REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 24 OF 2006

REPUBLIC.....PROSECUTOR

=VERSUS=

RALF DETLEF WERNICKE.....ACCUSED

JUDGEMENT

The accused **RALF DETLEF WERNICKE** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the offence are as follows:-

"On the night of 26th/27th of October 2006 at un-known time at Bamburi in Mombasa District within the Coast Province murdered RODE BERN"

The accused first appeared before the High Court in Mombasa on 24th November 2006 on which date the charge and information were read out and explained to the accused to which he replied:

"I deny having murdered the deceased"

A plea of ***'not guilty'*** was therefore recorded and the trial commenced before my learned senior brother **HON. JUSTICE MARAGA** on 28th May 2007 (more on this later). The prosecution was led by **MR. MONDA** State Counsel and called a total of nine (9) witnesses in support of their case. **MR. KADIMA** Advocate represented the accused.

The facts of this case present an unusual scenario. The accused a German National lived in a rented house (Villa) behind Nakumatt Nyali Shopping Complex. He lived there with his girlfriend one **MONIKA HANKEL**. Monika was however at the time legally married to the deceased **RODE BERN** who lived in Germany. On 20th October 2006 the said Rode Bern arrived in Kenya for a holiday and the said Monika and the accused accepted to offer him accommodation in their home. Therefore there was the accused his

girlfriend Monika (who was also the wife of the deceased) and the deceased all living, by all accounts peacefully as friends, in the same house. Apart from the three a house servant called **CALEB OTIENO** also lived in the same house in the servants quarters assigned to him. On 27th October 2006 at about 6.00 A.M. police from Bamburi Police Station received an emergency call and rushed to the house. They found the deceased lying dead on the floor in a pool of blood inside one of the upstairs rooms. Both Monika and the accused as well as the servant Caleb were in the house and all were questioned by the police. The story which emerged was that the previous night i.e. on 26th October 2006 the three had taken their supper and thereafter sat outside in the veranda relaxing and chatting. Both the accused and the deceased were drinking beer. At about 11.00 p.m. Monika retired to sleep in her bed-room which was down-stairs. During the night Monika was disturbed by a noise and came out to check. She met accused who assured both her and Caleb that all was well. Monika decided to smoke a cigarette as the accused went up-stairs. He returned to inform her that the deceased was dead. Accused then called out to the BM security guards for assistance. Police were later called and arrived at the scene. They recovered a wooden stick, two hammers and a blood-stained T-shirt in the compound. All these were taken to the police station as exhibits. The matter was investigated and finally the accused was arraigned in court and charged. That in a nut-shell is the case for the prosecution.

Before I proceed with any analysis of the evidence I feel it is imperative that the history of this case be clearly set out. As I stated earlier this trial commenced on 28th May 2007 before **Hon. Justice D. Maraga**. The Honourable Judge heard a total of seven (7) witnesses at which point he was transferred out of Mombasa. **Hon. Justice Sergon**, then took over the hearing of the case, but did not take the evidence of any witness. He only heard and determined a constitutional application made by Mr. Kadima on behalf of the accused which application, was dismissed. Subsequently Hon. Justice Sergon was also transferred out of Mombasa at which point I took over the proceedings. Directions having been given by the Resident Judge that the matter proceed from where Hon. Justice Sergon stopped I proceeded to hear two (2) witnesses before the prosecution closed their case. Upon examining the prosecution case I found that a prima facie case had been made out and I ruled that the accused should give his defence in compliance with S. 306(b) of the Criminal Procedure Code. The accused opted to give a sworn defence in which he denied any involvement in the death of the deceased. The court then retired to prepare a judgement. However in perusing closely the record I did discover a serious anomaly which brought yet another twist to the case. That was the fact that when the trial commenced before Justice Maraga, Sections 262 and 263 of the Criminal Procedure Code which required that evidence be taken in the presence of assessors was still operational. As such **PW1** and **PW2** gave their evidence in the presence of assessors. Following the enactment and operationalisation of the **Statute Law (Miscellaneous Amendments) Act 2007** the role of assessors in murder trials was abolished by law and as a result Justice Maraga discharged the assessors on 10th December 2007, thus the remaining 7 witnesses gave their evidence in the absence of assessors.

In the case of **BERNARD KIMOTI M'ARACHI Criminal Appeal 114 of 2008**, it was held by the Court of Appeal that such dismissal of assessors mid-trial was procedurally wrong. The court held that where a trial starts in the presence of assessors then an accused person acquires the right to have his trial concluded with assessors present. As such a mistrial ought to have been declared and the trial started de novo. Do to an oversight this did not happen and the accused's trial proceeded to its logical conclusion. Faced with that dilemma and in an attempt to rectify the situation I did direct on 30th November 2010 the trial be re-opened and that **PW1** and **PW2** be re-called to testify in line with S. 150 Criminal Procedure Code. Unfortunately this did not happen and the court gave a last adjournment on 21st March 2011. Mr. Muteti learned State Counsel appeared in court on 11th April 2011 and told the court:

"The key witness [PW2] was to be recalled. She has not been traced to date. We have been unable to secure her attendance. My other witness PW1 is also not in court. I am in a predicament. In the circumstances I close the prosecution case"

It transpired that **PW2** Monika Henkel had returned to Germany and could not be traced. Once again as a court I find myself in a dilemma. Do I at this stage declare a mistrial due to non-adherence of the decision of the Court of Appeal in the Bernard M'Arachi case? Whilst I am very mindful of the ***'stare decisis'*** rule and I am also acutely aware of the fact that in this country precedent must be followed and decisions of the Court of Appeal are binding on all lower courts, I do feel that this case is somewhat distinguishable from the **Bernard M'Arachi** case. It is indicated that in the latter case assessors were selected on or about 26th October 2005. Therefore it is quite safe to assume that the trial commenced round about that time. The judgement by the Court of Appeal was delivered on 5th December 2008 roughly three (3) years after the trial started in the High Court. Given the severe shortage of Judges and their heavy workload I dare say that this matter was in the circumstances concluded relatively quickly. In the present case the trial commenced on 28th February 2007. Due to delays caused by amongst other things transfer of the trial judges (which delays cannot be attributed to the accused at all) we are now in May 2011, four (4) years since the trial started and the matter is still pending before the High Court. All this time the accused has been in custody. He has therefore had to endure (through no fault of his own) an inordinate delay in the conclusion of his trial. Certainly it has taken far much longer than the 3 years it took to conclude the **M'Arachi case**. One of the universal rights guaranteed to any suspect is the right to have his/her trial concluded without undue delay and in the shortest possible time. Article 6 of the **Universal Declaration of Human Rights** provides for the ***'Right to a fair trial'***. Sub-article (1) provides that:

"everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"

Kenya as a country having ratified this convention is bound by its provisions. In addition Kenya has given life to this particular aspect of the above Convention in Article 50(2) (e) of the New Constitution which provides –

"(2) Every accused person has the right to a fair trial, which includes the right –

(e) to have the trial begin and conclude without unreasonable delay"

This principle is further highlighted in the Constitution at Article 159(2) (b) of the Constitution which provides:

"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) ……

(b) Justice shall not be delayed"

It would be extremely prejudicial and would cause great hardship to the accused not to mention the delay involved if the court were to order a re-trial at this late stage. It cannot be ignored that the accused is a foreigner undergoing trial in a strange land. It is only fair that his trial be concluded as soon as is reasonably possible. This is not to say, of course, that different rules should apply where an accused is a Kenyan citizen.

Secondly the **M'Arachi case** was decided before the promulgation of the new constitution. This new constitution which was welcomed and promulgated with much fanfare and pomp on 27th August 2010 brought several new and novel changes to the application of law in our countries. For example for the first

time in this country murder suspects are entitled to be released on bond and indeed several have been so released. Article 159(2) (d) of this New Constitution provides:

"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) ……..

(b) ……..

(c) ……..

(d) Justice shall be administered without undue regard to procedural technicalities; and …..

(e) ……"

By this provision of the Constitution which is the supreme law of the land courts are enjoined to administer justice without undue regard to procedural technicalities. The presence of assessors was previously required in all murder trials but this requirement was abolished by the statute law (Miscellaneous Amendments) Act of 2007. The role of assessors in a murder trial even when the law required their participation was actually a peripheral role – whilst they were required to provide an opinion in the case their opinion was not binding on the court at all. The trial judge could just as easily disregard the opinion of the assessors and come to a totally different verdict. It is only the decision of the Judge which would finally determine the guilt or innocence of an accused. As such in my opinion the absence of assessors would not greatly prejudice an accused and I have no doubt that this thinking is what informed the decision to do away with their participation in murder trials. The substance of the evidence given by a witness remains the same whether such evidence is tendered in the presence of assessors or not. Therefore the presence or absence of assessors in a murder trial is a mere procedural technicality which does not add to or take away from the substance of the trial; thus such presence or absence ought not delay or otherwise influence the progression of a murder trial. It is such technicalities that article 159(2) (d) of the New Constitution mandates a court not to give undue regard to in the administration of justice.

Lastly on this point this court has been informed by the learned State Counsel that despite their best efforts they have been unable to trace **PW1** or **PW2**. Therefore even if this court were to order a re-trial the two witnesses would still be unavailable to testify. This would serve to prejudice the prosecution case unfairly.

For all the above reasons I find this present case is distinguishable from the **M'Arachi** case and I further find that despite the fact that **PW1** and **PW2** testified in the presence of assessors, this does not render their testimony any less valid. Such testimony remains validly on record. It may and indeed ought to be considered by this court in determining this case. I do so find.

I will now proceed to examine and analyze the evidence on record.

The fact of the death of the deceased ***'Rode Bern'*** is not in any doubt. His identity is proved by his

passport and other documents which police recovered in the bed-room where the dead body was found. **PW2** Monika who was the deceased's legal wife and the accused both knew the deceased well and both confirmed the identity of the dead man to police.

The offence of murder is defined in S. 203 of the Penal Code as:

"Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder"

The prosecution in any murder trial is required to satisfy the court of two main facts. Firstly that the death of the deceased resulted from some unlawful act or omission which forms the ***'actus reus'*** of the offence and secondly that the unlawful act or omission was done with malice aforethought – this forms the ***'mens rea'*** of the offence.

On the first point the prosecution appear to have met the required standard of proof. The death of the deceased ***'Bern Rode'*** cannot be in any doubt. His dead body was seen by several witnesses lying in an upstairs bed-room. The identity of the deceased was duly confirmed by **PW1** and **PW2**. Photographs taken at the scene also show the dead body of a Caucasian male lying in a pool of blood **Pexb3**. All in all there can be absolutely no doubt about the death of the deceased.

The cause of death has also been sufficiently proved. All the witnesses who saw the body speak of seeing a wound to the back of the head which wound was bleeding profusely. This wound is clearly visible in the photographs. It is clear that the deceased sustained a heavy blow to the back of his head. **PW3 Dr. K.N. Mandalya** confirms that he performed an autopsy on the body of the deceased on 9th November 2006 at Pandya Hospital in Mombasa. His expert opinion was that the cause of death was ***"increased intra-cranial pressure (brain swelling) due to intra cranial haemorrage due to head injury"***. The evidence of **PW3** which was evidence of a medical expert was not challenged or controverted in any way. The cause of death was clearly the injury to the deceased's head leading to excessive haemorrage in the brain cavity. It is equally clear that this head injury was the result of an unlawful act i.e. some person or persons delivered a heavy blow to the back of the deceased's head causing this fatal injury.

That having been established the court now has to decide whether it was the accused who with malice aforethought so fatally injured the deceased. As stated earlier in this judgement the evidence is that the accused, **PW2** and the deceased were all living together inside this house in Nyali. All three were from Germany and obviously knew each other well. It is pertinent to note at the outset that not a single witness called by the prosecution witnessed the accused hitting or attacking the deceased. Indeed there was no witness who witnessed the actual attack on the deceased. However by all accounts all was peaceful in the house on the evening of 26th October 2006. **PW1** the house-servant told the court that the three foreigners took their supper and then he went to bed leaving them chatting in the veranda. This evidence is confirmed in all material respects by **PW2** who says that she later retired to bed and left the accused and the deceased chatting over a glass of beer. No incident was reported until about 4.00 A.M. when **PW1** heard neighbours shouting saying in his own words:

"Ralf's home had been invaded"

PW2 got out of his room to check and began to shout for help. He states that neighbours came as well as BM Security Guards whose offices were adjacent to the house. At that point the accused also came out of his room and on being asked what is wrong he assured everyone that there was no problem. Everyone then dispersed and **PW1** returned to sleep. Only to be woken up again at 5.30 A.M. by accused calling

him. This time accused told **PW1** to call the police as their visitor was dead. It is important to note that when the first incident occurred at 4.00 A.M. neither **PW1**, **PW2** or any other person thought to check if all was well with the deceased. Thus nobody is able to tell whether the deceased was still alive and probably asleep in his room at 4.00 A.M. when the first alarm was raised.

The prosecution largely relies on circumstantial evidence to finger the accused as the perpetrator of this offence. This is because the accused was the last person who was seen with the deceased before he died. The rule regarding the application of circumstantial evidence was stated in the oft-cited case of **JAMES MWANGI –VS- REPUBLIC [1983] KLR 327** where the Court of Appeal sitting in Nakuru held that:

"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co existing circumstances which would weaken or destroy the inference."

Their lordships went on to state that in order for a court to rely on circumstantial evidence as proof of guilt of an accused such circumstantial evidence must **conclusively** prove the guilt of the accused. In other words such circumstantial evidence must point at the accused and **only** the accused as the perpetrator of the offence. Such circumstantial evidence must form the only possible hypothesis to explain the death of the deceased and must be incompatible with or effectively exclude any other hypothesis.

PW2 said that the first time he awoke at 4.00 A.M. his neighbour was shouting that the home of Ralf had been invaded. Ralf is the accused and he obviously could not possibly have invaded his own home. This suggestion that the home of the accused had been invaded by thieves was repeated by **PW5 NICHOLAS GUATAI MWEBIA** who was a security officer with BM Security Services. His evidence to the court was that:

"On 27/10/2006 at about 3.30 A.M. I was alone in BM Security offices behind Nyali Nakumatt when I heard shouts from a woman from the opposite building. She claimed that there was a robbery in the adjacent building not hers. She was shouting from her compound"

PW5 goes on to state that he went to the compound where he met **PW1** who had also heard the shouting and had come out of his room in the servants quarters to investigate. This evidence is also corroborated by the testimony of **PW7 KENNEDY ADIKA** who was also a security guard with BM security services. He states in his evidence:

"But at 3.50 A.M. while seated at our reception I heard a man scream once. After a few minutes I heard a woman shout 'Askari Help' 'Askari Help'. The woman's scream came from the house adjacent to our offices on the right hand side. There are no houses on our left. The woman's screams came from the house across the road facing our right hand side neighbour"

Presumably this lady whom **PW7** heard calling out for help is the same woman whose calls for help were heard by both **PW1** and **PW5**. From this evidence it would appear that the accused's home was invaded by thieves or robbers on that night. Both **PW2** and the accused claim that they were woken up by the noise of some disturbance. The police it appears were convinced that any disturbance on the material night could have only occurred between the accused and the deceased. The police made no attempt to follow this particular lead and investigate whether indeed robbers sneaked into the house. The female neighbour who screamed was not interviewed by the police and she was not called to testify as to exactly what she had seen which caused her to call out for help. This court did visit the scene in Nyali on 29th March 2010 and was shown around the compound by **PW9 SUPT. GEORGE OJUKA** who was the investigating officer. To the rear of the house was a fully enclosed balcony extending from the living room. Though this balcony was fully surrounded by black security grills **PW9** did point out to the court

the spot where a small hole had been cut (which had by then been sealed) to enable the pet dog to gain access to the house. This space was measured to be 2 feet high and 1 foot across. The said hole is clearly visible in photograph No. 15. Although **PW9** stated that it was impossible for a human being to pass through that hole, I do not myself agree. In my view a person who was determined to enter the house could squeeze himself or herself through that hole and thereby gain access to the house. In her evidence **PW2** told the court that the glass door leading to the veranda is always left open. Again this provides easy access for any intruder. Indeed **PW2** told the court that thieves did on one previous occasion gain access to the house in that very manner. Therefore in my view the possibility that some intruder or intruders gained access to the material night with intent to commit felony, cannot be said to be totally unfathomable.

There is one aspect of the deceased's body which I myself noted in the photographs **Pexb13**. To my surprise this aspect was not brought out by either the prosecution or the defence. This is the manner in which the deceased was dressed at the time of his death. He was dressed in a pair of blue printed pyjamas and a pair of khaki shorts over the pyjama trouser. Why did the deceased feel it necessary to put a pair of shorts over his pyjamas? If he had been asleep he obviously would have been dressed in only his pyjamas and not the shorts. The only reason a person would awaken and pull on a pair of shorts over his sleeping attire would be if he was disturbed and he needed to step out of his room for one reason or another. Could it be that the deceased was also disturbed by the woman's shouting and put on his shorts to go outside to investigate? Could it be that he disturbed an intruder who then attacked and fatally injured him? This is a possible scenario which it would seem the police did not consider. In any event this is a possible scenario which casts doubt on the theory that it was the accused who murdered the deceased. I am guided in this thinking by the decision of the Court of Appeal in the case of **SAWE –VS- REPUBLIC [2003] KLR 365**. This was a similar case in which the Appellant was alone in the house with her husband the deceased when a fire started which fire killed the deceased. The question was who started that fire? Like in this case there were no eyewitnesses. The prosecution had placed before the court circumstantial evidence connecting the Appellant ***'Joan Sawe'*** with the death of the deceased. In that case the Court of Appeal in quashing the Appellant's conviction and acquitting her of the charge of murder held:

"(1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

(2) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on"

Similarly in the case of **TEPER –VS- R [1952]2 AC 480** the Privy Council in considering the legal principal of circumstantial evidence stated:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which would weaken or destroy the inference"

In this case the evidence relied on is that the accused was the last person seen with the deceased. The hypothesis is that the accused (for some reason) attacked the deceased while he was in his room and beat him to death. However certain issues come up in the evidence which are incompatible with this hypothesis. Firstly there was a neighbour who seems to have seen intruders in the accused's compound and called out for help. Secondly there was a hole in the security grill with the glass door left open providing very easy access into the house by an intruder with evil intentions. Thirdly from the dressing of the deceased at the time when he met his death it appears his sleep was interrupted and he put on a pair of shorts. If the accused had been the murderer he would have simply sneaked into the deceased's room and killed him. The deceased would not have possibly had time to get up and pull on a pair of shorts. The very real possibility that there may have been other intruders who gained access the compound was not

investigated and was not conclusively eliminated by the police as a possible explanation for the death of the deceased. The above facts weaken the inference of the circumstantial evidence relied upon by the prosecution.

As stated earlier in any murder trial the prosecution must establish mens rea on the part of the accused. There must be shown to have been malice aforethought on the part of the accused. The prosecution relies on the fact that both the accused and the deceased had some involvement with the same woman Monika **PW2**. The accused was a boyfriend of Monika with whom she lived in the house in Nyali whilst the deceased was her legal husband who lived in Germany but had come to Kenya on holiday. In what may appear to many to be a very unorthodox arrangement the three all lived together in the same house. Whilst we may find their living arrangements strange the fact that the two men had some relationship with this Monika is not in and of itself proof of bad blood between them. Monika herself explained that she and the deceased had long separated in Germany and the deceased was aware and had no objection to her relationship with the accused. Is this borne out by the evidence? If the accused truly had a problem with the deceased then he would not have allowed the deceased to come and live in their house in Nyali. **PW4 WILFRED MWANGI MWANIKI** a taxi driver who regularly ferried the accused around Mombasa told the court that on 20th October 2006 the accused called him and requested him to go to the Mombasa Airport and pick up his guest. **PW4** obliged and went and picked up the guest who turned out to be the deceased, whom he dropped at the accused's home. If the accused had a grudge against the deceased why would he not only arrange for transport to pick the deceased from the airport but even accommodate him in his house? These are the actions not of an enemy but of a friend.

The deceased arrived in Kenya on 20th October 2006 and lived with the accused and **PW2** for a period of six days before he met his untimely death. Surely if the accused meant to eliminate the deceased he would have done the deed as soon as he arrived. It makes no sense to wine and dine the deceased for a full six days before doing him in – this would be irrational behaviour. By all accounts the accused and the deceased had a friendly harmonious and cordial relationship. There is no evidence that at any time they quarreled or disagreed. **PW1** the househelp stated under cross-examination by Mr. Kadima that on the material evening he saw the three Germans together at 6.30 p.m. In his own words:

"I had seen the three talking at the veranda. They did not appear to quarrel. All the time from 23/10/2006 they appeared jovial"

On his part **PW4** the taxi driver stated that he often drove the accused and deceased to various places together. He states that on 23rd October 2006 he took the two men to the beach. **PW4** states:

"When I took them to the beach they were talking in German. They did not appear to have any problem"

PW4 says he later drove the two men to Pirates and then to Nakumatt. This is not the behaviour of two people who had a problem or disagreement. The accused was clearly showing his visitor from Germany around Mombasa and from the evidence the two appeared to relate well at all times. Indeed on the fateful night the two were last seen chatting and enjoying a beer after dinner. There was no evidence of a quarrel or disagreement between them. The issue of Monika did not seem to create any strain and by all accounts the accused and deceased related well as good friends. Why then would accused wake up at night and kill the deceased a man he had accommodated in his home and spent time exploring Mombasa with? No reason has been advanced by the prosecution? No motive is shown to exist? The mere fact that the deceased was the legal husband of Monika is not proof of a motive. It is apparent that this fact appeared to bother the Kenya police more than it bothered either of the three. They had clearly resolved that issue. There is no proof of any enemity between accused and deceased. On the contrary the two had a very cordial relationship and seem to have been great friends. The prosecution have failed to prove the element of malice aforethought in this case.

Further on this issue of motive, it is my view apart from the accused, Monika the legal wife of the deceased may equally have had a motive to eliminate her husband and thereby remove him from the scene to allow her to continue her relationship with the accused undisturbed. It appears that the police also had the same idea. This is because Monika was arrested and held in police custody as a suspect for 13 days. She was later released and made a prosecution witness. This court is not told exactly why the police cleared Monika as a suspect. She too lived in the same house and equally had opportunity to kill the deceased. **PW9** Supt. Ojuka who investigated the case gives no reason why the police changed their minds and cleared Monika as a suspect. What made the police believe it was accused who did the deed as opposed to Monika who had equal access and opportunity and as well could be said to have had similar motive.

Much is made of the blood-stained T-shirt which police recovered outside the house which was produced as an exhibit **Pexb5**. There is every likelihood that this T-shirt was abandoned at the scene by the deceased's killer but there is no evidence that this T-shirt belonged to the accused. It was recovered outside the house thus any person with access to the compound could have hidden it there. **PW9** told the court that he took this blood-stained T-shirt together with blood-stained hammer and rungu recovered in the deceased's room to the Government Chemist for analysis. The intention was probably to establish a nexus between the accused and the blood on the T-shirt. It would seem that no sample of the accused's blood was taken for comparison nor indeed was any sample taken of Monika's blood, yet she was also a possible suspect. In any event the Government Chemist's report shed no light on the matter. His findings were inconclusive. The findings were ***"No profiles were generated from the stains"***. It was impossible to tell whose blood was on the T-shirt, the hammer and rungu. Was it the accused's blood? Was it Monika's blood? This court will never know. The T-shirt does not in any way link the accused to this offence.

The police also made much of the fact that the accused had instructed **PW4** the taxi-driver to pick him up and drive him to the airport on 27th October 2006 at 6.30 p.m. The suggestion is that accused intended to kill the deceased then make good his escape and leave the country. Firstly there is no evidence that the accused had made any booking with any airline to leave Kenya on that day. Police did search the house thoroughly but did not recover an air-ticket showing that the accused was scheduled to travel to Germany or anywhere else from Mombasa airport on the morning of 27th October 2006. Neither did police make enquiries from airlines operating out of Mombasa to establish whether the accused was booked to leave the country on that day. This remains mere speculation with no concrete evidence to back it. Secondly **PW4** told the court that the accused and the deceased were together in his vehicle at the time when the accused instructed **PW4** to pick him the next morning at 6.00 A.M. It would be very unlikely that accused would be making getaway plans in the presence of his intended victim! In his defence the accused has explained that the reason why he asked **PW4** to pick him up the following morning and drive him to the airport was because he planned to take his guest, the deceased, for an aerial tour of the Tsavo game park using a flight chartered from the airport. Given the fact that the accused had in the preceding days been entertaining the deceased and showing him around the country, this is not a far-fetched explanation. There is the very real possibility that this infact was the reason why accused had asked to be picked at 6.00 p.m. the following day and **not** that he intended to escape. It would appear that the police approached their investigations into this murder with a set mind. They were convinced that accused was the perpetrator and were out to prove it. The police did not keep an open mind and did not direct their investigations towards consideration of any alternative theory. That is why they ignored fact that there may have been an intruder into the premises and did not bother to visit or interview the neighbour who had initially called out for help.

Aside from these obvious short-comings in the prosecution case there are several major contradictions in the evidence adduced by the prosecution witnesses which inconsistencies are material. For example **PW8 SGT. SAMIR ATHMAN YUNIS** who was the first police officer to arrive at the scene told the court that he questioned the house-worker Caleb **PW1** about what had happened during the night. **PW8** states in his evidence in chief:

"I questioned him [Caleb]. He informed me that during the night he had heard loud disagreement

between the two men whose voices he was able to identify as accused and Bern (the deceased)"

Surprisingly **PW1** made no such statement to the court when he testified. **PW1** stated under cross-examination by Mr. Kadima:

"I heard a scream but I did not know who screamed"

At no time did **PW1** say that he had heard a quarrel or altercation between the accused and the deceased.

Likewise **PW8** in his evidence told the court that when he arrived at the scene he found the body of the deceased lying in a pool of blood and states that:

"Next to the body was a wooden stick and two hammers one was small and the other was big"

PW8 told the court that he saw no blood-stains on either the stick nor the two hammers. **PW8** stated that he secured the scene and waited for his senior officer Sgt. Ojuka **PW9** to arrive. On his part **PW9** states that he found the 2 hammers not lying next to the body as **PW8** had said but inside a kit box. **PW9** stated as follows:

"I searched for any murder weapon. In the corner of the room were two kit boxes, one red and one blue. I opened both. I found two hammers in one kit box but which had been disturbed. I took them and noticed they had blood-stains"

PW8 the first to arrive at the scene did not mention any tool-kit box yet **PW9** states that he had to open one of the kit boxes in order to recover the hammers. Had the scene been interfered with? Had someone returned the hammers into the kit box? This anomaly remains unexplained. Secondly whilst **PW8** says he saw no blood on the hammers **PW9** insists that the 2 hammers had blood-stains. This is more inconsistency in their evidence.

PW8 states that upon arrival at the scene he ***"found the deceased lying on his back on the floor."*** However **PW9** is equally emphatic ***that "The body was lying face down and blood was oozing from the back of the head"***. Here again there is confusion as to exactly how the body was positioned. **PW9** goes on to concede ***"I noticed the scene had been disturbed".*** If the scene had been disturbed, then who disturbed it and why? **PW8** insists that he did not interfere with the scene but merely secured it to await the arrival of **PW9**. Accused was at the time effectively under arrest and would not have had the opportunity to interfere with the scene. Once again this is an anomaly which remains unexplained. These inconsistencies cannot just be ignored or glossed over. They are material as they go to the crux of the matter and effectively serve to weaken the prosecution case.

Once again I find that the police did not explore all angles in investigating this matter. They approached the task with a pre-determined mindset. The charging of the accused was based on mere suspicion. In the **SAWE** case the Court of Appeal held that:

"Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt"

More recently the Court of Appeal sitting in Nairobi held in the case of **GACHANJA and 7 others –vs- Republic Cr. App. No. 51 of 2004**, that whereas circumstantial evidence against an accused person may raise suspicion, such suspicion was not sufficient to prove a charge of murder beyond all reasonable doubt. In the present case there may certainly have been ***"suspicion"*** that the accused murdered the deceased. But this suspicion however strong does not suffice as proof of circumstantial evidence against

the accused. The suspicion must have tangible evidence and facts to back it. This is not the case here. From my analysis I have shown that the circumstantial evidence relied upon does not pass muster. The prosecution case has several loopholes and leaves many questions unanswered. There has been no proof of malice aforethought on the part of the accused. Murder is a serious charge. Apart from the stigma it attracts the offence attracts a possible death sentence upon conviction. The evidence must prove the charge beyond all reasonable doubt. This standard has not been met in this case. As such I do find that the charge against the accused has not been satisfactorily proved. As such I enter a verdict of ***'not guilty'*** and I accordingly acquit the accused of this charge. He is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 2nd day of June 2011.

M. ODERO

JUDGE

In the presence of:
Ms. Kayata holding brief for Mr. Kadima
Mr. Onserio for State