



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 24 OF 2006

REPUBLIC.....
PROSECUTION

VERSUS

RALF DETLEF WERNICKE.....
ACCUSED

RULING

The Accused **RALF DETLEF WERNICKE** is charged with the offence of Murder contrary to S. 203 as read with Section 204 of the Penal Code. The accused was arraigned before the High Court sitting in Mombasa on 24th November 2006 when he entered a plea of '**not guilty**' to the charge. His trial commenced before Hon. Justice Maraga on 28th May 2007 and the learned Judge took down the evidence of seven (7) witnesses. Following the transfer of Hon. Justice Maraga to Nakuru High Court, the matter then proceeded for hearing before this court which recorded the evidence of the remaining two (2) witnesses.

Upon the close of the prosecution case I did rule that the accused had a case to answer and called upon him to give his defence in compliance with S. 306(2) of the Criminal Procedure Code. The Accused was led by his advocate **MR. KADIMA** and gave a sworn defence. Thereafter final submissions were made and the case was reserved for judgement on 30th November 2010. Having now carefully perused the record I notice a serious anomaly which I must address before I can proceed to write the judgement in this case. At the time when Hon. Justice Maraga commenced the hearing of this case, he did so in the presence of assessors which was then required by S. 169(2) and S. 168(2) of the Criminal Procedure Code. However following the enactment of **Statute Law (Miscellaneous Amendment) Act 2007**, the requirement that murder trials be conducted in the presence of assessors was abolished. On 10th December 2007 the learned Judge did proceed to discharge the assessors after having heard two (2) witnesses. The remaining five (5) witnesses were heard without assessors being present. This presents this court with a dilemma more so because this anomaly was not noticed until this point when the defence have effectively closed their case. In their ruling in the case of **BERNARD KINOTI M'ARACHI –VS- REPUBLIC CRIMINAL APPEAL 114/2008**, the Court of Appeal held that once a murder trial is commenced in the presence of assessors then the accused person acquires the right to have his trial completed with assessors. Therefore in that similar case where the assessors were discharged mid-trial the

court directed that a re-trial be held. That decision of the Court of Appeal binds this court and I do therefore find that it was wrong for the assessors in this trial to have been discharged before the conclusion of the case.

How can this anomaly be remedied without necessarily resorting to a full re-trial? I ask this being mindful of the fact that the accused has been in remand custody since 2006 awaiting the conclusion of his trial and also mindful of the fact that to re-call the nine (9) witnesses and to hear their evidence afresh would only amount to further delay which would serve to prejudice the accused. The Constitution of Kenya 2010 by Article 50(e) grants to every accused person the right to have his trial heard and concluded without unreasonable delay. Certainly four (4) years awaiting conclusion of a trial is a long time more so when the accused is held in remand prison all that time. I have as a court agonized over this issue and have perused all relevant laws in an attempt to adhere to the decision of the Court of Appeal in the **Bernard M'Arachi case**, whilst at the same time ensuring that the accused's trial is still concluded as soon as possible. S. 150 of the Criminal Procedure Code provides as follows –

“A court may at any stage of a trial or other proceeding under this code, summon or call any person as a witness or recall and re-examine a person already examined and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.”

This provision allows a court at any stage of a trial to recall a witness if such recall is deemed necessary for the just decision of the case. This trial is still ongoing as the court has not yet delivered a judgement. It is my view that in the circumstances justice demands that this case be concluded in the shortest possible time and with minimal delay. That is the only way this court can give life to the accused's right to an expeditious trial. It therefore serves the interests of justice to recall **PW1** and **PW2** to testify in the absence of assessors this time, rather than to declare a mistrial set aside the proceedings and begin the case de novo. This first option will not in any way prejudice either party as the right to cross-examine the two witnesses is retained and will be upheld. As such I do hereby invoke S. 150 of the Criminal Procedure Code and direct that **PW1** and **PW2**, who were the only two witnesses to testify in the presence of assessors be recalled to testify afresh before this court.

It is so ordered.

Dated and Delivered in Mombasa this 30th day of November 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-
Mr. Matheka holding brief for Mr. Kadima
Mr. Onserio for State

M. ODERO
JUDGE
30/11/2010