REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 229 of 2003

REPUBLIC …….……..……..PROSECUTOR

VERSUS

KAMLESH MANSUKLAL DAMJI PATTNI

alias PAUL PATTNI…….….....ACCUSED

RULING

The accused person, hereinafter referred to as the accused, is charged with **MURDER** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are as follows: -

"The accused: on 24th March 1994 at Tigoni in the Central Province, he murdered FRIEDRICH WILHELM KOHLWES."

MR. MURGOR, the Director of Public Prosecutions has personally prosecuted this case from inception. He has been assisted by various State Counsels working under him including **MRS. ONDIEKI, MR. OGETII**, and **MRS. TOIGAT**. On the side of the defence**, MR. NGATIA** has been the leading counsel assisted mainly by **MR. KALOVE** and in addition, occasionally by **MR. M'IMANYARA** and **MR. KILONZO.** The assessors in this case were **DOUGLAS THUO WANYOIKE, CAROLYNE GORETTI AKINYI** and **LINET BOYANI NYACHIEO.**

The State has called a total of 27 witnesses.

FACTS OF THE CASE.

The deceased in this case, was on the 24th March 1994 found dead on the floor of his bedroom by his wife, **VERONICA** at their Tigoni home. **VERONICA** rushed him to Nazareth Hospital where he was declared dead. **VERONICA** then took his body to Tigoni Police Station where she reported the sudden death and also sought assistance to take the body to City Mortuary. Even though **VERONICA** was not called as a witness **CPL. MUTHIANI** who took down her report and also escorted the body to the Mortuary was P.W.2. The deceased was buried at Lang'ata Cemetery the following month.

On the 13th November 2003, the accused in this case was arrested for the murder of the deceased and charged alone with the offence on the 28th November, 2003. Investigations were carried out which came up with various theories of how the deceased met his death on the fateful day. **MUZAHIM, KALAIYA** and **DANIEL** (P.W.1, 5 and 12) made statements showing that the accused and the deceased had fallen out just before the deceased died. They also revealed that the deceased worked for the accused as a security man just before he died. **DANIEL** also gave more information to the effect that he saw the

accused and others with the deceased at noon on the day he died. That he also heard a gun shot as he heard the deceased asking not to be held and as accused sought to know whether he was threatening him. The body of the deceased was then exhumed and a repeat autopsy done by **PROF. GATEI** and **DR. ROGENA**. The case was then heard culminating with this ruling.

SUMMARY OF THE EVIDENCE.

I will summarize the evidence of each of these witnesses and because of the nature of their evidence it may appear a rather detailed summary. PW1 **MUZAHIM SALIM MOHAMED**, hereinafter referred to as **MUZAHIM,** told the court that he met the accused 18 years ago in Mombasa when both of them worked as Clearing Agents for goods and cars at Mombasa Port. **MUZAHIM** told the court how the accused moved to Nairobi and set a base at **EAGLE STAR APARTMENTS** before moving to **MAGESO CHAMBERS MOI AVENUE** in 1988 or 1989. He said that he joined the accused at Mageso Chambers in 1989/1990, 2nd Floor where he ran his business and also did some business for the accused. That in 1991 the accused moved to View Park Towers where he eventually joined him briefly between 1992 and 1993. They occupied the 14th Floor of the building even though the accused always moved to the 8th floor where he had other offices, to meet people. **MUZAHIM** said that he moved back to Mageso Chambers in 1993 up to 1997. In summary he said that he and the accused were business associates. **MUZAHIM** told the court that he knew the deceased as the head of security and also driver to the accused but **DANIEL** who worked with the deceased as security for Goldenberg International said that the deceased actually worked for **ROHIT PATTNI. MUZAHIM** said that the deceased, who was a German, came to Kenya in 1989. That he went to pick-up the deceased at the JKI Airport on the instructions of the accused. That he also secured the deceased a driving licence and work permit. He said that he saw the deceased with sophisticated weapons and knew that he was a professional shooter and snipper. **MUZAHIM** said that the accused had GSU personnel guarding him in civilian clothing between 1995 and 1996 and that they numbered between 30 to 40 of them. **MUZAHIM** seemed to change that when he later said that the GSU were withdrawn in 1993. He also said that there were 3 to 4 security personnel from Germany and others from Nepal and India who worked for the accused. **MUZAHIM** stated that the work of security personnel was to escort money mainly to bank it.

MUZAHIM said that the accused and deceased developed bad relations. That on the one hand the accused claimed that the deceased was giving away information concerning the businesses ran by the accused. And on the other hand, the deceased complained to him that the accused had refused to pay him profit out of foreign currencies he gave to the accused. That eventually the accused asked him, **MUZAHIM**, to tap the telephone used by the deceased which he said he did using **KALAIYA** (PW5) a fact **KALAIYA** denied when he was asked concerning the same by the defense. **MUZAHIM** continued to say that he reported to the accused what he heard the deceased saying over the tapped phones. **MUZAHIM** said further that as the relations between the accused and the deceased worsened, the accused chased the deceased from a house in Parklands and also withdrew his vehicle. That it was during that time and as late as 2 days before he died that the deceased informed him that he had been threatened with death by the accused and his brother **ROHIT PATTNI** (hereinafter referred to as **ROHIT**). That following that information, he asked the deceased not to see him in the office. That two days before the deceased died, they met at The Stanley. He said that during that meeting the deceased was paranoid and that he informed him that things were very bad. That the deceased also informed him that the accused had sent him many people requesting for a meeting with him but that he had declined. He later saw a newspaper story showing that the deceased had died. He said that he never saw his body nor attended his funeral.

In Cross-examination by **MR. NGATIA, MUZAHIM** produced newspaper reports showing that the accused was arrested by Police on 18th March 1994. He also confirmed the said story to be true and said that after the arrest, the accused was held at Kamiti Prison. He also admitted that the accused was arrested (6 days) before the deceased died.

PW2 was **CPL. MUTHIANI**. He told the court that in March 1994, he was attached to Tigoni Police Station and that by then, he had worked there for four years. He is the Police Officer who escorted

the body of the deceased to the City Mortuary on the night of 24th 25th March 1994. He said that on the 24th March 1994, at about 11.30 p.m., **CHIEF INSPECTOR (C.I.P.) JAKAITI** (now deceased) called him. That he introduced him to one **VERONICA WANGUI,** (herein after referred to as **VERONICA**), and asked him to escort her husband's dead body to City Mortuary. He was also instructed to visit **VERONICA'S** home before proceeding to the mortuary. **VERONICA'S** husband is the deceased in this case. **CPL MUTHIANI** said that **VERONICA** reported to him that for 3 days prior to that day, the deceased had complained of chest pains. That on that day, she had gone to Nairobi only to return home in Tigoni at 7.30 p.m. and to find her husband on bedroom floor. That she carried him to Nazareth hospital where he was pronounced dead. **MR. MUTIE** confirmed entry of that information in the **OCCURRENCE BOOK** (O.B.) of Tigoni Police Station.

MUTHIANI said that he accompanied **VERONICA** to a vehicle outside the Police Station where he saw the deceased kept in a seated position in the front passenger seat. He said that he noted that his body had an unbuttoned shirt, trousers but no shoes. He saw blood on the mouth and lips which was not dry but not flowing either. He said that he proceeded to **VERONICA**'s house where he found a house-maid **MARY OKOSE** and a gardener one **JOSEPH.** That he went to the bedroom where he saw blood stains on the floor about half a metre from the bed and covering an area of one and a half metres. That the bed was well spread and there were no signs of a struggle. That he took the body to the City Mortuary well past mid-night. That at 10.00 a.m. next day, 25th March, **C.I.P JAKAITI** instructed him to move the body to the Lee Funeral Home and also book a postmortem for the next day. In compliance to the instruction he prepared a postmortem form marked Prosecution exhibit (P. Exh.) 1. He filled information on it as given by **VERONICA**. Due to errors she made and later corrected, he altered the name of deceased. He said the erasure of dates on the form from 25th to 24th was purely a mistake by him. That he then transferred the body to Lee Funeral Home accompanied by **VERONICA** and one **ANTHONY KURIA** who was also there the night before. That on the 26th March 1994, himself, **VERONICA** and **ANTHONY** proceeded to Lee Funeral Home where **DR. KIRASI OLUMBE** performed a postmortem examination on the deceased at 3.00 p.m. The postmortem was carried out at Lee Funeral Home. He said that P. exh.1, at page 2 was incorrect where it read that the postmortem was at City Mortuary on 24th March 1994.

PW3 was **DAVID MAKURI WANJOHI** (hereinafter referred to as **WANJOHI**). He identified himself as the Funeral Superintendent, City Mortuary since July 2002. He said he had worked at the mortuary since 1993. That on 16th June 2004, the D.C.I.O. Kiambu **MR. MUTIE** (hereinafter refereed to as **MR. MUTIE**) went to see him at the City Mortuary carrying a court order requesting the exhumation of a body at Langata Cemetery. That he referred **MR. MUTIE** to the Medical Officer of Health, based at City Hall (M.O.H.). He said that **MR. MUTIE** went back to him later the same day, with a letter from the M.O.H. requesting him to assist **MR. MUTIE** which he did. He said that on same day, himself, **DR. NJUE** the Government Pathologist, **MR. MUTIE, MR. OCHIENG**, the Public Health Officer for City Hall and other Police Officers all proceeded to Langata Cemetery. They went to **PHILIP EZEKIEL MIYA** (PW6) who was the Supervisor there. That **MIYA** gave them a Register of Deaths P. exh.2, to check the name of deceased whose body was wanted for exhumation. That they were able to trace the name of the deceased and the place of burial which was **BLOCK CE4 GRAVE NO. 73**. That they were taken to the grave where the deceased's names in full were written with date of birth as 1950, date of death 1994 and names of wife **CAROL**, daughter **ANN** and son **WILLY**. That grave diggers provided by the cemetery dug out the remains of a body after removing the tombstone. He said that the coffin was rotten but its handles were still evident and that the remains were bones with no flesh. They were removed and put in a body bag and carried away by Police Officers to City Mortuary. He said that the remains were left under his charge at the City Mortuary and were still there even on the date he testified.

WANJOHI confirmed that on 13th October 2004, **MR. MUTIE** requested for the remains for examination by pathologists who were with him. These were **DR. ROGENA, PROF. GATEI, DR. GACHII** and **DR. NJUE.**

PW4, **JANE WAIRIMU KARIUKI MRS**. (hereinafter referred to as **MRS. KARIUKI**) identified herself as the Registrar of Births and Deaths based at Kiambu, since May 1992. Her duty was to be in

charge of the station and to Register Births and Deaths in the district as reported to them. She confirmed that on 28th March 1994, a form A2 reporting the death of the deceased one **FRIEDRICK WILHEM KOHLWES**, aged 41 years, was received. They entered the particulars in their register as entry **No. 1301193**. Same was produced as P. exh 4. She said that the date of death was indicated as 24th March 1994 and place of death as **TIGONI, KIAMBU**. That one **DR. OLUMBE** conducted postmortem on 24th March 1994 and certified cause of death as indicated on the form A2. She also identified a letter from one **VERONICA** as P. exh. 3(d) and a photocopy of the Register of Death entry No. 1301193 in respect of the deceased as P. Exh 3(c).

MRS. KARIUKI told the court that on 17th November 2003, one **MUGAMBI IMANYARA & Co. Advocates** applied for a copy of certificate of death on the deceased. It was P. Exh3 (a). She identified cash receipt for **IMANYARA'**s Application as P. Exh. 3(e).

MRS. KARIUKI testified that on 20th November 2003 at 5.00 p.m., she was summoned from her office to proceed to the D.C.I.O's office at Kiambu. She said that she was questioned by the Police over the issuance of the death certificate to **MR. IMANYARA** 4 days earlier. She said that under **Cap 149**, the Registrar had no power to ask for reasons why a certificate for death had been applied for. She also said that once a person applied for such certificates, the Registrar was obligated to issue the certificate upon payment of the prescribed fees. **MRS. KARIUKI** said that despite that explanation the police locked her up in the cells for 2 hours.

PW5 was **AMRISH KALAIYA** (hereinafter referred to as **KALAIYA**). He said that in 1991, he left his employment with one, **MR. SAMJI** at a Duty Free Shop at JKI Airport and joined the accused person and was employed by **GOLDENBERG INTERNATIONAL** at Magesa Chambers. He said that he knew that **GOLDENBERG INTERNATIONAL** (hereinafter referred as **G.I**.) was owned by **KAMLESH PATTNI**, the accused in this case, and his brother **ROHIT PATTNI**. However in cross-examination by **MR. NGATIA**, **KALAIYA** testified that he was employed in clearing and forwarding department, in G.I's sister company called **SHARATON INTERNATIONAL** and that his immediate boss was **MUZAHIM**. He said that he met the deceased at G.I. and knew that he was in charge of the security at G.I. He said that at the same time, there were about 40 security men working with G.I. drawn from Europe, Nepal, locals and the General Service Unit (GSU). **KALAIYA** said that he was a close friend of the deceased both as a colleague and socially. He also said that they escorted money together to banks in some occasions. That he also accompanied the deceased to Mombasa severally to clear vehicles which the deceased imported.

KALAIYA informed the court that at some point in one of their trips to Mombasa to clear vehicles, the deceased had taken to the hotel room, which they shared, a tin of **CERELAC**. That on opening the tin he saw Deutschemarks and US Dollars. That the deceased explained to him then that he brought in the money from abroad and sold it to G.I. and out of the proceeds of the sale, G.I. gave him a percentage. **KALAIYA** continued to say that two months before the deceased died, the deceased had taken him out for coffee. During that outing **KALAIYA** said that the deceased appeared worried and unsettled. That he complained to him that the accused and **ROHIT** had threatened him with death and had refused to pay him his share from the foreign currency and the vehicle imports. **KALAIYA** said that at around the same time, that is, 2 months before the deceased died, he heard him ask his girlfriend, one **SUSAN TOO** to ask her father to intervene on his behalf. That the help the deceased sought from **SUSAN** related to the death threats and his share of profits from the accused. **KALAIYA** said that he could not tell whether any help was offered.

KALAIYA said that he was aware that the deceased had a wife called **GLORIA** and a girlfriend called **SUSAN TOO.** He said that he learnt later that **SUSAN**, who worked as an Air Hostess with Kenya Airways, was the daughter of a prominent man. **KALAIYA** also said that he met **GLORIA** when she was sent to him by **MUZAHIM**. That **MUZAHIM** instructed him to release to **GLORIA** a log book for motor vehicle KAA 797 N, Nissan Skyline, belonging to G.I. That he also saw **GLORIA** collecting money from **MUZAHIM** both before and after the deceased died.

PW6 was **PHILIP EZEKIEL MIYA**. **MR. MIYA** was Supervisor, Langata Cemetery on the 16th June 2004. **MIYA** confirmed that he kept the Register - P. Exh. 2, in which a record of names of people whose bodies were buried at the cemetery, with details of date of burial and grave number in which buried were kept. He confirmed that on 16.6.2004 a Police Officer whose name he could not recall took him a Court Order dated 16th June 2004. The Court Order was P. Exh 5. He said that the Court Order informed him that a team was to exhume a body at the Langata Cemetery. That he traced the name of the deceased in his register, and he was able to identify where he had been interred. He led the team, which included **DR. NJUE, WANJOHI** (PW3), **OCHIENG'**, a Public Health Officer and others to the grave. He said that the tombstone on the grave was removed and remains which were just bones were all removed and put in a paper. The Police carried everything away. He said that the Police also took away some soil from the same grave.

PW7 was **AGGREY OGOLA THIMANGO**. He identified himself as a grave digger with the Nairobi City Council based at the Langata Cemetery since 1992. **THIMANGO** told the court that **MIYA** (PW6) was his boss. He said that **MR. MIYA** called him and his fellow grave diggers including one **PATRICK WANJOHI** and **JUSTUS LALA** to go and exhume a body at a grave within the cemetery. **THIMANGO** said that **Mr. MIYA** identified the grave for them to dig. He said that doctors and police officers had gone to the cemetery at 1.30 p.m. on 16th June 2004 and that the exhumation exercise was carried out in their presence. He said that after removing a very heavy tombstone and digging out soil, they came to the remains which were basically bones. That Police carried away the bones in a paper bag which was zipped. That they also removed soil from the grave and put in a paper bag. They carried both away.

PW8 CHARITY GACHOKI MUIRURI, a 63 year old retired teacher told the court that **VERONICA WANGUI** was her younger sister. She said that some of **VERONICA's** friends also call her **CAROL**. **CHARITY** told the court that **VERONICA** married the deceased in a wedding to which she was not invited. That **VERONICA** had a child before her marriage to the deceased and whose name was **ANN**. That she then got a son with the deceased who was known as **WILLY**. She said that in 1994, **VERONICA** sent for her from Githunguri where she lives. That she met **VERONICA** in Nairobi. That both travelled to Tigoni where **VERONICA** lived with the deceased. It is then that she learnt of the deceased's death. **CHARITY** told the court that on enquiring from **VERONICA** what had happened, she told her that the two of them had been invited to a party. However, the deceased had told her that he was not feeling well and would not go but that the deceased insisted to her that she must go alone to honour the invitation, which she did. That on returning from the party, she found the deceased dead in a pool of blood. **CHARITY** also said that **VERONICA** informed her that she had contacted the deceased's parents in Germany and that they had given permission to her to bury him in Kenya.

CHARITY said that she only viewed the body of the deceased, inside the coffin on the day of burial, at the Lee Funeral Home. She said that the funeral service was conducted at Langata Cemetery where a good crowd of about 200 people of all races attended.

PW9 **LUCY WANJIRU MUNYAKA** is a Civil Servant working in the Office of the President (OP) at Thika. She said that prior to that, she worked as an Assistant Civil Registration Officer in Kiambu. **MRS. MUNYAKA** said that her duties included issuing birth and death certificates from current registers. She identified P. exh. 4 as one of their Registers of Death held in Kiambu from which a certificate of death could be issued. She confirmed that on the 17th November 2003, by way of an Application form D4 she was asked to issue a death certificate. She identified the Application as P. Exh 3(a) which she said came to her in the normal cause of duty after it was filed at their office. She identified a copy of the death certificate she issued as P. Exh 6. She issued it to one **MUGAMBI IMANYARA**. She also identified and produced the original death certificate she issued that day as D. Exh. 11.

PW10 was **MILTON MUGAMBI IMANYARA**. He confirmed obtaining the death certificate, D. exhibit whose copy he identified as P. exhibit 6. He said he asked for it on his own initiative on the 17th November 2003, after his client, the accused in this case, was arrested allegedly for having murdered the

deceased.

PW11 **CLEOPHAS KAMATHIA MUGAMBI** was Manager, Lee Funeral Homes, Ltd. since 1990. He said that on 25th March 1994, the body of the deceased was taken to the home for storage. He said that according to their register P. exhibit 7 the body was taken there from the City Mortuary. That on 2nd April 1994 after payment of their fees 7300/-, the body was collected and signed for by one **WANJIGI,** for burial. **CLEOPHAS** also said that from what he could re-call of the body, no postmortem was done on it as he did not see any stitches on the head, thorax and abdomen.

PW12 **DANIEL OPAR OUYA** worked for G.I. between 1991 and 1994 as a Security Officer. He said that his immediate boss was the deceased whose other names he gave as **BERNARD WILHEM PERTOSKIS**. He said that also working for G.I. and directly under the deceased as security officers were **JAIRUS OUNZA** (also known as **TYSON**) and **THOMAS MBOYA JUMA (TOM)**. **DANIEL** told the court that the latter man was his step brother and further that both he and **TOM** were both deceased. He said that there were other security officers including G.S.U. officers. He said G.S.U. was withdrawn in 1999. Daniel said that when he was employed in 1991, he worked from the 14th floor of View Park Towers. He provided security to **ROHIT,** the elder brother of the accused, who was the Managing Director (M.D.) of G.I. He said that he also performed other security duties including escorting managers of G.I. who included relatives of the accused and V.I.P. guests going to see either the accused or **ROHIT**. He said that later on, himself, the deceased and **ROHIT** moved to the 9th floor of View Park Towers. That **JAIRUS** was left on 14th Floor to provide security to the accused. **DANIEL** identified P. Exh 8, a card which he said he used to access certain restricted areas at G.I. He said that he was also issued with a firearm, an Italian Berretta Automatic Pistol of 9mm parebellum and a chemical maze. He identified the certificates permitting him to hold a firearm as DMFI 13(a) and (b). The two were licenses issued as authority to him to have a chemical maze. He also identified his letter of appointment as P. Exh. 10, his staff identity card P. Exh. 11 and letter of recommendation from G.I. dated 24th November 1994 as P. Exh. 12. **DANIEL** said that the deceased took him for target firing training.

DANIEL told the court that he was quite close to the deceased. That he knew he had married one **VERONICA** whom the deceased also referred to as **GLORIA** and **MA-CAROL**. That the said **VERONICA** had a big girl called **CAROL**. He said that the deceased and **VERONICA** got **WILLIAM** out of their union. He said that the deceased lived with **VERONICA** first in Parklands then later in Tigoni, Kiambu District. That the deceased also had a lady friend by name **SUSAN TOO,** who worked with Kenya Airways as an Air Hostess. **DANIEL** said that he knew that **SUSAN** lived in Kileleshwa and that towards the end of his life, the deceased frequented **SUSAN'S** house and appeared closer to her than **VERONICA**. He said that he knew that the deceased also had a son with **SUSAN**.

DANIEL told the court that he used to get orders directly from the deceased until December 1993 or January 1994. At that time, he noticed some animosity between the deceased, the accused and **ROHIT**. That during that period, **ROHIT** gave him instructions directly which was unusual. That at around that times the deceased started saying that the accused and **ROHIT** must pay him his share of profit. That on enquiring further from the deceased, he was told that the money that he claimed was owed to him included for an **AUDI**, two **GOLF GTI's**, 500 Class Mercedes Benz and a **V/W COMBI**.

DANIEL continued to say that 2 days before he learnt of the deceased's death, the deceased called him on his cell phone and told him that the accused had withdrawn his gun, his security access card and fuel card. That the deceased said that even though he was no longer working for them, he would still insist to have the money owed to him paid. **DANIEL** said that the deceased's parting shot was to request him to look for **SUSAN** and tell her to take care of their son in case anything happened to him.

DANIEL then told the court concerning events he saw on the 24th March 1994. He said that he and his brother **TOM** had spent the night at the home of **ROHIT** on the night of 23rd. **ROHIT'S** home was in Parklands inside a compound which had several other houses including that of the accused and one **HITESH PATTNI** their brother. That they had gone to **ROHIT's** home late that evening and spent the night there. That at mid-day, **ROHIT** called him on his cell phone and instructed him to tell **TOM** to go

for his brief case which he did. They all entered **ROHIT'S** vehicle, a Mercedes Benz 300 with **ROHIT** on the driving wheel, **TOM** on the co-drivers seat and him on the rear seat immediately behind the driver. That before they could leave the compound, the accused was driven in, accompanied by the deceased in this case, and **JAIRUS**. The three sat at the rear seat of a Mercedes Benz 500 with the deceased sandwiched between them. The vehicle was driven by a person whom **DANIEL** never saw because the vehicle's windows were tinted. In fact **DANIEL** said that he only saw the accused, deceased and **JAIRUS** through the accused's open window and later when they alighted from the vehicle. That to him the deceased looked worried and was not free in the sense he had been sandwiched between the two. **DANIEL** then described seeing the accused, deceased and **JAIRUS** walk into the accused's house. That a quarrel ensued between them which he could hear but he could not see them. **DANIEL** said that he first heard the deceased tell **JAIRUS**, who was nicknamed '**TYSON**", to stop holding him. That he then heard the accused say;

"***What money do you want from me? Are you threatening me?"***

Followed immediately by deceased shouts which said;

"***Tyson stop holding me and fighting me. Why are you fighting me?"***

DANIEL said that he then heard a sound like that of a gunshot. That soon afterwards, **ROHIT**, who had stood at the doorstep to the house in which the accused, the deceased and **JAIRUS** were called him and told him and **TOM** to go to the office. That after he and **TOM** went to the office, he did not see the accused, the deceased, **ROHIT** and **JAIRUS** again that day. That the following morning, one **HITESH PATTNI** went to 9th Floor where **DANIEL** worked and informed him that the deceased had died. He also told him that the body was at the City Mortuary with **DR. OLUMBE**. **DANIEL** said that he waited until mid-day before proceeding to the City Mortuary accompanied by **TOM** and other G.I. Staff. That on arriving at City Mortuary he asked for **DR. OLUMBE** and was shown a door. That he opened the door without knocking and entered a room followed by **TOM.** That he found '**DR. OLUMBE'** and other staff. **DANIEL** said that he assumed that one of the two men he met in the room was **DR. OLUMBE.** Lying covered on a table was a body. **DANIEL** said that he did not talk to anybody but walked straight to the body and uncovered it. That he saw the naked body of the deceased and as he keenly looked at and went round, he asked '**DR. OLUMBE'** what killed him. He said that '**DR. OLUMBE'** answered him loudly and said that the deceased had died of a cardiac arrest. **DANIEL** said that he noted bruises or cut on the right side of the face and a '*penetrating wound*' on the right ear lobe as the doctor told him that he was working on the body. That he then left the Mortuary but went back again at 3.00 p.m. same day hoping to see relatives or friends of the deceased. He saw none. On the 26th March, **DANIEL** claims that **ROHIT** whispered to him and said that he was very sad for what happened to the deceased. That he too told him that he was aware and was also sorry.

DANIEL said that eventually he attended the deceased funeral on 2nd April 1994 at Langata Cemetery. That he first went to Lee Funeral Home in the company of **TOM, NJUGUNA** and other G.I. colleagues. He said that the accused, **ROHIT** and **HITESH** never attended.

DANIEL said that after the burial of the deceased, his working relationship with **ROHIT** changed. **ROHIT** stopped giving him work directly. That in May 1994, his gun and Chemical Maze were withdrawn by **SHREEKANT**, the Manager of accused person's office. That he was not told anything and his attempt to talk with **ROHIT** proved fruitless until September 1994. That since he got no work and no communication, he started missing at the office once in a while. That **DELILIAH**, the Personal Assistant of **ROHIT** informed him to consider himself an employee of G.I. until he received a letter to the contrary. That he continued receiving payments until August 1994. He eventually got a letter on 24th November 1994 indicating that he worked for G.I. until 31ST November 1994.

DANIEL continued with his testimony talking about the employments he took after G.I. and experiences he had. I saw no relevance in that evidence. In cross-examination **DANIEL** read from a newspaper, Kenya Times, of 19th March, 1994. The headline was "**PATTNI arrested in Noon**

Drama". The body of the content indicated that **KAMLESH PATTNI**, the accused in this case, was arrested on the day before (18th March 1994) and held in custody. **DANIEL** said that he did not know when the accused was released.

PW13 was Chief Inspector of Police (C.I.P.) **PETER MUNGAI WANYOIKE**. He told the court that on 2nd January 2004 the **DPP**, **MR. MURGOR**, called him on his cell-phone and asked him to see him on his office. On proceeding there he found **MUZAHIM**. That he took a statement from him which he identified as PMFI 15. He said that on 28th March 2004. **MR. MURGOR** called him to his office and on going there he recorded a statement from **DANIEL** which **DANIEL** signed and he countersigned on each page. In cross examination **CIP WANYOIKE** admitted that on 21st February 2004, he was involved in a Police raid at the offices of the accused. He said that the said raid was conducted under the instructions of **MR. MUTIE**, D.C.I.O. Kiambu.

PW14 was **ODHIAMBO MARCELLUS TITUS ADALA**, advocate. His evidence related to one **PAUL NJUGUNA MBUGUA** not called as a witness. He said that the said **MBUGUA** went to him and asked him whether he could accompany him to the Central Police Station to see one **MR. OSUGO**, a Senior Police Officer. That was in November 2003. **ADALA** said that he agreed and accompanied **MBUGUA** twice or thrice to Central Police Station but in all occasions they were unable to get **OSUGO**. He says that his client was eventually able to see the Police Officer and to record a statement.

ADALA told the court that **MBUGUA** went back to him again complaining that he was being followed and that he wanted to go to the press. That he requested him to accompany him to the press conference which he did on 18th November 2003. **ADALA** said that **MBUGUA** was eventually arrested and kept in police custody for some time. He said that **MBUGUA'S** wife, **JANE NJUGUNA**, instructed him to file a *Habeas Corpus* Application. He identified the Application documents which he said he filed under Certificate of Urgency as P. Exh. 16. Attached to the certificate were a Notice of Motion and an affidavit by **MBUGUA'S** wife. The Affidavit contained several annexure as follows: -

a) Photograph of the deceased in this case – P. exh. 16(a)

b) Photocopy of a death certificate on the deceased – P. exh. 16(b).

c) Photocopy of a pathologists report on deceased dated 18th November 2003. – P. exh. 16(c) signed by **DR. WASIKE**.

d) Photostat copy of an insurance form – P. exhibit 16(d).

e) Photostat copies of newspaper cuttings – P. exhibit 16(e).

He said that **MRS. MBUGUA** took some of the documents to him while others were provided by **MBUGUA** before his arrest. That **MBUGUA** was eventually released without being charged with murder as the Police had threatened to do. **ADALA** said that **MBUGUA** was released on the day he filed the Application i.e. 3rd December 2003. **MR. ADALA** also stated that he knew that **MBUGUA** worked at The Grand Regency Hotel at the time.

PW15 **JOSEPH KIMARU CHUMA** was an Assistant Commissioner of Police (ACP); **ACP CHUMA** told that court that the **PCIO**, one **NDUNGU**, his former Director, called him on the 13th November 2003. That he instructed him to proceed to the **DPP**'s office which he did. That the **DPP**, **MR. MURGOR**, informed him that he was to investigate a murder charge against the accused in this case. **ACP CHUMA** said that he could not re-call the name of the deceased. **ACP CHUMA** also said that he knew that the accused was going to Court (Chief Magistrate's Court -Nairobi) for an application of bond. That he preceded to Court with **BOSIRE** his colleague. That on the same day he arrested the accused at Kamiti Prison soon after his release on bond. That he proceeded with the accused to JKI Airport Police station where **BOSIRE,** his colleague, booked him and locked him up. **ACP CHUMA** said that the next day he was called by the D.C.I.O., Airport Police and informed that the accused was

seriously sick. That he proceeded there and found him sick. He then escorted him to Kenyatta National Hospital where he was admitted at the 10th floor of the same hospital. **ACP CHUMA** that on the same day **MR. NDUNGU** instructed him to hand over the investigations to **ACP OSUGO** (P.W 17) which he did at Kenyatta National Hospital.

PW16 was **EUPHRASIO GITONGA MBERIA**. His evidence was that he worked at Grand Regency Hotel between 1994 and 2003. Apart from saying that **MILTON IMANYARA** (PW10) gave him death threats, his evidence had no relevance to this case.

Pw17 was **ACP ISAIYA OSUGO** attached to **EMBU** as Deputy P.C.I.O. He told the court that in November and December 2003, he was DCIO Central, Nairobi. That in November 2003 the PCIO Nairobi, **PETER KAVILA**, summoned him to his office where he found DCIO Kilimani, **MR. MWENDA**, **DCIO EMBAKASI**, **S.S.P. RUTERE** and DCIO Kiambu **S.P. MUTIE** (P.W.27). That **MR. KAVILA** informed them that he wanted them to investigate a murder case involving the deceased, a German Citizen, who had died several years before then. He said that **KAVILA** allocated them duties. That his duty was to verify some documents and to assist him he was given some documents P. exh. 6(a) to (e). The documents included a certificate of death signed by **DR. WASIKE** and a photograph alleged to be that of the deceased.

ACP OSUGO stated that he was able to obtain the original hand written post mortem form by **DR. KIRASI OLUMBE,** P. exh. 1. He obtained them from Kenyatta National Hospital, offices of the Government Pathologist. **ACP OSUGO** said he interviewed **CPL MUTHIANI** who confirmed that he completed Page 1 of the post mortem form P. exh. 1 and made all the unsigned for erasures. That **CPL MUTHIANI** also confirmed escorting the body to the City Mortuary on 24th March 1994. He also confirmed escorting the body to Lee Funeral Home on 25th March 1994. He also identified the body to **DR. OLUMBE** at the Lee Funeral Home on 26th March 1994 for postmortem. **ACP OSUGO** said he was not satisfied with the documents ---P. exh.1 and P. exh. 6(b) and (c). He said that due to erasures and the inconsistency in the causes of death of the deceased stated in both documents. He said that he handed over said documents to **MR. MUTIE** when he was transferred to Embu.

PW18 was Inspector of Police (I.P.) **COSMAS KIIO**. He said that he was attached to **CRIME SCENE SUPPORT SERVICES** that was previously known as **SCENES OF CRIME**. That in that capacity on 16th June 2004 he was assigned duties to take photographs connected with this case. That on said day at 3.30 p.m., while at Langata Cemetery, on the instruction of D.C.I.O. Kiambu, **MR. MUTIE**, he took photographs marked No 1 to 7. These were of a grave stone bearing *inter alias* the deceased names, and of the grave, as grave diggers excavated.

I.P. KIIO said that he was summoned again by **MR. MUTIE** on 13th October 2004. On that day at 12.20 p.m. he proceeded again to Langata Cemetery where he took photographs 8 to 10. These show the grave stone and of the dug up grave of the deceased. He said that at 1.20 p.m. same day at City Mortuary he took Photographs 11 to 19. These were different views of the remains of the deceased bones, his clothing and shoes found with the remains. **I.P. KIIO** said that on same day at 4.00 p.m., while at Mbagathi District Hospital he took Photographs 20 to 24. These were different views of the skeletal remains of the deceased.

IP KIIO said that on 29th October 2004 at 3.20 p.m. while at City Mortuary he took photographs marked 25 to 37 under the directions of **PROF. GATEI. IP KIIO** produced all the photographs as P. exhibit 18 and his report and P. Exhibit 17. Later on **IP KIIO** produced a photograph of the Hyoid bone P. exhibit 20(b) and a report on it P. exh. 20(a). **IP KIIO** said that he inadvertently left it out when he produced the other photographs. He explained that he had taken the photograph of the bone with other photographs on 13th October 2004, after **PROF. GATEI** instructed him.

PW19 was **DR. JANE WASIKE SIMIYU**. **DR. WASIKE** introduced herself as a Pathologist working with the National Public Health Laboratories (NPHL) and based at the City Mortuary. She told the court that on the 18th November 2004, one **MS. MIRITI** went to her at the City Mortuary with forms

from CID Headquarters. She requested a Postmortem extract on the deceased's death. **DR. WASIKE** identified the forms **MS. MIRITI** had as P. exh. 16(b), (c) and (d). She also identified P. exh. 16(c) as the one she filled for the inquirer. **DR. WASIKE** said that she filled the form P. exhibit 16(c) using records held by the NPHL which she identified as P.Exh. 3(c). She admitted that the cause of death she recorded on the forms was slightly different from the one on **DR. OLUMBE's** post mortem form P. Exh. 1.

DR. WASIKE answered general questions put to her on the apparent disparity in the Postmortem form between date of postmortem and date of actual postmortem. She explained that such a disparity was not uncommon. She gave the example of Muslims whose post mortems are done before the postmortem forms are filled. She explained that the postmortem form would be filled after the date of postmortem and dated the date of filling them which could result in a disparity.

PW20 was **BEATRICE MUTHONI NGURE**, an 81 year old woman. She told the court that she had six children among them **VERONICA WANGUI,** also called **CAROLYNE** by her friends, and who was the wife of the deceased in this case. She said that **VERONICA** had two children, one **ANNE** born before her marriage to the deceased and **WILLY** born to the deceased. She said that **VERONICA** moved to Germany in 1997 and that she lives there with both her children. **BEATRICE** confirmed that the deceased died in 1994 and that she attended his funeral at Langata Cemetery. She said that the deceased had not been sick prior to his death and that his death had shocked her. She said that she viewed the face of the deceased at Lee Funeral Home before the burial. Beatrice said that the deceased brother and nephew came to Kenya one week after the burial ceremony and that no family member attended the burial.

PW21 was **PC MWANGANGI NYAMBU** who was a scene of crime officer attached to Nairobi area. He told the court that while attached to the CID headquarters in same capacity on the 6th June 2004, **MR. MUTIE** went for him and took him to City Mortuary where he was asked to take photographs of a skeleton. **P.C. NYAMBU** said that he saw the skeleton being removed from apartment 'C' at the City Mortuary. He identified photographs 1 to 6 as those of the skeleton which he took from various views and parts. Photograph 7 was that of a tag on the body No. 2209. He produced his report as P. exhibit 19(a) and the photographs as P. exhibit 19(b).

PW22 was **DAVID GITHONGO GATEI**, a Professor in Pathology. Apart from the general degree of M.B., Ch.B. which he obtained in 1967, he also obtained Membership of the Royal College of Pathologists, United Kingdom in 1973 after doing examinations in pathology. He also obtained Fellowship of the Royal College of Pathologists of the United Kingdom in 1984. **PROF. GATEI** spent quite some bit of time describing what Forensic Medicine is and how it relates to Forensic Pathology and other disciplines. At the end of it, even though not coming out clearly, **PROF**. **GATEI** admitted that he did not have a degree in forensic medicine. **DR. ROGENA** (PW26) in her evidence said that the Membership and Fellowship of The Royal College which **PROF. GATEI** had were equivalent to Masters Degree in Morbid Anatomy and Histopathology.

PROF. GATEI spent time explaining his appointment to do the repeat autopsy in this case. The letter appointing him was from **DR. NYIKAL** the Director of Medical Services (D.M.S.). The letter was not an Appendix to his Report. However, a letter from the Director of Public Prosecutions (D.P.P.) signed by **MR. MURGOR** was Appendix 1. It was dated 13th October 2004 and provided that he; **PROF. GATEI** and **DR. ROGENA** only were to conduct the repeat autopsy. **PROF. GATEI** was not happy with the letter from the D.M.S. because it indicated that he was to assist **DR. ROGENA** to carry out the autopsy. According to **PROF. GATEI**, being professionally more senior to **DR. ROGENA**, there was no way he could have been asked to assist her. **PROF. GATEI** said that the second autopsy begun on receiving an Exhumation Report Appendix 2 of his report P. exhibit 21 and A Statutory Declaration also appended in same report, both which were by **MR. MUTIE**. **PROF. GATEI** stated that on 16th June 2004, the remains of the deceased were disinterred at Grave No. 73 Block CE4, Langata Cemetery in his absence. That on 13th October 2004, himself, **DR. ROGENA, DR. GACHII** and**, MR. MUTIE** and others proceeded to Langata Cemetery to the said grave. The grave was identified by **MR. MIYA**. That it measured 55 inches in depth. That under his instructions, loose soil was removed from the grave to ascertain whether any bones or coffin were left. That they took samples of the loose soil from the grave

for analysis. **PROF. GATEI** said that they also collected human nails and phalanges bones which he said were for both fingers and toes. The Phalanges were later put together with the rest of the exhumed bones. After taking a few photographs identified as P. exhibit 18 photographs 8 and 9, the group proceeded to the City Mortuary where the process of the repeat autopsy was continued as per the request contained in P23A which was Appendix III of P. exh. 21. He said that the disinterred remains were only bone, the tissues having decomposed including cartilages. That that was expected since the body had been buried for over 10 years. **PROF. GATEI** produced P. exhibit 23, a hand written document signed by himself and **DR. ROGENA**. He explained that **DR. ROGENA** wrote it on 30th October 2004 and that it contained the 'Major findings' on the exhumed skeletal remains of the deceased. These findings were;

1. Absent greater horn of hyoid bone on the right.

2. Right 5th and 6th rib defects attended by periosteal reaction on the 5th rib.

3. Florid osteophytes on the vertebral column, hands and feet.

4. No demonstrable fractures

Also contained in same findings but which was subsequently cancelled was a '**comment**' thus

"***Arising from the post mortem findings articulated there above, the absence of one horn of the hyoid bone is suggestive of homicide. Not withstanding the absence of one of the horns may be associated with***

1. Natural loss following variable periods of the body having stayed in the grave,

2. ……..."

PROF. GATEI said that after the examination of the skeletal remains and photography of same at City Mortuary on 13th October, they proceeded to Mbagathi District Hospital where the bones were X-rayed by **DR. KIGO** (PW24). He identified the photographs taken there as P. exh. 18, pictures 10 to 19 and P. Exh. 20(b). He said that P. exh. 20(b) was of the hyoid bone which he picked from the remains from the neck region. He picked it out while at the City Mortuary on the same day. That he had it photographed alone. He also identified the bone itself as P. exh. 24.

PROF. GATEI said that after the X-ray of the remains by **DR. KIGO** (PW24) at Mbagathi District Hospital soil samples taken from the head, chest, abdominal and cervical (neck) regions were also x-rayed. **PROF. GATEI** explained further that on 18th October 2004, soil samples were subjected to magnetic tests at the Kenya Bureau of Standards. He said that the test revealed metallic nails. That the examination was done in his presence and that of **MR. MUTIE** and his security detail.

PROF. GATEI said that on 28th October 2004, at City Mortuary, **MR. OGETO OMWEBI** (PW25) arranged the skeletal remains in their anatomical relationship. He identified photographs of the exercise as P. exh. 18, picture 20, 26 to 37. He says that after examining the remains again with **DR. ROGENA** and **DR. GACHII** among other people, he noted;

1. 7th and 9th thorasic vertebrae had mild Osteophytes. He said those were bone protrusions that are seen in aging individuals as a degenerative condition which occurs from age 35 years.

2. Pelvis bone between the sacrum and iliac bone had osteoarthritis or osteophytes which was also a degenerative condition.

3. Deformity of anterior aspect of right fifth and sixth ribs with periosteal reaction (healing of previous fracture) on 5th rib.

4. Fresh chipping of distal ends of phalanges which were post mortem artifacts.

5. Exostosis of the tassal (toe) distal ends which were abnormal growths of toes present in life.

6. Missing right greater horn of the hyoid bone and loss of normal curve of the body of the hyoid bone.

He said that the missing greater horn on right side of the hyoid bone was not in his opinion normal especially due to the loss of the normal body curve. He said that in his opinion, that discovery was central to the investigations up to that stage because it was the most significant finding in relationship to the narration given by the Police. **PROF. GATEI** said that a team of 3 Radiologists led **DR. MILKA WAMBUGU** (PW23) and who included **DR. A. K. KIGO** (PW24) and **DR. AYWAK ANGELINE** examined and reported on the X-rays taken earlier by **DR. KIGO**. This reporting was done on 4th November 2004 and he was present. The examination confirmed the absence of the right greater horn of the hyoid bone. The Radiologists Report – P. exh. 28, confirmed the missing right greater horn at the point of fusion between the body of the hyoid bone and the horn and also the medial angulation which was estimated at 15 degrees. That, it also confirmed a subtle fracture of the right fifth metacarpal, old fracture of the fifth rib on right side, the thorax lumbar spine osteophytes with 2nd and 3rd thorasic vertebrae showing partial collapse and exostosis of hand phalanges. **PROF. GATEI** said that after receiving the Radiologists Report, he made his report P. exh. 21. He said that his comments were:

"***The loss of greater horn commonly follows significant or considerable trauma, injury or force that has been applied onto the neck.***

Fracture of the hyoid bone attended by medial angulation is a well recognized indicator of strangulation particularly manual direct lateral compression of the hyoid bone.

The fracture has been less frequently reported in ligature strangulation and hanging."

PROF. GATEI continued to explain that in manual strangulation, the factors that may lead to death are: -

1. Reduced air supply

2. Stimulation of nerve impulses that will lead on to the slowing of the heart and consequent stoppage.

3. The pressure on the carotid sinuses with consequent pressure changes that will ultimately affect the heart rhythm.

He also explained in autopsy findings, one may see, as a result of manual strangulation, as follows: -

1. Bruises, abrasions or scratch marks externally around the neck.

2. Internally bruises or seepage of blood of tissues in the neck.

3. Fractures of the Laryngeal bones including the thyroid cartilage and hyoid bone.

He clarified that the said external and internal injuries may not be seen.

4. Congestion of blood vessels in the face, the tongue, and the eyes and internally on the brain substance caused by lack of oxygen and referred to as cyanosis. It may also involve finger nails and toe nails.

PROF. GATEI was then given the original draft post mortem finding by **DR. OLUMBE** P. exh. 1. He said that he was asked to review the same and that his comments were;

1. Page 2 Peripheral cyanosis was a general term which was not explained. It referred to extremities that involved finger nails, toes and lips.

2. There should have been a comment on the clothing.

3. There ought to have been more detail on the laceration.

4. Lung consolidation – more detail should have been given and sample for microscopic examination taken to confirm pneumonia.

5. Left coronary arthesclerosis should have specified the degree whether partial or complete.

6. Myocardial infarct or dead muscle of the heart should have been confirmed by microscopic examination of the heart muscle to confirm dead tissue.

7. Pneumonia should have been indicated under respiratory system.

PROF. GATEI said further that Myocardial infarct could not be seen by (naked) gross eye examination unless it had been present for about 18 hours. On this point **DR. ROGENA** differed and said that the myocardial infarct could be noted by gross eye examination even from as early as 8 hours. **PROF. GATEI** said that it could however be demonstrated through microscopic and enzyme studies. **PROF. GATEI** also stated that pneumonia was rare these days in view of the available effective antibiotics. **DR. ROGENA** differed with that view and stated that due to the incidence of **HIV** and **AIDS** that position was not correct. That more and more people were dying of pneumonia despite anti-biotics to treat same.

PROF. GATEI also stated that the wound on the fore head required a more detailed description to include evidence of crushing of the wound markings so that it would be consistent with a crushing fall following cardiac arrest. **PROF. GATEI** also said that subtle fracture of the 5^{th} metacarpal could have been caused by;

i) A defence reaction in life

ii) Where individuals has been subjected to multiple fractures

iii) Hitting a hard surface

iv) Being hit on the bone by hard object.

DR. ROGENA also agreed that those could be the possible causes of the fracture but emphasized that it was difficult to tell if the injury occurred in life or after death.

PROF. GATEI said that he concluded that the likely cause of death of the deceased was manual strangulation arising from some of the original gross postmortem features and findings in the exhumed skeletal system.

PROF. GATEI commented on **DR. ROGENA'S** report P. exhibit 26. He observed that **DR. ROGENA'S** report did not discuss the radiologists findings or report. It also did not include the medial angulation of 15 degrees. **PROF. GATEI** ended by saying that he did not agree with **DR. ROGENA'S** conclusion that the cause of death of the deceased was "**indeterminable**" using the skeletal remains alone.

In cross-examination **PROF. GATEI** stated that the professional way to carry out an exhumation was to involve a pathologist and the Cemetery Superior. **PROF. GATEI**, also in cross-examination by **MR. NGATIA** said that the DPP, while briefing him before the repeat autopsy, and in the presence of **MR. MUTIE**, had given options of how the deceased may have died. He stated that they were;

1. He had been shot

2. That a metal bar had been pushed through his ears.

PROF. GATEI said that after thoroughly examining the deceased's remains, he found no evidence of either shooting or of a metal bar having been pushed through the ears. **PROF. GATEI** explained that whereas the loss of the horn of a hyoid bone was strictly not an indicator of strangulation, medial angulation was a definite indicator of force having been used. **PROF. GATEI** described a greater horn of the hyoid bone as being about ½ inch in length and its size, in terms of width, as a match stick. He agreed that if the greater horn separated from the body of the hyoid bone, it was possible that it could be lost in the soil. He agreed that since not all the soil scooped from the grave was examined the missing right greater horn could still be at Langata Cemetery.

PROF. GATEI stated that there were several causes of medial angulation including;

1. A congenital abnormality

2. Trauma either in life or death

PROF. GATEI disagreed that the medial angulation in this case was caused by congenital abnormality even though he could not rule it out. He also stated categorically that weathering could not cause angulation.

PW23 was **DR. MILCAH NDUNGE WAMBUGU**. She introduced herself as a Medical Doctor with specialty in Diagnostic Imaging. Since 1985 she said that she was Chairman of the Department of Diagnostic Radiology/Imaging, University of Nairobi and also a lecturer. She said that she was based at Kenyatta National Hospital. **DR. WAMBUGU** told the court that on 4th November 2004, herself, **DR. KIGO** and **DR. AYWAK** examined films taken to them by **PROF. GATEI** and **MR. MUTIE**. The examination was carried out at her department. She identified the films that they examined as P. exh. 25(a) to (j). She said that upon examining P. exh. 25(a), her team realized that it needed more films of the bone and they took a second set of X-RAY films of the hyoid bone. They took additional X-Ray identified as P. exh. 25(aa). She said that the hyoid bone was provided to them by **MR. MUTIE** and **PROF. GATEI**. She summarized their findings on the report signed on 12th November 2004 as follows: -

1. Loss of the right greater horn of the hyoid bone.

2. Medial angulation of 15 degrees of the right hyoid body.

3. Subtle fracture of the right 5th metacarpal.

The report was P. Exhibit 28. **DR. WAMBUGU** told the court that after writing and signing their report, she sent it to **PROF. GATEI**. That eventually when she read it, she realized that she needed to make certain corrections. That is how she came up with the amended Radiologists Report produced as P. exh. 28(a). She highlighted the amendments introduced but the most notable was at page 7 of the report where a new item was added as part of the summary of significant findings, as follows: -

"***7. Partial Collapse of T7, with spondylotic changes of the adjoining vertebral bodies superiorly and inferiorly."***

She said that her two colleagues agreed with the changes and also signed the report. Even though the amendment was made much later, the report still read signed on 12th November 2004 as the first one. **DR. WAMBUGU** insisted that the dating of the second report was not intended to mislead but for purposes of consistency.

In cross-examination **DR. WAMBUGU** agreed that none of her team and herself were Forensic Radiologists and that their report just gave their general findings. She also stated that the disarticulation at the right of the hyoid bone was a clean margin which was a proof that it was not caused by a fracture. She however stated that she could not tell the cause of disarticulation or separation whether a fracture, surgical procedure or loss. She also said that medial angulation of the hyoid bone could not have been after death even though she could not tell when the one they noted in the films examined occurred. She also said that she was not in a position to know what caused the medial angulation. She could not also tell when the subtle fracture on the 5th metacarpal occurred, whether in life or at the mortuary due to handling.

PW 24 was **DR. ANDREW KIUBI KIGO**. He said he had MB. Ch.B. and Masters in Medicine in Diagnostic Radiology both from University of Nairobi. He confirmed that after the D.M.S. **DR. NYIKAL** requested him, he carried out X-RAY work on skeletal remains of a body at Mbagathi District Hospital. He said that he took the X-Rays on 13th October 2004. That the remains he X-rayed were for the deceased in this case. That they were taken to him by a team including **MR. MUTIE D.C.I.O** Kiambu (PW27), **PROF. GATEI** (PW22) **DR. ROGENA** (PW26), **DR. GACHII** and other Police Officers. He identified the X-Rays he took as P. exhibit 25 (a) to (j). Also among them he identified X-Ray of soils that he took. **DR. KIGO** also said that he participated in the reporting on same X-Rays on 4th November 2004 at the Department of Radiology U.O.N. He identified P. exhibit 25 (aa) as additional X-Rays of the hyoid bone which they took on the 4th November 2005 with **DR. WAMBUGU** (PW23) and **DR. AYWAK**. He also identified the report they made as P. exhibit 28 and an amended copy of same P. exh. 28 (a).

In cross-examination **DR. KIGO** said that the disarticulation on the hyoid bone noted in the X-Ray was a clear margin and not a fracture.

PW 25 was **OGETO MWEBI** who said that he was working in the Osteology Department, National Museums of Kenya. He explained that he had a Bachelors Degree in Zoology from Nottingham University in which he studied, *inter alia*, Osteology. He said that while on leave on 13th October 2004, he received a call from **DR. NJUE** of City Mortuary. He says that he proceeded to the City Mortuary at 4.00 p.m., where **DR. NJUE** asked him to accompany a team of people to Mbagathi Hospital. He proceeded to Mbagathi Hospital. He says that at the hospital a body bag, green in colour, was brought out and it contained human bones. He says that **PROF. GATEI** asked him to arrange the bones in their anatomical position which he did. With **PROF. GATEI** was **DR. NJUE, DR. ROGENA, DR. GACHII, DR. KIGO**, Police officers and radiologists. **MR. OGETO** confirmed having arranged the bones to a complete human skeleton. He identified photographs of the bones taken at Mbagathi Hospital as P. exh. 18 Photographs 20 to 24. **MR. OGETO** said that the bones were for a white adult man of age 40 years and above. He said that apart from some of the third phalanges of the hands and feet, which were missing, all other bones were there. **MR. OGETO** said that he saw the P. exh. 24 (hyoid bone) at Mbagathi Hospital with **PROF. GATEI**. That **PROF. GATEI** produced it from an envelope and presented it for X-Ray.

MR. OGETO said that he was summoned again by **DR. NJUE** on 28th October 2004 to assist in arranging the same bones again. He said that he arranged them anatomically both at City Mortuary and at Nairobi Hospital, on the same day. He said that at the City Mortuary **PROF. GATEI**, **DR. ROGENA** and **DR. GACHII** examined the bones in the presence of **MR. MUTIE** the Investigating Officer and other Police officers. At Nairobi hospital, **MR. OGETO** said that the bones were X-Rayed in sections. Also X-Rayed was the hyoid bone P. exh. 24. He said that the hyoid bone hangs in the body and does not articulate with any bone and therefore, he was not asked to arrange it.

PW26 was **DR. EMILY ADHIAMBO ROGENA**, a Forensic Pathologist with MB, ChB and Masters in Pathology both from University of Nairobi and a Masters Degree in Forensic Medicine from University of Dundee, Scotland. She said that she was requested to give an opinion in this matter by the **D.M.S. DR. NYIKAL.** She was required to carry out a repeat autopsy together with **PROF. GATEI**. The evidence of **DR. ROGENA** was basically the same as that of **PROF. GATEI** in regard to the

exercise carried out by both of them on the 13th, 28th and 30th October 2004. **DR. ROGENA** confirmed the Major Findings as per P. exh. 23 as what both she and **PROF. GATEI** agreed. She also confirmed having written P.Exh.23 and signed it with **PROF. GATEI**. She also explained that both she and **PROF. GATEI** agreed to cancel the contents titled "**COMMENT**". She said that they came to the conclusion to cancel same on the basis that they needed to make various references (clarified as book references) on the gross findings before making conclusions.

DR. ROGENA in her evidence clarified that the bones of the deceased were still inside the clothing when they got the remains from a cabinet at City Mortuary on the 13th October 2004. She told the court that in her view, there had been no interference or sorting out of the bones of the skeleton before they did so on the 13th of October 2004. **DR. ROGENA** also clarified that **PROF. GATEI** personally retrieved the hyoid bone from the bones of the remains at the neck region in her presence and that of the others on the 13th. She said that both of them agreed that due to the delicate nature of that bone, it had to be kept separately from the rest of the bones. She identified P. exhibit 24 as the bone in question. **DR. ROGENA** also said that she took photographs of the grave, at Langata Cemetery, of the bones at City Mortuary and at Mbagathi District Hospital. She identified the photographs as Appendix VI of her report P. exh. 26.

DR. ROGENA'S report on examination of individual bones where remarkable was as follows; -

Skull: shows a linear post mortem craniotomy incision, the jaws have teeth attached with some missing some of these teeth are found in the soil from the head and neck.

Vertebrae: The vertebral column shows florid Osteophytes in the entire length. There are most marked anteriorly on T7-T10 and L1 to L5.

Distal Phalaxx: left middle finger had a fresh crack with missing distal end post exhumation.

Phalanges; Left 2nd and 4th distal Phalanx missing.

Phalanges; Right 1st to 2nd and 4th to 5th distal missing

Sacral: Osteophytes situated on the right sacroiliac joint and right and left lilac crest.

Right Public Ramos: Fresh crack post exhumation

Ribs: Right 5th rib attenuated distally with a fresh crack – probably post exhumation.

Ribs: Right 6th rib has a distal 1/3rd nodule -? Old healed fracture adjacent to a linear saw incision.

Ribs: Left 2nd, 3rd, 4th and 5th ribs show linear saw cuts anteriorly.

Manubrium Sternum has a right sided linear saw incision.

Hyoid bone: Missing right greater cornu with erosion of the entire superior surface and parts of the inferior lesser cornu and the medical base and up of the left greater cornu

In conclusion **DR. ROGENA** said that she did not find any significance to the finding of the missing right greater cornu or horn. She said that in her opinion the significance of the absence of the right greater horn was debatable. She emphasized that its importance depended on firm circumstantial evidence of injury to the neck region both to the skin, subcutaneous tissues, muscles and or the rest of the Larynx including bruises, scratches, bleeding and hemorrhage. She said that the circumstantial evidence

was missing due to lapse of time since deceased died and for the fact that all muscle, tissue and cartilage had decomposed by the time of the repeat autopsy. **DR. ROGENA** also said that she did not notice any medial angulation on the hyoid bone. That since many factors determine angulation of that bone a Forensic Anthropologist was the only person qualified to speak on same. That consequently her report did not include it. She said further that there was evidence apparent, of weathering on the hyoid bone's left greater horn, lesser horns, its superior surface and base of left horn. She said that she could not, from gross examination of the skeletal remains, determine the cause of the missing greater horn. She said that decomposition; post humus changes and handling both at exhumation and post mortem procedure could cause the loss or disarticulation of the hyoid bone. She recommended the decision of a Forensic Anthropologist to verify the disarticulation. She explained that if the post mortem was routine, the incision applied during post mortem could affect or even break the hyoid bone. She explained that the post mortem procedure in forensic examination included a 'Y' incision at the neck region not done in routine autopsies. She concluded by saying that it was impossible to tell what kind of autopsy **DR. OLUMBE** performed on the deceased and whether that could have affected the hyoid bone. In conclusion she said that she came to the opinion that the cause of death was indeterminable based on the gross observations of the bones presented to her in this case. She said that she had not seen the Radiologists report before writing her report. It was her evidence that after seeing the report identified as P. exh. 28(a), she still stood by her conclusion. In her opinion the radiologists' findings did not affect her diagnosis and report.

Commenting on the Radiologists Reports P. exh. 28 and 28(a), **DR. ROGENA** said that they were not complete because they never noted some of the fractures she had noted in her gross examination. She however agreed that the fractures were not a possible cause of death in this case.

PW27 was **DANIEL MUTIE**, a Police Officer who was also the investigating Officer in this case. He told the court that he was the District Criminal Investigations Officer (DCIO) Kiambu. That in that capacity on the 24th November 2003, he was summoned by the Provincial Criminal Investigating Officer, Nairobi (P.C.I.O.) one Senior Assistant Commissioners of Police **KAVILA,** to proceed to his office in Nairobi. That after informing his P.C.I.O., based in Nyeri, he proceeded to **MR. KAVILA's** office. That in his office, he found him with D.C.I.O. Central, **MR. OSUGO**, D.C.I.O. Industrial Area, **MR. RUTERE** and D.C.I.O. Kilimani **MR. MWENDA**. That the four of them (DCIO's) were briefed by **MR. KAVILA**, to team up and investigate the murder of one **FRIEDRICH WILHEM KOHLEWS** alias **BERND PETROSWSKI**, the deceased in this case. **MR. KAVILA** informed them that the deceased, a German National, was murdered on 24th March 1994 by people who were known. **MR. KAVILA** also informed them that the accused was already in custody for the said offence. He said that each officer was given a role to play. His role was to collect documents, interrogate witnesses and investigate when the matter was reported to the Police, which he did.

MR. MUTIE explained his role as the investigating officer of this case. Apart from mentioning in passing that he took over the investigations of the case, he did not mention when that happened and the circumstances surrounding that decision. However, he did at some point take over evidence in form of documents and other items and the statements of witnesses from the other members of the investigating team.

MR. MUTIE confirmed that on 24th March 1994 as per Occurrence Book (OB) No. 65 of 23/4/94 of Tigoni Police Station, at 11.20 p.m. one **MRS. VERONICA FREIDRICK** reported "**SUDDEN DEATH REPORT**" of the deceased. The OB entry was made by one **PC MUSYOKA** who was not called as a witness. The OB was P. exh. 30 and a certified copy of same P. exh. 30(a). That as per same OB one **PC MUTHIANI** (now **CPL MUTHIANI**, PW2) escorted the body of the deceased in the company of **VERONICA** to City Mortuary. That in OB No. 4 of 25/3/94 at 2.25 a.m. **PC MUTHIANI** reported back to station from City Mortuary from escorting body of the deceased. The OB No. 4 also contained further details by **PC MUTHIANI** to the effect that **VERONICA** had reported that the deceased had for 3 days complained of chest pains. That on the material day, (24/3/04) she left him at home with their maid **MARY** and grounds man **JOSEPH**. That on returning she found him dead with a wound on left side of the head and bleeding in the mouth. That **PC MUTHIANI** also reported that he visited the bedroom and found blood stains. That the final remarks in OB 4 of 25/3 were to the effect that

investigation into the death was to follow.

MR. MUTIE said that he also came across OB No. 44 of 25/3/94 13.32 hours in which **PC MUTHIANI** reported that he left the station for post mortem of the deceased. **MR. MUTIE** also said he came across OB No. 59 of 25.3.94 as per OB P. exh. 31. In that OB entry No. 59 of 25/3/94 which was for 18.27 hours **PC MUTHIANI** reported returning to station from City Mortuary where he had transferred the body of the deceased from City Mortuary to Lee Funeral Home. It also indicated that Post mortem was to be carried out the next day. That in OB No. 20 of 26/3/94 made at 9.06 a.m. it indicated that **PC MUTHIANI** left the station to witness the postmortem on the deceased body. It also referred to an Inquest file No. 5/94 as related to the Postmortem and the deceased. At 15.30 p.m. as per OB No. 41 of 26/3/94 **PC MUTHIANI** reported his return from attending the Postmortem of the deceased.

MR. MUTIE told the court that from the records held at Tigoni Police Station, he became aware that an inquest file No. 5/94 was opened to investigate the deceased's death. That the investigating officer of the case was **JAKAITI**, a **CHIEF INSPECTOR OF POLICE** who has since died and who was then the Officer Commanding Station (OCS) Tigoni Police Station. He said he was unable to get that inquest file and opened a police file No. 212/411/2003. **MR. MUTIE** said that **MR. KAVILA** asked him to pursue death certificates issued by Kiambu Registrar of Births and Deaths which he did by summoning **MRS. KARIUKI** (PW4) and locking her up in his cells for 2 hours. He said that he felt that she could assist him in the investigations. From his evidence, **MUTIE** was unhappy what **MRS. KARIUKI** had issued a death certificate to **IMANYARA** Advocate (PW10), whose original copy was produced as D. exhibit 11, while **VERONICA,** the deceased's wife, had by two letters dated 26/3/94 and which were part of P. Exh. 4, cautioned the Registrar of Deaths from issuing any other death certificate without her express authority. **MR. MUTIE** said he was able to summon **MR. IMANYARA** advocate to produce the original death certificate issued to him by **MRS. KARIUKI**. He said that **IMANYARA** declined to give him the original copy and instead gave him a photocopy of the certificate. Date of issue was indicated as 17th November 2003. **MR. MUTIE** said that he got the copy of certificate of death P. Exhibit 6 from **MR. OSUGO** (PW17) whom, he said, had claimed that it had been given to him by **PAUL NJUGUNA MBUGUA** together with several annexure. **PAUL** was not called as a witness. The annexure to P. Exh. 6 was a Notification of Death P. Exhibit 6(b) written by **DR. JANE WASIKE** (PW19) and signed by her on behalf of **DR. KIRASI OLUMBE. MR. MUTIE** had a bone to pick with that report because it indicated that the deceased was identified to the pathologist by one **BEATRICE WANGU** which contradicted the postmortem form P. exh. 1, which indicated the identifying witnesses were **VERONICA WANGUI** and **ANTHONY KURIA**. The other contradiction was the cause of death in both documents. **MR. MUTIE** said that the contradiction raised more suspicions to him over the matter.

MR. MUTIE confirmed interviewing **ODHIAMBO M. T. ADALA** (PW14) over another annexure to P. exhibit 6, that is, P. exhibit 6(c) That was a request for death certificate signed by **MR. ADALA**. He also questioned him over newspaper reports associated to him (**ADALA**) which he identified as P. exhibits 6(e), (f), (g), (h), (j) all from various dailies all dated 19th November 2003. **MR. MUTIE** said that the reports made him even more suspicious over this case because they were reporting events of the day before in which **ADALA'S** client **PAUL NJUGUNA MBUGUA,** had made announcements concerning the death of the deceased.

MR. MUTIE said that he also had occasion to interview **DR. ALEX KIRASI OLUMBE** at a date, time and place he did not disclose. He however, said that he summoned him through his mobile phone number which he obtained from his fellow doctors. He said that **DR. OLUMBE** was in Kenya at the time. **MR. MUTIE** said that he wanted to clear certain areas of doubt as highlighted to him by **MR. OSUGO** in his statement dated 15th December 2003. In brief, what concerned **DR. OLUMBE** in the 7 points raised was;

a. Date of Postmortem which was not clear.

b. Omission to complete page 2 of the postmortem form, P. exhibit 1, to reflect reference number, address, date and officer-in-charge of police station from which the postmortem form was sent.

c. Name of doctor performing post mortem.

MR. MUTIE said that after interviewing **DR. OLUMBE**, he was still not satisfied with his explanation. That he treated him as a suspect and took a statement under inquiry under caution from him.

MR. MUTIE also dwelt on the part of investigations he led as a Police Officer and which have been testified to at length, *inter alia*, by **PROF. GATEI**. This includes the exhumation on 16th June 2004 in which **DR. NJUE** was the only pathologist. It also included the exercises carried out by **DR. ROGENA** and **PROF. GATEI** and witnessed by **DR. GACHII** and documented by **IP KIIO** and **PC MWANGANGI** on 13th October 2004, and 28th October 2004. It also included work done by himself and **PROF. GATEI** on 18th October 2004 at Kenya Bureau of Statistics whose results were negative as per the samples submission form P. exhibit 40. It also included the day of X-Ray Reporting by **DR. WAMBUGU, DR. KIGO** and **DR. AYWAK** (latter not called as a witness) in the presence of himself and **PROF. GATEI** on 4th November 2004.

MR. MUTIE also highlighted his narration to **PROF. GATEI** and through him to **DR. ROGENA** on the postmortem form Appendix III of **PROF. GATEI'S** report P. exhibit 21. In it he stated that the deceased was **ASSAULTED/MURDERED** by persons known. **MR. MUTIE** said that he did eventually receive the reports from **PROF. GATEI**, P. exh. 21 and 22, from Radiologists P. exh. 23 which **PROF. GATEI** gave him and from **DR. ROGENA** P. Exh. 26 which he got from **MR. MURGOR**. **MR. MUTIE** purported that **PROF. GATEI'S** report was complete because of considering **DR. OLUMBE'S** initial postmortem report, the exhumation report and the radiologists report and because of having an opinion on the cause of death. He also purported that **DR. ROGENA'S** report was incomplete for omitting to consider the two reports and for not coming up with any conclusion as to cause of death.

MR. MUTIE commented on a report from **DR. NJUE** dated 21st June 2004 P. Exh. 33, in which **DR. NJUE** makes unsubstantiated statements. These include the words '**deceased collapsed and died instantly'** and words like "**partly collapsed coffin**". It also concluded that soil samples would bring negative results from the Government Chemist. **MR. MUTIE** clarified that none of the post mortem forms before the court – P. exh. I and Appendix 3 of P. exh. 21, had any words as '**collapsed**' or" **died instantly**". That further no soil samples had been sent to the Government analyst by 21/6/2004. **MR. MUTIE** also identified P. exh. 34(a) and (b) as records of soil samples sent to the Government Chemist Department and their report. The report was negative for chemically toxic substances in soils submitted. **MR. MUTIE** also identified P. Exh. 35(a) and (b) as Firearms Licensing Officers reports given to him following an inquiry he made. The significance of the reports are to show that **DANIEL OPAR** (PW12) was only licensed to carry a Gas Ejector Gun but not a firearm while **TOM MBOYA** was licensed to carry both a Gas Ejector Gun and firearm.

MR. MUTIE also produced an Exhumation Report he prepared and gave to **PROF. GATEI** on his request P. exh. 37 and another one dated 25/11/2004 prepared by the Public Health Officer, (not called as a witness) as P. exh. 38.

MR. MUTIE said that in the cause of his investigations two women featured as wives to the deceased. He said **VERONICA WANGUI** lives in Germany at unknown place. The other wife, **SUSAN TOO**, lives in the United States in unknown place. He said he had been unable to get **DR. OLUMBE** by the address he gave. He also said he was unable to trace **MARY OKOSE** and **JOSEPH** workers at the home of the deceased. He was also unable to get **PAUL NJUGUNA MBUGUA**.

In cross-examination **MR. MUTIE** admitted that the accused in this case was arrested before any statements were recorded from any witness. He also admitted that he was unable to tell who complained concerning this matter to prompt the Hon. Attorney General's office to order investigations into this case.

ANALYSIS OF THE EVIDENCE

Before the accused was arrested for this offence on the 13th November 2003, Act No. 5 of 2003 had

come into effect. That Act is quite significant to this case because it had the effect of changing the law in regard to committal of accused persons charged with offences triable in the High Court, for example **MURDER**, for trial before the High Court. All the provisions giving the subordinate courts power to commit accused persons to trial before the High Court, and the procedure to be followed, were deleted. Together with them all the provisions making it mandatory for the prosecution to furnish the court and the accused and his counsel with committal documents were also deleted. The committal documents were defined under **Section 231 (2)** of Criminal Procedure Code to include;

1. The information stating the charge.

2. A list of witnesses whom the prosecution intends to call at the trial and copies of their statements relevant to the case.

3. A list of exhibits which the prosecution intends to produce at trial including copies of medical and post mortem reports, Firearms Examiner reports, Government analysts reports and photographs.

Also affected by the enactment were the provisions relating to alibi warning and the requirement that the accused person discloses whether he was to rely on the alibi defense.

We have no case on point, (at least I have not been made aware of any) which sets out what the current procedure in the High Court should be. I am aware that my colleagues have continued to demand committal documents at least before the trial commences, since there are no any legal provisions requiring them. There is now no standard procedure and it seems to depend on the judge's discretion from case to case. In this case, the prosecutor **MR. MURGOR** heavily argued in support of non-disclosure of the list of witnesses, their statements and other exhibits and documents the prosecution wished to rely on and only to supply those, which in his absolute discretions, he deemed necessary. Eventually, to overcome that situation this court made an order on 1st December 2004 requiring that all documents, as provided to accused persons before the repeal of **Section 231(2)** of the Criminal Procedure Code provided before commencement of the case the next morning. The decision whether or not to withhold statements of witnesses cannot be left to the prosecution. It must be a judicial decision to be made after a just cause or peculiar circumstances of the case are demonstrated to the court.

I felt that it was necessary to highlight that aspect of this case and to state what I believe should be the position as regards pre-trial disclosures. Pre-trial disclosure was well known and approved in this country under Emergency Regulations and is not a new idea. **KARIUKI KAMAU & OTHERS vs. REGINAH (1954) 21 EACA 203** is a case on point where this practice was approved by the Court of Appeal for East Africa. It was a misconception for the prosecution to submit that since **Part VIII** of the Criminal Procedure Code and all the provisions there under had been deleted, then the prosecution was not obliged to supply witness statements and exhibits to the defense. It is not easy to justify the preposition which clings to the notion that the prosecution does not have a legal duty to disclose all relevant information. Not only do they have that duty but also the Constitution safeguards it under **Section 77**. **Section 77** of the Constitution provides that an accused person should be afforded a fair hearing within a reasonable time. 'Fair trial' constitutes in it the right to pre-trial disclosure of material statements and exhibits. That is the only way an accused person would be able to prepare for the case and to have an informed representation. Anything less would mean that the court is giving approval to trials by ambush and in criminal litigation, it is against the rules of natural justice and the Rule of law to adopt a practice under which an accused person will be ambushed.

It has been held before, that: -

"***a trial in criminal case is in the nature of a contest. A fair hearing requires by its nature, equality between the contestants, subject to the supreme principles of criminal jurisprudence, requiring the presumption of innocence and that the guilt of the accused be proved beyond any reasonable doubt. When one of the contestants has no pre-trial access to the statements taken by the police from potential witnesses, the contest can be neither equal nor fair… Non disclosure is a potent source of injustice."***

(See **High Court Misc. Appl. No. 345 of 2001** in a reference which considered the right of access to information held by Police by an accused in a trial before the subordinate court. I agree with my two brothers' (M. Mbogholi and Kuloba JJ) views on pretrial disclosure.)

It was therefore, the duty of this court to ensure that the accused was afforded a fair trial and that the prosecution did not gain an undeserved or unfair advantage over the accused or cause the accused to suffer unfair disadvantage and prejudice. I had to ensure that the prosecution did not adopt an adversary process of adjudication which it relentlessly attempted to do throughout this trial. I am fully persuaded that the witness statements, exhibits and documents obtained by the prosecution after investigations are not the property of the prosecution but the property of the public to ensure that justice is done.

Turning now to the issues raised **MUZAHIM, KALAIYA** and **DANIEL** were undoubtedly the key witnesses in this case. None of them saw the accused attack, assault or murder the deceased in this case. The common fibre which runs through their evidence was their perceived motive for the deceased's death and then belief that the accused had both the motive and intention to commit this offence and the means and opportunity to carry it out.

Starting with **MUZAHIM** it was his evidence that the accused fell out with the deceased when the accused started suspecting the deceased of passing business information to the accused's rivals. He claims that as a result of that suspicion, the accused asked him to tap the deceased's phones which **MUZAHIM** claims he did through **KALAIYA.**

This evidence needed to be tested against other evidence adduced in this case. In terms of time, **MUZAHIM** put the period of the fall out between the two as about 2 months before the deceased died. **KALAIYA** contradicted **MUZAHIM** on the issue of tapping the deceased's phones. **KALAIYA** denied being used to tap the phones. However, **KALAIYA** said that he witnessed **MUZAHIM** tapping the deceased's phones.

Apart from that contradiction between the evidence of **MUZAHIM** and **KALAIYA** as to who tapped the phones, there was further doubt created as to the truthfulness of both witnesses on that issue. **MUZAHIM** spent a considerable part of his evidence saying where his offices were at which time between 1988 and 1997. It was his clear evidence that in 1993 he was based at Mageso Chambers up to 1996. **MUZAHIM** was very clear in his evidence that the deceased worked as driver and security for the accused and that both were based at View Park Towers 14th Floor. **DANIEL** contradicted that by saying that the deceased worked with him on the 9th floor of View Park Towers for **ROHIT. KALAIYA** confirmed deceased worked from View Park Towers. So if the deceased was based at View Park Towers while **MUZAHIM** and **KALAIYA** were based at Mageso Chambers, several major roads away, how possible was it for the latter to tap the formers phones both in terms of opportunity and logistics? That evidence needed substantiation so as to be sure without a doubt that either witnesses had the opportunity and necessary know how and the implements, taking into account the logistics involved (due to the long distances) to succeed in such an exercise. Why that bit of evidence seems to me to be more fantasy than reality is because, despite not claiming to have any know how in phone-tapping and despite not suggesting they used the phone supplier to do so, **MUZAHIM** and **KALAIYA** stated as a matter of course that it was done.

Taking into account the contradiction noted and the lack of substantiation, I am not convinced that any of the two, **MUZAHIM** and **KALAIYA,** ever tapped the deceased's phones. That conclusion is further fortified by the complete lack of evidence as to the information gathered by either witness as a result of the tapping.

MUZAHIM said that on the deceased's part, he fell out with the accused because he was not paid profits or his share for fake foreign currency. There was no evidence adduced before this court to show that either the deceased or the accused dealt in fake foreign currency. **KALAIYA** who came closet to proving it said that he saw the deceased with some '**dollars**' and 'Deutschmarks' in a cerelac tin but that could not tell whether they were fake or not. That evidence did not come close to proving that any fake currencies were dealt with by the deceased. Further more, the currencies **KALAIYA** saw fitted in a tin of

cerelac, the children's baby food? I do not fathom how a human being would be killed for money that can fit in a baby food tin!

DANIEL also claimed that the accused and deceased fell out over imported vehicles. Only **DANIEL** tried to disclose the alleged vehicles which he claimed the deceased had imported and sold to the accused. He did not however see any of them. **KALAIYA** on the other hand said that he did accompany the deceased often to Mombasa to clear vehicles. **KALAIYA** was not clear whose vehicles they were. **KALAIYA** knew that he worked for **SHARATON INTERNATIONAL** to do '**clearing and forwarding'**. He was not clear to whom the company belongs. He could not tell who owned the vehicles they cleared allegedly with the deceased. More importantly, he did not mention their make.

On the issue of accompanying the deceased to Mombasa that appeared '**hazy**' for two reasons. One the nature of work that the deceased was employed to do according to **MUZAHIM**, **KALAIYA** and **DANIEL** was very involving. To offer personnel security to a person must mean that you are in the company of that person often if not most of the time. It does not make sense that the accused could have "**imported**" the deceased, so to speak, as an expatriate on security to work for him, and at the same time allow the deceased to carry out other personal business. Even more unlikely was the allegation that the deceased could be able to travel from Nairobi to Mombasa for his 'own personal businesses. It is difficult to understand that. Secondly, **KALAIYA** could vividly remember details concerning other aspects of his evidence. However, he could not re-call any make of the vehicles the deceased allegedly imported to Kenya and which he claimed he assisted the deceased to clear. He could not re-call where the vehicles went when he assisted to drive them to Nairobi. For these points, I find it difficult to accept that the accused and the deceased had any disagreement over any foreign currency and vehicles, as alleged by **MUZAHIM, KALAIYA** and **DANIEL**. **MUZAHIM** and **KALAIYA** did not witness any disagreement between the two. **DANIEL** said he witnessed on one occasion. I will deal with that later. All three witnesses claimed to be very close to the deceased, yet none of them could place any figures to the amount of money that the accused allegedly owed the deceased. There is another difficulty created by their evidence due to the lack of a consistent time frame. **KALAIYA** claims that the deceased told him, two months before he died, that the accused had threatened him with death. **MUZAHIM** on his part said that the deceased told him only 2 days before he died that the accused had threatened him with death. **DANIEL** on his part said that he noticed animosity between **ROHIT** and the deceased in December 1993 and January 1994 when **ROHIT** started giving him, **DANIEL**, instructions directly which was unusual. That evidence did not implicate the accused at all. The only time the deceased indicated that the accused had a problem with him, according to **DANIEL**, was 2 days before the deceased died. **DANIEL** claimed those 2 days before he died, the deceased called him on his cell phone and told him that the accused had withdrawn his firearm, fuel card and security access card. That the deceased interpreted that withdrawal to mean that he was no longer an employee of G.I. The deceased did not talk of any threats made to him by the accused but **DANIEL** said he appeared anxious about his safety displayed by the request the deceased made to him that if anything happened to him, he was to tell his girlfriend **SUSAN** to take care of their son.

MR. MURGOR urged the court to find that the confessions made by the deceased **to MUZAHIM, KALAIYA** and **DANIEL** that the accused had threatened him should be treated as **DYING DECLARATIONS**. I stated earlier that **DANIEL** did not state anywhere that the deceased had told him that he had been threatened by the accused. **MR. NGATIA** submitted that the alleged statements did not qualify to be treated as dying declaration. The law is very clear on what amounts to be a dying declaration. For a start it should be made at the time the attack that leads to death is carried out. There is no dispute that the statements in issue were made by the deceased days before any attempt on his life. If **DANIEL** heard any words by the deceased to effect that the accused or someone else was killing him then such words would be worthy to consider as dying declaration. The words in issue here do not qualify as same.

We now turn to the issue of opportunity. Did the accused have an opportunity to commit this offence? **DANIEL** is the only witness who claims to have seen the deceased at around mid-day of 24th March 1994 in the company of the accused, **ROHIT** and **JAIRUS**. **DANIEL** did not see the other person who drove the accused, deceased and **JAIRUS** into the Parklands home of the accused. Doubts

have been raised on whether the accused had a home at Parklands at any time. That issue remained unresolved by the time the prosecution closed its case. What is important however is that there is no dispute that the deceased died on 24th March 1994 and that his body was found by his wife **VERONICA** at 7.30 p.m. at their Tigoni home according to OB No. 4 of 25/3/94, Tigoni Police Station. The prosecution evidence was that **DANIEL** saw the deceased alive at midday. He then graphically explains what he heard after the deceased was allegedly frog matched into the accused home. **DANIEL** heard the deceased asking **JAIRUS** why he was holding and fighting him. He then heard the accused asking the deceased in a loud voice what money he was claiming from him and whether he was threatening him. At that stage, **DANIEL** heard what he thought was a gun shot after which **ROHIT,** whom he claims was standing at the door to the accused house all the while, ordered him and **TOM** to go away to the office. **DANIEL** then alleged that on learning of the deceased's death the next day, he proceeded to City Mortuary 1.00 p.m. where he saw what he described as a penetrating wound on the right ear lobe.

MR. NGATIA urged the court to find that Daniel's evidence was not worthy of any consideration for two reasons. The first and most important is the absence of corroboration by medical evidence that the deceased had any gun shot injury and penetrating wound. **MR. NGATIA** relied on **SARKAR ON LAW OF EVIDENCE**, 15th edition pages 904 and 905 where the authority citing Indian authorities suggests that medical finding during autopsy of a deceased person is the 'acid test' as to the trustworthiness of a witness. **MR. MURGOR** also agreed with that proposition of the 'acid test'. **MR. NGATIA** submitted that **DANIEL's** theories of a gunshot injury and a penetrating wound was proved to be incorrect. I agree that **DR. OLUMBE** in P. exh. 1, **PROF. GATEI** in P. exh. 21 and 22, and **DR. ROGENA** in P. exh. 26, all proved the two theories of injuries as alleged by **DANIEL** to be unfounded.

The second reason given by **MR. NGATIA** why **DANIEL**'s evidence should be disregarded was the omission of a description of words allegedly spoken by both the accused and the deceased at Parklands on the 24th March 1994 in his evidence. It is true that **DANIEL** admitted that those words as given in his evidence associated to the two were missing in his statements to the police.

MR. MURGOR differed in his submission and stated that **DANIEL'**s evidence of what happened on 24th March 1994 was in total agreement with **VERONICA'**s finding as recorded in O.B. No. 65 of 24th March 1994. **MR. MURGOR** also submitted that **DANIEL**'s evidence of the events of 24th March 1994 proved that the accused had the opportunity to commit the offence.

DANIEL's evidence cannot be considered in isolation. As against the evidence of **CPL. MUTHIANI** who said that at 11.20 p.m. same night of 24th, when he saw the deceased in a car outside the Police Station, he noted blood on a cut on the right forehead and blood on the deceased mouth. He described the blood on the mouth as not dry but not flowing. He also found more blood on the floor of the deceased's bedroom which he described as drops. It will be noted that **CPL MUTHIANI** saw the deceased over 11 hours after the incident described by **DANIEL.** If the accused shot the deceased as **DANIEL** 'perceived' or caused a penetrating wound on his right ear lobe 11 hours earlier, I fail to understand how **CPL. MUTHIANI** would have seen fresh blood on his mouth. Taking into account what **CPL. MUTHIANI** saw and what **VERONICA** told him that she found deceased dead that evening, and what **CPL MUTHIANI** saw, that seems to cast doubt on **DANIEL**'s evidence. It was important that some other evidence supporting **DANIEL**'s, whether directly or indirectly, were found. I found no such evidence.

Instead of evidence to support **DANIEL**'s evidence on the issue of opportunity, I found more evidence which cast further doubt on his evidence. The first one is found in **CHARITY**'s account of what **VERONICA** told her. **CHARITY** who was **VERONICA**'s sister, told the court that **VERONICA** had said that she had left the deceased home on the evening of 24th March. **CHARITY** went further to say that **VERONICA** had told her that it was the deceased who told her to leave him home that evening because he was unwell and was in no position to attend a party to which both he and **VERONICA** had been invited.

The other piece of evidence was **MUZAHIM**'s evidence to the effect that the accused was arrested

on 18th March 1994 and held in police custody for 10 days. **MUZAHIM** made that statement in response to a newspaper report he was shown by the defense in cross-examination and which he agreed to produce in evidence as Defense exhibit 5. Taking all these evidence together, it is the prosecution case through **CHARITY** that the deceased was alive on the evening of 24th March 1994. That strengthens the evidence of **CPL**. **MUTHIANI** that the blood seen on the deceased was still fresh. Even if we are to disregard the evidence of **CHARITY** and CPL. **MUTHIANI,** that of **MUZAHIM** could not be disregarded. If the accused was arrested on 18th March 1994 and held for some days as **MUZAHIM** stated then the prosecution needed to adduce evidence to show when the accused was released if at all.

I must state that **MUZAHIM** was the first witness and his admission concerning the accused's arrest and detention came at the beginning of this case. The significance of that evidence is that the prosecution had the opportunity but did not take the liberty to adduce evidence to show when he was released. The records of the arrest of persons are kept by officer commanding station where such persons were detained. These records were squarely within the access and the control of the police. I have no doubt that the prosecution could access them if called for considering the prosecutor's great diligence and thoroughness in searching for and in adducing evidence particularly that which was perceived to assist or further the prosecution case. The failure to have the records of the accused arrest on 18th March 1994 and those pertaining to his release is quite suggestive. I find that the only inference I can make of this failure to adduce evidence surrounding the arrest of the accused on 18th March 1994 and of his subsequent release must be that such evidence would have adversely affected the prosecution case. Even if no such inference is made, I do find that **MUZAHIM's** admission that the accused was arrested on 18th March 1994 as reported in the said newspaper publication creates a serious doubt whether the accused had the opportunity to commit this offence. I find further that the lapses in the prosecution case between the time testified to by **DANIEL** on the one hand and that testified to by **CPL. MUTHIANI** and **CHARITY** including the OB entries P. exh. 30(a) and the evidence of **MUZAHIM** on the other all create a reasonable doubt on the chain of evidence brought by the prosecution case and the possibility that the accused could be regarded to have had an opportunity to commit this offence. In conclusion on this point, having tested the evidence of **DANIEL** as against that of **MUZAHIM**, **CPL. MUTHIANI, CHARITY** and the police records, I am not satisfied that the prosecution proved opportunity against the accused.

I now turn to the next issue which is the place of death. Despite hearing what he thought was a gun shot **DANIEL** did not know that the deceased had died until the next day. He claimed that one **HITESH PATTNI** informed him of the death on the morning of 25th March 1994. **DANIEL** did not know where the deceased was when he died and he did not make any suggestions.

CPL. MUTHIANI was the only witness called who saw the body of the deceased on 24th March 1994. He saw it outside Tigoni Police Station in a sitting position inside a car. Apart from what **VERONICA** told him that the deceased had died either in his house or Nazareth Hospital where doctors declared him dead. **CPL. MUTHIANI** had no personal knowledge of where the death occurred. Having assessed the evidence adduced before me, I believe the correct position would be to find that the deceased died between his house and Nazareth Hospital. As for the time of death, this can only be deduced from the information given to **CHARITY** and **CPL. MUTHIANI**, his observations on the fateful day and the police records. **VERONICA** told **CPL MUTHIANI** that she went home at 7.30 p.m. to find her husband on the floor of their bedroom. **VERONICA** had told her sister **CHARITY** that she had been with the deceased that evening before she left for a party. **CHARITY** did not tell the court what time, if any**,** **VERONICA** had said she left the deceased at hone. From their evidence, it is quite clear that the time **DANIEL** alleges he last saw the deceased alive being mid-day does not fit the time **VERONICA** told **CHARITY** that she last saw him alive. If what **VERONICA** told **CHARITY** was true then the deceased was still alive on the evening of 24th. It is trite law that the benefit of doubt should always be given to the accused. Even though the time of death is not precisely ascertainable but there is strong evidence to suggest it occurred in the evening of 24th March 1994. It is however, definite that the deceased was found dead by **VERONICA** around 7.30 p.m. same evening.

The next issue to determine is the **CAUSE OF DEATH**. From the Police narrations and briefings by both DPP and the Police and which the prosecution seemed to rub in when opportunity presented itself,

there were at least seven theories of the cause of death. These were

1. Assault and

2. Murder

Both are contained in the P23A form given by **MUTIE** to **PROF. GATEI**. It was Appendix II of **PROF. GAT**EI's report. P. exh. 21.

3. Natural causes

This is contained in P23A form given to **DR. OLUMBE** by **CPL. MUTHIANI**. It is P. exh. 1.

4. Gunshot and

5. penetrating wound

These were introduced in the evidence of **DANIEL (**PW12)

6. Passing sharp object through the ears.

7. Poisoning

These were contained in briefings given to **PROF. GATEI** by **MR. MUTIE** and the **DPP**.

The first point I wish to discuss here is the importance of medical evidence as to the cause of death. Both **MR. NGATIA** and **MR. MURGOR** relied heavily on excerpts from **SARKAR'S LAW OF EVIDENCE** 15th Edition Vol. I, Medical opinion and its value. I will draw on some of the excerpts relied on by both counsels and examine whether they find any support in our law. The opening remarks under the title ***Medical opinion and its value*** seems to me to be a fair comment as to when medical opinion may be admitted in evidence and its value.It reads thus;

"***The opinion of physicians and surgeons may be admitted to show the physical condition of a person, the nature of a disease, whether temporary or permanent the effect of the disease or of physical injuries upon the mind or body as well as in what manner or by what kind of instruments they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death."***

There are two categories of reports on the cause or likely cause death adduced in this case. The two sets were made 10 years apart. The first category is the one by **DR. OLUMBE** which was made by him in March 1994 a day or two after the deceased died and after carrying out a post mortem examination on the body of the deceased. The second category is by **PROF. GATEI** and **DR. ROGENA** made by them 10 years 7 months after the death of the deceased. Both pathologists were in agreement in their reports that they examined skeletonized remains without any tissue or cartilages and that the lack of any tissue did not surprise them due to the length of time the body had been in the grave.

I will deal with the one by **DR. OLUMBE** first. **MR. MURGOR** for the prosecution has urged this court to reject the report on the basis that it was inadequate as no samples were taken for analysis and further that;

1. It was produced in evidence as a document received by **MR. MUTIE** in the course of his investigations.

2. **DR. ROGENA** declared that it was a draft and that the fair copy was never found.

3. There were irreconcilable errors on it as to date of postmortem and that considering the evidence of

CPL. MUTHIANI, the post mortem could not have been conducted on 24th March 1994 as reflected on page two of the report.

4. It has various omissions for example lack of a reference number and address of the police station lack of an address for the pathologist and lack of the name and designation of the person who did the postmortem.

MR. NGATIA on his part submitted that the incision marks on the skull and the other remains were evidence that postmortem had been carried out. He also submitted that the argument that the postmortem could not have been done on the basis of arithmetic's could not be sustained.

In **SARKAR ON LAW OF EVIDENCE** (Supra) quoting from **TANVIBEN PAKAJIKUMAR DIVETIA vs. STATE OF GUJARATA 1995 SC 2196; 1997 Criminal Law Journal 2535, 2551** it was suggested

"***The doctor who had held the postmortem examination had occasion to see the injuries of the deceased quite closely and in absence of any convincing evidence that he had deliberately given a wrong report his evidence is not liable to be discarded."***

In **REPUBLIC vs. LANFEAR 1968 1 ALL ER 683** at Page 685 **DIPLOCK, L. J**. gave the correct English position in regard to the doctors evidence thus;

"… ***Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the court."***

The above case did not elaborate on the statement to show when a doctor's evidence can cease to be treated as that of a professional man giving independent expert evidence. I did come across a more recent British authority which seems to lay down principles to be applied by the court to determine the value to be placed on such evidence. **TURNER {1975} QB 834** at page 840;

"***Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or had omitted to consider relevant facts, the opinion is likely to be valueless."***

It would seem then that the position in England seems to be that the facts upon which doctor's opinion is based must be disclosed and proved in evidence. Failure to prove them in evidence would render such an opinion of minimal or no value.

In Kenya the position is quite clear and established, in **DHALAY vs. REPUBLIC {1997} KLR 514** the Court of Appeal held: -

"***It is now trite law that while the courts must give proper respect to the opinion of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so."***

The acid test set out in this case is that an expert's opinion can only be rejected if there is proper and cogent basis for rejecting it. The principle was fortified in an earlier case **NDOLO vs. NDOLO {1995} KLR 390**. The Court of Appeal held;

"***The evidence of PW1 and the report of MUNGA were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held, the evidence of experts must be considered along with all other available evidence and it is the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision… of course where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion***

is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected."

Applying this principle, the facts that were available to **DR. OLUMBE** are contained in the police narration on the face of his report P. exh. 1. **CPL. MUTHIANI** testified that he wrote the said facts containing circumstances surrounding the death of the deceased as given to him by **VERONICA.** The same facts were contained in OB reports produced as P. exh. 30(a). All these facts were recorded in March 1994 between the dates of 24th and 26th. **VERONICA** was not called to testify as to the correctness of the statement of facts as recorded by **CPL. MUTHIANI**.

Both **DR. WASIKE** and **DR. ROGENA** upon going through **DR. OLUMBE's** report stated that the findings recorded by **DR. OLUMBE** were in agreement with his conclusion as to the cause of death and also in agreement with the brief narration of the circumstances surrounding the death given by the police on the face of the same report. **DR. ROGENA** in particular did not find the report inadequate for lack of taking samples for analysis. She said that facilities in Kenya were inadequate to allow for the taking of samples for further tests or analysis and that non were taken unless it was really necessary. **DR. ROGENA** also said that going by the narration by the police no samples were needed. In that practical basis, **PROF. GATEI's** suggestion that lungs and heart should have been kept for further tests was more academic than realistic.

Having evaluated the evidence available before me and applying the relevant test, I see no proper or cogent basis to reject P. exh. I as suggested by **MR. MURGOR**.

In **NDUNGU vs. REPUBLIC 1985 KLR 487** the Court of Appeal in considering same issues held as follows at page 493: -

"***Where a postmortem examination is performed and a report is prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution. Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution."***

From the above decision the doctors report, even where he is not called as a witness, like in this case, as long as it is signed and kept in safe custody, cannot be discarded. The judges of appeal held that another opinion could be sought to give general evidence as an expert on the basis of the absentee doctor's report. That position is binding to this court and it is therefore quite clear that despite not calling **DR. OLUMBE**, his report cannot be discarded merely for his absence. The errors as to dates and omissions found in it do not in my view affect the core and substance of this report. In the same **Ndungu's case** (Supra) the Court of Appeal commented on the postmortem form thus;

"***Clearly a committal document which is undated and which does not bear the name and signature of the medical officer who performed the postmortem examination is not a copy and ought not to have been accepted as a committal document."***

I have stated elsewhere that the provisions of **Part VIII** of **Criminal Procedure Code** where committal documents were provided for have since been deleted. However, the importance of the above statement is to show that a postmortem form cannot be disregarded if it bears either the name or signature of the officer who performed the postmortem. P. exh. 1 bears **DR. OLUMBE's** signature which **DR. WASIKE** identified for the court as that of his former colleague.

MR. NGATIA also commented on the basis of admitting P. exh. I. It is true that it was not admitted in evidence on the basis of documents collected by **MR. MUTIE** in the course of investigations. It was admitted under **Section 77(1**) of the **Evidence Act Cap 80** which provides thus;

"***77 (1) in criminal procedures document purporting to be a report under the hand of a Government Analyst, medical practitioner or of any ballistic expert, document examiner or geologist***

upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."

CPL. MUTHIANI told the court that he identified the body of the deceased to **DR. OLUMBE** for a postmortem examination on the 26th March 1994 at Lee Funeral Home and that he had no reason to believe that the same was not done. P. exh. I **DR. OLUMBE's** report was therefore, admissible in evidence under the above section on that basis. **DR. OLUMBE** examined the deceased and noted the injuries on his body when they were still fresh before decomposition set in. He had the occasion to see the injuries on the deceased quite closely and gave an opinion as to the cause of death. There is no evidence to suggest he deliberately gave a wrong report or at all.

Applying the above tests therefore, I find no legal or other basis to reject **DR. OLUMBE's** report as contained in P. exh. I or to disregard it.

I will now consider the second category of reports. **MR. MURGOR** urged the court to determine which of the two reports it should **accept on the results of the findings on the repeat autopsies. MR. MURGOR** suggested that the court could determine which report between the two to accept on the basis of determining which was more thorough, more scientific and supported by more materials. He suggested that **PROF. GAT**EI's report passed this test for the added reason it was conclusive as opposed to that of **DR. ROGENA** which did not determine the cause of death. And further unlike **DR. ROGENA, MR. MURGOR** submitted that **PROF. GATEI** considered **DR. OLUMBE's** report and the Radiologist Report (P. exh. 28) and also submitted references which he felt were useful. **MR. MURGOR** also submitted that **DANIEL**'s evidence supported **PROF. GATEI**'s manual strangulation theory as the likely cause of death.

While agreeing that the court was entitled to accept or reject either medical report, **MR. NGATIA** did not agree that **PROF. GATEI**'s findings corroborated **DANIEL**'s evidence. **MR. NGATIA** did not agree that **DANIEL**'s evidence suggested any strangulation theory or bitter exchange of words. He cautioned the court against reliance on words allegedly heard by **DANIEL** at accused home on 24th March 1994 for reason that **DANIEL** admitted that the words were not recorded in his statement to the police, or anywhere else.

In the summary of the prosecution case hereinabove, I have set down **PROF. GATEI's** findings and the basis of same. Having evaluated entire evidence adduced before me including that of other doctors whose evidence has also been summarized I find as follows in relation to **PROF. GATEI's** findings: -

1. That **PROF. GATEI** ceased playing his role as an independent expert witness and became an investigator. An illustration of this is demonstrated in evidence for example he held more conference briefing sessions with **MR. MUTIE** and **MR. MURGOR** than attended by **DR. ROGENA** whom he was to work closely and jointly with. Those briefings were held before the repeat autopsy and soon thereafter and mostly at a time when **DR. ROGENA** was within Kenya and available.

Another example is where he acted beyond what had been agreed between him and **DR. ROGENA** to investigate soils taken from the grave and the remains at K.B.S. on 16th November 2004.

2. Whereas as a part of the process of forming an opinion, **PROF. GATEI** was entitled to refer to research, tests, works of authority, learned articles, research papers and other similar material written by others and forming part of the general body of knowledge falling within his field of expertise; and whereas he referred extensively to such material in his evidence he did not produce any report or material in the expertise field under consideration that could or which supported his conclusion. The conclusion under reference is titled "**COMMENT**" and is 3.1 of his report P. exh. 21 page 8 of 9. It reads thus;

"***Loss of greater horn commonly follows significant or considerable trauma injury or force that has been applied on the neck. Fracture of the hyoid bone attended by medial angulation is well-recognized indictor of strangulation, particularly manual direct lateral compression. The fracture has been frequently reported in ligature strangulation and hanging."***

In addition to lack of reference material to support **PROF. GATEI's** comments, **DR. ROGENA**, did not find it factually *correct for the Professor to use "follows significant", "fracture" "attended by medial angulation"* as well recognized indictor of *strangulation*" and "*manual direct lateral compression*". Further **DR. ROGENA, DR. WAMBUGU** and **DR. KIGO** did not agree that there was conclusive evidence that the hyoid bone had been fractured at the right greater horn. All three doctors agreed that they were not in a position to say that there was any fracture of the right horn of the hyoid bone. In fact **DR. KIGO** and **DR. WAMBUGU's** report on the missing right greater horn was that there was a clean margin on the remaining bone which they say negated a fracture. **DR. ROGENA** on her part said that looking at the left greater horn there was evidence of weathering and that may have caused the loss of the right greater horn.

3. **PROF. GATEI's** findings did not correlate with the prosecution case. I do not blame him for that since the prosecution has advanced seven theories as to the cause of death. The significant part of **PROF. GATEI's** report is that it did not confirm any of the theories advanced to him in the many briefings he had with the investigators. More significantly, his conclusion as to the likely cause of death was not supported by any evidence adduced by the prosecution.

4. The most critical finding on **PROF. GATEI's** report is the fact that it did not provide any conclusive answer to the cause of death.

DR. ROGENA's report was equally as lengthy if not longer than **PROF. GATEI's**. The important aspects of it is that she supported her conclusion with reference to ***Knight's*** book on ***Forensic Pathology*** Appendix V of her report and emphasized that lack of circumstantial evidence to support homicide was significant to her finding. There was lack of any circumstantial evidence to suggest homicide going by initial findings of **DR. OLUMBE** which remain unchallenged and the facts surrounding the death as given by the police. Further it was **DR. ROGENA**;s evidence that the missing greater horn of the right of the hyoid bone was not significant because, in addition to above reasons: -

1. The exhumation report was never given to her. She suggested how the exhumation process should be carried out culminating in the exposure of the entire skeletal remains at the grave *in situ* and photography at every stage including the removal of all debri and clothing material before the remains are retrieved.

2. She also suggested that the hyoid bones did not preserve well. That it was possible the horn was affected by weathering. Alternatively due to its small size, it could have been lying at the grave or in the soils scooped out of the grave due to the wrong exhumation procedure. She supported the preposition that the hyoid bones do not preserve well with a doctor's evidence in the proceedings of the **International Criminal tribunal for the former Yugoslavia page 27x28 of 108 Appendix IV** of her report. The preposition is not binding to this Court.

DR. ROGENA also said that she suggested use of various sizes of sieves to be used on the soils in and around the grave for purposes of recovering any other bones but same was ignored. **MR. MUTIE** admitted that such a suggestion had been made.

3. **DR. ROGENA** stated that the hyoid bone could equally be damaged or destroyed during postmortem especially if the routine autopsy was the one carried out in this case. She said that it was impossible to tell the kind of autopsy **DR. OLUMBE** carried out and its effect on the hyoid bone.

While still dealing with the hyoid bone, it is prudent to mention that after evaluating the evidence on record in this case, I find no reason to hold, as suggested by **MR. NGATIA**, that the hyoid bone in this case P. Exh. 24 did not belong to the deceased remains. I must also point out that after evaluating the evidence on record and upon the recovery of some bones at the grave of the deceased on 13th October 2004, five months after the remains had been exhumed, I find that the exhumation process undertaken in the case was faulty. **PROF. GATEI** stated that the presence of a pathologist during the exhumation was enough. Having recovered some more remains later, it is quite clear that the team that carried out the exhumation did a crude job of it, using very crude weapons and unqualified personnel. It is no wonder

the clumsy removal and subsequent handling of these remains as evidenced by the attendant difficulties encountered subsequent to the exhumation.

Bearing all this factors in mind and the long period of time it took before the repeat autopsy, I find that the second category of autopsy report were of little assistance to the Court in its quest of determining the cause of death of the deceased. Applying the test of the correlativeness of the two doctor's opinions to the evidence adduced by prosecution (**Ndungu's case Supra**) I find both opinions of little value to the prosecution case.

I now come to the issues I found most unsettling and disturbing in this case. I will outline all of them thus;

(A) What are the powers of the Attorney General under Section 26 of the Constitution in relation to ;

1. Prosecution of cases. Also under these, what are the functions of a prosecutor?

2. Investigations of cases

(B) Who is a complainant?

(C) When is a suspect a suspect

(D) Adjournments and calling of witnesses.

Section 26 (3) and (4) of the Constitution provides

"***26(3) the AG shall have power in any case in which he considers it desirable so to do: -***

a. to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;

(4) the powers under subsection 3(a) can be executed by the A-G in person or by officers subordinate to him acting in accordance with his general or specific instructions''

MR. NGATIA has in this case questioned the role played by the A-G and officers working under him. He urged the court to find that that office was involved in the work that only the police could carry out especially in investigations. **MR. MURGOR** on his part could not agree with those submissions. He submitted that under **Section 26(4)** of Constitution the A-G could give instructions to the Commissioner of Police and officers under him.

The foregoing provision (Section 26 of the Constitution) underscores the fact that it is the state through the A-G which is bestowed with the power of controlling criminal prosecutions. That means that the A-G has a special Constitutional role in the conduct of prosecutions and he is under duty, as he exercises this power to take into account and to safeguard the public interest. The rationalization of the conduct of prosecutions is accomplished in the following passage from the article by **SIR ELWYN JONES {1969} CLJ at** page 49;

"***The decision when to prosecute as you may imagine, is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is thought desirable to prosecute. Sometimes there are reasons of public policy which make it undesirable to prosecute this case. Perhaps the prosecution would enable him to present himself as a martyr. Or perhaps he is too ill to stand his trial without great risk to his health or even to his life. All these factor enter into the consideration."***

The position in Kenya is the same. The A-G no doubt is the custodian of the Constitutional and legal authority for the conduct of criminal prosecution. That however, does not give him or officers under him power to be involved, whether intricately or casually in my view, with the exercise of roles which only the police can or should perform.

Section 24(4) of Constitution provides;

*"**The A-G may require the Commissioner of Police to investigate any matter which, in the AG's opinion relates to any offence or alleged offence or suspected offence and the Commissioner shall comply with that requirement and shall report to the AG upon the investigation."*** (Emphases are mine)

The foregoing provision underscores the extent of the AG's powers in regard to investigations of criminal cases. Whereas the AG or his officers may require the Commissioner of Police to investigate, they cannot following the instructions be involved in the same. The provision is clear and in my view expressly provides that following the instructions to investigate, the AG should then wait to receive a report from the Commissioner of the outcome of the same. In this case, the AG and his officers did not only give instructions but were themselves directly, and as **MR. NGATIA** suggested, intricately involved in them. Let me demonstrate this: -

- **OSUGO's** evidence was that **MR. MURGOR** summoned him to his office on the 13th November 2003 and following a briefing with him, he (**OSUGO**) proceeded to arrest the accused person.

- **PROF. GATEI** was not one of the doctors that the **DMS DR. NYIKAL** had given in a list of Government Pathologists. Yet his name was eventually chosen among those who were to assist in the investigations of the case by conducting a repeat autopsy due to the direct intervention of **MR. MURGOR**. The letter appointing him was signed by **MR. MURGOR**.

- Almost all the statements taken from witnesses in this case were recorded in the office of **MR. MURGOR** and under his supervision.

- **MR. MURGOR** wrote several letters giving instructions pertaining to the exhumation of the deceased remains in June 2004 and others pertaining to investigations generally in 2004.

There are many other actions taken and decisions made directly by **MR. MURGOR** and other state counsels which demonstrates that after the instructions to investigate this case given at some undisclosed time but testified to by **MR. MUTIE**, the AG and his officers did not wait for the results of the investigations but got involved in same performing roles which were the preserve of the police. I do find that the AG and particularly **MR. MURGOR** exceeded the powers given to that office under **Section 26** of the Constitution. It was wrong to do so. He ought to have waited for his instructions to be complied with and a report given to him showing the fruits of the investigations.

This brings me to the issue of the complainant. I agree that there is nothing in this case to show who made the report that culminated in the arrest of the accused and investigations into this case. However, under **Section 2** of the Criminal Procedure Code, a Complainant is defined as: -

*"**Complainant" means a person who lodges a complaint with the police or any other lawful authority."***

In **REPUBLIC vs. MWAURA IKEGE 1979 KLR 209**, the High Court held that a Complainant included a public prosecutor. In **RUHI vs. REPUBLIC 1985 KLR 373** at Page 379 the High Court held;

*"**We must state at the outset that we are satisfied that the term "Complainant" in section 208(1) of Criminal Procedure Code includes the prosecution as well as the person so described in the particulars of the charge. It is clear from section 26(3) (a) and (b) of the Constitution that the state through the AG is or can become the Complainant in every criminal proceeding."***

I am persuaded by that holding in the above case. **MR. MURGOR** submitted that the Complaint was the one lodged by **VERONICA** at Tigoni Police Station in the "*Sudden Death Report"*. I agree with **MR. NGATIA** that **VERONICA**'s report on the night of 24th March 1994 cannot be considered as a Complaint since **CPL. MUTHIANI**, who made it, understood **VERONICA** to say that her husband had died at home after a short illness of 3 days. I find that it is not clear what prompted the investigations into this case and the arrest of the accused. I will get back to this later.

The next issue which begs some consideration is when is a suspect a suspect? **Section 72(3) (b)** of Constitution provides;

"***A person who is arrested or detained (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence…"***

The key words used here is "**reasonable suspicion".** A person becomes a suspect in relation to the commission of a crime only where there exists a clear and genuine cause for suspicion. Such genuine cause will emerge where a complaint has been raised by an aggrieved person or persons; or alternatively, where there exist openly suspicious circumstances calling for investigation by the relevant authority. In either case where genuine cause is sought for, the passage of a long time, such as many years, without any complaint raised, or any openly suspicious circumstances emerging, will negate the possibility that anyone is a suspect. In such circumstances a heavy burden lies on anyone who avows that there exists a suspect. In such circumstances, the police, whether acting on their own or under instructions, would have no reason or business to arrest anyone. There must be reasonable suspicion that a person has committed (in our context) an offence before he is arrested. In this case, reasonable suspicion was not demonstrated. Let me illustrate this;

a. By 13th November 2003 when the accused was arrested, none of the key witnesses had given their statements. **MUZAHIM** gave his first statement in December 2003 and so did **KALAIYA**. On the other hand **DANIEL** made his first statement in March 2004.

b. By 13th November 2003 no investigations into the case had been carried out.

When challenged over the evidence in the possession of the Police by the time the accused was arrested. **MR. MUTIE** stated that the only statement they had was of **VERONICA's** mother **BEATRICE** and which was made on 24th November 2003 four days before the charge against the accused was filed in court. That statement contains no evidence pointing to the accused and neither does it raise any suspicions concerning the death of the deceased. As far as the arrest is concerned, the prosecution has failed to demonstrate that it was based on any reasonable suspicion that the accused had murdered the deceased.

As of 28th November 2003, when the charge against the accused was filed in court therefore, the prosecution had no police file and therefore no demonstrable evidence or reason to suspect the accused or against the accused. This is demonstrated by the following: -

a. On 28th November 2003 the charge against the accused is filed in court.

b. On 13th December 2003, the first statement by **MUZAHIM** is recorded.

c. On 14th December 2003, the first statement by **KALAIYA** is recorded.

d. On 21st March 2004 search of accused offices and home carried out after an application in court.

e. In March 2004, first statement from **DANIEL** is recorded.

f. On 16th June 2004 after an application in court an exhumation order is made.

g. On 16th June 2004, the deceased remains are exhumed. No exhumation report is filed to-date.

h. Between 13th and 28th October 2004 examinations of the remains are carried out by a team including **PROF. GATEI, DR. ROGENA** and **DR. GACHIE**.

i. On 13th October 2004 X-ray of remains taken by **DR. KIGO**

j. On 4th November 2004 radiologists led by **DR. WAMBUGU** and in presence of **PROF. GATEI** carry out reading of the X-rays and made report.

k. On 20th November 2004 final Report by **PROF. GATEI**.

l. On 17th January 2005 -Report by **DR. ROGENA** made.

From the above chronology, which is not exhaustive, it is very clear that the accused was arrested before investigations were ever commenced. The more glaring being the examination of the remains of the deceased one year after the arrest of the accused!

It is my view that the accused arrest was an abuse of power and of the due process. I would even go further to hold that charging the accused in court and subsequently using the court to obtain orders to facilitate various kinds of investigations (e.g. exhumation, searches and examination of remains by pathologists) was an abuse of the process of court. A court cannot keep an accused in custody indefinitely on speculative reasons. Holding of an accused in custody pending investigations in the manner that happened in this case is not proper and has no place in our criminal jurisprudence.

In **Metropolitan Bank Ltd. vs. Pooley {1885} 10 Appeal cases, 210** at page 220, 221 **Lord Blackburn** said: -

"***But from early times… the court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing - the court had the right to protect itself against such an abuse."***

Lord Selbourn said at page 214.

"***The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure."***

In **Mills vs. Cooper {1967} All ER 100** at page 104 **Lord Parker CJ** said:

"***Every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court***."

I do not intend to say that the High Court trying a murder case can decline to hear the case on grounds that it is oppressive and an abuse of the process of court. But I am suggesting that it has power to decline to have its power abused the moment it becomes apparent that the prosecution had arrested the accused without any grounds and intended to use the court process to assist them in their investigations. I am also suggesting that such exercise of power by the prosecution can be brought to question, in an appropriate manner, and the Court would have jurisdiction to determine a question arising from such exercise of power. (See Section 123 of the Constitution).

That brings me to the other question, should there be a time limit within which criminal prosecution may commence. **JUSTICE DELAYED IS JUSTICE DENIED** – or as recently stated – **IS JUSTICE MASACRED** or **BURIED**. Even though our law has no legal prescription of what constitutes delay in murder cases, it is my view that time is now ripe for a limitation to be introduced in our law. Even though there is no time limit, the AG should not offend **Section 77** and **84** of the Constitution. This was

the Court's view in the case of **GITHUNGURI vs. REPUBLIC 1985 KLR 91** where **SIMPSON CJ, SACHDEVA and MBAYA JJ** held;

"***The preferment of a charge against any person nine years after the alleged commission of the offence, six years after a full inquiry in respect of it and five years after the decision of the office of the AG not to prosecute and to close the file is vexatious, harassing an abuse of the process of the court and contrary to public policy unless a good and valid reason exists for doing so, such as the discovery of important and credible evidence or the return from abroad of the person concerned."***

MR. MUTIE, the Investigating Officer of this case declared that an inquest file No. 5/1994 was opened as per OB entries. P. exh. 30(a). He said that he was unable to get the file or to know what happened in regard to investigations. The fact remains that an inquest file was opened to investigate into the deceased death in 1994.The cause of death as per P. Exh. I, which was the only record then, was natural causes. It is not surprising then that no charges could have been preferred since there was absolutely no reasonable cause to do so.

On 13th November 2003, 9 years 8 months after the deceased was buried and matter closed the AG through the police decided to re-open the investigations. I have already stated that no reasonable cause was demonstrated for that decision. I can also state with certainty that after hearing the evidence adduced in support of the charge, I see no demonstration of any discovery of important and credible evidence that could have justified this prosecution. No one alleged that the accused ever left the country so the second option is not relevant to this case.

In **GITHUNGURI vs. REPUBLIC 1986 KLR 1** at page 21, **MADAN Ag CJ, AGANYANYA** and **GICHERU JJ**.

"***We are of the opinion that to charge the applicant four years after it was decided by the AG of the day not to prosecute and thereafter also by neither of the two successors in office, if not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by Section 77(1). The delay is inordinate as to make the non-action for four years in excusable in particular because this was not a case for no significance."***

Even though the Constitutional bench in the cited case was dealing with the prosecution of the applicant in charges under the Exchange Control Act, the principle underlying in that case is applicable here.

I am suggesting that once the AG decides not to pursue a matter his right to change his mind may be lost where there has been inordinate delay. I am convinced that 9 years and 8 months of inertia is inordinate and inexcusable delay.

I do find that there was no evidence to show that any fresh evidence had become available since 1994 and therefore, the court has not been told why the AG had to cause the turning up of the soil and unearthing of the deceased remains and why there was need to subject the deceased remains, which were peacefully lying in their grave to a second autopsy. Not to mention the need to arrest and charge the accused with his death.

I also wish to state that the accused arrest was not proper. Every member of the Kenyan society is entitled to an orderly and tranquil life and not to be subjected to vicissitudes of the law especially where no reasonable cause has been demonstrated.

I now come to the issue of the **Role** or **Function** of a **Prosecutor**. **MR. MURGOR** was the leading prosecutor in this case. I have already shown how the evidence adduced before court demonstrated that he actively and intricately got involved with the investigations into this case.

MR. NGATIA brought references that demonstrated the American and English position on this

issue. Luckily our law is well developed and the role or function of prosecutors quite discernable.

In **ELIREMA & ANOTHER vs. REPUBLIC Mom. CA No. 67** of 2002 quoting from **UGANDA VS. MILENGE AND ANOTHER** at page 9 it was stated;

"***It is essential to consider the powers of a public prosecutor such as the state Attorney in this case. The first elementary principle is that he is the person who decides what witnesses to call and that he, at any rate, at the trial, has complete control of the prosecution in court. He can at any stage of the prosecution close his case and call no further evidence and it is from this power that the practice has arisen for a prosecutor who does not offer during the course of the trial 'no evidence, or 'no further evidence'.."***

In **High Court Misc. Criminal Application No. 345 of 2001, JUMA & OTHERS vs. AG**, **Msagha** and **Kuloba JJ** at page 18 held (unreported)

"***Always remember that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the court what the state considers to be credible evidence relevant to what is alleged to be a crime. The prosecutor has a duty to see that all available legal proof of the fact is presented; and this should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing. His function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings."***

These two cases speak for themselves. I would only comment that **MR. MURGOR**, having been involved in the investigations into this case, ought to have left the prosecution to be carried out by some other officer. It is my belief that any notion of fairness, justice and objectivity could not be supported justifiably on his part. I will end this part by quoting from **ARCHBOLD's Criminal Proceedings 2002** page 324 paragraph 33 – 11.1;

"***Prosecuting counsel should not attempt to obtain a conviction by all means at his command. He should not regard himself as appearing for any party. He should lay before the court fairly and impartially the whole of the facts which comprise the case for the prosecution and should assist the court on all matters of law applicable to the case."***

I wish to mention in passing the issue of witnesses, adjournments and the court's role to call witnesses. **MARY OKOSE, JOSEPH, (Veronica's** workers**) VERONICA, ANTHONY KURIA, SUSAN TOO** and **DR. KIRASI OLUMBE** were important witnesses to call. Initially **MR. MUTIE** said he saw no need to call **MARY OKOSE, JOSEPH, VERONICA, ANTHONY KURIA** and **SUSAN TOO**. In re-examination, he claimed he had been unable to trace them. He did not demonstrate the efforts he had made to get them. The prosecutor blamed the court for failure to call them on account of failing to grant adjournments sought. It is trite law that the court is entitled to draw an adverse inference that the evidence of witnesses not called as witnesses, if adduced would have been or would have tended to be adverse to the prosecution case. See **RITHO & ANOTHER vs. REPUBLIC CA No. 99 of 1986**, **REPUBLIC vs. UBERELE {1938} KLR 413.** In **BUKENYA & OTHER vs. REPUBLIC 1972 EA 549** such inference can only be made if the evidence adduced by the prosecution, as in this case, is hardly sufficient to sustain a conviction.

Even though the court has the power to call and examine witnesses that power can only be exercised if the court is of the opinion that some persons ought to be called who can throw material light on the subject. The court has the right to exercise its discretion in the matter. See **KULUKANA OTIM vs. REPUBLIC 1963 EA 253, MANYAKI NYAGANYA vs. REPUBLIC 1958 EA 495**. In the **NYAGANYA case**, **GOULD JA** was of the view that this discretionary power should be sparingly exercised and should not be used merely to **bolster** up the prosecution. No statements were taken from **MARY OKOSE, JOSEPH, VERONICA, ANTHONY KURIA, DR. KIRASI OLUMBE** and **SUSAN TOO and** therefore the Court had no means of telling whether they had evidence that would be material.

I could only assume. **MR. MUTIE** took a statement under inquiry from **DR. OLUMBE** on grounds he was a suspect. On that ground, due to the amendment of the Evidence Act, his statement was not admissible in evidence. Even if I was to form an opinion that any of these witnesses had material evidence that could assist the Court, **MR. MUTIE** categorically informed the Court that he did not have the contacts of any of the witnesses except **DR. OLUMBE.** For **DR. OLUMBE**, he was not sure whether the contact he had was correct. The court cannot act in vain and so I could not send out summons without any forwarding address.

On adjournments, I will quote from **NGUI vs. REPUBLIC 1985 KLR 268** at **page 40 SIMPSON CJ, COCKAR** and **MBAYA** JJ held;

"***We feel strongly however, that in all such cases lengthy adjournments should be avoided and that the trial should continue from day to day until completed. Undue consideration should not be given to the convenience of advocates when the accused is facing a possible death penalty."***

The issue of whether or not to adjourn the case is a matter for the court to decide. It should be exercised fairly, judicially and bearing all issues in mind including the effect of delay on the accused. Once adjournment is rejected, the Court cannot be blamed for the consequences on the case as long as the courts decision is judicious. I believe that the various adjournments I declined to grant were justified in the circumstances of this case.

Having considered all the matters before me, and for the aforementioned grounds I find that there is no case to justify the accused person to be placed on his defense. The prosecution case was based on theories it was unable to support or prove. It left the prosecution case with more questions begging for answers than the answers it set itself out to offer. I enter a finding of not guilty and acquit the accused accordingly. The accused should be set at liberty unless otherwise lawfully held.

Dated at Nairobi this 10th day of March 2005.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

Accused present

Mr. Murgor for prosecution

Mr. Ngatia for accused

LESIIT

JUDGE