – ***TEPER V R [1952] AC 480***. With those safeguards in place, circumstantial evidence is as good as any direct evidence which is tendered and accepted to prove a fact. In ***R V. TAYLOR, WEAVER AND DONOVAN*** [1928] 21 Cr. App. 20 CA, the court stated:-

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

Possession of an article which is proved to be connected directly with a crime after commission of the crime may, in certain circumstances, lead to the irresistible inference that the possessor of the article participated in the crime. The predecessor of this Court made and applied that proposition in ***ANDREA OBONYO & OTHERS V. R [1962] EA 542.*** In this case, we have considered the length of time between the commission of the crime and the recovery of the offending weapon and the killer bullet, which was within a few hours and not far from the scene of crime. We have considered the nature of the weapon and the explanation of the appellants for possession of it, which was a total denial despite the veracity of direct evidence on recovery. And we have considered the *alibi* put forward by the appellants in the context of circumstantial evidence and found it unsupportable and totally displaced by other evidence which it did not weaken or destroy. For those reasons, the irresistible inference is that the two appellants committed the offence as charged. We reject their appeal in totality and order that it be and is hereby dismissed.

Dated and delivered at Mombasa this 4th day of March, 2011.

R.S.C. OMOLO

……..…..
JUDGE OF APPEAL

P.N. WAKI
……
JUDGE OF APEAL

J.G. NYAMU
……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR