IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, NYAMU & ONYANGO OTIENO, JJ.A.)

CRIMINAL APPEAL NO. 346 OF 2007

CHARLES MAINA WAMBUGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Okwengu J.) dated 28th September, 2007

in

H.C.CR.C. NO. 34 OF 2005)

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JUDGMENT OF THE COURT

This is a first appeal. The law requires us to analyze and re-evaluate the evidence that was adduced before the learned judge of the superior court a fresh and come to our own conclusion, but always bearing in mind that the trial court had the advantage of seeing the witnesses' demeanor and hearing them and to give allowance for that in our analysis, evaluation and conclusion – see the case of **Okeno vs. Republic** [1972] EA 32.

The appellant **Charles Maina Wambugu** was arraigned in the High Court at Nyeri on an information dated 25th October, 2005 in which he was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that:

"On the 26th September, 2005, at Kanini Bar within Othaya Town in Nyeri District within Central Province, murdered Peter Nderi Makanga".

He pleaded not guilty to the charge, but after a full trial with the aid of assessors, who all returned the opinion that he was guilty of the offence, the learned trial judge, (Okwengu J.) in a lengthy judgment delivered on 28th September, 2007, found him guilty of a lesser offence of manslaughter and after considering mitigating factors, sentenced him to serve eight (8) years imprisonment. He was not satisfied with that judgment and sentence and hence this appeal.

The brief facts may be stated as follows:

On or about 26th September, 2005, the appellant was a police. His rank was that of a Sergeant. He said in his sworn statement in his defence that he became sergeant in 1989. He was attached to DCIO's office in Nyeri on general duties. His home was in Othaya area, not far from Othaya Township. On 8th July, 2005, Sgt. Lawrence Njagi (PW21) (Njagi), the officer then in charge of the armory at Othaya Police Station issued to the appellant a firearm No. F2173, a ceska pistol with 15 rounds of ammunition of 9 mm which Njagi said, was the capacity of the gun. On 26th September, 2005, the appellant was on duty as the duty officer. On the evening of the same day at about 10.00 p.m. Stephen Muthenge Githendu (PW4) (Githendu), a meat seller at Kanini Bar and Butchery was on duty at the butchery. The deceased Peter Nderi Makanga went to the butchery, bought half (½) a kilogram of meat and asked for it to be roasted. He then went away but returned after about ten minutes to enquire as to whether the meat was ready. On being told it was not ready, the deceased left and did not go back for his meat. That was the last time Githendu saw the deceased alive. After about three minutes later, he heard a sound as if something had blasted but he did not go out to see what it was. When he later went out he saw a watchman called Wachira (PW22) locking the door leading to the corridor leading to where he sells the meat, but he did not make any serious enquiries except that he noted there was some commotion outside. David Njuguna Kariuki (PW6) who was working with Githendu at Kanini Bar as the Manager of the same Bar and Butchery confirmed Githendu's story to the extent that at about 9.45 p.m. he also saw the deceased with Githendu in the butchery and on his request, Githendu told him the customer was called Nderi, the deceased. He also heard a gunshot just after he had seen Nderi in the Butchery and after Nderi had left the butchery. Andrew Waweru Theuri (PW5) (Theuri) worked at Muiru Bar in Othaya which is about 50 metres away from Kanini Bar. At about 10.20 p.m. while on duty at Muiru Bar, he heard noises from outside the Bar. He went outside and found many people outside and some were looking towards Kanini Bar. He likewise looked towards Kanini Bar and saw appellant's motor vehicle – saloon vehicle registration number KUR but he did not know the other numbers. He had known the appellant before as the appellant was his neighbour back home though they were not related. He rushed to the scene near Kanini Bar. He found a few people surrounding the appellant. There was another vehicle facing appellant's vehicle. The appellant asked him to help him carry a person who was lying down between the two vehicles as the person had been injured by thugs. On close observation, Theuri identified the person lying down as Nderi, the deceased. He had known the deceased since their childhood as they had gone to school together. He identified him also as a taxi driver. He tried to carry the deceased alone but he could not. Some people helped him and the deceased was put in the appellant's vehicle. Once that was done, the appellant drove the vehicle with the deceased inside, to hospital. Theuri said the appellant was accompanied by one Wanyoike and he did not see any other person accompanying the appellant on their journey but as will be seen later, there is overwhelming evidence that the appellant's wife also accompanied the appellant in taking the deceased to the hospital. After the body had been ferried to the hospital by the appellant in the appellant's car. Susan Wangui Kamau (PW7) (Susan) who was working at Division Bar in Othaya – a bar near Kanini Bar, heard noises outside the Bar. She went outside the Bar, found a group of people there and learnt that some one had been shot. As she was still outside the Bar, a landrover carrying police officers approached them. The OCS told them to look for something which looks like an aerial for a mobile phone. They looked around and she found the thing outside Kanini Bar. This turned out to be an empty cartridge which she identified and was produced as Exh. 4. At the time she found it, she was with an Administration Police and she gave the empty cartridge to the Administration Police. Although she did not know the name of the AP, the record shows that AP. Eliud Makanga (PW20) who was at the relevant time attached to DO's office at Othaya and had gone to the scene on hearing the sound of a bullet, is the one who received the empty cartridge from Susan. Indeed, Makanga said in evidence that he came to learn later that she is the one who gave it to him. At the hospital – Othaya sub-District Hospital, Joseph Maina (PW3) (Maina a qualified Kenya Registered Community Nurse, was on duty with one Tabitha. At around 10.55 p.m. that same night of 26th September, 2005, he received the deceased at the hospital. He testified that the deceased, who was at that time still alive but was gasping for air and unconscious was taken there in a red saloon and one of the people who took him there was a lady. Maina observed that the deceased had a penetrating wound on the left abdomen which was oozing a little blood. They put the deceased on I.V. fluid and called one Purity, the clinician but when Purity arrived, she confirmed that the deceased was already dead. Meanwhile, Senior Sergeant Peter Nyamai (PW13) who was the duty officer at Othaya Police Station that night had

gone on duty within Othaya sub-district hospital when he hard a gun shot. He rushed to Othaya town and saw a crowd outside Kanini Bar. He proceeded to the house of OCS and alerted her of what had happened. Inspector Rhoda Kanyi (PW25) who was the OCS Othaya Police Station together with Senior Sergeant Nyamai proceeded to the hospital. On their arrival, they found the deceased had already died. On checking, they found the deceased had a gun shot wound. IP. Rhoda approached the appellant who was still there and asked him if he was a police officer and whether he was armed. The appellant gave his name and admitted he was armed but he resisted handing over the gun whereupon IP. Rhoda instructed Senior Sergeant Nyamai and Sergeant Kahoya (PW16) to disarm the appellant. On being disarmed, he was found with a ceska pistol Serial Number F2173 which had 14 rounds of ammunition. He was arrested and was taken to Othaya Police Station. He was, at the time of his arrest, with his wife. Sgt. Rogers Kahoya (PW16) who had found IP. Rhoda and Senior Sgt. Nyamai outside Kanini Bar and had proceeded with them to the hospital confirmed in substance the evidence of Senior Sergeant Nyamai and IP. Rhoda. He added that in the morning of 27th September, 2005 i.e. the next morning, he was instructed by IP. Jonah Kimanzi Nzau (PW10) (IP. Nzau) to take the 14 rounds of ammunition, one cartridge 9 mm and one ceska pistol to the Ballistic expert for examination. The pistol also had the magazine. He took them to the Ballistic expert on 7th October, 2005. Before that, on 27th September, 2005, Dr. Moses Ngugi (PW18) attached to Provincial General Hospital at Nyeri performed post-mortem examination on the body of the deceased at Nyeri Provincial Hospital where the body had been transferred. The body was identified to him by Consolata Nyawira Ngorongo (PW8) and Regina Nyawira Nderi (PW9) who were deceased's sister and wife respectively. Dr. Ngugi, a pathologist, on examining of the body noted that externally there was a bullet entry point which was approximately 2 cm in diameter. It was on the lower side of abdomen. It penetrated the body into the abdominal cavity and had ruptured the great blood vessel. On that day, he could not locate the bullet and he blamed that failure on the limitation of instruments he had at his disposal. He formed the opinion at that stage, that death was due to severe haemorrhage secondary to bullet injury and signed the Post-Mortem Report. Later, apparently, on complaint from some Non-Governmental Organization body, Dr. Minda P. Okemo (PW23), a pathologist then working at the City Mortuary in Nairobi, was consulted to carry out another post-mortem. He went to Nyeri Funeral Home, accompanied by IP. Gerald Mwangi (PW15), Dr. Joseph Ndungu and Dr. Ngugi. This time the body was identified to them by John Wangondu Ngoroge (PW24), the deceased's uncle and one Martin Kalu. They carried out an X-ray on the body in search of the bullet. With the use of X-ray machine, they were able to clearly see where the bullet head was in the body. They were able and did remove the bullet head from the deceased's body. They too came to the conclusion that the cause of death was due to severe haemorrhage due to gun shot wound. The bullet head was handed over to IP. Gerald Mwangi (PW15). On 11th October, 2005 IP. Gerald Mwangi prepared exhibit memo for the bullet head and took the bullet head to CID Headquarters for ballistic examination. He waited for the results of Ballistic examination and also to wait for results of the other exhibits i.e. the pistol magazine and cartridge which Sergeant Kahoya had earlier taken to ballistic expert. On 13th October, 2005 he was given back one ceska pistol Serial No. F2173, an empty magazine, eleven (110 live ammunition of 9 mm caliber, three (3) spent cartridges, one (1) bullet head, three (3) fired cartridges and a ballistic report. He handed over all these exhibits to Supt. Sammy Musyoka Mukeku (PW14) who was the DCIO Nyeri Division on 13th October, 2005. Supt. Mukeku kept all those exhibits in safe custody together with ballistic expert's report till they were produced in court. Johnstone Musyoki Mwongela (PW2) was a firearm examiner attached to firearms laboratory at the CID Headquarters, Nairobi. On 28th September, 2005, he received from Sergeant Kahoya, one (1) ceska pistol Serial No. F2173, one (1) magazine, fourteen (14) rounds of ammunition and one (1) fired cartridge together with an exhibits memo form. He identified those items in court. On 11th October, 2005 he received a fired bullet from IP Gerald Mwangi. That exhibit was also accompanied by an exhibit memo form. He examined all those exhibits and his findings were that the pistol was ceska pistol. Its caliber 9 mm parabellum and was designed to chamber the 9.19 mm pistol ammunition such as the rounds of ammunition that were received by him for examination. That pistol was in good general and mechanical condition. It had all its component parts and was capable of being fired. The magazine that he received and examined was also in good working condition. He stated further concerning the fired cartridge as follows:

"Exhibit D was a fired cartridge case in caliber 9 mm parabellum. I examined the cartridge case under a combined microscope and found that it had identifiable firing pin marking and bridge face

markings. I compared the cartridge case with each of the 3 cartridge case (sic) which I had test fired. I found sufficient matching bridge face markings and firing pin markings to enable me form the opinion that D was fired from A1".

A1 was ceska pistol taken from the appellant. He examined it as stated hereinabove. And as to fired bullet, this witness stated:

"The exhibit 21 was a fired bullet. It was engraved with 6 lands and groves with a right had twist. I examined the bullet under microscope and compared with the 3 test bullet I had fired from A1. I found sufficient matching rifling striation markings to enable me form the opinion that the bullet exhibit was fired from exhibit 1".

During his analysis, Johnstone also took microscopic pictures showing the matching areas i.e. bridge face markings and the firing pin markings between the fired cartridge and the test cartridge cases which he had fired from the ceska pistol and further took microscopic pictures showing rifling striation markings on the bullet head and test bullets fired. All those were availed to the court in evidence.

The appellant, as we have stated above, was arrested and was arraigned in court on a charge of murder which he denied. In his defence in court he gave sworn evidence and stated that he drove to Kanini Bar & Restaurant together with his wife to buy meat. When he reached Kanini Bar, and before he could park his vehicle, he noticed a number of people including the deceased all of whom he knew. He flashed them and they saluted him. One of those people reached him while he was still in the vehicle and wanted to offer him a beer but he declined and that man left. He then got out of the vehicle, went to greet each of the people he had seen by hand. He shook the hand of the first person but before he shook the hand of the second person, he heard a loud bang, coming from the direction of the police station. He dashed to the corridor in ready position. He then heard a second shot. People ran in different directions and as he was waiting, he heard the deceased crying for help. He rushed to where the deceased was and asked him what was the matter but the deceased never responded by touching his abdomen. The appellant noted there was blood in the deceased's abdomen. Having realized the deceased was shot, he asked people nearby to help him take the deceased to hospital. He asked one Kimani to report the incident to the police station as he drove the deceased to hospital. On their way to hospital the deceased said:

"They wanted to kill me and I have not refused to pay their money".

When he asked him whom he was referring to, the deceased did not say anything but later said in Kikuyu, words which in English could be interpreted to mean *"God forgive all my sins"*. Thereafter the deceased went into a coma. Minutes after they reached the hospital the deceased was pronounced dead. He took the deceased's property that were in the pocket plus some money and gave them to a relative of the deceased who was nearby. As he was still talking to the relatives and one Wanjohi, IP. Rhoda arrived at the hospital and after few inquiries, she ordered him to surrender the gun to Senior Sergeant Nyamai. He did so. He was then arrested together with his wife and were taken to the police station and put in the cells. Later, he was charged in orderly room proceedings on 28th September, 2005, with breaking out of police lines without any lawful excuses and of unlawful use of a firearm to shoot and kill the deceased. Later he was charged before the trial court. He denied shooting the deceased and termed that as an allegation by the DCIO. He admitted in that defence that the gun which he had and which he gave to Senior Sergeant Nyamai was a ceska Serial No. 2173 and that he had the gun on 26th September, 2005, but that whereas he had been issued with 15 rounds of ammunition, as on 26th September, 2005, he had only 13 rounds as he had fired 2 rounds earlier in action at Tumu Tumu. He denied that the signature in the arms register produced by Sgt. Lawrence Njagi was his signature and the force number shown against the relevant entry in the register was his. Lastly, he admitted that the gun he had could take 9 mm caliber bullet. In cross-examination he said:

"I am not denying that I had the gun. I had that gun on that day …… It is true that I had my bullets in my possession".

At the end of his evidence, his defence counsel Mr. Mugambi stated that the defence was dispensing with

evidence of orderly room proceedings and the defence case was closed.

The above is the brief summary of the evidence that was adduced in the superior court. The learned Judge of the superior court summarized that evidence to the assessors and on their being asked for their opinion, each assessor found that the appellant guilty of murder as charged as we have stated above. The learned Judge, in her judgment stated in particular part as follows:

"I find as a fact that the Accused's firearm was renewed on 26th September, 2005, and that the accused ought to have had the ceska pistol, magazine and 15 rounds of ammunition, but when PW25 recovered the gun from the accused on the night of 26th September, 2005, it had only 14 rounds of ammunition which meant that Accused had already used one round of the ammunition.

This fact is further strengthened by the recovery of the spent cartridge (fired cartridge case) outside Kanini Bar by PW7, which cartridge case was confirmed by PW2 to have been fired through the ceska pistol Serial Number F2173. The recovery of the bullet head from the body of the deceased also confirmed to have been fired from the ceska pistol Serial Number F2173 removes any doubt that the deceased was shot using this weapon.

Given that the Accused was present when the deceased was shot and that the weapon used was the ceska pistol Serial Number 2173 which was allocated to the Accused and which was recovered from the Accused some minutes after the incident, the inescapable conclusion is that the Accused is the one who fired the fatal shot".

And in finding the appellant guilty of a lesser offence of manslaughter, the learned judge of the superior court considered whether in causing the death of the deceased, the appellant had any malice aforethought and found that there was no evidence which militated against the possibility that the shooting might not have been intentional and concluded as follows:

"Finally, although I concur with the finding of all the 3 Assessors that the Accused person caused the death of the deceased, I do not find any evidence that the Accused caused the death of the deceased with any malice aforethought. To this extent I would disagree with the Assessors and find the Accused person guilty of the offence of manslaughter contrary to Section 2002 of the Penal Code.

I convict the Accused of this offence under Section 322 (3) of the Criminal Procedure Code".

The above is the genesis of the appeal which was conducted by the appellant in person and which was originally premised on seven grounds of appeal but later on the appellant added more grounds to make twenty three. This was by way of a supplementary memorandum of appeal dated 24th April, 2009. A brief summary of the grounds is that the conviction was not properly entered against the appellant because; material witnesses were not called to give evidence; the prosecutions case was full of inconsistencies, e.g. the evidence as related to second post-mortem contradicted that of the first post-mortem; defence case, particularly of grudge between the appellant and DCIO was not considered; evidence of IP Rhoda should not have been relied upon as her evidence could not establish the appellant's guilt; the police in taking the appellant to orderly room proceedings violated appellant's right under the constitution; that the appellant was detained for more than 14 days before being taken to court and that violated his constitutional rights; that the finalization of the entire case by the superior court was inordinately delayed and that was a breach of the appellant's constitutional rights; that at the time the appellant was arrested, he had only 13 rounds of ammunition, whereas the court relied on the evidence of IP Rhoda which was unreliable; that the judgment relied on the false evidence of Sergeant Njagi, that the appellant had a bigger gun on the raid at Tumu Tumu on 16th July, 2005; that the firearm register was erroneously admitted notwithstanding the forgery detected in it during the hearing; that **Section 119** of the Evidence Act was ignored by the trial court; that evidence on the recovery of the spent cartridge was a falsication; that the appellant suffered double jeopardy as the orderly room proceedings had also condemned him and he had been dismissed for the same offence; that psychiatrist report was produced by a person who was not the maker of it and it should not have been relied upon in convicting the appellant; that the murder scene was not attended to

and evidence and exhibits from the scene should have been ignored; that some exhibits were admitted evidence without an exhibit register contrary to the law; that the court erred in finding that at Tumu Tumu, he had fired 7.62 mm ammunition whereas he was not issued with that kind of ammunition; that it was wrong to accept IP. David Kipkurui Cheruiyot (PW17) as the investigation officer of the case and that the learned judge erred in rejecting the defence case without good reasons.

The appellant, as we have stated above, conducted his appeal in person. In doing so, he submitted, with our permission, written submissions covering 32 pages which on the main, highlighted all the grounds.

Mr. Makura, the learned Senior State Counsel opposed the appeal both on conviction and on sentence stating that even though none saw the appellant shoot the deceased, nonetheless, the bullet head removed from the body of the deceased was from the ceska pistol issued to the appellant and was the same as the others issued to the appellant. That circumstantial evidence showed that it was the appellant who shot the deceased and there were no co-existent evidence. As to failure to call appellant's wife and Wanjohi, he agreed they could have been called, but submitted that as to the wife, **Section 127** of the *Evidence Act* forbade calling her as a witness and that could have been an issue if she had been called. As for Wanjohi, he referred us to **Section 143** of *the Evidence Act* and stated that as no particular number of witnesses were required to prove the case, no adverse inference could be drawn by failure to call Wanjohi. As to the alleged breach of **Section 72 (3)** of the Constitution, he said the appellant had an advocate at his trial but did not raise that point. On orderly room proceedings, Mr. Makura stated that those were not strictly judicial proceedings as they were administrative matters and so could not stand on the way of the trial of murder. He made other submissions to which we attach not much importance, and concluded that the appeal lacked merit.

We have anxiously considered this appeal. We have carefully perused the record as is evident from the summary of facts above. We have perused the list of exhibits. We have considered the written submissions by the appellant and the submissions by Mr. Makura. We have considered the judgment and the law. We make no apology for the lengthy summary of facts as in our view, this case depended on a detailed analysis and evaluation of the evidence, particularly the movement of the pistol, the ammunitions, the fired cartridge and the bullet head as well as the evidence on the handling of the same. Before we deal with what we think is the substance of the matter, we will consider the other matters that were raised, particularly the procedural aspects. The record shows that the appellant's wife and one Wanjohi were at the scene when the incident happened. They were not called to testify despite the fact that the record shows that the appellant did not object to his wife being called as a witness and no proper reason was given for failure to call Wanjohi. The learned trial judge captured this failure by the prosecution in her judgment and she rightly deplored it. It is clear from the judgment of the learned judge, that that omission is what contributed to her inability to find the appellant guilty of murder as, in their absence, she did not find any evidence of malice aforethought. On our part, whereas we agree with the learned judge that malice aforethought was indeed not proved, the absence of the two witnesses did not affect the finding that the appellant caused the death of the deceased. Evidence in proof of that aspect of the case could be availed without the input of those two witnesses. **Section 143** of the *Evidence Act* states:

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact".

That in effect means that there is no law requiring superfluity of witnesses to prove a matter and unless the evidence adduced in proof of the matter is not sufficient or is barely sufficient because of the absence of those witnesses, the court cannot draw an inference against the prosecution on that matter. This is made clear in the case of **Bukinya and Others vs. Uganda** [1972] EA 549 where the predecessor to this Court held:

"(ii) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(iii) The Court has the right, and duty, to call witnesses whose evidence appears essential to the just decision of the case.

(iv) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution".

In this case, we also agree with Mr. Makura that even though the appellant had no objection to his wife being called as a witness, nonetheless it would have been unfair to base any decision on the entire matter, on his wife's evidence. In any case, proof that the appellant caused the death of the deceased was possible with the evidence of the witnesses availed. We see no merit in this ground of appeal.

The next ground was the complaint against the second post-mortem that was carried out after the first post-mortem failed to reveal the whereabouts of the bullet head. This complaint, in our view cannot, with respect, stand. Dr. Ngugi, who performed the first port-mortem was clear that the cause of death was a bullet wound that penetrated into the body of the deceased. The place where that bullet entered the body was there and clear, but there was no point of exit of that bullet from the body. Clearly, the bullet was inside the body. Dr. Ngugi could not retrieve it as he did not have the assistance of equipments such as X-ray which could direct him to where the bullet was in the body. That necessitated the second post-mortem done by Dr. Okemo. That was, in our view, done in the search for the truth and justice. As if that was not enough, Dr. Ngugi and another Doctor also attended that second post-mortem and took part. There is evidence by Dr. Ngugi that before the second post-mortem took place, the body was as he left it and there was no interference with it, in the intervening period. Dr. Ngugi was an independent witness. Dr. Okemo, another independent witness also stated that the bullet entered the body of the deceased but there was no evidence that it exited the body meaning it was inside the body. The deceased was heavily built according to the Doctor and the bullet was lodged in the soft tissue in the buttock. Dr. Okemo confirmed that it could have been difficult for Dr. Ngugi who did the first autopsy to locate it and that is why they had to use X ray first, and added that even with three of them it took them more than two (2) hours with the aid of X ray to retrieve the bullet. In short, it was not something planted into the body later after first autopsy. The second post-mortem did not in our minds conflict with the first one. All it did, was to assist in achieving proper results which could not be availed by Dr. Ngugi because of lack of proper equipment. We note that Dr. Ngugi never said the results of the post-mortem he did were final. He, too realized that the bullet head remained in the body because it did not exit the body yet he did not retrieve it from the body. That ground of appeal is neither here nor there.

The next ground we need to deal with is that on allegation of ultrafoir convict or the allegation that as the appellant had been subjected to orderly room proceedings, he suffered double jeopardy when he was again prosecuted for the offence of murder in the superior court. The record shows that the appellant, through his counsel in the trial court dispensed with the evidence of orderly room proceedings. That left the trial court with no evidence to act upon. But even if such proceedings were produced, still we would agree with the learned judge of the superior court that the orderly room proceedings, if it existed, were administrative proceedings conducted under the Police Act and Force Regulations and were thus not judicial proceedings commenced and continued in establishing whether or not he committed murder under the Penal Code. Such proceedings could not in our view bar the trial of the appellant for the offence of murder.

As to the complaint that the psychiatrist report was not produced properly in court, **Section 77** allowed the court to receive it from a police office and we see nothing wrong with David K. Cheruiyot producing that report. We say no more on that complaint.

The other matter raised by the appellant was that his constitutional rights were violated because he was produced in court after staying in custody for 26 days instead of the maximum 14 days allowed. The record shows that the appellant was arrested on 26th September, 2005 but was not produced in court till 21st October, 2005. This was in fact eleven (11) days after the last date he should have been produced in court. At his trial before the superior court, the appellant had an advocate who conducted the trial on his behalf. He was a police Sergeant fully aware of this requirement as the court takes judicial notice of the fact that they deal with such matters as police officers and particularly in the CID where he served for sometime. They did not raise this matter before the trial court. This Court has said on many occasions that where an appellant was represented before the trial court or on first appeal, if he did not raise a particular issue on violation of his constitutional rights in those courts then he would be taken to have waived his

right and cannot be heard to raise it in this Court. That is the view of the Court.

The other matter also revolves around that same question of violation of the appellant's right and that was that his right to employment was violated. He alleged that the court failed to consider that the Police Force had violated his constitutional rights of employment by dismissing him from service before taking him to court. Our response to that is that clearly, the superior court had no jurisdiction to handle the matters of Orderly room proceedings because what was before it was a charge of murder and not an appeal from the Orderly room proceedings. In any case, the orderly room proceedings were not before the trial court. Whether or not the appellant was properly dismissed was a civil matter and the trial court was not seized of it.

On the delay to deliver the judgment on this matter, it is true that the appellant closed his case on 3rd April, 2007 and this matter was adjourned to 18th May, 2007 for summing up and directions to the assessors. That was not done. However, the record shows that the learned judge proceeded on transfer from Nyeri to Nairobi before the case was completed. This file was inadvertently left in Nyeri. This appears in the record of the proceedings for 20th July, 2007. That scenario delayed the completion of the case but no prejudice was allegedly caused by that delay and on our side we say none.

The last of the matters we want to deal with on complaints pertaining to procedural aspects is the allegation that no investigation officer was called. IP. Cheruiyot in his evidence stated that he was instructed by the DCIO Mr. Mukeku to compile a police file in regard to the case. He also said that he not only compiled the file but he also went through the file because he was investigating the case. He also took the suspect to Nyeri Provincial Hospital for examination by a psychiatrist. Thereafter he charged the suspect with the offence of murder and later forwarded the file to PCIO. However, before the file came back he was transferred and consequently he handed over the file to Inspector Ngugi. He was transferred on 23rd November, 2005. This was after he had charged the appellant with murder and caused him to be produced in court on 21st October, 2005. IP. Cheruiyot gave evidence in court as PW17. We do not see what prejudice was caused to the appellant by non-appearance of IP. Ngugi. That ground lacks merit.

We now move to consider the substantial aspects of the case. The appellant has made heavy weather of the flaws in the evidence of Sgt. Lawrence Njagi and the pitfalls detected in the arms register as concerns the renewal of the issue of the gun to him and the number of ammunition he was issued with and of what caliber. In his written submission, the appellant maintains that as his signature was forged in the register and a wrong force number assigned to him in the register on that date of renewal of the issues, that evidence could not properly be relied on to convict him of the offence. We have anxiously considered that submission against the record and the entire evidence that was before the trial court. What is undisputed is that nobody saw the appellant shoot the deceased. That in effect means that the conviction proceeded solely on circumstantial evidence. Secondly, it is not in dispute that circumstantial evidence rotated around the movement of the gun (ceska F2173), the fired cartridge picked up at the scene of evidence by Susan Wangui Kamau, the bullet head retrieved from the body of the deceased by Dr. Okemo, Dr. Ngugi and another, and the other rounds of ammunition allegedly issued to the appellant by Njagi.

The law as regards the approach the courts should adopt when considering a matter which depends solely or to an extent on circumstantial evidence is now well settled. In the case of **Mwangi vs. Republic** [1983] KLR 522. This Court held as follows:

"1. An offence of murder can be established by evidence tendered directly pointing it or by evidence of facts from which a reasonable person can draw the inference that murder has been committed.

2. In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the

inference".

In this case, the appellant admitted before the trial court that he was issued with the ceska pistol Serial Number F2173 together with fifteen (15) rounds of ammunition which were of 9 mm caliber. He said he used two rounds of ammunition at Tumu Tumu incident earlier on, and so remained with only thirteen (13) rounds which was the number found when he was arrested and he surrendered the gun to Senior Sgt. Nyamai soon after the incident. That evidence of the appellant is contradicted by the evidence of Sgt. Njagi who said that at Tumu Tumu, the appellant fired two (2) rounds of 7.62 mm caliber and not 9 mm caliber. Sgt. Njagi relied, in his evidence, on the entries in file No. 258/81/05 which was in a signal concerning that case. The superior court accepted that evidence and found that the appellant had 15 rounds of ammunition 9 mm caliber and after one was used, 14 rounds remained. That was a matter of fact and the trial court arrived at that finding after analyzing the evidence before it. We have no reason to disturb that finding. In any event, the evidence of the firearms examiner, Johnstone Musyoki Mwongela, which was not challenged in material aspects was that he examined ceska pistol Serial Number F2173 which the appellant admitted he had at the time of the incident. He also examined one fired cartridge, which was picked up at the scene of the incident few minutes after the incident by Susan Wangui, and found that the fired cartridge was that of a bullet from a ceska pistol and was similar to the other fourteen rounds of ammunition some of which he test-fired. Johnstone also examined the bullet head retrieved from the body of the deceased by Dr. Okemo, Dr. Ngugi and another Doctor. He did that under a microscope and compared with 3 test bullet he had fired from a ceska pistol. He found sufficient matching rifling striation markings and he formed the opinion that the bullet was fired from the exhibited ceska pistol. He also found that the cartridge case found at the scene was that of 9 mm parabellum, and was also fired from the ceska pistol. In short, whether the appellant had only thirteen rounds of ammunition as he stated in his defence or fifteen rounds as Njagi stated, one salient fact remained and that is that the bullet found in the body of the deceased who was shot in his presence that night and the cartridge that was found at the scene of the incident both were from the pistol he had at that relevant time. That being the case, the provisions of **Section 111 (1)** of the *Evidence Act* must be invoked. That provision states:

"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 with the knowledge of such person is upon him".

In this case, the appellant admitted that he joined the deceased who was together with other people and before he could greet all of them, the deceased fell down. On post-mortem examination, the deceased was found to have died of one bullet would and that bullet was found in his body. That bullet was fired from a ceska pistol. The appellant had at the relevant time a ceska pistol of the same description. That bullet was found on examination to have been similar to others issued to the appellant and which were retrieved from him soon after that incident. There was also a cartridge case that was found at the scene immediately after the incident and was from the same gun. Under all those circumstances, it was only the appellant who had special knowledge as to what could have happened that resulted in his gun being used to shot the deceased in his presence. It is incomprehensible that a stranger fired the fatal bullet from the dackness. The appellant had the opportunity to kill the deceased and the circumstances point to him and no one else as the killer.

The appellant did not explain a fact peculiarly within his own knowledge and in our view the learned Judge of the superior court and the assessors were plainly entitled to come to the conclusion that the appellant was the one who caused the death of the deceased. The evidence adduced pointed to him and to him alone. There were no other co-existing circumstances that weakened or could weaken that evidence or destroyed it. As there was no evidence of malice aforethought in causing such death, the conclusion reached that the offence committed was manslaughter was unassailable and we have no proper legal or factual basis for interfering with it. As we were not addressed on the sentence that was awarded, we will not disturb it as in any case, in our view, it was on the lenient side considering the circumstances of the entire matter.

In conclusion, the appeal lacks merit. It is dismissed.

Dated and delivered at Nairobi this 5th day of February, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR