



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 49 of 2002**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SGT. JACOB MUTHEE & 8 OTHERS.....ACCUSED**

**J U D G M E N T.**

The nine accused persons, Sgt. Jacob Muthee Mathiu (A1), Warder Joseph Lenana Rukwaro alias Wakanyungu (A2), Warder Caesar Mwangi Njoka (A3), Samwel Kamau Ngugi (A4), Sergeant Artisan James Mugo Karanja (A5), John Kariuki Njuguna alias Chizi (A6), No. 26560 Chief Officer James Sise Boit (A7), Noor Mohammed Kumo (A8), and Joshua Onyango Nyakundi (A9) are charged jointly with the murder of:-

1. Peter Loyara Lumukunya (deceased in Count 1).
2. James Irungu Ndugo alias Joseph Kamande Mwangi (deceased in Count 2).
3. John Njoro Njuguna (deceased in Count 3).
4. Julius Mungania M'Moraa (deceased in Count 4).
5. Peter Ngarushane Emashe alias Kingori (deceased in Count 5).
6. Peter Koring (deceased in Count 6).

The particulars of the offence are in:-

**COUNT 1:- MURDER CONTRARY TO SECTION 203 AS READ**

**WITH SECTION 204 OF THE PENAL CODE, CAP 63**

**LAWS OF KENYA.**

1. SGT. JACOB MUTHEE MATHIU.
2. WARDER JOSEPH LENANA RUKWARO **alias** WAKANYUNGU.
3. WARDER CEASAR MWANGI NJOKA.
4. SGT. SAMWEL KAMAU NGUGI.

5. SGT. JAMES MUGO KARANJA.
6. WARDER JOHN KARIUKI NJUGUNA **alias** CHIZI
7. C.O. JAMES SISE BOIT.
8. WARDER NOOR MOHAMMED KUMO.
9. WARDER JOSHUA ONYANGO NYAKUNDI **alias** MWALIMU.

On the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000, at the Nyeri Prison, otherwise known as “KING’ONG’O, in Nyeri District within Central Province, jointly, murdered **PETER LOYARA LUMUKUNYA**.

**COUNT II:-** MURDER CONTRARY TO SECTION 203 AS READ

WITH SECTION 204 OF THE PENAL CODE, CAP 63 LAWS OF KENYA.

1. SGT. JACOB MUTHEE MATHIU.
2. WARDER JOSEPH LENANA RUKWARO **ALIAS** WAKANYUNGU.
3. WARDER CEASAR MWANGI NJOKA.
4. SGT. SAMWEL KAMAU NGUGI.
5. SGT. JAMES MUGO KARANJA.
6. WARDER JOHN KARIUKI NJUGUNA **alias** CHIZI
7. C.O. JAMES SISE BOIT.
8. WARDER NOOR MOHAMMED KUMO.
9. WARDER JOSHUA ONYANGO NYAKUNDI **alias** MWALIMU.

On the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000, at the Nyeri Prison, otherwise known as “KING’ONG’O, in Nyeri District within Central Province, jointly, murdered **JAMES IRUNGU NDUGO alias JOSEPH KAMANDE MWANGI**.

**COUNT III:-** MURDER CONTRARY TO SECTION 203 AS

READ WITH SECTION 204 OF THE PENAL

CODE, CAP 63 LAWS OF KENYA.

1. SGT. JACOB MUTHEE MATHIU.
2. WARDER JOSEPH LENANA RUKWARO **alias** WAKANYUNGU.
3. WARDER CEASAR MWANGI NJOKA.
4. SGT. SAMWEL KAMAU NGUGI.
5. SGT. JAMES MUGO KARANJA.
6. WARDER JOHN KARIUKI NJUGUNA **alias** CHIZI
7. C.O. JAMES SISE BOIT.
8. WARDER NOOR MOHAMMED KUMO.

9. WARDER JOSHUA ONYANGO NYAKUNDI **alias** MWALIMU.

On the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000, at the Nyeri Prison, otherwise known as “KING’ONG’O, in Nyeri District within Central Province, jointly murdered **JOHN NJORO NJUGUNA**.

**COUNT IV:-** MURDER CONTRARY TO SECTION 203 AS

READ WITH SECTION 204 OF THE PENAL

CODE, CAP 63 LAWS OF KENYA.

1. SGT. JACOB MUTHEE MATHIU.
2. WARDER JOSEPH LENANA RUKWARO **alias** WAKANYUNGU.
3. WARDER CEASAR MWANGI NJOKA.
4. SGT. SAMWEL KAMAU NGUGI.
5. SGT. JAMES MUGO KARANJA.
6. WARDER JOHN KARIUKI NJUGUNA **alias** CHIZI
7. C.O. JAMES SISE BOIT.
8. WARDER NOOR MOHAMMED KUMO.
9. WARDER JOSHUA ONYANGO NYAKUNDI **alias** MWALIMU.

On the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000, at the Nyeri Prison, otherwise known as “KING’ONG’O, in Nyeri District within Central Province, jointly murdered **JULIUS MUNGANIA M’MORAA**.

**COUNT V:-** MURDER CONTRARY TO SECTION 203 AS

READ WITH SECTION 204 OF THE PENAL CODE, CAP 63 LAWS OF KENYA.

1. SGT. JACOB MUTHEE MATHIU.
2. WARDER JOSEPH LENANA RUKWARO **alias** WAKANYUNGU.
3. WARDER CEASAR MWANGI NJOKA.
4. SGT. SAMWEL KAMAU NGUGI.
5. SGT. JAMES MUGO KARANJA.
6. WARDER JOHN KARIUKI NJUGUNA **alias** CHIZI
7. C.O. JAMES SISE BOIT.
8. WARDER NOOR MOHAMMED KUMO.
9. WARDER JOSHUA ONYANGO NYAKUNDI **alias** MWALIMU.

On the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000, at the Nyeri Prison, otherwise known as “KING’ONG’O, in Nyeri District within Central Province, jointly murdered **PETER NGURUSHANE EMASHE alias KINGORI**.

**COUNT VI:-** MURDER CONTRARY TO SECTION 203 AS

READ WITH SECTION 204 OF THE PENAL CODE,

CAP 63 LAWS OF KENYA.

1. SGT. JACOB MUTHEE MATHIU.
2. WARDER JOSEPH LENANA RUKWARO **alias** WAKANYUNGU.
3. WARDER CEASAR MWANGI NJOKA.
4. SGT. SAMWEL KAMAU NGUGI.
5. SGT. JAMES MUGO KARANJA.
6. WARDER JOHN KARIUKI NJUGUNA **alias** CHIZI
7. C.O. JAMES SISE BOIT.
8. WARDER NOOR MOHAMMED KUMO.
9. WARDER JOSHUA ONYANGO NYAKUNDI **alias** MWALIMU.

On the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000, at the Nyeri Prison, otherwise known as “KING’ONG’O, in Nyeri District within Central Province, jointly murdered **PETER KORING**.

The prosecution called 36 witnesses in support of its case.

#### **BACKGROUND.**

It all started on the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000 by the activating of a siren at Nyeri Main Prison Christened Kingongo.

The siren attracted the attention of a large group of prison officers and warders. Equally attracted were the officers and warders’ relatives in addition to visitors who were present in the prison compound that fateful night. The group was estimated by eye witness account at between 100-300 people.

There are two conflicting versions of evidence which this judgment seeks to unravel.

On the one hand, the prison authorities version (defence) is that eight condemned prisoners housed at cell No. 4 in Block E escaped by cutting the grill on the window of their said cell, using a hack-saw climbed over the roof of the firewood store adjacent thereto, climbed on top of the roof of Tailoring section, onto the kitchen roof and landed at the perimeter wall lined with pieces of glass.

Once at the perimeter wall the said prisoners commenced scaling the 24ft high wall downwards using a makeshift rope made of old prison blankets, prison uniform and nylon, in a bid to escape from lawful custody. In the process six of them fell headward and died. Two escaped. One of the escapees, **Benard Kimani Mwirichia (PW1)**, was arrested the following day. The other escapee, **Godfrey Ipomai**, was at large until later gunned down while reportedly engaged in an attempted robbery at Nanyuki.

On the other hand the prosecution’s version is that the eight prisoners housed at cell No. 4 Block E were led out of their said cell by a group of warders under the command of Sgt. Muthee (A1). Outside the main prison gate, Senior Sergeant Kamau (A4) ordered Sergeant Muthee (A1) to search them. After the search Sgt. Kamau gave safe passage to one of them - Godfrey Ipomai – but ordered his colleagues to “finish” the rest (seven).

By this time, a mob comprising of prison officers, warders, their relatives and visitors in the prison compound had gathered in response to the siren and were armed with all manner of crude weapons. The said mob set upon the seven prisoners culminating into the death of six of them. The seventh one – Benard Kimani Mwirichia (PW1) - bolted. He was however, arrested the following day. The eighth – Godfrey Ipomai – was at large until subsequently gunned down while reportedly engaged in attempted robbery at Nanyuki.

By reason of the two conflicting versions of evidence as aforesaid an inquest was ordered for – Nairobi Principal Magistrate Inquest No. 122/2000. At the end of it all, the Principal Magistrate came to a conclusion that there was foul play – the death of the prisoners were as a result of unlawful acts of the prison authorities under whose care the inmates were entrusted.

Arising from the findings of the inquest the Director of CID Kenya instructed a team of CID officers, under the command of Peter Mwangi (PW33), to re-open the investigations relating to the death of the six prisoners.

The result of the said investigation culminated into a recommendation that eleven prison officers and/or warders be charged with the murder of the said prisoners. However, of the eleven only nine were brought before the court. Reportedly, the two fled and are still at large.

Whatever version one believes, the bottom line is that all the six prisoners died. The issue therefore is this: How die they meet their death? Put in another way; who killed them?

### **THE PROSECUTION'S CASE**

**PW1, Benard Kimani Mwirichia** was a condemned prisoner at Nyeri Main Prison, christened Kingongo, as at 3<sup>rd</sup>-4<sup>th</sup> September, 2000. He had supper at 6.00 p.m. on 3<sup>rd</sup> September, 2000 followed by a head count. About 8.00 a.m. there was a final head count. They were eight (8) prisoners in cell No. 4 at Block E. Two prison warders, Caesar (A2) and Lenana (A2), were guarding the said cell.

It is his evidence that in the wee hours of the said night Sergeant Muthee (A1) in company of Lenana (A2) opened the door of cell no. 4. Sergeant Muthee (A1) instructed the 8 inmates to take their belongings. When they reached gate E (see Exhibit 3 (a) and (b) ) Sergeant Muthee pushed the same open. On reaching the second gate a warder wearing "Marvin-hood" opened the same. Outside the main gate they met four guards, one of whom was Senior Sergeant Kamau (A4) who ordered Sergeant Muthee (A1) to search the eight (8) inmates. This entailed removing all clothes and remaining naked (see Exhibit 1, photo No.5-19). In the process sergeant Kamau (A4) summoned Godfrey Ipomai, one of the eight inmates. The two proceeded to undisclosed place. On coming back Senior Sergeant Kamau, who was now alone, ordered his colleagues to "finish" the rest (seven) of the inmates. Immediately **Julius Mungania M"Moraa**, was assaulted with a club. Then all hell broke loose. He escaped while stark naked through the staff quarters. About 5.00 a.m. he met a watchman at the tarmac road, linking the prison with Nyeri town and Kiganjo, who took him to his residence. The said watchman gave him a trouser and a T-shirt. The watchman asked him what kind of assistance he required. He told the watchman to call for him the police. Eventually CID Officers collected him. At Nyeri police station he wrote a statement. Subsequently, he was taken to Nyeri Chief Magistrate court and charged with the offence of escaping from lawful custody in **Nyeri C.M. Criminal case No. 3630/2000**. In the said proceedings he narrated what transpired that night. He conceded that in the proceedings aforesaid he did not include all the details of the assault on the eight (8) inmates since he was threatened with dire consequences by the prison authorities.

**PW2, Francis Nganga Ndungu**, was remanded at Nyeri Main Prison, christened Kingongo, in May 1999 for the offence of rape and assault and sentenced to serve 7 years. He was released from prison on 19<sup>th</sup> October, 2002 after serving his full sentence.

While at the said prison he was housed at Block A. That is where the inmate cooks stay for the night. On the fateful night the cooks were Fred Kamotho, Duncan Irungu, Muriuki Kirinya and himself. They began cooking during nightfall (3/4<sup>th</sup> September, 2000). About midnight they spread gunny bags to rest.

About 2.00 a.m. he heard screams from the direction of Block E. Spontaneously, he heard whistles and gun-fire. The cooks were under the supervision of warder Waigwa (PW7) that fateful night.

Subsequently, several armed warders walked into the kitchen.

- (i) Warder Noor (A8) was carrying a blood stained axe.
- (ii) Mwalimu Onyango (A9) was carrying a Masai rungu and a Somali sword.
- (iii) John Kariuki Njuguna *alias* Chizi (A6) was carrying a panga and a rungu. His shoes and jacket were blood stained.
- (iv) Chief officer James Sise Boit (A7) had a riot gear, a blood stained rungu and eye protection glasses.

He learnt from the said warders that they had killed some inmates. About 6.00 a.m. on 4<sup>th</sup> September, 2000 Sergeant Muthee (A1) took his statements. Three days later they were all transferred to Kamiti Maximum Prison. Most significantly, he testified that at the kitchen they were using logs of wood kept at the store annexed to E Block. He did not notice anything unusual at E Block that night. **That the said wood store was demolished on 4<sup>th</sup> September, 2000 just hours after the episode.** He was categorical that the night was dark and he did not see anyone walking on top of the kitchen roof.

**PW3, Fredrick Kamotho Kariuki**, an inmate at Kingongo as at 3/4<sup>th</sup> September, 2000 was housed at Block A and deployed in the kitchen. On the night of 3/4<sup>th</sup> September, 2000 he was in the company of Nganga (PW2) Dominic Irungu and Mwaniki. They were being supervised by prison warders Waigwa (PW7) and Karamiti. Sergeant Muthee (A1) was the sleeping in officer. While Joseph Lenana Pukwaro alias Wakanyungu (A7) was in charge of Block E.

About 1.00 a.m. in the morning of 4<sup>th</sup> September, 2000 he heard whistles, a siren and then a burst of gun fire. All of them went to where supervisor Waigwa was. They learnt from Waigwa that some people had invaded the prison. Five or so minutes later Corporal Ruoro opened the kitchen door and some of the accused entered. He heard Mwalimu Onyango (A9) say that they had done a good job.

Fifteen or so minutes later they were ordered to go to sleep. The following day they were shown the window grill at cell No. 4, Block E which was alleged to have been the escape route. His further evidence was as follows.

**“ ..... the kitchen is an open space. Anybody moving to or from the E Block is capable of being viewed from the kitchen. I saw nobody moving from the E Block to outside ..... I heard whistles, then alarm and gunshots. Subsequently the warders came to the kitchen area .....**”

He served porridge to Mwalimu Onyango (A9), Ruoro and Fredrick Nganga (PW2). Nganga (PW2) washed blood stained boots of the said warders at the kitchen. He confirmed that sergeant Muthee (A1), Joseph Lenana (A2) and Caesar Njoka (A3) and sergeant Kamau (A4) **were on duty** and in uniform. Mwalimu Onyango (A9) was in civilian but had a riot gear.

**PW6, Gabriel Kinyua**, was a sentry at Watch Towers No. 2. He was armed with a G3 rifle with 20 rounds of ammunition. He was working in shift with warder Ngunjiri whom he relieved from 10.30 a.m. About 1.00 a.m. he heard a whistle from the direction of the kitchen. He saw eight (8) people crawling on the roof of the kitchen with the aid of lights from the kitchen. He reacted by firing in the air. Immediately the security lights on the perimeter wall went off. The said wall has lighting points positioned about 20 ft above the ground.

In a bid to stop the escapees he went down from tower No. 2 and ran towards staff quarters. Siren was on. Warders started streaming into the prison. He took cover by the fence next to the house of the officer-in-charge of the women prison. After a while he moved to a place where several people had gathered. With the aid of torches he saw five motionless bodies on the ground, and the sixth body a few meters away. He noticed injuries all over their bodies. The six bodies were about 40 metres from Watch Tower No. 2 but at the bottom of the perimeter wall.

**PW7, No. 81144536 Warder John Waigwa**, was a night guard-supervisor in the kitchen on the fateful night. His duties included guarding the prisoner-cooks.

About 1.50 a.m. on 4<sup>th</sup> September, 2000 he heard noise on the roof of the tailoring section adjacent to the kitchen and E Block. He saw eight nude people crawling against the perimeter wall. He asked them where they were going to. Immediately the eight rose up and some of them threw **akala** shoes at him. He responded by shouting and blowing the whistle. This woke up the inmate-cooks. The whistle scared the eight escapees who started jumping down one after another from the roof to the ground. The acting guard Commander Warder Ruoro came just in time to see the last escapee jumping from the roof. Warder Ruoro went outside the kitchen area only to return with Sergeant Muthee (A1). Thereafter about 10 prison warders and officers streamed into the kitchen area. Simultaneously, with the arrival of the 10 warders and officers, the warders on all the four watch towers were firing at random. Lights at the perimeter wall suddenly went off. About 2.30 a.m. **ACP Mungo Longit** (PW31), **Muthami** (PW17), **SACP Gacharia** (PW13) the Deputy OCPD Nyeri one Joho and OCPD, Mr. **Shamalla** (PW36) arrived. He accordingly briefed both the prison officers and the police officers.

The **guard commander** that fateful night was Warder Ruoro. Warder Ruoro came to the kitchen area first then went for Sergeant Muthee (A1). The siren was activated when Sergeant Muthee (A1) left the kitchen area.

He was categorical that apart from Sergeant Muthee (A1) and Warder Ruoro who were in uniform, he saw Onyango (A9). Last but not least he testified that he did not collect the **akala** shoes which were thrown at him by the escapees,

thus bringing into issue who collected the same and in what circumstances.

**PW 12, No.31763 Inspector Sambu Wafula**, was summoned by a radio call on 4<sup>th</sup> September 2000 to Kingongo. He took 19 photographs, which bundle he tendered in as **Exhibit 1** and the report as **Exhibit 4**.

**PW 13, Cyrus Munene Gacharia**, was the Provincial Prisons Commander, Eastern Province as at 4<sup>th</sup> September 2000. He was at his house on the night of 3/4<sup>th</sup> September 2000. At 1.50 am he was awakened by burst of gun fire and wailing of the siren. On enquiry, from the prison switch board, he was informed that some prisoners had escaped. He rushed to the scene. Sergeant Muthee (A1) directed him to E Block at cell No.4. He found the first door open. He entered and ordered Warder Lenana (A2) and Ceasar (A3) to open the door to Cell No.4. He found a prisoner **Esokon Kionga**. He noticed that the prisoner had only one blanket instead of two. On enquiry, the prisoner told him that the second blanket had been used by the escapee-prisoners to make ropes. He noticed a **cut grill** on the ventilation. Esokon Kionga told him that the prisoners had escaped through the grill. He went round the gate which leads to the kitchen. The small store, containing the firewood, from whose roof the prisoners were assumed to have landed before climbing the kitchen roof, was opened on his orders. He went inside the kitchen and thereat met Warder Waigwa (PW 7) who briefed him. With the aid of a torch he saw some broken glasses on top of the perimeter wall. He went out of prison, and at the first watch tower he found a motionless naked body. Near watch tower No.3 he found some people gathered around five (5) naked bodies. Among the group was Shamalla (PW36), the then OCPD Nyeri. He handed over the scene to the said OCPD and concentrated his energies in tracking the other two prisoners who were still at large.

**A signal** was drafted and sent by the officer-in-charge of Nyeri G.K. Prison to the Commissioner of Prisons. It was dated 4<sup>th</sup> September 2000. It was admitted as **Exhibit 11**. The said signal was to the effect that eight prisoners had escaped from G.K. Prison Nyeri **but six of them were killed during a fierce fight with warders and two were still at large**. The said signal was copied to him (PW 13). A press release (**Exhibit 5**) dated 4<sup>th</sup> September 2000 to the effect that **six prisoners were killed in a fierce fight with the warders was then drafted by Gacharia (PW 13)**. It was infact relayed to the Commissioner of Prisons who in turn issued a press release based on the same.

**PW 14, No.26828 Warder Silas Rogers**, was in-charge of watch tower 3. About 1.00 am on 4<sup>th</sup> September 2000, he heard somebody from the kitchen saying that some inmates were escaping. He then saw two people. He fired in the air to scare them away. Suddenly the security lights went off. He climbed down the ladder and took cover near a trench. About 5-10 minutes later he heard officers discussing between themselves between tower No. 2 and 3. As he moved nearer, he saw five naked bodies on the ground. He over-heard one officer saying that there was an escape from Cell No. 4, E Block and that two of the escapees were missing. **He estimated the crowd that had gathered at between 250-300 people**.

**PW 15, No.215654 Inspector Godfrey Onyango**, was summoned at 4.00am to Nyeri G.K. Prison on 4<sup>th</sup> September 2000. He found the OCPD Nyeri SSP Shamalla (PW36), who instructed him to assist in loading the six bodies of the inmates into a Police Landrover. The five bodies were behind the perimeter wall. The sixth body was 50 metres away from the five. He handed over the said bodies to Inspector Kithaka, the OCS Nyeri for further action.

On 6<sup>th</sup> September 2000 he took the finger prints (**Exhibit 6**) of the six dead inmates to the Criminal Investigation record office Nairobi for elimination and identification. On 7<sup>th</sup> September 2000 he collected the finger prints forms (Exhibit 6A-F) after the same had been identified. He passed the same over to the OCPD Nyeri, SSP Shamalla (PW36).

**PW 16, Sergeant Jackson Gitonga**, was at his residence within Kingongo on 4<sup>th</sup> September, 2000. He heard siren at about 2.30am. While rushing to the prison he was injured by a stone. He did not reach the main gate but saw bodies of the six inmates who had injuries all over the body outside the perimeter wall. **The inmates were groaning and writhing in pain**. They had difficulty in breathing. Among the prison officers he saw at the scene were Senior Sergeant Kamau (A4), Mungo Longit (PW 31) and Gacharia (PW 13).

**PW 17, No.70039940 Peter Muciri Mathami**, the Deputy Officer-in-charge of G.K. Prison as at 4<sup>th</sup> September 2000 was awakened by a call from the prison telephone operator at about 1.50am. He was informed that condemned prisoners had escaped from Cell No.4, E Block. On reaching the prison, he met Mungo Longit (PW 31) and Gacharia (PW 13) who were already at the scene. With the aid of a torch he saw three naked bodies with injuries on the legs and head apart from other parts of the body. The bodies were lying on the eastern side of the prison perimeter wall. Only the eastern and the southern perimeter wall were **lit by flood lights**. That was the area where the six bodies were. He saw a **steel bar** lying on the floor of Cell No.4. He noticed a missing grill at the ventilation window. He assumed that the grill on the floor was the one from the ventilation. He also noticed a blanket on the floor. **The floor was dry**. There was nobody in the cells. Prison officers were outside the E Block. He saw a ladder resting against the roof of E Block which he used in climbing the roof. On the roof he found **akala** shoes which he identified in the court. He saw a piece of rope made of prisoner's blankets and white sheets. He climbed down and went outside the prison. It was about 3.00am.

Shamalla (PW 36) and Mungo Longit (PW 31) were already in prison compound.

He confirmed that a signal was sent to the Commissioner of Prisons within 24 hours as enjoined by the prison regulations. He identified the signal (Exhibit 11). Other signals dated 8<sup>th</sup> September 2000 (Exhibit 12) were sent to the deceased next of kin. He produced the weekly Duty Roster (Exhibit 14) in respect of the officers who were on duty at cell No.4, Block E. According to the records they were Lenana (A2) and Ceasar Njoka (A3). The sleeping-in-officer that fateful night was Sergeant Muthee (A1). The guard commander was Warder Ruoro. There were also other officers in addition thereto.

He narrated the prison regulations and confirmed that events taking place in prison at night had to be recorded in Guard Commander journal and the sleeping-in –officer journal. **He did not see the two said documents.** That the main gate register (Exhibit 29) contains records of movements in and out of prison. He was categorical that even during an emergency guns and ammunition issued out have to be recorded in Firearms Issue Register (Exhibit 21).

**PW 18, No.95027217 Warder John Sapur**, was awakened by gun shots at about 2.05 am on the night of 4<sup>th</sup> September 2000. He rushed to the armoury where Warder Miriti issued him with a rifle and ammunition. As he approached Tower 3 he saw three naked bodies on the ground near the perimeter wall. He sensed danger and took cover at the coffee plantation. He thought the prison was under attack. He was joined by Warder Tergech and Corporal Maina. The pandemonium lasted about 20 or so minutes. When peace returned the three of them went towards the main gate. They came back to tower 2 after about 15 minutes and found additional three bodies. He then went back to the main gate where he stayed until 7.00am.

He was categorical that staff quarters were surrounded by **banana and sukuma wiki** plantation in addition to the bushes. There was also bushes. He opined that a person could hide in the said plantation at night. He confirmed that there were lights at Tower 2 and 3. On the eastern perimeter wall there was no light. However, there was a bit of light where the naked bodies were at point D on sketch map (**Exhibit 3 (b)**). He further confirmed that the commotion attracted so many people.

**PW 19, No.74039508 Corporal George Kenti**, reported on duty at the prison on the evening of 3<sup>rd</sup> September 2000. He mounted guard for the staff then dismissed the parade. At 1.00am he handed over to Warder Ruoro as guard commander and retired to the guard room to catch some sleep.

About 2.00am he was awakened by an alarm. Then he heard noise from the kitchen. He went to gate No.2 where Warder Waigwa and four prisoners confirmed to him that some prisoners were escaping from cell 4, E Block. While there he met Warder Ruoro and Sergeant Muthee (A1) emerging from the direction of the duty office. Mungo Longit (PW 31) and Boit (A7) and Gacharia (PW 13) found him inside the prison compound, inside gate No.2 which had been opened by Warder Waigwa (PW 7).

He further confirmed that inside cell No.4 was **dry** but along the corridor was **wet**. At the kitchen area were pieces of glass, which he assumed were from the perimeter wall. Ceasar (A2) and Lenana (A4) were manning Block E on the fateful night.

When cross-examined by Mr. Wandugi he confirmed that all officers on duty that night were in **uniform which included among other things batons**. He confirmed that Kamau (A4), Onyango (A9), Noor (A8), Ceasar (A3) and Lenana (A2) were in uniform.

**PW 20 Dr. Moses Njue Gachoka**, a practicing pathologist of 13 years standing was the Provincial Pathologist Central Province based at Nyeri Provincial Hospital.

While at the Nyeri Provincial Hospital on 4<sup>th</sup> September 2008 at 9.00am he saw six bodies sprawled on the floor of the mortuary. The bodies were marred by blood and had multiple injuries mainly on the head. Some bodies had brain tissue oozing from the skull. Others had fractures of the lower limbs. **None had gun-shot wounds**. Later in the day the prison authorities joined him at the hospital to provide the history and identification for purpose of post-mortem . By way of preliminary investigations he ordered the X-raying of the six bodies before undertaking post-mortem.

All the six bodies were identified by John Kitiyo and C.W. Wesonga PF 135446 prison/police and/or representatives.

**Peter Loyara Lumukunya (deceased in count 1).**

**History:** it is alleged that the deceased died while trying to scale the Prisons perimeter wall with others in a bid to

escape from the said G.K. Prison Nyeri.

**Injuries:** laceration on the forehead. Irregular 4cm laceration to the hair line palpable fractures to the mandible. Lacerated mandible on the middle line measuring 2cm x 1.5cm. Lacerated left ear 15cm. Laceration extending from the right eye to the mandible. Fracture of the palate and two incisors were defective.

**Abdomen:** bruise on the left iliac crest 7cm x 3cm. Right iliac had a bruise 4cm x 1cm.

**Upper limb:** right upper limb had marked swellings on the dorsal aspect of the hand. Bruises on the hand 12cm x 12cm.

**Left upper limb:** had swelling dorsal aspect and wrist injuries.

**Lower limb:** bruise on the right leg 8cm x 2cm. a comminuted fracture of the distal tibia.

**Back:** marked post mortem slonging.

**Internal examination:**

Bruises under the scalp. Compound fracture spreading from the right mastoid area to the left parietal region and also involving the right supraorbital ridge. The fracture was in one plane.

**Chest:** bruises on the anterior sternum in the region of the right, 3<sup>rd</sup> and 4<sup>th</sup> intercostal space. There is an associated fracture of the 5<sup>th</sup> rib at the middle clavicular line.

**Musculo-skeletal:** incised wound below the right medial malleolus 8cm x 2cm.

**Skull:** fracture at the back extending from the left temporal parietal area to the right anterior cranial fossa.

**Comment:** the cause of death is in keeping with fall from a height headwards. **It is difficult to explain the fracture of the distal tibia on the basis of the same fall or whether it occurred otherwise.** No bullet wounds were found contrary to police story. His opinion was that the injury on the head could have been caused by a fall but the injury at the back of the hand is basically a defence kind of injury i.e. warding off an attack.

The post mortem report was admitted as exhibit 17(d).

**Joseph Irungu Mwangi alias James Irungu Ndugo:** (the deceased in **count 2** of the charge). A male adult. History given by prison authorities aforesaid was that death was caused by a fall. This was in sharp contrast to the media report that the six prisoners were shot while trying to escape. This was equally in contrast to the initial reports from the prison authorities that the prisoner **died in a fierce fight with the warders.** He also visited the scene and discounted a **fall from a height theory.**

From the postmortem findings the fractures or the injuries that stand out includes the following:

External Examination

**Head and neck:** had frontal laceration at the hairline 4cm horizontal and another one 3cm long. Equally there was laceration of the right parietal region 4cm long.

**Mandible:** palpable fracture of the right mandible. Fracture of the maxilla at the midline.

**Upper limb:** fracture of the humerus.

**Back:** laceration of the left occipital area 4cm long.

Internal Examination

**Head:** bruise under the scalp. Depressed fracture on the left parietal area 4cm in diameter with no overlying laceration. He opined that, **that was the point of impact**. There was subarachnoid haemorrhage on both cerebral hemispheres i.e. parietal lobes. Fracture extending from the frontal area to cranial fossa and involving the whole occipital area.

**Humerus:** right humerus had a fracture in the middle.

**Chest:** had left subcutaneous bruise on the left parietal region.

**Lungs:** had aspirated blood.

**Musco-skeletal:** had simple fracture of the right ankle joint.

**Legs:** bilateral subcutaneous bruises on both legs.

**Opinion:** cause of death, head injury due to a fall from a height.

**Comments: It was difficult to associate some injuries on the body with a fall.** Bruises on the head would be explained by trauma. Depressed fracture with no associated laceration is consistent with either a stone or a rungu. If one fell from a height head first, it would be difficult to explain the injuries on the foot and the head simultaneously. More so since there were no windows or walls or stones on the ground that would have caused the injuries. He visited the scene and discounted a fall from height theory.

The post mortem report was admitted as Exhibit 17(c).

**John Njoro Njuguna** (the deceased in count 3 of the charge). History given by the said prison/police authorities was that death was caused by a fall. This was in sharp contrast to the media report that the six prisoners were shot while trying to escape and to the prison authorities report that there was fierce fight between the warders and the six prisoners. In the company of Dr. Kirasi Olumbe he performed postmortem and also visited the scene and discounted a fall from a height theory. From the post mortem finding the following features of the injuries that stand out include the following:

External Examination

**Head:** in the front was laceration of the right side of hairline 3cm long. At the back of the head was another laceration 6cm long. On the right side of the parietal region was a star-shaped laceration 8cm x 3cm x 4cm. Internal examination of the head disclosed a depressed structure associated with laceration of the skin. In addition thereto, the brain tissue had a diffused hemorrhage.

**Mandible:** the right angle of the mouth had laceration 2cm long.

**Lower limbs:** there was fracture of the right femur. The tibia and fibula had spiral fracture.

**Opinion:** cause of death was head injury due to a fall. However, the fracture of the lower limb could not be explained on the basis of **fall head ward theory**. It was inflicted by a third party. The swelling of the right hand was consistent with defence i.e. the deceased was trying to ward off an attack. Spiral fractures of the tibia and fibula was consistent with the twisting force of a limb.

The postmortem report was admitted in evidence as Exhibit 17(b).

**Julius Mungania M'Muraa** (the deceased in count 4 of the charge). History given by the said prison/police authorities was that death was caused by a fall. This was in sharp contrast to the media report that the six prisoners were shot while trying to escape. This was equally in contrast to the claim by the wife of the deceased one **Cecilia Karume**, that her husband never fell from a height. In the company of Dr. Kirasi Olumbe he performed postmortem and also **visited the scene and observed that some of the injuries were inconsistent with the fall from a height theory**. From the postmortem the salient features of the injuries that stand out includes the following:

**Head:** had multiple cranial fractures involving the whole of the skull known in medico-legal terms as **crack-pot fractures**. On external examination the fracture extended to the base of the brain.

**Mandible and maxilla:** had multiple fractures.

**Right upper limb:** had incisional injury at the elbow joint 8cm long. The fracture made the bone to extrude. The bone had sharp margins 8cm long.

**Upper limb:** had fracture of the right haemerus and bruise on the **stranum** 8cm x 10cm subcutaneous bruise.

**Ribs:** between the 4<sup>th</sup> and 5<sup>th</sup> ribs, there was a fracture of the fourth intercostals space.

**Heart:** had ontosion involving the whole epicadium.

**Opinion:** the cause of death was head injury due to a fall from a height.

**Observations:** injury on the right upper limb was occasioned by sharp object and did not fit in with the fall theory. The post mortem report was marked exhibit 17(a)

**Peter Ngurushane Emashe alias Kingori**( the deceased in count 5 of the charge). History prison/police authorities given by was that death was caused by a fall. This was in sharp contrast to media report that the six prisoners were shot while trying to escape from lawful custody. Equally in sharp contrast to the prison authorities reports to the Commissioner of Prisons, that there was a fierce fight between the prison warders and the six prisoners while trying to escape. In the company of Dr. Kirasi Olumbe he performed post mortem and discounted a fall from height theory.

From the post mortem findings the following features of the injuries that stand out include the following:

**External Examination:**

Deformity of the right temporal region. Laceration of the right parietal region 10cm x 4cm and extrusion of the brain substance. The right lower limb had extrusion of the tibia at the ankle joint.

**Internal Examination:**

**Head:** complete fracture of the skull involving the right temporal parietal area and radiating to the left frontal area. Sub-galeal haematoma of the occiput. Fracture of the left anterior fossa and the pituillary fossa. Diffused subrachmoid haemorrhage.

**Musco-skeletal:** fracture of both ankle joints.

**Cause of death:** head injury due to a fall from a height. The fracture to both ankle joints cannot be explained on the basis of fall head ward theory.

The post mortem report was admitted as Exhibit 17(f).

**Peter Koring:** (the deceased in count 6 of the charge). History given by the said prison/police authorities was that death was caused by a fall. This was in sharp contrast to the media report that the six prisoners were shot while trying to escape. Equally in sharp contrast to the prison authorities report that there was a fierce fight between the prison warders and the six prisoners while trying to escape.

In company of Dr. Kirasi Olumbe he performed postmortem and also visited the scene and discounted a fall from a height theory. From the post mortem findings the following features of the injuries that stand out include the following:

External Examination

**Head:** compound fracture involving the whole calvarium. Laceration on the right parietal region above the ear. Brain

tissue oozing out of the fracture.

**Right hand:** incision injuries on the ulterior aspect of the hand 6cm long tapering towards the proximal and another at the wrist separated by intact skin.

**Lower Limb:** both had red soil on both legs and feet.

#### Internal Examination

**Head:** compound structure of the whole cranium around the foramen magnum more towards the occiput. The fracture involved the whole skull.

**Cause of death:** head injury with multiple fractures of the cranium from a fall.

**Comments:** the cause of death not in keeping with a fall. Did not see any red soil at the scene. The scene had grass only. Sharp injuries on the right hand out of keeping with the above inflicted.

The post mortem report was admitted as Exhibit 17 (e).

**PW21, CPL Mohamed Golicha** was on duty officer at Nyeri Police Station. On the way he heard gunshots in the direction of Nyeri Town about 2.00am. The control room came on the line with a report that prisoners had escaped from G K Prison Nyeri. They arrived at the said prison compound at about 3.00am and found Deputy OCPD – Nyeri (Abdullahi Joho) and OCPD (Shamalla) had arrived. They were briefed of the incident. He personally saw six dead bodies. Five bodies were in one heap while the sixth was approximately 200 metres away from the five. All the six bodies were naked and had injuries. **There were lights from the perimeter wall from a distance. There was no bloodstains on the wall. He saw half blanket at the roof.** He was instructed by the OCPD Nyeri, Shamalla (PW 36), to summon the scene of crime personnel. There were many people at the scene. Inspector Nganga removed the bodies from the scene. **At the scene he saw broken sticks.**

In cross-examination he testified that not all officers present were in uniform. **The crowd carried various weapons, to wit, sticks, riot truncheons, guns etc.**

**PW22, John Mingo**, was summoned to G K Prison Nyeri on 20<sup>th</sup> May 2002 where he met Peter Macharia, Assistant Commissioner of Police, and a team of CID Officers from Headquarters in Nairobi and prison authorities. He was requested to take photographs of a general view of the window grill in cell No.4, Block E. He took several photographs that were admitted as **Exhibits 18(i) - 18(ix)**. The report accompanying the exhibits was received in evidence as **Exhibit 19**. The convicts used for demonstration in the window grills were pushed from inside to outside. They could not go through the grill on their own. They had to be pushed in order to do so.

**PW 23, No.26887 Prison Warder Julius Segeyu**, was attached to Nyeri G K Prison as at 3<sup>rd</sup> September 2000. He was on duty and in the company of prison warder Ngara among others until 1.00am (4<sup>th</sup> September 2000) at Block E. He went to guard room to rest. About 2.00am he heard a whistle within the prison compound. In company of other warders, who were resting in the guard room, they rushed to the scene. They met warder Caesar Mwangi (A3) and Lenana Rukwaro (A2) who told them that some prisoners had escaped. **The three gates to the E Block were open. He did not know who or how they were opened.** He did not enter the cells. He confirmed that before handing over at 1.00am, on 4<sup>th</sup> September, 2000, to warder Ceasar Mwangi (A3) and Lenana (A2), the lights were on in Cell 4 Block E. All prisoners were in. He did not check the window grill as that would entail getting inside the cells and he had no keys. In any case the security personnel usually checked the grills on the windows and doors on a daily basis. He was categorical that warders on duty were usually locked inside the various blocks. That a third party has to open and close the cells. A warder inside the block cannot open cell doors. Caesar Mwangi (A3) and Lenana Rukwaro (A2) as well as himself were in **uniform** because they were on duty.

**PW24, Chief inspector Christopher Chesoni** was instructed by, the Director of CID to proceed to Nyeri to re-investigate the death of six prisoners who had died at Nyeri Main Prison christened Kingongo. They arrived in Nyeri for the exercise on 26<sup>th</sup> February 2006 and met O.C. Prison Muraya, Deputy O.C. Prison Kimutai and CPL Ringera who was the investigation officer in Nairobi PM Inquest No. 122 of 2000 relating to the six prisoners. They were taken around the prison perimeter wall and particularly Block E, cell No.4. He was assigned the responsibility of drawing a

sketch plan which he produced in the following manner:-

- (i) legend as Exhibit 3A
- (ii) Map as Exhibit 3B

As part of the investigation, they visited various prisons with a view to taking statements from inmates who were in Nyeri Main Prisons on 3<sup>rd</sup> and 4<sup>th</sup> September, 2000. Three prisoners were chosen to demonstrate whether it was possible to go through the grill at the ventilation of cell 4, Block E with the following results:-

- (i) First inmate could not pass even when pushed by other inmates.
- (ii) Second inmate, with assistance of others, managed to squeeze himself through the cut grill.
- (iii) The third inmate failed to pass through even with assistance.

During the demonstration CIP Mingo (PW 22) was taking photographs which were produced as Exhibit 18 (i) – 18(ix) and accompanying report as Exhibit 19. The prisoners were weighed to ascertain that their weights were as near as possible to those of the escapees. The hole made out of cutting the grill on the ventilation of cell No.4 measured 19” x 8”. He produced a wooden representative of the grill (**Exhibit 20**) with nails representing the steel stumps that had remained when the grill was cut. The wooden frame measurement is as follows:- length 17” x 18” width. The distance between the two nails stumps is 17”. He also participated in the arrest of the 11 prisoner officers who had been implicated in the murder of the six inmates. **His own investigation revealed that the theory of escape was not tenable.** The six inmates had open wounds not consistent with a fall. The six inmates were bulgeoned to death as opposed to falling from the perimeter wall. The 3 pieces of hacksaw (Exhibit 8 ) shown to them by Muraya (O.C. Nyeri prison) appeared to be new. Their groves were intact. They could not possibly have been used in cutting the grill at the ventilation in Cell 4, Block E given the thickness. He was shown the makeshift rope (Exhibit 2) and the metal bar (Exhibit 2).

**PW25, No.930882756 Warder Peter .K. Muriuki**, was on duty on the night of 3<sup>rd</sup> /4<sup>th</sup> September 2000. He was relieved by warder Waigwa at 1.00am. About 3.00am he heard an alarm. He was in company of Onyango and Kariuki. They rushed to the main gate. Warder Ruoro told them that prisoners had escaped at Cell No. 4, E Block. At E Block they met two sentries Lenana (A 2) and Caesar (A 3). He observed that there was **no light** but he saw one prisoner by aid of a lantern lamp brought from the store. The senior officers at the scene included Mungo Longit (PW 31) who ordered them to hunt for the escapees.

**PW26, No.26335 Peter Muriti Nkuri**, was at the armoury on night of 3<sup>rd</sup> /4<sup>th</sup> September 2000. In the course of his duties, he issued firearms and ammunitions to 7 officers **and batons to all officers who presented themselves.** He registered the persons issued with firearms in the Firearm Register (Exhibit 21). He went back to sleep at 10.00pm on 3<sup>rd</sup> September 2000. About 2.00am on 4<sup>th</sup> September 2000 he was awakened from sleep by an alarm and gunshots. He rushed to the main prison gate which was opened by warder Kinyua (PW 6) the gatekeeper for the night. As the gunshots intensified, he went to the duty office where he met the telephone operator – warder Mukua - who told him that some prisoners had escaped. C.O. Boit (A7) and Sergeant Muthee (A1) found him in the duty office. Sergeant Muthee **broke the seal of the key safe, opened the safe and gave him the key to the armoury safe.** He opened the armoury and issued firearms to the officers who were lined up outside the perimeter wall at the window. The issuance of firearm was done in the presence of C.O. Boit (A7). He made the entries personally in the Firearms Register. **The same morning at 9.00 am Sergeant Muthee (A1) gave him a makeshift rope to keep but did not record the occurrence.** He confirmed having issued firearms, ammunition and batons to the officers on duty, on the night of 3<sup>rd</sup> and 4<sup>th</sup> September 2000 before the lock up in the evening. Though he was supposed to record the same at different registers from the Firearms Register (Exhibit 21) **he did not do so.**

**PW27, NO.19449 CIP Hussein Galgalo**, was at his house in prison compound on 3<sup>rd</sup> September 2000. About 2.30 am on 4<sup>th</sup> September 2000 he heard gunshots. He rushed to prison and found Boit (A7) who ordered him to take firearm and 20 rounds of ammunition and to follow the escaping inmates. About the prison canteen he met **Warder Gitau** who informed him that he had seen a naked person entering the coffee plantation. In company of warder Gitau they ran after the escapee in vain. They went on searching until 9.00am in the morning. He then surrendered the firearms and ammunition and retired to his house. He met warder Miriti, Warder Kibet and C.O. Boit (A7) at the armory. Boit (A7) was in civilian.

**PW28, NO.790023385 Warder Samwel Ndegwa**, was on duty on 4<sup>th</sup> September, 2000 at Nyeri G K Prison at 9.00a.m. He was told by his workmates that some prisoners had escaped. Out of curiosity he went to check. He saw some pieces

of stick and blood stains along the perimeter wall. On 6<sup>th</sup> September, 2000 he saw **Sgt Gitonga with a bandage on the head**. He had been told by warder Mudday that warder Gitonga had been beaten by some warders on the night of 3<sup>rd</sup> /4<sup>th</sup> September 2000 while trying to restrain them from beating the prisoners who were trying to escape.

**PW 29, No. 47368 Senior Sergeant Tom Opiyo**, was on duty on the night of 3<sup>rd</sup> September, 2000 within Nyeri Town using police 999 vehicle. He was in the company of CPL Tom Ekisa, police driver Kimondo, PC Nganga. About 2.00am they heard a burst of gun fire from Kingongo direction. On reaching Cocacola the watchman told them that the gunfire was from Nyeri G K Prison direction. On reaching prison they found nobody manning the gate. As they waited at the locked main gate the Deputy OCPD Nyeri ordered that he be collected from his official residence. They drove him to G K Prison Nyeri and found warders being issued with firearms, batons etc. Some were in **uniform**, others were in **civilian, one warder had an axe**. At the scene some warders had **iron bars, rungus and pangas**. He heard, while inside the prison, that one body was lying near watch tower no. 2. On arrival he noticed that the body had noticeable injury on the head. The body was naked and a lot of blood was oozing from the wounds. Five to ten meters from the first dead body, he saw 4 more naked bodies with almost similar injuries on the head. While in the vehicle he heard some people saying another dead body had been cited. His further evidence was as follows:

**“.....Some people were saying in Kiswahili, “Mwingine ndiyo huyo. Leta hapa”. Meaning in English. “There is another one. Bring him here”.**

Then he heard other gun's shots. He went towards Tower no. 2 and found another naked body lying dead. In total the bodies now were six. Then the OCPD Nyeri Shamala (PW 36) came with Senior CID Officers Nyeri. Scene of Crime Personnel were summoned and took over the investigations. He heard further whistles and siren blaring and some people saying.

**“ Kamata, shika”** which means in English **“arrest, hold”**.

**PW30, Dr. Jane Wasike Simiyu**, is a pathologist of 13 years standing attached to National Public Health Laboratory, deployed at the City Mortuary. She had worked with Dr. Kirasi Olumbe in the year 2000. She is conversant with the handwriting and signature of Dr. Kirasi Olumbe. She confirmed that all the postmortem reports, following herein, bore the handwriting and signature of Dr. Olumbe. On application she produced the said reports under Section 33 as read together with Section 77 of the Evidence Act. All the six post mortems reports were done on 20<sup>th</sup> September 2000 at Nyeri Provincial Hospital Mortuary.

Request for post-mortem was done by the police in Form 23A in all the six cases. The said forms are annexed to each and every report.

#### **1. Peter Koring: (the deceased in count 6)**

Form 23A at No.7, Dr. Olumbe wrote thus:

**“It is alleged that the deceased died while trying to scale a wall in a bid to escape from the said G K Prison Nyeri”.**

According to Dr Wasike Simiyu, that comment means that Dr. Olumbe did not find the autopsy findings consistent with the circumstances given in Form 23A. He did not believe so. From the post mortem findings the following features of the injuries that stand out includes the following:

**Post mortem changes:** minimal rigidity to the upper limbs and the jaws. The body is partially autolysed.

**Central nervous system:** brain is partially autolysed i.e. decomposed. Exclusive diffused subarachnoid hemorrhage over the cerebral and cerebellar hemispheres. No extra-dural haematoma. The vessel at the circle of Willis free of a thromatous disease and there is no aneurysm.

**Muscular skeletal system:** subcutaneous dissection shows massive diffuse sub-galeal haematoma.

The following fractures were evident.

- (i) skull fracture
- (ii) cracked pot of the whole calvarium

(iii) multiple hinge fractures of the base of the skull

There were no special investigations done. Significant and anatomical findings.

(i) severe head injury subarachnoid hemorrhage with crackpot structures.

(ii) Multi fractures of both ankle joints symmetrically.

**Cause of death:** head injury due to a fall from a height.

**Comments:**

1. Death of Peter Koring is due to a severe head injury following blunt trauma. At postmortem there was evidence of both multi cracked pot fractures of the skull vault and base. The blunt trauma would be due to a fall from a height within sight of the primary impact being the right front of the skull accentuated by the whole weight of the body falling upon the ground (fixing object inflicting injury to the skull). The body may fall least maintaining the same orientation to the ground but usually turns and twists in unpredictable manner resulting in other valuable injuries to the body. The latter would depend on the height of the fall and also the time available for turning. This means the body may strike the ground in a manner of different attitudes and may strike some obstruction part of the way down. If the body falls out the head first then there is likely to be massive fracture often but not always scalp laceration and possibly extrusion of the brain when a fall occurs on the side of the body any combination of injuries may occur. Multiple rib fractures etc. the legs can be broken at any point at the tibia or femoral level often bilaterally.

**Comment 2:** there was no evidence of firearm wounds on the body.

**Comment 3:** no gross evidence of any natural disease.

**Comment 4:** He (Dr. Olumbe) attended the scene after an autopsy from 16 hours to 16.25 hours.

**Comment 5:** no samples of body fluids and tissues were sent for toxicological analysis.

**Comment 6:** no samples of tissues were taken for histo-pathological examination.

**Comment 7:** findings of autopsy are not consistent with circumstances of death as indicated in Kenya

Police Form 23A.

Dr. Wasike was categorical that finding of Dr. Olumbe at No.7 is significant. **In Form 23A it is alleged that the deceased died while trying to scale the prison perimeter wall with others in a bid to escape from the said G K Prison Nyeri.** However Dr. Olumbe did not find the autopsy findings consistent with the circumstances given in Form 23A.

**The post mortem report in respect of Peter Koring was admitted as Exhibit 22. Relative Forms P 23A in respect of Peter Koring was admitted as Exhibit 22(a).**

Dr. Jane Wasike Simiyu's further evidence is that all the other five postmortem reports in respect of **Joseph Kamande Mwangi alias James Irungu Ndugo, John Njoro Njuguna, Peter Loyara Lumukunya, Peter Ngurushane Emashe alias Kingori and Julius Mungania M'Moraa** were performed on 20<sup>th</sup> September 2000 in the same format as the one in respect of Peter Koring. All the five reports have relative Police Form 23A annexed. She confirmed that all the five reports were performed by Dr. Olumbe on 20<sup>th</sup> September 2000. The details of the reports are as follows:-

**(2) Joseph Kamanda Mwangi alias James Irungu Ndugo (Deceased in count No. 2)**

It was alleged that the accused died while trying to scale the prison's perimeter wall in a bid to escape from Nyeri G.K. Prison.

**Head and Neck:-** Injury No. 1:- Horizontal laceration of the right forehead measuring 3 cm x 0.5. cm.

**Injury No. 2:-** Oblique laceration on the right parietal measuring 4 cm x 0.5. cm with palpable fractures of the

calvarium.

**Injury No. 3:-** Obliquely oriented laceration on the left occiput measuring 4cm x 0.5. cm.

**Injury 4:-** Horizontal lacerations of the bregma measuring 3 cm x 0.5 cm associated with palpable fractures of the mandible marked in the right.

The post mortem report was admitted as Exhibit 23.

**(3) John Njoro Njuguna:- (deceased in Count 3)**

It was alleged that the deceased died while trying to scale the prison's perimeter wall while at G.K. Prison Nyeri in a bid to escape from Nyeri G.K. Prison.

**Head and Neck:-**

Horizontal laceration of the right forehead encroaching the hairline 3cm x 0.5 cm.

Oblique laceration on the mid part of the occiput measuring 6cm x 0.5 cm with palpable fractures of the calvarium.

Stellate laceration on the right parietal measuring 8cm x 4cm x 3cm.

Laceration of the lateral aspect of the right side of the mouth measuring 2cm x 0.5 cm associated with palpable fractures multiple fractures of the mandible and the maxillia in the mid line.

**Eyes:-** Periorbital haematoma.

**Mouth:-** Multiple palpable fractures of the palate and upper disruption of the lower teeth.

**Upper limbs:-** Marked swelling of the whole hand extending to the wrist joint.

Left:- No surgical scars, distinguishing marks or fractures

**Lower limbs.**

Right:- Deformed lower limb simple fracture of the distal part of the femur ankle joint.

Left:- No signs of injury.

**Central Nervous System:-** the brain is partially autolysed but there is extensive diffuse subarachnoid haemorrhage over the cerebral and cerebellar hemispheres. No extradural haematoma. The vessels at the circle of Willis are free of atheromatous disease. No aneurysm.

**Muscula Skeletal System:-**

On subcutaneous dissection, there is bruising on the left side at the ribcage, pectoral muscle, over area measuring 10 cm in maximum extent, extending to the left strap muscle, on the anterior aspect of the whole leg, and variegated regions on the mid part of the right leg.

The following fractures were evident:-

1. Skull fractures of the frontal bone, depressed in the midline measuring 4 cm in diameter with radiating areas and "hinge" fracture of the left temporal to the middle cranial fossa.
2. Fracture of distal right femur.
3. Fracture of distal right tibia/fibula
4. Multiple irregular fractures of the mandible.

5. restraining of the right ulna.

**Cause of death:**

Head injury due to a fall from a height.

Comments:-

Death of John Njoro Njuguna is due to severe head injury following blunt trauma. At postmortem there was evidence of both multiple fractures of the skull vault and base (hinge fracture). The blunt trauma would be due to a fall from height within sight of the primary impact being the front of the skull accentuated by whole weight of the body as it falls upon the ground (the fixating object inflicting injuries to the skull).

The body may turn whilst maintaining the same orientation to the ground, but usually turns and twists in unpredictable manner resulting in other variable injuries to the body. The body may strike the ground in a number of different attitudes – and may strike some obstruction part of the way down.

If the body falls on the head, there is likely to be massive fractures, often (but not always) a scalp laceration and possibly extrusion of the brain. When a fall occurs onto the side of the body, any combination of injuries may occur. Multiple rib fractures, shoulder girdle on arm fractures. The legs can be broken at any point, at tibial or femoral level, often bilaterally.

Last but not least he opined that the **autopsy findings are not consistent with the disclosed circumstances of death**. The post-mortem report was produced as **Exhibit 24** and the relative post mortem form as **Exhibit 24 (a)**.

**4. Peter Loyara Lumukunya (deceased in count 1)**

It was alleged that the deceased died while trying to scale the prisons perimeter wall with others in a bid to escape from Nyeri G.K. Prison.

**Head and Neck:-**

Laceration obliquely oriented on the right fore head. Laceration on the left occiput measuring 1.5 cm x 0.5 cm with palpable fractures of the cranium. Multiple lacerations associated with palpable multiple fractures of the whole mandible. Above the upper margins of the ear is a obliquely oriented laceration measuring 2 cm x 0.5 c.m.

**Mouth:-** There is a multiple palpable fractures of the palate and disruption of the lower teeth.

**Upper Limbs:-** Swelling of the dorsal aspect of the hand associated with bruising of the front of the wrist joint measuring 12cm x 7 cm. Abrasion of posterior aspect of the wrist 6cm x 6cm.

**Lower Limb:-** Right:- Obliquely oriented incised around on the medial aspect of the ankle joint measuring 8 cm x 2 cm involving the underlying bone with comminuted fracture of the tibia.

**Central Nervous System:-** the brain is partially autolysed but there is extensive diffuses subarachnoid haemorrhage over the cerebral and cerebellar hemispheres. No extra dural haematoma. The vessels at the circle of Willis are free of atheromatous disease. No aneurysm.

**Muscular skeletal System:-** the following fractures were evident:-

1. Skull fracture of the 5<sup>th</sup> left rib antero-lateral.
2. Obliquely oriented “psedo-hinge” fracture from the right mastoid region to the anterior cranial fossa measuring 10cm in length.
3. Multiple irregular fracture of the paleta.
4. Multiple irregular fractures of the mandible.

## **Causes of death.**

Head injury due to a fall from a height.

**Comments:-** Death of Peter Loyara Lumukunya is due to a severe head injury following blunt trauma. At post-mortem, there was evidence of both multiple fractures of the skull vault and base (“hinge fracture”). The blunt trauma would be due to a fall from a height with the sight of the primary impact being the right side of the skull accentuated by whole weight of the body as it falls upon the ground (the fixating object inflicting injuries to the skull). The post mortem report was admitted as **Exhibit 25** and the relative Police Form as **Exhibit 25A**.

In cross examination she confirmed that apart from Dr. Olumbe there were also other expert observers, namely; **Dr. Moses Njue, other observers were SSP Joseph Kina Chino, CIP Henry Machoka, ACP Mungo Longit (PW 31).**

### **(5) Julius Mungania M’Moraa (deceased in count 4)**

It was alleged that the deceased died while trying to scale the prison walls in a bid to escape from Nyeri G.K. Prison.

**Head and Neck:-** Multiple palpable irregular “cracked – pot” fractures of the whole cranium with deformity. Oblique laceration on the right parietal measuring 8 cm x 0.5 cm. Palpable fractures of the mandible and maximilla.

**Mouth:-** there are multiple palpable fractures of the palate and disruption of the lower teeth.

**Upper Limbs:-**Multiple incised wounds on the distal part of the upper arm, longitudinal oriental with the superficial aspect in the distal end. The wounds are postero lateral and antero – medial measuring 4 cm x 8 cm with comminuted portion at the wrist joint with a regular wedge shaped bone.

**Central Nervous System:** The brain is partially autolysed but there is extensive diffuse subcrachnoid haemorrhage over the cerebral and cerebellar hemispheres. No extradural hamatoma. The vessels at the circle of Willis are free of atheronatus disease. No aneurysm.

### **Muscular skeletal system:**

The following fractures were evident.

1. Skull fractures “cracked pot” associated multiple fractures of the whole cranial fossa and orbital plates.
2. Fracture distil right humerus.

**Cause of Death:-** Head injury due to fall from height.

**Comments:-** Death of Julius Mungania M’Moraa is due to serve head injury following blunt trauma. At post mortem, there was evidence of both multiple “cracked pot” fractures of the skull vault and base (‘hinge’ fracture). The blunt trauma would be due to a fall from a height with sight of the primary impact being the frontal of the skull accentuated by whole weight of the body falling upon the ground (the fixating object inflicting injuries to the skull). The body would fall whilst maintaining the same orientation to the ground but normally turns and twists in an unpredictable manner resulting in other variable injuries to the body. The latter would depend upon the height of the fall and also the time available for turning. This means that the body may strike the ground on a number of different attitudes – and may strike some obstruction part of the way down.

If the body falls on the head, there is likely to be massive fracture often (but not always) a scalp laceration and possibly extrusion of the brain. When a fall occurs onto the side of the body, any combination of injuries may occur. Multiple rib fractures, shoulder griddle or aim fracture etc. The legs can be broken at any point, at tibial or femoral, often bilaterally.

He opined that the findings of autopsy are **not consistent with the circumstances of death as indicated in relative Police form 23A.**

The post-mortem report was produced as Exhibit 27 and the relative police form 23A as Exhibit 27 (a).

### **(6) Peter Ngarushane Emashe alias Kingori (deceased in count 5)**

**Head and Neck:-** Multiple palpable irregular “cracked pot” fractures of the whole calvarium. On the right frontal extending to the right mastoid region associated with stellate laceration in the parietal region measuring 10 cm x 4 cm x 3 cm with deformity and extrusion of the brain.

**Mouth:-** There are multiple palpable fractures of the palata and disruption of the lower tooth.

**Lower Limbs:** There is compound fracture of the antero-medial aspect of the ankle joint with profusion of the tibia. There is simple fracture of the ankle joint with dislocation.

### **Musculoskeletal System:**

Subcutaneous dissection shows massive occipital subgaleal haemotoma. The following fractures were evident;

1. Skull fractures “cracked pot” associated with multiple fractures of the right front parietal region, irregular fractures of the left anterior cranial fossa extending to the pituitary fossa and orbital plates.
2. Bilateral fractures of both ankle joints.

**Cause of death:-** Head injury due to fall from height.

Comments:-

Death of Peter Ngurushane Emashe alias Kingori is due to severe head injury following a blunt trauma. At post-mortem, there was evidence of both multiple “cracked-pot” fractures of the skull vault and base (‘hinge fracture). The blunt trauma would be due to a fall from height with sight of the primary impact being the right front of the skull accentuated by whole weight of the body as it falls upon the ground (the fixating object inflicting injuries to the skull)

The body may fall whilst maintaining the same orientation to the ground, but usually turns and twists in an unpredictable manner resulting in other variable injuries to the body. The latter would depend upon the height of the fall and so the time variable for turning. This means that the body may strike the ground in a number of different attitudes – and may strike some obstruction part of the way down. If the body falls on the head, there is likely to be massive fracture often (but not always) a scalp laceration and possibly extrusion of brain. When a fall occurs onto the side of the body, any combination of injuries may occur, Multiple rib-fractures, shoulder girdle or arm fractures etc. The legs can be broken at any point, at tibial or femoral, often bilaterally.

He opined that the finding of autopsy are not consistent with the circumstances of the death as indicated in the Kenya Police form 23A.

**Barnabas Mungo Longit (PW 31)** Assistant Commissioner of Prisons, Provincial Prisons Commander Nyanza Province. Between 2<sup>nd</sup> June 2000 – November 2000 he was the officer-in-charge G K Prison Nyeri. His testimony was that as a matter of routine from 1.00pm – 6.00pm there is a lock-up by late shifts duty officer. The sleeping-in-officer takes over the running of the prison between 7.00pm-7.00a.m. The handing over entails going round the prison and confirming in each cell the number of prisoners. Upon confirming that all prisoners, as per the records, are present the sleeping-in-officer and the late shift officer return all the keys to the main safe and seal the keys to the main safe using wax and seal.

All the keys are locked except the few keys which would facilitate the operation of the prison at night e.g. **keys to the main gate, keys to the middle gate (before entering the main prison), and keys that open the main entrance to the various cells**). The keys that facilitate the operations as aforesaid are kept by the guard commander who opens the gate to the various cells for purposes of exchanging guards every 2 ½ hours. **The keys to the main gate is kept by the sleeping-in-officer**. The sleeping-in officer works with two guards commanders who work in rotation. The sleeping-in-officer has no deputy. The warders who take short breaks to sleep do so at the guard room upon exchanging duties with others. The sleeping-in-officer sleeps at the duty office which is separate from the guard room. Duty office is adjacent to the main gate. In an emergency the warders are given orders by the sleeping-in officer. In the event of an escape the search is not co-ordinated. In the event of an emergency the seal to the main safe housing the key for the prison may be broken e.g. when a prisoner is sick at night and has to be taken to the hospital. During such an event, when the seal is broken, the sleeping-in officer records in his sleeping-in journal **in red ink** that occurrence for the attention of the officer-in charge the following day.

On the night of 4<sup>th</sup> September 2000, he was awakened by a siren, whistles and gunshots. The phone was picked by the operator who informed him of an escape from cell 4, Block E. He rushed to prison. The main gate was opened by the gate keeper. He met the guard commander who explained to him the situation and took him to Block E in company of other officers. **The sleeping-in officer was not in his company then.** He was directed to cell 4 at the E Block where the escape had been reported. **There were no lights in the cell.** There was no bulb contrary to the prison regulations that lights in the cells are left on during the night. He did not check the ventilation grill at Cell 4 at that time. He found two guards at Block E but did not talk to them.

As he was leaving Block E cell 4 he met the **Provincial Prison Commander Gacharia (PW 13)**, near the inner gate proceeding to the cells. He went outside the main gate. On the way he met the OCPD Nyeri, Shamalla, (PW36) and briefed him of the events at the prison. As he went round the prison perimeter wall, he noticed warders at the parking lot. He went in the direction of tower no. 2 and noticed **one body lying on the ground naked and groaning.**

As he approached watch tower no. 3 he noticed **4 or 5 bodies on the ground below the perimeter wall. They were all naked, unconscious and groaning.** He did not notice any injuries on them since there were no lights. Suddenly an officer said **“another one is here”**. This was the **sixth** body. The same was carried by the officers and placed where the four others, between tower no. 2 and 3 were. About 20 minutes later, the OCPD Nyeri (PW 36) arrived closely followed by the Scene of Crime Personnel who took photographs. As soon as the photographs were taken the six injured prisoners were taken to hospital.

As soon as the police took the six prisoners to hospital the **PPC, Gacharia (PW 13)**, addressed the staff present and instructed them to continue searching for the two missing prisoners. Gacharia, (PW13), briefed the Commissioner of Prisons on phone about the occurrence. A signal, Exhibit 11, was sent to the Commissioner of Prisons at 2.00 am explaining the circumstances of the deaths. He confirmed that **Exhibit 12** dated 4<sup>th</sup> September, 2000 was sent to the Commissioner of Prisons.

On 5<sup>th</sup> September, 2000 he communicated to the Commissioner of Prisons by a letter. He referred to the signal of 4<sup>th</sup> September, 2000 on the subject of the 8 prisoners who had escaped. He qualified that the report made on 4<sup>th</sup> September, 2000 at 2.20 a.m. was an initial report following what was suspected on the ground, before any investigations was carried out. That the right position would be communicated through another signal. He produced the signal of 5<sup>th</sup> September 2000 as **Exhibit 28** and the one of 8<sup>th</sup> September 2000 as **Exhibit 12. (a)-(f)** in respect of each of the 6 prisoners who had died. **All the 6 inmates were said to have fallen from high perimeter wall.** He confirmed from Main Gate Register (**Exhibit 29**) that on the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000 the gate-keepers were Cpl. Kiviti and Warder Ruoro. He further confirmed that **Exhibit 15 (a) and (b)** are copies of the Duty Rooster which contain the names of staff on duty. He confirmed that to know the sleeping-in-officers one had to look at **sleeping in officers journal.** The **Main Gate Entry Register (Exhibit 29 (a) and (b))** shows the name and when the sleeping in officer reported, on duty. He further confirmed that the sleeping in officer on the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000 was Sgt Muthee (A1). From **Exhibit 14** he confirmed that the officers who were on duty at “BLOCK E” on 3<sup>rd</sup> September, 2000 between 18.30 hours and 19.00 hours on 4<sup>th</sup> September, 2000 were **Caesar Njoka (A3), Julius Sigei, Nelson Ngare and Lenana (A2).** That the officers deployed in the kitchen area were **Joseph Mwai, Benard Mwaniki, John Githaka, Peter Kirimi.** That the officer deployed in the 3 watchtowers were **Julius Munyao (tower No. 1), Sammy Munguchu (tower No. 2) Silas Asembo (tower No. 3), Peter Kinyonya (tower No. 4.)** He produced a list of uniformed and civilian staff during September, 2000 as **Exhibit 30.** It was a list of all officers working under him during the month of September, 2000. He also produced **weight register as Exhibit 31.** The weight register contains **inter-alia** the names of **Peter Loyara Lumukunya (count 1) weight 71 kg, Julius Mungania M”Moraa (count 4) weighing 63 kg, Peter Ngarushana Emashe alias Kingori (count 5) weight 73kg, James Kamande Mwangi alias James Irungu Ndungo (count 2) weighing (not – recorded), John Njoro Njuguna (count 3) weighing 60 kg and Peter Koring (count 6) weight 66Kg.** All the weights of the said prisoners were taken as at September, 2000.

On 4<sup>th</sup> September, 2000, one of the escapees who was at large by the name Mwirichia (PW1) was arrested. Mwirichia, had injury to the leg. He interrogated him and ordered that he be taken to the cells. Later on Mwirichia was charged with the offence of escaping from lawful custody in Nyeri CM CR Case NO.3630/2000. REPUBLIC –V- BENARD KIMATHI MWICHIRIA. He later learnt in the local papers that **Mwirichia had been acquitted of the said charge.** After sometime he also read in the papers that the other escapee **Ipomai** had been gunned down at Nanyuki while in the process of committing a robbery. He was not aware that a report had been made that cell no. 4, Block E had a missing bulb on the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000. He produced also the following Exhibits.

(a) MFI 14 as exhibit 4.

(b) MFI 15 (a) and (b) as Exhibit 15 (a) and (b)

(c) Main Gate Register as Exhibits 29 (a), and (b)

He was categorical that apart from firearms the warders were armed with regular **prison batons**. He confirmed talking to the prisoners who were at the kitchen shift on the night of 3<sup>rd</sup>/4<sup>th</sup> September, 2000. The said prisoners confirmed that they saw naked prisoners throw “**tyre sandals**” at the guard in the kitchen. When the guard blow the whistle the prisoners scaled the perimeter wall.

He equally confirmed having seen the make-shift rope made of blankets, prison uniform and nylon in the morning of 4<sup>th</sup> September at his office. The same was brought by Sergeant Muthee (A1).

He confirmed that according to Exhibit 14, Warder Joshua Onyango (A9) was on duty at the car park within prison compound while Kariuki Njuguna (A6) was on duty at the Provincial Hospital. Kariuki Njuguna (A6) does not say or allude to have been at Provincial Hospital in his unsworn evidence though.

**Dr. Zephania Kamau (PW 32)** was requested to examine several prison warders and to assess their age, injuries and mental status. In sum he testified as follows:

**1<sup>st</sup> Accused: Sgt. Jacob Muthee Mathew:**

Age; 46 years old. He had no visible injuries and was mentally fit. He completed and signed the P.3 which he produced as **Exhibit 33**.

**2<sup>nd</sup> Accused: Joseph Lenana Rukwaro.**

Age: 46 years old. He had no injuries and was mentally fit. He completed and signed the P3 which he produced as **Exhibit 34**.

**3<sup>rd</sup> Accused:- Caesar Mwangi Njoka.**

Age: 36 years old. He had no visible physical injuries and mentally fit. He completed and signed the P3 which he produced as **Exhibit 35**.

**4<sup>th</sup> Accused: Samuel Kamau Ngugi:**

Age: 55 years old. He was suffering from ulcers and was duly treated. He had no physical injuries and mentally fit. He completed and signed his P3 form which he produced as **Exhibit 36**.

**5<sup>th</sup> Accused: James Mugo Karanja.**

Age: 41 years old. He had no visible injuries and was mentally fit. He completed his P3, signed it and produced it as **Exhibit 38**.

**6<sup>th</sup> Accused: John Kariuki Njuguna.**

Age: 48 years old. He had a history of depression in 1994. He had been treated and recovered. The cause was domestic. At the time of examination he was mentally fit. He completed his P3 and signed and produced it as **Exhibit 32**.

**7<sup>th</sup> Accused: James Sise Boit.**

Age: 32 years old. He had a no visible physical injuries and mentally fit. He completed signed, and produced his P3 as **exhibit 37**.

**8<sup>th</sup> Accused: Noor Mohammed Kumo.**

Age: 29 years old. He had **skin disease** on the front part of the neck. He complained of difficulties in breathing during cold weather. He had a noticeable scar on the medical aspect of the right breast as a result of skin problem. He completed, signed and produced his P3 as **Exhibit 39**.

**9<sup>th</sup> accused: Joshua Onyango Nyakundi.**

Age: 38 years old. He complained of ulcers. Otherwise he had no other physical injuries. Examination revealed that he was of sound mind. He completed and signed the P3 which he produced as **Exhibit 40**.

**Peter Mwangi (PW33)**, retired as Senior Assistant Commissioner of Police on 1<sup>st</sup> February, 2004. In the year 2002 he was the Deputy Commander of CID Training School. On 21<sup>st</sup> February, 2002, he was instructed by the Director of CID to re-open investigations into the death of the 6 inmates at Kingongo on the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000. The instructions were based on the result of the Inquest No. 122/2000 before the Nairobi Principal Magistrate, Maureen Odero. The inquest had made finding that the deaths of the inmates arose from a possible unlawful acts of the prison officers under whose custody the inmates were entrusted. He was instructed to establish the circumstances relating to the death of the six inmates aforesaid. His team consisting of five police officers commenced investigations on 26<sup>th</sup> February, 2006 – 21<sup>st</sup> March, 2006. They interviewed 56 witnesses who included police officers who had initially investigated the matter. They also interviewed one of the ex-convicts, **Mwirichia (PW1)** who was in the company of the deceased inmates on the fateful night. They also interviewed all the accused persons in court and two others who are not before the court (they absconded). As a result of their investigations they recommended that all the 11 prison officers be charged with the death of the six inmates but of the 11 there are only nine in court. One fled away. Another cannot be found/traced.

The conclusion of the investigation was embodied in a report which was produced as **Exhibit 41**. He produced **the makeshift rope** as Exhibit 2, 3 pieces of hacksaw as **Exhibit 8**, the iron bar as **Exhibit 9**, the akala shoes as **Exhibit 10** and the wooden structure as **Exhibit 20**. In cross-examination he had this to say:

**“I now see Exhibit 29(a). On the right heading DISCHARGEES, their names and times as 0.200 hours, date is 3<sup>rd</sup> September, 2000. The names are John Njoro, Bernard Kimathi, Godfrey Ipomai. There are numbers against each name as follows:-**

1. No. 766/2000 – John Njoro.
2. No. 747/2000 – Benard Kimathi.
3. No. 722/2000 – Godfrey Ipomai.
4. No. 122/2000 – Peter Koring.
5. (Not Clear) – Peter Ngarushane.
6. 765 – Julius (not clear)
7. 1864 – Joseph (not clear)

**On the same page under discharges is a figure 8. There is the word admission and there is a name. On this document the gatekeeper at night were Cpl. Kiviti and Warder Ruoro, Discharge to me means those officers were let out of the premises at 2.00 a.m. on 3<sup>rd</sup> September, 2000. That means 4<sup>th</sup> September 2000, those people were not in the cells. O.B. is the occurrences during this period. I say the 8 people were discharged through the main gate at 2.00 hours i.e. 2.00a.m on 4<sup>th</sup> September, 2000 at 2.00 a.m.”**

**Scaver Mbogo (PW34)** was Deputy PCIO Railway Police Nairobi. On 21<sup>st</sup> February, 2002. He was instructed by the then Director of Criminal Investigation Kenya to join a team of officers investigating the death of six inmates at Nyeri Main prison under the command of ACP Peter Mwangi (PW33). The other members of the teams were Chief Inspector Christopher Chesoni, (PW 24) Inspector Amado (since retired), Sgt. Mayaka (since retired) and Sgt. Kimari.

Investigations started at Kingongo prison. A number of inmates, and warders were interviewed. They were shown cell No. 4 at Block E. where the escape had taken place with a view to finding out if a full grown man could pass through the grill. They once again cut the grill which had been replaced. Since they had weight record of six dead inmates they selected inmates with almost similar weight to demonstrate whether a full grown up person could pass through the opening.

First, was 83 kg Samwel Mema. He could not pass through the grill from the inside of the cell. Second, was 76 kg Thomas Njoroge, he passed through the grill from inside of the cell but only after being pushed by the third

demonstrator, Paul Macharia. Third, was 94 kg Peter Macharia. He could not pass even after being assisted by the first demonstrator Samuel Mema. The demonstration was done in full view of the investigating team and captured by Scene of Crime Officers present in the form of photographs. Mr. Gacharia (PW 13) Deputy Commissioner of Prisons was in attendance.

They then followed the route from cell 4 through the kitchen which the inmates purportedly went through. The wall to cell no. 4 had then next to it a **firewood store which** partially blocked the grill. The store was demolished soon after the escape.

They reached a conclusion that it would have been very difficult for the prisoner to escape through the grill then go on top of the **firewood store** to the kitchen. He confirmed that **Exhibit 1**. Photo No. 5, accurately depicts the firewood store directly next to the grill in cell No. 4 Block E where the prisoners had purportedly escaped through. A person in the firewood store would see the grill in cell No. 4. However, given the way the cell 4 was situated it could have taken a lot of pains and time for one to go on top of the firewood store wall then walk outside to the perimeter wall. He confirmed that sketch plan **Exhibit 3 (a) and 3 (b)** accurately represents the position of cell 4 vis-à-vis the kitchen and the firewood store. For the six inmates to pass through the kitchen the warders would have seen them because the wall is open from the kitchen side. The team went up to the wall, they noticed broken glasses. They were told that from the perimeter wall the escapees jumped down to the ground or scaled down the wall using a rope or a make – shift rope. **He discounted this theory**. He was categorical that there was no place on the perimeter wall where a rope could be tied to facilitate the scaling down. Put in another way there was nowhere to hold a rope because there were glasses stuck on edge of the perimeter wall. The pieces of blankets and prison uniform could not be held by the glasses to support the weight of a body scaling down the wall. There was nowhere to hold the rope. **He equally discounted the theory that the warders could have been the first to see the escapees given the layout of the kitchen**. He was categorical that if anything the first person who could have seen the escapees, would have been three inmates in the kitchen who denied having seen any inmate pass them. **It is only the warders who claimed that they saw shadows of some people passing**. Visibility could not have been a problem given that the kitchen area was well lit. There was fire and also electricity light on.

On enquiry they were briefed that the keys for the blocks were kept by guard commanders who were warder Ruoro and Kiviti. While the keys to the cells were kept by the sleeping-in-officer who was Sgt. Muthee (A1). That the daily occurrence was being recorded in the Main –Gate Entry Register **Exhibit 29 (a) and 29 (b)**. Gatekeepers for the night were Cpl. Kiviti and Warder Joseph Wachira Ruoro. That if door to cell 4 were to be opened the guard Commander (Ruoro) would have opened the gate of the E Block and the sleeping –in-officer would have opened the same to get the keys for the cells.

**Exhibit 29 (a)** shows discharges at 2 am on 4<sup>th</sup> September, 2000 of 8 people from Block E. **Discharge means that they were discharged through the main gate**. This coincided with the evidence that the escape took place at 2.00 a.m. on 4<sup>th</sup> September, 2000. He produced the committal warrants as **Exhibit 44 (a)**, the finger-prints as **Exhibit 6 (a) – (f)**. The team traced Benard Kimathi Mwichiria (PW1). But were unable to trace signal to the effect that **Godfrey Ipomai** had been shot by the police at Nanyuki on 29/5/2001. However, he managed to trace a signal relating to the demise of Godfrey Ipomai. He produced the signal as **Exhibit 47 (a)**. Post mortem report as **Exhibit 47(b)** and finger prints as **Exhibit 47 (c)**. They also learnt that a signal had been sent by the officer-in-charge Nyeri Main Prison as **Exhibit 11 and 12**. **Exhibit 11 is evidence that death occurred when the six inmates were engaged in a fierce fight with warders. While Exhibit 12 is evidence that the six inmates died when falling from high perimeter wall as well as serious confrontation with prison warders while escaping. He opined that the contents of Exhibit 11 and 12 (a) – (f) are not similar though they talk of the same incident.**

He established that:

- (a) **The car park is well lit during the night.**
- (b) **There was a bulb in cell 4 and lights were left on in the cells throughout the night for security reasons.**
- (c) **Along the corridors of the blocks were guards.**
- (d) **Each cell door has a small opening through which one can see the corridor and vice-versa.**
- (e) **A person moving from cell no. 4 towards the gate would be able to see cell no. 3, 2, 1, 5 and 6 because the cells face each other. Cell no. 4 faces cell no. 3, cell no. 2 faces cell no. 5, cell no. 1 faces cell no. 6.**

In cross-examination he testified thus:

**“Mwirichia (PW1) was charged with the offence of escape from lawful custody on the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000 but he was acquitted by a Nyeri court on the basis that there was no escape. (SEE exhibit D2). CMCC No. 3630/2000: REPUBLIC VS. BENARD KIMATHI MWIRICHIA.”**

He was skeptical that the hacksaw, **Exhibit 8**, could have been used to cut the grill on the ventilation window of cell 4 at Block E on the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000 given that the grooves were intact.

**Dr. Godfrey Zambezi Mutuma (PW35)**, a pathologist and specialist in forensic Medicine was the Chief Government Pathologist between 1997 – 98. In 1998 he joined **KEMRI** as Senior Research officer. He was commissioned by Independent Medico Legal Unit (IMLU) to exhume bodies of six inmates from Nyeri Main G.K. Prison christened Kingongo and redo postmortem on them. He was in the company of Dr. Njue (PW 20 ) Dr. Kagena, Dr. Gaci, Dr. Kituyi (then Director of IMLU), Prof. Sedsil Rogers (professor of Forensic Pathology in Oslo Norway) and the then MOH Nyeri Provincial Hospital. In attendance were police officers under the command of the OCPD Nyeri, (PW36), in addition to the relatives of the six deceased who were willing to identify the bodies in case of need.

Exhumation was done on **1<sup>st</sup> November, 2000** from the mass graves. The bodies were designated by name tags. For purposes of postmortem they were named in the sequence following:-

(1) Peter Loyara Lumukunya (2) James Kamande Mwangi alias James Irungu Ndugo (3) John Njoro Njuguna (4) Julius Mungania M’Moraa (5) Peter Ngurushane Emashe alias Kingori (6) Peter Koring.

Postmortem was conducted on **2<sup>nd</sup> November, 2000** at the Lee funeral Home. **The aforementioned doctors were present.** He was given the history and the circumstances of death. The six deceased were alleged to have been escaping from prison. That they had scaled a wall about 24ft high and from that height fell on the ground and died from the injuries sustained therefrom.

He made specific comments on each case and equally made general comments on the injuries associated with a fall generally. He also made references and where they could be found. He filled and signed the six postmortem reports on **28<sup>th</sup> December, 2000**. His findings in each were as follows:

(1) **Peter Loyara Lumukunya:** (deceased in count 1)

The body was decomposed. All the bones were carefully selected and arranged in the anatomical position and the injuries were classified as follows:

**Head and Neck:-** there were multiple fractures with fragmentation of the skull bones. Fracture of the base of the skull and frontal bone. Fracture of the mandible and the palate (roof) of the mouth at the mid-line. Several teeth were missing.

**Axil skeleton:-** No injuries seen.

**Ribs:** All ribs had no fracture.

**Extremities: Limbs-hands and legs.** There were fractures of the left humerous, the distal portion of the humerous was missing. Fracture of the right calcaneous bones.

**Internal Examination:-** Not applicable as they were decomposed.

**Histology Report:-** Not applicable. No tissue available. They were decomposed.

### **Opinion.**

(a) **General comments:-** Upon examination he formed the opinion that the cause of death of Peter Loyara Lumukunya was due to head injuries in a man with multiple fractures of extremities.

(b) **Specific Comments:-**

The postmortem findings of the deceased were not in keeping with the circumstance of death. The rationale for this comment is that the fractures of the extremities i.e. limbs do not go hand in hand with the fractures of the skull. When one lands on his feet it is only the limbs that get fractured. In that event there would be no fracture of the skull. Put in

another way when one lands on his feet the skull cannot be fractured. When one lands on the skull and there is fracture of the skull one would expect fragmentation of the internal organs i.e. the liver, the spleen, the heart, the lungs and fracture of the ribs because of impact.

### **Conclusion.**

There is reason to believe that the cause of death of Peter Loyara Lumukunya was head injury. That the multiple injuries on the extremities (limbs) disclosed in the examination alone would not have caused the death. He filled, signed and dated the postmortem report which he produced as **Exhibit 48**.

### **(2) James Irungu Ndugo alias Joseph Kamande Mwangi.(deceased in count 2)**

**Head and Neck:-** there were fragmented fractures of the skull in frontal bone. Fracture of the maxilla and mandible in the mid line. Depressed round fracture over the frontal region of the skull measuring 3 cm x 3.5 cm in maximum dimensions.

**Axial Skeleton:-** No evidence of fracture in all the vertebrae bone.

**Ribs:-** No fractures noted.

**Extremities:-** There was evidence of fracture of the left middle third humerus. Communicated fractures of the distal right tibia bone – bone between knees and foot i.e. the leg.

**Internal Examination:-** Not applicable as the organs were decomposed.

**Histology:-** Not applicable because the organs were decomposed.

### **Opinion.**

(a) **General Comments:-** Upon examination he formed the opinion that the cause of death was head injury in a man with multiple fractures of the extremities.

(b) **Specific Comments:-** the postmortem findings were not in keeping with the circumstances of death. The rationale for that comment is that the fracture of the extremities (limbs) do not go hand in hand with the fracture of the skull. When one lands on his feet the skull cannot be fractured. When one lands on the skull and there is fracture of the skull one would expect fragmentation of the internal organs i.e. liver, spleen, heart, lungs, kidney which were not indicated in the original first report done when the body was fresh.

He filled and signed the report on 28<sup>th</sup> December, 2000.

The general comments and specific comments are similar to that of Peter Loyara Lumukunya. He produced the postmortem report as **Exhibit 49**.

### **3. John Njoro Njuguna (Deceased in count 3)**

Postmortem was done on 2<sup>nd</sup> November, 2000 in the company of the doctor's aforementioned.

**Head and Neck:-** Linear fracture on the nostril ridge, the orbit and the zygomatic bone i.e. bone housing the eye. Depressed fracture of the frontal bone measuring 3 cm x 2.5 cm in maximum diameter. Linear fracture of the mandible at the midline with associated fragmentation.

**Axial Skeleton:-** No fracture seen.

**Ribs:-** No fracture seen.

**Extremities:-** Fracture of the right distal humerus with fragmentation of the condyles. Simple fracture of the mid region of the right tibia/tibular. The right foot revealed fracture of the middle portion of the nasal bone and the distal phalanx.

**Internal Examination:-** Not applicable because of decomposition.

## **Opinion.**

Formed opinion that the cause of death of John Njoro Njuguna was head injury in a man with multiple fractures of the **Extremities**. The multiple fractures not in keeping with an impact on the ground.

### **General Comments:-**

The injury varies according to height, the objects on the falling path, the body orientation, the body surface contact area, duration of deceleration, landing surfaces, duration of impact, tissue elasticity, viscosity, impact velocity and the age.

### **Specific Comments:-**

Crush and/or compression of the vertebrae bodies result from **fall feet first**. It results in massive fracture of the skull and extrusion of the brain. It can break the axial skeleton at a number of points. It is not possible to have fracture of the lower extremities and the head in combination. These findings typically point out to inflicted injuries.

He signed the postmortem report on 28<sup>th</sup> December, 2000 which he produced as **Exhibit 50**.

3. **Julius Mungania M'Moraa (deceased in court 4)** Postmortem was done on 2<sup>nd</sup> November, 2000 in the company of the doctor's aforementioned.

**Head and Neck:-** Skull fracture of the frontal region with bone fragmentation possibly from the frontal bone. A round depressed fracture of the skull over the occiput region (back of the head) measuring 34 cm in maximum diameter. Multiple fracture of the maxilla and mandible with evidence of bone fragments of both bones.

**Axial Skeleton:-** No fractures.

**Ribs:-** Fracture of the ribs on the left side 3<sup>rd</sup> to 7<sup>th</sup> ribs. There was blackening around the fracture's presumable haematoma.

**Extremities:-** Fracture of the right middle ulna. Evidence of comminuted fracture of the left lower third fibula bone. Simple fracture noted on the right third tibia bone. A bone chip was taken for DNA analysis for matching with one of the close relatives at the Government Chemist. However, he did not follow up the result of the DNA test.

**Cause of Death.** After the postmortem examination, he formed the opinion that the cause of death was due to head injury in a man with multiple fracture of extremities.

### **Specific Comment:-**

The post mortem findings were not in keeping with the reported circumstances of death. Multiple fractures at different positions is not in keeping with an impact on the ground. **The fractures were more in keeping with injuries inflicted by an implement than impact on the ground.** The depressed fractures of the skull are in keeping with injury by a blunt object and does not fit with a fall from a height theory.

### **General Comments.**

The injuries vary according to height, the objects on the falling path, the body orientation, the body surface contact area, duration of deceleration, landing surfaces, duration of impact, tissue elasticity, viscosity, impact velocity and age.

He signed the report on 28<sup>th</sup> December, 2000 and produced it as **Exhibit 51**.

4. **Peter Ngarushana Emashe alias Kingori.(deceased in court 5)**

Post mortem was done on 2<sup>nd</sup> November 2000 in the company of the doctors aforementioned.

**Head and neck:** multiple fractures of the skull with fragmentation of the skull bones, fracture of the lower jaw mandible at the mid line.

**Axial skeleton:** no fracture noted.

**Ribs:** no evidence of fracture.

**Extremities:** spiral and oblique fractures of the tibia/fibula at the middle distal third and of the bones.

**Cause of death:** head injuries in a man with multiple fracture of extremities.

### **Specific Comments**

The post mortem findings were not in keeping with the reported circumstances of death. The cause of death can best be described as head injury. The fractures were more in keeping with injuries inflicted by an implement than impact to the ground. The fractures of both the lower limb and the skull cannot be explained on the basis of either fall head – first or feet first. Assuming that the injuries were from a fall from height the brain would be fragmented and there would be no evidence of intra-cranial hemorrhage as indicated in the first post mortem done when the body was fresh.

### **General Comment:**

The injuries vary according to height, the objects on the falling path, the body orientation, the body surface contact area, duration of deceleration, landing surfaces, duration of impact, tissue elasticity, viscosity, impact velocity and the age.

He signed the report on 28<sup>th</sup> December, 2000 and produced it as **Exhibit 52**.

5. **Peter Koring:- (deceased in count 6)** He did postmortem examination on 2<sup>nd</sup> November, 2000 in the company of the doctor's aforementioned.

**Head and Neck:-** There was multiple fracture of the base of the skull with ring fractures of the foramen magnum.

**Axial Skeleton:-** No fracture noted.

**Extremities:-** Fracture of the left pharynx of the 4<sup>th</sup> digit.

**Internal examination:-** No possible because of decomposition.

**Histology:-** Not applicable because of decomposition.

### **Specific Comments:-**

The post mortem findings were not in keeping with the reported circumstances of death. Cause of death was head injury. Lack of fractures on the upper limbs also make these injuries not fitting with the common findings in forensic pathology if one falls from height.

### **General Comments.**

The injuries vary according to height, objects on the falling path, the body orientation, the body surface contact area. Duration of deceleration, landing surface, duration of impact. Tissue elasticity, viscosity, impact, velocity and the age.

**Cause of death:-** He formed the opinion that the cause of death of Peter Koring was head injuries.

He signed the report which he produced as **Exhibit 53**.

### **He summarised the six (6) cases thus:-**

In all the 6 reports, the cause of death was due to head injury. The injuries could have been caused by a blunt object to the head.

There were striking similarities in the cases of Joseph Kamande Mwangi alias James Irungu Ndugo (Exhibit 49) and Julius Mungania M'Moraa (Exhibit 51). Both of them had evidence of depressed fracture of the skull. It is probable that the implements used to cause the injuries were most likely having a rounded head. There are striking similarities in the pattern of fractures. An example of probable weapon would have been **hammer** because a rungu cannot fracture a skull. Another example of probable weapon could have been an **iron-bar with rounded head**. In a nutshell the injuries were inflicted using a blunt object. A stone would **not** have produced such an injury because a stone is not all round.

Invariably a stone would produce **uneven fracture** or depression.

The graves of the 6 inmates were shown to him and his team by gravediggers who had buried the bodies under the direction of police. The policemen who were involved in the exercise confirmed the location of the graves before exhumation was done.

He gave references at the end of each report. He opined that he did thorough research given the controversies then surrounding the death of the 6 inmates.

He confirmed that the first postmortem had been done earlier by **Dr. Njue (PW20)** who was part of the team.

The height of the perimeter wall - 24ft – was given to him by the prison authorities. **He knows from experience that people survive even from a fall from a height of 7 storeys.** That people who fall by design from a height always have more injuries because they are prepared for injuries and they want to die. That people who fall by accident do not always incur injuries because as they fall they prepare psychologically and structurally to land safely.

Proceeding on that premise the six inmates who were preparing to escape had prepared themselves psychologically and structurally to land safely, they could have landed very safely from a height of 24ft. If at all there were injuries in the cause of the fall, the same could have been the fractures on the lower limbs if they fell feet first. But in the event they fell head first, there would have been injuries to the head but not of the lower limbs. Falling feet first or head first would have depended on the orientation of the body at the time of the fall.

In cross-examination he confirmed that he did postmortem in the presence of a team of pathologists, namely, Dr. Gacii, Dr. Rugena, Dr Njue, Dr. Kituyi, MOH Nyeri and Professor Sedsil Rodgers from Oslo. That before performing postmortem his team put all the bones with their names and marked on the principle of exclusion in identification.

He confirmed that **Dr. Njue (PW20)** is not in the same standing as himself in Forensic medicine: **He was in a class of his own.** He also confirmed that he had serious reservations about **Dr. Kirasi Olumbe's** postmortem report and opinion. In effect he was saying that his evidence was **the best** among the various medical reports by various doctors.

**PW36, Elijah Kina Shamalla (Rtd) A.C. Police,** retired on 31<sup>st</sup> December, 2003 as Assistant Commissioner of Police. In the year 2000 he was the OCPD Nyeri Provincial Headquarters. In March 2000 he received intelligence report, on phone from his colleague Regional Co-ordinator National Intelligence, the late Mulwa, to the effect that some capital remandees from Nyeri Main Prison christened Kingongo were planning to escape or to be rescued by force by other people when their case was coming for judgment. Acting on that information, he informed the PPO. He also informed the officer-in-charge Kingongo prison. Since then capital remandees going to court were given heavy security. He then organized night and day patrols within Kingongo prison from March, 2000. He then went on long leave but left standing instructions for security arrangements to be tight in respect of Capital Remand Prisoners. He returned from leave on 4<sup>th</sup> September, 2000 about 11.00 p.m. Around 3.00 a.m. the break up occurred at Nyeri G.K. Prison. He went to the scene at about 4.00 a.m. and found Cpl. Kolicha, 999 Car Crew commander Senior Sergeant Opiyo, Provincial Prison Commander PPO Cyrus Gacharia (PW 13), SACP, Mungo Longit (PW 31), ACP Muthami (PW 17) and a group of prison warders within the prison compound near watchtower No. 2. Around the said watchtower (2) he saw a naked body lying on his stomach by aid of a lighting system from the said watchtower. He also directed spotlight at the body. The body had fresh injuries. Blood was oozing therefrom. Gacharia (PW 13), showed him five (5) other bodies with fresh injuries and blood equally oozing from their bodies. His further evidence was as follows:-

***“The injuries were fresh. The faces were badly damaged. One of the bodies had broken legs. I saw bones sticking out. On top of the 5 bodies were broken sticks and clubs which were tainted with blood .....*”**

From his observation all the six bodies were lifeless. He flashed his torch at the perimeter wall on the outside part and saw a string of make-shift blanket hanging on the wall. The blanket was hanging on the top of the perimeter wall facing downwards. He is 6ft tall but he could not reach the end of the make-shift blanket string. On the ground below the perimeter wall just about the place where the six dead inmates were **lying was a murram road and red soil.**

He observed that the perimeter wall had electricity light from a globe hanging just about where the first dead body was. Where the 5 other dead bodies were was dark. He was told by Gacharia (PW13) that the bulbs thereat were broken during the escape.

In company of prison and police officers aforementioned he visited cell No. 4, Block E where the escape allegedly took place. His further evidence was as follows.

***“When the door to cell No. 4 was opened, I went inside I found inmate Esokon Kionga seated at a corner. I***

*found a small ventilation enforced by 4-5 pieces iron bars. I thought it was meant for ventilation. Some iron bars were cut and left a gap. There were 3 iron bars cut. I did not see any cut iron bars. Esokon the sickly looking inmate had a blanket .....*”

**Cell No. 4 Block E had electric bulb on.** He was taken behind cell no. 4 and observed a firewood store. It (the store) was adjacent to the kitchen and equally adjacent to cell no. 4. He went inside the kitchen and interviewed the one cook he found there. He noticed that the kitchen was well lit and food was being prepared. He was shown the general area and informed by Cyrus Gacharia (PW13) that the six inmates having cut the grills squeezed themselves out of the ventilation and walked across the kitchen roof to the perimeter wall. He observed that from inside the kitchen one cannot see the perimeter wall as the kitchen has a roof that obstructs the view of the perimeter wall. However, he observed an open space in the kitchen not covered by the roof where one could see the perimeter wall and watchtower no. 2. From that vantage point he was unable to see the makeshift string of blanket he had seen hanging outside the perimeter wall when he was outside the prison. That piece of blanket had stuck at the top of the broken pieces of glass that reinforced the perimeter wall. **He did not see something on the perimeter wall where the blanket would have been tied to support the weight of escapees as they scaled the perimeter wall downwards.**

From there he made arrangements for search of the two missing inmates and scene of crime personnel to take photographs. He called the DCIO Nyeri, Inspector Chumo, who took over the investigations. **He noticed that the prison officers among the crowd which had gathered had clubs and the officers manning the tower had guns.** The following day one of the escapees Bernard Kimathi Mwirichia (PW1) was arrested. He recorded a statement with the police after the inquest. He produced his typed statement as Exhibit 54 (a) and manuscript as Exhibit 54(b).

### THE DEFENCE CASE.

Having analyzed the evidence by prosecution witnesses, I put all the accused persons on their defences after explaining to them the provisions of section 306 (1) of the Criminal Procedure Code.

**DW1, Sergeant Jacob Muthee Mathiu, (A)** in his sworn statement stated that he was stationed at GK Prison Nyeri as at 3<sup>rd</sup> September, 2000. He reported for night shift between 6.25 a.m. – 6.30 p.m. He took over from CO2 **Ongumi** as a sleeping-in-officer, which means he was the over all in-charge of the night operations at the prison. The day shift-officer in charge aforesaid handed over to him the operations in the presence of the night guard commander. Handing over entailed the giving of lock-up sheet by the incoming sleep-in-officer. The lock-up sheet contain all prisoners inside the prison as per their blocks and cells. A physical count is done to tally with the lock-up sheets. This is done in the presence of day-shift-officer in charge who in this case was CO2 Ongumi.

The guard commander confirms that each cell is properly locked. He ascertains the number of keys and tallies the same with the number of cells. This exercise is done from the first block to the last block.

The officers and or warders on duty on the night of 3<sup>rd</sup>/4<sup>th</sup> September, 2000 were as follows:-

- (i) Warder Thumbi – day gate clerk.
- (ii) Sergeant Muthee – sleeping-in-officer.
- (iii) Corporal Kiviti – Night guard commander.
- (iv) Warder Albert Gaceri Mwangi – gatekeeper.
- (v) Warder Joseph Kinyua – gate keeper.
- (vi) Warder Mukua – telephone operator.
- (vii) Warder Ruoro. – Ag. Guard Commander.
- (viii) Warder Waigwa – Guard Commander.
- (ix) Warder Joseph Lenana. (Cell No. 4 Block E)
- (x) Warder Caesar Mwangi Njoka. (Cell No. 4 Block E.)
- (xi) Warder Miriti – Armoury.

In this regard see Exhibit 30.

The sealed canvas was handed over to him by CO2 Ongumi the duty officer. The sealing wax, candle and sealing stamp were kept in a metal box which is within the duty office. After locking the same in the box the sleeping –in-officer does not have access to the sealing equipment because the day duty officer - who on the fateful night was C.O. 2 Ongumi-kept the key to the metal box. The metal box is fixed to the ground using cement and ballast and hence not movable. The keys to this metal box is kept by the duty officer. That leaves 2 keys outside the metal box i.e. keys to the metal box kept by the Duty Officer and the keys contained in the sealed canvas which is kept by the sleeping –in-officer, who on this fateful night was him (A1). This third key, not locked in the key safe is the key to the main gate. The 4<sup>th</sup> which is not locked in the key safe is for the inner gate. The fifth key which is not locked in the key safe is the key to the Blocks. The keys which are not locked are then handled in the manner following:-

- (i) Guard Commander – left with keys to the blocks.
- (ii) Gatekeeper Corporal Kiviti – gate keys are left with the gatekeeper (warder Kinyua and Gacheru)
- (iii) Warder Gacheru – given the keys to the main gate and the inner gate.

Of all the keys left after the lock up – none of the keys would open any cell. However, there would be keys opening the gates to the blocks to facilitate the change of guards during the exchange of duties. The keys were kept by the guard commander who on the fateful night was Warder Kaviti from 7.00 p.m – 1.00 a.m. Then Warder Ruoro from 1.00 a.m. to 7.00 a.m.

The events which take place from handing over to taking over by officers on duty are all recorded in the **sleeping-in-officers journal**. It was his evidence that he recorded all events as required of him by prison regulations. The guard commander also had **guard commanders journal** where all events which relate to his line of duty was supposed to be recorded.

The day duty officer also maintains **sleeping in officers journal** where events pertaining to handing over–taking was supposed to be recorded. All handing over exercises are done after physically visiting the various prisons blocks and ascertaining the number of inmates thereat.

About 1.50a.m on 4<sup>th</sup> September, 2000 while at the sleeping –in-officer’s room he was awakened by the gate-keeper, warder Joseph Kinyua. He (Kinyua) told him that in company of warder Ruoro and the telephone operator, warder Mukua, they had heard voices and whistle blowing from the direction of the kitchen and Block E. That prisoners from E Block were escaping and had been spotted by warder Waigwa (PW7) who was in the company of four prisoners preparing breakfast for the inmates.

It was his further evidence that he then ordered the night gatekeeper, Warder Kinyua, to activate the siren. Simultaneously he ordered warder Kinyua, to inform the officer-in-charge of the Nyeri Main Prison, Mungo Longit (PW 31) who was residing inside the prison compound. In the meantime warder Kinyua opened to himself, (A1) and warder Ruoro, the guard commander, the inner gate. The three proceeded to E Block cell 4. Warder Ruoro opened Gate 4 and 5 as captured in Exhibit 3 (a) and Exhibit 3 (b). Time was now about 2.00 a.m. on 4<sup>th</sup> September, 2000.

At the kitchen they found the sentry, warder Waigwa, with four prisoners, namely, Nganga, Kamotho and Irungu. They were informed by warder Waigwa of the presence of prisoners on top of the tailoring roof adjacent to the kitchen. For that reason they raised the alarm by blowing the whistle. While still talking there was a burst of gunfire. At that point in time the only personnel armed with firearms were sentries at the four watchtowers and warder Kimani and Nderitu at the car park.

From the kitchen they proceeded to E Block which was opened by Ag guard commander Ruoro. Thereat they met **Warder Joseph Lenana (A2)** and **Warder Caesar Mwangi Njoka (A3)**. The two warders informed them that prisoners had escaped at cell 4. On peeping at the peeing-in-hole he saw only one prisoner whom he came to learn was called **Esokon Kionga**. Observation of the rear wall of cell 4 revealed that the wire mesh at the window (ventilation) had been folded on one side. He equally observed that one metal bar at the ventilation was missing. He confirmed that exhibit 1 at Photograph 8 captures the position accurately. He also confirmed that he did not test the metal bar at the ventilation in cell no. 4 because the wire mesh at the window hindered him. He could not therefore vouch whether the metal bars on the window were secure. He could equally not test the grills on the ventilation of cell 4 from outside because the firewood store which was behind the window prevented him from doing so. In effect no prison officer had tested the grill before this incident because of the hindrance by the wire mesh from inside and the firewood store from the outside.

From the corridor, at the peeping hole of cell 4, he noticed that there were no lights inside the cells. However, the lights from the corridor illuminated the cells through the grill on top of the door. Though this light was dim he managed to see a silhouette of somebody sleeping on the floor. He confirmed that photo No. 6 of Exhibit 1 accurately captures the grill and the peeping hole at the door of cell no. 4. He asked (Esokon Kionga) about the rest of the inmates. Kionga said he did not know. He then went back to the duty office. The inner gate was opened by warder Ruoro. It was now approximately 2.00 p.m. Gunfire was still blazing. The siren was still on.

By the time he went to E block before 2.00 a.m. he had not yet broken the canvas seal. All keys to the cells were still in the main key safe on the wall. However, the duplicate keys were still with Mungo Longit (PW 31) or Muthami (PW 17). Even these set of keys were kept in duplicate key safe.

When he reached the duty office the inner gate was opened by gatekeeper, warder Kinyua. Thereat, he met CO2 Boit (A7), the armoury man, Warder Miriti, and the telephone operator, warder Mukua. Only warder Mukua was in uniform. He narrated to CO2 Boit (A7) what he had seen and what he had heard at cell no. 4 Block E. CO Boit instructed him to break the seal open the armoury so that weapons could be distributed to the officers who had responded to the alarm. He then produced the sealed canvans, opened the main key safe to the armory in full view of CO2 Boit (A7) Warder Kinyua, Warder Miriti, Warder Mukua. **At this stage he had not entered any event in the sleeping-in-officers journal.** On breaking the canvas he fetched the armory keys which he passed on to warder Miriti and CO2 Boit (A 7). The two entered the armory. He remained in the duty office. He confessed that he did not know whether the activating of the alarm was recorded in a book called **Alarm Practice Register**. Then he passed over the signal key to Warder Kinyua. He further testified thus:

***“I removed the keys to the cells later when the prison bosses had come. I entered the occurrence in the sleeping-in officer’s journal.”***

That Mungo Longit (PW31) arrived after he had entered the records of the breakage in the sleeping-in-officer’s journal. And Mungo Longit demanded a briefing. In company of Mungo Longit and other officers they visited “E Block”. Mungo Longit (PW 31) enquired from the sentries on guard at Block E what might have been.

Mungo Longit then peeped through the hole in cell No. 4. From cell 4 the entourage proceeded to the kitchen which is Gate No. 5 as captured in Exhibit 3(a) and 3(b). At the kitchen Mungo Longit (PW31) interviewed Warder Waigwa (PW7). From the kitchen the entourage went to the office. On the way back from the office the entourage of Mungo Longit met with the entourage of Gacharia (PW13) at Gate No. 1 in Exhibit 3(a) and 3(b). Mungo Longit (PW31) briefed Gacharia.(PW13) Then Mungo Longit (PW31) went outside the prison gates. In company of other officers, under the command of Gacharia (PW13), they went back to E Block where Gacharia (PW13) peeped through the peeping hole and talked to the only inmate inside- Esokon Kionga. Gacharia and his team then went back through Gate No. 4 to Mungo Longit’s office. It was now between 2.00 a.m. and 2.30 a.m. 4<sup>th</sup> September, 2000. **He went to his office marked Guard Room in Exhibit 3(b).** On reaching his office he entered the night occurrences in **the sleeping-in-officer’s journal**. Subsequently he went back to the tailoring section then to gate No. 3 where he met Gacharia (PW3) who instructed him to get the keys for E Block and open cell No. 4. It was now between 2.45 a.m. – 3.30 a.m.

According to him, that was the first time since the lock-up that he opened and entered cell No. 4, which is captured in Exhibit 1 at photograph No. 6. He did not observe the conditions obtaining in cell No. 4 as there were no lights. Scenes of Crime Personnel came and took photograph of cell No. 4. Esokon Kionga was then transferred to cell No. 5.

In respect of dressing, he was categorical that he was in uniform, Lenana (A2) and Caesar (A3) were in uniform and had prison batons. Onyango (A9) was in uniform. He met Boit (A7) at the tailoring section also. Both were in civilian.

It was also his evidence that he went out of the prison for the first time between 4.00 and 5.30 a.m. In the company of Mungo Longit (PW 31), Gacharia (PW 13), Scene of Crime Personnel and SSP Shamalla (PW36) OCPD Nyeri, the entourage headed for tower no. 2 in Exhibit 3 (a) and (b). That is the first time he saw a body of a person lying on the ground. On turning towards tower No. 3 in Exhibit 3 (a) and (b) at the place marked D adjacent to staff houses he saw 5 bodies. Here they found a group of people – police officers, prison officers and persons whom he presumed came out of staff quarters. He denied having caused the death of the deceased in count 1-6. He denied having facilitated the removal of the 8 inmates from cell no. 4, and leading them outside the prison main gate to be “finished”.

**DW 2 Joseph Lenana Rukwaro (A2)** testified on oath that on the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000 he was the night guard at Block E at Nyeri Main Prison. He reported on duty at 6.30 p.m. together with Warder Caesar Mwangi Njoka (A3). They were working in shifts. At 10.30 p.m. they exchanged with warder Nelson Ngare and warder Segei (A2), he and Warder Caesar Njoka (A3) went to the guard room to sleep. They resumed duty at E Block at about 1.00 a.m. After 2 ½ hours Warder Joseph Ruoro opened for them the main gate to E block. They were literally locked in by warder Ruoro. After 1 ½ hours they exchanged the shift again.

About 2.00 a.m., on the 4<sup>th</sup> September, 2000, he heard movement of logs of wood. He presumed that cooks were taking firewood from firewood store to the kitchen. About 1 ½ minutes or so later he heard movements like that of cats playing on the roof top of Block E and the tailoring block. However he could not see the roof from where he was. They decided to check. They went to cell no. 2 and 3. While thereat they heard someone in cell no. 4, 5 or 6 direction complaining that he was sick. In cell no. 4 a prisoner, Esokon Kionga, claimed that his fellow inmates had escaped.

The cell had **no lights on**. Warder Caesar Njoka (A3) lit a cigarette lighter. With assistance of the light from the said lighter he peeped through the peeping hole and noticed that the wire mesh on the window grill had been pulled on one side and the grill on the ventilation was cut. He saw one prisoner leaning against the wall inside cell no. 4. He was shocked. He started banging the door using his wooden baton. Caesar Njoka (A 3) was blowing the whistle. He joined Caesar Njoka in doing so. Suddenly warder Waigwa (PW7) screamed. Then he heard gunshots from the tower. Somebody ran towards the kitchen. He then heard warder Ruoro (who is at large) telling warder Waigwa that prisoners were escaping. He saw warder Ruoro running towards the main gate through the peeping hole to the door to "Block E". Before he reached the inner gate he heard the alarm. Then pandemonium ensued. He denied having assisted any inmate from escaping from "E Block".

He was categorical that Mungo Longit (PW1) was the first senior prison officer to arrive followed by Gacharia (PW 13). That the door to cell No. 4 Block E was opened by Sgt. Muthee (A1) when Mungo Longit (PW31) Gacharia (PW13) and police officers came for the second time. This was about 3.00 a.m. – 4.00 a.m. The said officers left them in the compound of E Block with Caesar Njoka (A3) where they stayed until 7.00 a.m. in the morning. He denied having assaulted any prisoner. He maintained his plea of not guilty.

**DW 3, Caesar Mwangi Njoka (A3)** testified on oath that he reported on duty at 6.30 p.m. on 3<sup>rd</sup> September, 2000 on night shift and was detailed to work in Block E. They were four warders working at this Block in shifts of two. First shift was himself and Warder Lenana. The second shift was warder Karoro and warder Segei. The first shift were relieved by warder Karoro and Segei at 10.30 p.m. They resumed work about 1.00 p.m.

About 1.30 a.m. – 1.40 a.m. he heard movements from the roof of the tailoring section which he suspected were of human beings. They decided to check. He personally went towards cell no. 1, 2 and 3, while Lenana (accused 2) went to cells 4, 5 and 6.

On his way out he heard an inmate tell Warder Lenana (A2) in Kiswahili, that he was sick. He met Lenana in the area of cell 4, 5 and 6. He told Lenana (A3) to call the guard commander. At cell no.4 he talked to one prisoner through the peeping-in-hole. The prisoner confirmed that he was sick and had been given sleeping tablets and the rest of the prisoners had escaped. He observed that there were no lights in cell no. 4. Only lights from the corridor were on. With the aid of corridor lights he observed that the wire mesh on the window was folded on one side. There was a metal grill missing from the ventilation window of the cells. He assumed that there were no prisoners in cell no. 4 and broke this news to Lenana (A2). He then blew a whistle as Lenana banged the door to E block gate using a baton. Then he heard warder Waigwa (PW7) shouting from the kitchen. There was a burst of gunfire. Then warder Ruoro and others came to E Block and broke the news that prisoners were escaping. Then pandemonium ensued. He did not leave the E Block until 7.00 a.m. He denied having assaulted any of the dead inmates. He denied having opened the door to cell no. 4 at E Block to facilitate the escape of prisoners. He denied the charges in toto.

**DW 4, Sergeant Samwel Kimani (A4)** testified on oath that he was in charge of maintenance of high discipline. In line with his duty he would put inmates in solitary cells, demote them from stage 4 to 3, put them on penal direct and take prisoners to duty officer who would prefer charges. Then appropriate punishment would be meted out to the inmates. He contended that by reason of the foregoing he was very unpopular with the inmates. Before 2000 he had been in that position for 3 years.

He was off duty and went to his rural home at Thika on 1<sup>st</sup> September, 2000. He resumed duty on 4<sup>th</sup> September, 2000. He arrived at his residence within the prison compound at 8.00 p.m. in the company of his son Duncan Wanjohi Ndungu, who was then a student at Karimi Boys High School. They retired to bed. At about 2.00 a.m. About the same time he heard gunshots, whistle blowing and sound of alarm. He became uneasy when the commotion persisted. He opened the door to his house. His next door neighbour, **Senior Sergeant Jackson Gitonga**, (PW16) passed by enroute to the prison 150 meters away. **He also followed in civilian clothes**. On reaching the main gate he found many warders being issued with firearms. CO2 Boit (A7) ordered him to remain in the armory to prevent armed warders getting inside the prison compound. Boit was issuing arms and ammunition to warders outside the perimeter wall through the service window. Time was about 3.00 a.m. His further evidence was as follows:-

***“Firearm is not permitted unless a Senior Principal Officer does allow for specific reason. Battons are normally allowed when officers are on duty especially during nights. Night guards are always armed with batons.”***

He denied having assisted the prisoners to escape. He denied having ordered other warders to finish the inmates. It was his further evidence that he went with police dog search party. When he returned he saw the dead bodies for the first time. There was, at the jump up point, a crowd of about 100 people consisting of **Senior Prison officers, visitors from the warders quarters and warders**. He returned to the house about 5.30 a.m. to change for morning duty at the duty office. That is when he saw C.O. Boit (A7). Towards 8.00 a.m. Sergeant Muthee brought him a piece of make-shift rope made of prisoner's uniform, nylon and blankets in addition to three pieces of hacksaw. (Exhibit 8). CO2 Boit (A7) said that he had collected the items from the area of E Block. He took the said items to the officer-in-charge of prisons.

In cross-examination he testified as follows:

***“I did see service officers with batons and rungun at the jump-up point. Those officers were having unofficial batons which they got from their houses but not issued at the armoury.....”***

He denied the charges in toto.

**DW5, Duncan Wanjohi Ngugi**, son and witness called by Senior Sergeant Samwel Kimani Ngugi (DW4), a student at Karima Boys High School Nyeri, echoed the testimony of his father. He was left at the house while the father went to the prison. He had no idea what his father did or did not do while inside the prison.

**DW 6 Senior Sergeant Artisan James Mugo Karanja (A5)** was alone in his house within prison quarters. About 3.00 a.m. – 4.00 a.m. he heard commotion about 250 metres away from prison direction. **He went to prison**. The first thing he saw was a police Land rover coming from watchtower no. 2 adjacent to the main gate.

He met, among others, senior officers Mbaya (technical officer), Gacharia (PW13), SP Emuse, (Officer-in-charge medium prison), SSP Muthami (PW17), SSP Ngunjiri. He did not talk to the said officers. He went to his house. He never heard alarm, whistles blowing or gunfire. He did not see any armed members of staff. He pleaded mistaken identity. That there was another officer within Nyeri Main Prison whom he shared a name with – Senior Sergeant artisan Atanas Mugo Karanja. He denied having participated in assaulting the inmates on the night of 3<sup>rd</sup>/4<sup>th</sup> September, 2000. He claimed to have been drunk that night though he did not write that in his statements which was admitted in evidence as Exhibit 59 (a) (original) and 59 (b) (typed).

**DW 7, John Kariuki Njuguna (A6)** in his **unsworn** evidence narrated how he was awakened by gunshots, siren and whistles that rent the air at midnight on the night of 4<sup>th</sup> September, 2000 while in his house at the prison compound. At first he was shocked. **Later at about 4.00 a.m. he walked towards the prison gates**. He asked some warders what might have been. He was briefed of the escape. Near the main gate he saw some stains of blood towards the kitchen from tower no. 2 and 3. He met other warders who showed him the jump-up or escape point. He went back to the house and started to prepare for morning duty. He denied having gone to the prison kitchen that night. He denied the charges preferred against him.

**DW 8 No. 26560 Chief Officer James Sise Boit (A7)** in his sworn statement testified that he was supposed to be on duty on 3<sup>rd</sup> September, 2000 but made his own private arrangement with Sgt. Jacob Muthee Mathiu (A1) to stand in for him as the sleeping-in-officer on the night of 3<sup>rd</sup> and 4<sup>th</sup> September, 2000 because he had a personal matter to attend to at Kerugoya. It turned out to be matters of the heart. On the night of 3<sup>rd</sup> September, 2000 he attended the party at Mungo Longit's (PW31). He went to the party at 8.00 p.m. instead of going to work as sleeping-in-officer for the day. He left the party at 12.30 am on 4<sup>th</sup> September, 2000. He slept with his girlfriend, Tabitha Muthoni Gachara. Around 2.00 a.m. he was awakened by gunshots and sound of alarm from the prison. He dressed in civilian clothes and dashed to the prison. Warder Kinyua opened the gate. He met Sgt. Muthee (A1) who broke to him the news of the escape. He accompanied Muthee (A1). Warder Kinyua opened the main gate. The gate to E Block was opened by warder Ruoro. It was his evidence that both the aforesaid warders were not wearing **“Marvin Gay hoods”** on their head. That nobody in the duty office was wearing **a hood**. At Block E he found Warder Caesar Njoka (A 2) and Warder Lenana (A3). He went to cell 4 and talked to the prisoner Esokon Kionga through the peeping hole. Kionga told him that he was unwell. That when he woke up he found himself alone in cell no. 4. The other eight colleagues had disappeared. He then alerted the warders guarding E Block. Kionga showed him the ventilation with one metal bar missing. At the kitchen he talked to warder Waigwa who briefed him of the occurrence. He saw four prisoners in the kitchen. He then rushed back to the armory through the duty office. He found warder Miriti and Sgt. Muthee (A1). He ordered Sergeant Muthee to break the sealed canvas containing the key to the key safe to facilitate obtaining the key to the armoury. The seal was broken in his presence, the armourer and **warder Mukua** (telephone operator). **But he did not see Sgt. Muthee (A1) making entries regarding the breaking of the seal in the sleeping-in-officers journal**. Sgt. Muthee then passed the keys to the armourer, (warder Miriti) who entered the armoury in his company. At the armoury he supervised the issuance of the firearms, tear gas, batons, ammunition, shields, helmet, shinguards etc to the officers and warders. Warder Miriti made entries on a register called Arms Movement Register (Exhibit 21). He then went outside the main gate. Warder Kinyua (PW6) instructed the non-commissioned officers to form groups to hunt for the escapees. He then went to view the

jump-up point. Near tower no. 2 he saw one naked body next to the said tower by the aid of a torch. Forty to fifty meters away he saw 5 bodies with the aid of a torch. He confirmed that the group assembled at that point consisted of persons **armed with guns, and two with rungs**. He went back inside the prison. He found Mungo Longit (PW31) had arrived together with Gacharia (PW13). He briefed them of what he had done that far. He went outside the prison for patrol purposes then went back inside the prisons after one hour. He found the gate leading to the tailoring section open. Several warders were inside. He found **akala** shoes had been recovered on top of the tailoring roof. While going out of tailoring section he saw Mungo Longit (PW31) and Gacharia (PW13) at E Block. He did not enter the E Block. After some time Mungo Longit (PW31) and Gacharia (PW13) together with prison officers left the E Bloc and moved towards the main gate. He went out of the prison and found warder Tergech and warder Sapar patrolling the kitchen and Kingongo prison environs generally. At 7.00 a.m. on 4<sup>th</sup> September, 2001 he went to his house, put on his uniform and returned to prison for official duties. He returned the pistol he had been issued with. He denied the charges preferred against him. He conceded that the time he entered prison on the night of 3<sup>rd</sup>/4<sup>th</sup> September, 2000 was not recorded in the main gate register.

**DW 9, Noor Mohammed Kumo (A8)** in his sworn statement conceded that he was a prison warder at Kingongo in the year 2000. On 3<sup>rd</sup> September, 2000 he was off-duty. He went to visit his friend within Nyeri town. He reported back to his house within prison at 7.30 a.m. and went to bed at 1.00 p.m.

About 2.30 a.m., on 4<sup>th</sup> September, 2000 he heard a siren, whistles then a burst of gunfire. He realized there was an emergency. **He put on a tracksuit and rushed to the prison.** He met CO1 Boit (A7) and warder Miriti the armourer (PW 26) outside the main gate. CO1 Boit briefed him of the escape and ordered him to take firearm and accompany the search party. He was issued with a G3 by the armourer and 20 rounds of ammunition. The transaction was recorded in the Arms Movement Register (Exhibit 21) and he signed for it. He had no any other weapon.

After 1 ½ hours of unsuccessful search they went back to prison. On reaching the first gate of the prison approaching from Nyeri – Kiganjo road they met police officers. In company of the said police officers they combed the area towards coffee plantation of Duncan Ndegwa towards Kiganjo until 10.00 a.m. In the course of the search he panicked and used two rounds of ammunition in the coffee plantation when he heard some movement. This was recorded in the Arms Movement Register upon his return. He returned the G3 and 18 rounds of ammunition.

It was his further evidence that from 2.30 a.m. – 10.00 a.m on 4<sup>th</sup> September, 2000 he never ventured inside the prison. He had no blood-stained clothes or weapons. No warder washed his blood stained shoes and weapons in the kitchen. He pleaded the defence of mistaken identity. During that period there were many officers of Somali origin within Kingongo. One of them was Mohammed Noor. The other was him. Hence Kamotho (PW3) could have been mistaken. He denied ever seeing dead bodies the whole period of the search or at the prison compound. He denied having assaulted anybody. He denied having caused the death of the six inmates named in the charge sheet.

**DW 10, Joshua Nyakundi Onyango (A9)**, in his sworn statement testified that he was a warder at the Main Prison Nyeri christened Kingongo. He carried out general duties including administering corporal punishment on prisoners.

**On the night of 3<sup>rd</sup>/4<sup>th</sup> September, 2000 he was guarding the car park in the company of warder Kimani, warder Tergech and Warder Michael Nderitu.** The first shift from 6.30 p.m.-10.30 p.m. comprised of warder Michael Nderitu and warder Kimani. The second shift from 10.30p.m – 1.30 a.m. on 4<sup>th</sup> September, 2000 comprised of himself and warder Tergech.

The car park is in front of the main gate of the prison and well lit. He was armed with a G3 rifle with 20 rounds of ammunition. He was in full uniform which includes khaki long trouser, khaki short sleeved shirt, a whistle, cap, green sweater, green rain coat, a pair of boots, socks and **a baton**.

About 2.30 a.m. on 4<sup>th</sup> September, 2000, while at the guardroom he heard sounds of siren, whistles and a burst of gunfire. In company of the 20 guards they responded to the alarm. He rushed to the duty office to check what might have been. The shoots and whistle appeared to have been from the kitchen direction and Block E. They went to the direction of the gate and found warder Kinyua (PW6) and Sgt Muthee (A1). He instructed warder Kinyua to open the inner gate which leads to the E Block and the kitchen. This was done by warder Ruoro. At the kitchen they found warder Waigwa (PW 7) guarding prisoners preparing breakfast. Warder Waigwa briefed them about the prisoners jumping from the edge of perimeter wall. They had no weapons then.

They then went to the E Block where the door was opened to them by Sgt. Muthee (A1) but did not enter the cells. Their intention was to ascertain if the inmates were safe. They found warder Lenana (A2) and warder Caeser Njoka (A3), Sgt. Muthee (A1) ordered them to check the doors of all the cells. At cell no. 4 he observed, by aid of corridor lights, through the peeping-in-hole, that there was **one convict**. There were **no lights** and the wire-mesh on the ventilation

window appeared **bent**. While at the entrance of E Block Senior Prison officers Muthami (PW17) ordered that they conduct search on the roof of the tailoring section. They discovered a rope made of inmates uniform, blanket and manila sack, and **akala** shoes on the roof. From there they proceeded to main gate. They were ordered to remain inside the prison while the senior officers went outside the main prison gate. He denied having assaulted any of the prisoners on the night of 4<sup>th</sup> of September, 2000. He admitted having seen the 2<sup>nd</sup> and 3<sup>rd</sup> accused at the entrance to Block E. He denied the charges in toto.

In cross-examination he testified thus:

***“The grills are the iron-bars on the ventilation.***

One of the grills, as I saw it had been cut and bent towards the kitchen’s firewood store but had not been removed completely. I mean the grill was still sticking on the ventilation ..... I did not know where the grill which was cut but not removed was found. I was not able to see the bulb and the bulb-holder from the peeing-in-hole of the door to cell 4. I did not use cigarette lighter to facilitate seeing the inside of the cell 4. The 3<sup>rd</sup> accused did not give me cigarette lighter to facilitate the seeing inside of the cell 4 .....

On further cross examination, of the events that took place at the tailoring section, he testified thus:

***“..... At the top of the roof of the tailoring section, we recovered only one akala shoe and a shirt of an inmate and a rope made of inmates’ uniform and nylon sacks. The rope was recovered towards the perimeter wall of the prison. The others were recovered above the roof of perimeter wall. The makeshift rope was about 6 metres long. I did not see any short trouser for an inmate on the roof. I did not see 3 hacksaws pieces on the roof. I did not see any blankets on the roof. I only saw the rope made of inmates uniform and nylon sacks. I did not see the rope part of which was constituted by a blanket .....*”**

**(DW11) Warder Joseph Kinyua** testified, on oath, that he was on duty on 3<sup>rd</sup> September, 2000 from 8.30 p.m. as a gatekeeper at the main gate and inner gate. He had custody of the two keys. He was on duty from 1.00 a.m. on 4<sup>th</sup> September, 2000. As a gate keeper he keeps records in the gate-book of movement of persons inside and outside the prison. He made a mistake by recording entries of 4<sup>th</sup> September, 2000 instead of entry of 3<sup>rd</sup> September, 2000. Warder Ngunjiri corrected the entries of 3<sup>rd</sup> September on 4<sup>th</sup> September, 2000 by white-outing the entries of 3<sup>rd</sup> September, 2000 in his absence. On the opposite page of Gate Book, which he produced as EXHIBIT 29, are entries of 3<sup>rd</sup> September, 2000 marked as **discharges** in red ink. The entries are indicating 2.00 hours (2.00a.m.) i.e. 4<sup>th</sup> September, 2000. That is when he was at the main gate. He denied having made those entries. Those entries were made by warder Ngunjiri. He denied having led out Sgt. Muthee (A1) with a group of inmates during the time he was on duty.

He was the one who activated the alarm. The officers who responded to the distress call includes but were not limited to CO1 Boit (A7). He witnessed the breaking of the seal by Sgt. Muthee(A1) He is the one Muthee (A1) handed over the keys to and who used the same in opening the safe where the keys to all blocks which houses cells were kept. He could not remember the time when he was given the key but remembers it was after the incident of escape and after activating the siren. He confirmed activating the siren because there was an escape by inmates. It was the telephone operator, warder Ruoro and Sgt. Muthee (A1) who told him of the escape. He confirmed having omitted to record the entry of police officers in the prison compound on the fateful night. **He confirmed that the entries on Exhibit 29 were not complete.** He blamed his laxity on stress. He confirmed having seen CO1 Boit (A7) respond to the siren but he did not include the name of CO1 Boit (A7) in Exhibit 29 ( C ). He owned up to that omission. He confirmed having woken up Sgt. Muthee (A1). By that time he had already opened the inner gate to warder Ruoro who had already gone inside with a view to finding out the reasons for the Warders banging of the door at Block E and kitchen area. Much later he opened the main gate for warder Ruoro and Sgt. Muthee (A1) whom in company of other prison officers went outside the prison in the morning of 4<sup>th</sup> September, 2000. Warder Ruoro came back running and briefed him that there was an escape. Last but not least he testified that between 2.00 a.m. and day break on 4<sup>th</sup> September, 2001, he was oscillating between the main gate and the inner gate (gate 2). That senior prison officers and police officers entered the main gate more than once in the morning of 4<sup>th</sup> September, 2001.

**DW 12 Corporal John Ngunjiri Waweru**, testified on oath that he is a gate clerk. He reported on duty on 4<sup>th</sup> September, 2000 at 6.30 a.m and he got information of an escape of inmates. Though he stays in the prison compound he did not sleep in the prison premises on the night of 3<sup>rd</sup> September, 2000. He arrived in the compound in the morning of 4<sup>th</sup> September, 2000 and went straight to work. He was categorical that any gate book or register is meant for **recording the names of all persons who enter the prison during the day or night and whether civilian or prison personnel.** That any junior officer who is not on duty will not go beyond the inner gate. He confessed that though he was not on duty on 3<sup>rd</sup> September, 2000, whether during the day or night, yet he made entries of 3<sup>rd</sup> September, 2000

relating to discharges in Exhibit 29 ( C ). He owned up to that commission.

He admitted having reported on duty on 4<sup>th</sup> September, 2000 at 6.30 a.m. Guard commander Ruoro briefed him of what had happened. He asked Ruoro, as the second officer-in-charge to Sgt. Muthee (A1), the names of the escapees and he recorded formally the names of the escapees as narrated to him. Those are the names he put down as discharges in Exhibit 29 ( C ). The names were John Njoro, Bernard Kimathi, Julius Mungania, Godfrey Nyamai, Peter Lumukunya, Peter Ngurushana, Peter Koring and Joseph Kamande. He explained that a discharge is a term which connotes any prisoner who leaves the prison illegally or legally. He averred that there is no definition of discharges in the Prison Act (Cap 90) though that is his own understanding. Prisoners who are taken to hospital at night and taken to court are marked as discharges. The time they go out is written and the time they come back is equally written. Exhibit 29 (b) shows discharges at page 2. As relates to the six inmates who escaped on 3<sup>rd</sup> September, 2000 at 2.00 a.m. (should read 4<sup>th</sup> September, 2000) see (Exhibit 29 (a) he wrote on the side of the main heading discharges as **ESCAPED**.

Transactions in exhibit no. 29 (a) were made on 3<sup>rd</sup> September, 2000. Transactions on exhibit 29 (b) were made on 4<sup>th</sup> September, 2000. He confirmed that Exhibit 29 (a) has many entries wite-outed relating to Gacharia (PW13), Mungo Longit (PW31) and Muthami (PW17). As against Muthami (PW 17) it was wite outed and replaced as follows: (in) 1800 and (out) 1810. In respect of Gacharia it is completely wite-outed. As against Mungo Longit( PW31) the time seems to have been erased by rubber and then replaced with 1600 (in) and 16.30 (out). He could not remember where he got the time yet he was not on duty when the events took place. He transferred entries relating to Muthami (PW17) to read 0.215. (in) and 0.645(out). He did not know who made the wrong entries on 3<sup>rd</sup> September, 2000. In respect of the record of 4<sup>th</sup> September, 2000, the time relating to entry and exit of Gacharia is written on top of the wite-out. He owned up to having put wite out on the name of Gacharia on 3<sup>rd</sup> September, 2000. It was his evidence that the officer-in-charge Mungo Longit (PW31) instructed him to put wite-out on time relating to entry and exit of Gacharia on 3<sup>rd</sup> September, 2000 and also to himself (Mungo Longit) and Muthami. He agreed that entries made in Exhibit 29 (a) regarding discharges of 4<sup>th</sup> September, 2000 were in fact of discharges of 3<sup>rd</sup> September, 2000 as opposed to discharges of 4<sup>th</sup> September, 2000. That is what is contained in exhibit 29 (b). The entries of 3<sup>rd</sup>/4<sup>th</sup> September 2000 were checked by the officer-in-charge. The officer-in-charge would only sign after all the entries have been made. The officer-in-charge Mungo Longit (PW31) had signed all the entries on 4<sup>th</sup> September, 2000. He confirmed that Warder Kinyua (DW11) was the gatekeeper for the night of 3<sup>rd</sup>/4<sup>th</sup> September, 2000 and opened the gate for him. He confirmed that warder Ruoro was the Ag. Guard Commander on the morning of 4<sup>th</sup> September, 2000 when he reported on duty at 6.30 a.m.

**DW 13, Michael Kariuki Nderitu** a prison warder testified on oath that he was in the company of Simon Kimani Mbiru Muiuru on the shift commencing 8.00 p.m. – 10.30 p.m. They were guarding car park in front of the main gate. They were all in uniform. He was again on the shift from 1.00 a.m. He rushed to the prison to confirm what was happening. Before he reached the gate he heard foot steps of people running inside the prison. The next thing he heard was a burst of gunfire from tower no. 3. Then from tower no. 2. At that point in time warder Onyango (A9) and warder Tegerech were in the guard room. He rushed to tower no. 2 and met Sammy manning that tower. Sammy told him that they were shooting to resist the prisoners who were scaling the wall. That before he heard the first whistle he had not seen Senior Sergeant Kamau (A4) anywhere near the main gate. From 1.00 a.m. to the time of the siren was activated, punctuated by whistles being blown, he did not see any naked people criss-crossing around the car park. Silas Osembo was manning tower 3. The gatekeeper was Joseph Kinyua (DW11). The guard –commander, was warder Ruoro and Cpl. Kiviti. The sleeping-in-officer was Sgt. Muthee (A1).

After talking to Sammy at Tower 2 he took a vantage point where he could see the perimeter wall. While thereat he saw two “figures” following each other. When the first “figure” reached the middle of the perimeter wall the light went off. He then confirmed that what Sammy was saying was true. He also fired twice to resist those two “figures” from running away. He assumed the two “figures” were prisoners. He did not observe the manner in which they were dressed. When the lights went off he took cover. He then saw a “figure” running towards him but he did not shoot at him. He briefed the Senior Prison Officers who had come and then joined the search party at the coffee plantation until about 7.00 a.m.

### **ISSUES ARISING FOR DETERMINATION.**

From the foregoing evidence the issues arising for determination, in my view, are as follows;

1. (i) Who among the 9 accused were on duty on the fateful night?
- (ii) Who of the 9 accused responded to the siren and/or alarm?
- (iii) Were the warders and officers on duty armed and if so with what weapons?
- (iv) Were the warders, officers, members of their family and visitors who responded to the siren and/or alarm armed and if so with what weapons?

- (v) Did they use the arms on the six inmates i.e. bulgeoning them to death.
2. (i) How did the inmates come out of the prison on the night of 3<sup>rd</sup>/4<sup>th</sup> September, 2000?
- (i) By scaling the perimeter walls of prison compound?
- (ii) Or by being lead out of the prison main gate by Muthee (A1) and his other colleagues on duty on the night of 3<sup>rd</sup>/4<sup>th</sup> September, 2000?
- (iii) Whose evidence is to be believed?
- (iv) Were the occurrences of 3<sup>rd</sup>/4<sup>th</sup> September entered in **sleeping in officer's journal** and **Guard Commander journal**? And Gate Register Exhibit 29.
- (v) If not why?
3. Having escaped or led out of prison, either way, how did the six inmates meet their death?
- (i) by falling from a 24ft height when scaling the perimeter wall?
- (ii) Or by/through being bulgeoned?
- (iii) Who bulgeoned the inmates to death?
- (iv) Whose evidence is to be believed?
4. The six inmates died of what causes?
- (i) is multiple injuries and fractures evidence of malice afterthought under section 206 of the Penal Code?
- (ii) Whose evidence is to be believed?
5. What offence, if any, has been disclosed?
6. What is the sentence to be meted to the accused if found guilty?
- 
- 

#### ANALYSIS OF THE EVIDENCE

##### **(1) FIRST ISSUE.**

In respect of the first issue, it is clear to me, on the evidence available, that the following accused persons were on duty at the prison on the night of 3/4<sup>th</sup> September, 2000,

- (i) Sergeant Muthee (sleeping-in-officer)
- (ii) Warder Joseph Lenana Rukwaro – guarding cell 4, E Block – (A2)
- (iii) Warder Ceasar Mwangi Njoka – guarding cell No. 4, E Block (A3)

It is further clear to me, on the available evidence, that the following accused persons responded to the siren in the

morning of 4<sup>th</sup> September, 2000.

- (i) Sergeant Samwel Kimani (A4)
- (ii) Senior Sergeant Artisan James Mugo Karanja (A5)
- (iii) John Kariuki Njuguna (A6)
- (iv) C. O James Sise Boit (A7)
- (v) Noor Mohammed Kumo.(A5)
- (vi) Warder Joshua Onyango Nyakundi alias Mwalimu (A9)

The foregoing evidence is borne out by the prosecution witnesses account, duty rooster (Exhibit 14) and the accused persons own statements in their various defences. That puts all the nine accused persons at **the scene** of crime.

It is thus common ground that all the nine accused person were within the prison precincts on the fateful night.

Further, from the available evidence, each accused person played different roles, were dressed differently and were armed with different weapons.

(i) **Sergeant Muthee (A1)** was in uniform, was fully armed, since he was a duty. He was under a duty to maintain sleeping in officers journal in which all the events of the night were recorded, mysteriously the guard commanders journal and the sleeping in officers journal went missing since 4<sup>th</sup> September, 2000. The disappearance of this document is a fact within his knowledge (see section 111 (1) of the Evidence Act).

He ordered the night gate-keeper Warder Kinyua to activate the siren. In company of Warder Kinyua (PW7) and Warder Ruoro they went inside the prison. They met Warder Joseph Lenana (A2) and Warder Caesar Mwangi Njoka (A3) who disclosed to them that prisoners at E Block had escaped. He confirmed that fact and alerted Mungo Longit (PW31). He then raised alarm and several officers, warders, members of warders families and visitors of the staff in the prison compound responded. They were armed with various weapons.

Then the hunt for the escapees commenced in earnest. Six were found dead outside the prison perimeter wall. Two escaped. Of the two, one, Mwirichia (PW1) was re-arrested. The other Godfrey Ipomai was reportedly gunned down in Nanyuki in the course of another robbery (see evidence of PW33 and PW34).

(ii) **Joseph Lenana Rukwaro (A2)** was the night guard commander on the fateful night. He was stationed at Block E housing cell 4. He was in the company of Caesar Mwangi Njoka (A3). He is one of the first officers who discovered the break up. They started banging the door to cell 4 using a baton. Warder Ceaser Njoka (A3) was blowing the whistle. This woke up warder Waigwa (PW7). The alarm was then raised.

(iii) **Caesar Mwangi Njoka (A3)** was deployed at Block E which houses Cell 4. He was in the company of Joseph Lenana Rukwaro (A2) when the break up occurred at cell 4. He told Lenana (A2) to call Warder Ruoro; the guard commander when he realized the prisoners had escaped. Lenana banged the door of cell 4 as he blew the whistle which woke up warder Waigwa (PW7). Warder Waigwa shouted and blew the whistle. Then pandomonium ensued.

(iv) **Sergeant Samwel Kamau Ngugi(A4)** heard gun'shot and alarm about 2.00 a.m. He followed Senior Sergeant Jackson Gitonga to the prison compound. C.O. Boit ordered him to remain in the armoury to prevent armed warders getting inside the prison compound while armed. This was about 2-3 a.m. on 4<sup>th</sup> September, 2000. He was categorical that **batons** are allowed when officers are on duty, especially during the night. About 8.00 a.m. Sergeant Muthee brought him a piece of make-shift rope made of prisoners uniforms and three pieces of hackshaw. (Exhibit 8) C.O. Boit (A7) told him that he had collected the items within the area of Block E. He took the said items to the officer-in-charge of prisons. He saw officers warders and their visitors with **batons** and **rungus** that night at the jump up point. That some of those items were property of those officers, warders and visitors. Some were distributed at the armoury.

(v) **Sergeant Artisan James Mugo Karanja**, heard alarm. He went to the prison about 3.00 – 4.00 a.m. He saw police landrover coming from watch tower No. 2, laden with dead bodies. He claimed he was drunk that night. However he did not record this in his statement to the police. He pleaded mistaken identity. He claimed that there was another officer within the Nyeri Prison with whom he shared a name – Senior sergeant Artisan Atanas M. Karanja.

(vi) **John Kariuki Njuguna (A6)** was awakened by gun'shots, siren and whistles. He went to the prison. Near the gate he saw some blood stains towards the kitchen from tower No. 2 and 3. He met other warders who showed him the jump up point. He went back to his house.

(vii) **C.O. James Sise Boit (A7)** was asleep in his house on 4<sup>th</sup> September, 2000 in company of his girl-friend. He was awakened by gun'shots. He went inside the prison after warder Kinyua had opened the gate. He met Sgt. Muthee (A1). He went to cell No. 4, E Block and confirmed the fact of escape. He rushed back to duty office, ordered Sgt. Muthee (A1) to break the seal and obtain the armoury key. He ordered the armourer (**Warder Miriti**) to distribute weapons to the officers on duty and the warders who responded to the alarm. However, he did not see Sgt Muthee (A1) making entries regarding the breakage of the seal in the sleeping in officer journal. Together with the armourer **he supervised the distribution of firearms, tear gas, batons, ammunitions, shields, helmet shin guards etc.** Warder Miriti (armourer) made entries of these items in the Arms Movement Register (**exhibit 21**). He went to Block E, cell No. 4 and talked to the prisoner Esokon Kionga through the peeping hole. At the jump up point he saw a crowd with **guns and rungun**.

(viii) **Noor Mohamed Kumo (A8)**, heard a siren at 2.30 a.m. on 4<sup>th</sup> September, 2000. He put on a jacket and went to prison. He met COI Boit (A7) who ordered him to take a firearm and 20 rounds of ammunition and join warders searching for the escapees. He used 2 rounds of ammunition in error and returned the remaining 18 to the armoury. He pleaded mistaken identity. He claimed that during that period there were many officers of Somali origin within Nyeri Prison. One of them was Mohammed Noor.

(ix) **Joshua Nyakundi Onyango (A9)** was guarding the car park in the morning of 3/4<sup>th</sup> September, 2000. He was armed with a G3 rifle and 20 rounds of ammunition. He was in full uniform. He was one of the officers who conducted search on top of tailoring room, cell No. 4. He was in the party that recovered **akala shoes**, a shirt of inmate and a rope made of prison uniform, blankets and nylon sacks on the perimeter wall. He observed that cell No. 4, Block E ventilation window appeared bent and had no wire-mesh. There was one convict inside the said cell.

Against that backdrop of evidence the officers and warders present were armed. The ones on duty were fully armed which included guns and **batons** and were in uniform. The ones that responded to the alarm had all manner of crude weapons from their residence. The visitors of the officers and warders in the compound that night also responded with all manner of crude weapons.

The next issue is whether the officers, warders, and their visitors used the various weapons in assaulting the six inmates.

It is clear to me, on the evidence, that the officers who were at the scene, which includes all the 9 accused, did use the arms they had on the 6 inmates. The medical evidence – postmortem report speaks for themselves. In addition thereto the photographs, (Exhibits 1 to 18), taken at the earliest opportunity bear testimony to that fact.

**Dr. Moses Njue Gachoka (PW20)**, a practicing pathologist of 13 years standing, and Provincial Pathologist Central Province based at Nyeri did postmortem examination on the 6 bodies on 4<sup>th</sup> September, 2006 just hours after the incident. He observed multiple fractures on the head of all the six deceased. Some bodies had brain tissue oozing from the skull. None had gun shot wounds. He ordered x-raying of the six bodies. The salient features of post mortem reports are as follows.

(i) **Peter Loyara Lumukunya** (deceased in count 1). [(Exhibit 17 (d).]

Laceration on the forehead.

There were compound fracture spreading from the right mastoid area to the left temporal region and involving the right supraorbital ridge. Left upper limb had marked swellings. Lower limb had bruise on the right leg 8cm x 2cm and a comminuted fracture of the distal tibia.

(ii) **Joseph Kamande Mwangi alias James Irungu Ndungo** (deceased in count 2 [(Exhibit 17(c)]

There was depressed fracture on the left parietal area 4cm in diameter with no overlying laceration. He opined that, that was the point of impact. Fracture extended from the frontal area to cranial fossa and involving the whole occipital area. On the humerus (leg) right humerus had a fracture in the middle. It was difficult to associate some injuries on the body with a fall from a height. Depressed fracture could be associated with either **a stone or a rungun**. If one fell head first it would be the feet to sustain injuries. This is because there is no evidence of windows or walls or stones on the ground at the point of impact. The ground consisted of murrum and red soil (**see evidence of PW 36**) – six dead bodies were lying on a murrum road on red soil).

(iii) **John Njoro Njuguna** (deceased in count 3) (Exhibit 17(b) ).

The head disclosed a depressed fracture and the brain tissue had diffused hemorrhage. The fracture of the lower limb could not be explained on the basis of a fall head ward theory. It was inflicted by a third party. The swelling in the hand was consistent with a defence, i.e. the deceased was warding off an attack. Spiral fracture of the tibia and fibula was consistent with the twisting force of a limb.

(iv) **Julius Mungania M'Moraa** (the deceased in count 4) (Exhibit 17 (a) head had multiple fractures involving the whole skull known in medico-legal terms as **Crack-pot fractures**. Injuries to the right upper limbs inconsistent with fall from height.

(v) **Peter Ngurushane Emashe alias Kingori** (deceased in count 5) (Exhibit 17 (f).

Head had complete fracture of the skull involving the right temporal parietal area and extending to the left frontal area sub-galeal haematoma of the occiput. Fracture of the left anterior-fossa and pituitary fossa. Diffuse subarachnoid hemorrhage.

(vi) **Peter Koring** (deceased in count 6). Head had compound fracture involving the whole cranium. Laceration of the right parietal region above the ears. Brain tissue oozing. The cause of death was not in keeping with a fall. He did not see any red soil at the scene. The scene had grass only. (Exhibit 17 (e)

**PW 30 Dr. Jane Wasike** produced the medical reports filled by Dr. Olumbe under Section 33 as read together with Section 77 of the Evidence Act.

Dr Wasike was categorical that Dr. Olumbe did not find the autopsy findings consistent with the circumstances and history given in Form 23A in each case. In other words the prison authorities gave wrong history – a fall from a height. Dr. Olumbe filled the post-mortem reports based on the history given. The post-mortem report disclosed the following salient features:-

1. **Peter Koring** (deceased in count 6) – Exhibit 22.

The following fractures were evident.

- (i) skull fracture
- (ii) cracked pot of the whole calvarium
- (iii) multiple hinge fracture of the base of the skull.
- (iv) Extrusion of the brain

2. **James Kamande Mwangi** alias James Irungu Ndungo (deceased in count 2) – (Exhibit 23).

- (i) Head and neck: horizontal laceration of the right forehead measuring 3cm x 0.5cm.
- (ii) Oblique laceration on the right parietal measuring 4cm x 0.5 cm with palpable fracture of the calvarium.
- (iii) Oblique oriented laceration on the left occiput measuring 4cm x 0.5 cm.
- (iv) Horizontal laceration of the bregma measuring 3cm x 0.5cm associated with palpable fractures of the maxilla in the region.

3. **John Njoro Njuguna** (deceased in count 3). (Exhibit 24).

- (i) Head and neck: horizontal laceration of the right forehead encroaching the hairline 3cm x 0.5 cm.
- (ii) Oblique laceration on the mid part of the occiput measuring 6m x 0.5 cm with palpable fracture of the calvarium.
- (iii) Stellate fracture on the right parietal measuring 8cm x 4cm x 3cm.

- (iv) Laceration of the lateral aspect of the right side of the mouth measuring 2cm x 0.5 cm associated with palpable fractures of the mandible and maxilla in the mid line.
- (v) Multiple fracture of the mandible and the maxilla in the mid line.
- (vi) Fractures of the skull, mid-shaft, of left humerus, palate, mandible and small fingers and phalanx.

4. **Peter Loyara Lumukunya** (deceased in count 1). (Exhibit 25).

- (i) Head and neck: had laceration of the left occiput measuring 1.5cm, x 0.5 cm with palpable fractures of the calvarium.
- (ii) Multiple lacerations of the left side of the mandible measuring 3cm x 0.5 cm associated with palpable multiple fractures of the whole mandible.

5. **Julius Mungania M'Muraa** (deceased in court 4). (Exhibit 27).

- (i) Head and neck: had multiple palpable irregular "crack-pot" fractures of the whole cranium with deformity.
- (ii) Oblique laceration on the right parietal measuring 8cm x 0.5cm.
- (iii) Palpable multiple fractures of the mandible and maxilla.

6. **Peter Ngurushane Emase** (deceased in count 5). (Exhibit 26).

- (i) Head and neck: had multiple palpable irregular crack-pot fractures of the whole calvarium. On the right frontal extending to the right mastoid region associated with stellate laceration in the parietal region measuring 10cm x 4cm x 3cm with deformity in the brain.

It is significant that in all the six cases involving the six deceased the cause of death was due to extensive multiple injuries to the head which the good doctor did not believe was consistent with the history given by the prison authorities. Hence something else must have caused their deaths other than a fall from a height. **Dr. Godfrey Zambezi Mutuma (PW35)** seems to have that evidence.

**Dr. Godfrey Zambezi Mutuma (PW 35)** a pathologist and specialist in forensic medicine examined the remains of the six deceased on 2<sup>nd</sup> November, 2000 in the company of Dr. Moses Njue (PW 20), Dr. Kagena, Dr. Gaci, Dr. Kituyi (then Director of IMLU), Dr. Sedzil Rogers (**Professor of Forensic Pathology in Oslo, Norway**) and the then MOH Nyeri Provincial Hospital.

In all the six deceased, the cause of death was due to multiple extensive head injuries. The injuries could have been caused by a blunt object. He opined that there were striking similarities in respect of the case of Joseph Kamanda Mwangi alias Irungu Ndungo (deceased in count 2). Exhibit 49 and Julius Mungania M'Muraa (deceased in count 4). (Exhibit 51). He opined that the probable weapon used could have been a **hammer since a rungu cannot fracture a skull**. Another example of a probable weapon used would have been an iron-bar with a rounded head. He further opined that a stone could not have caused such injuries because a stone is not all round. That a stone could have caused uneven fracture or uneven depression.

Last but not least the good doctor opined that assuming that if the six inmates were preparing to escape they would have been prepared psychologically and structurally, to land safely. That they would have landed safely from a height of 24ft (perimeter wall). That if at all the injuries were in the cause of a fall, the same could have been fractures on the lower limbs if they fell feet first. That in the event they fell head first, **there would have been injuries to the head but not of the lower limbs**.

The foregoing evidence should be seen in the light of the evidence regarding the prison officers, warders, warders family members and workers and the visitors present within the prison compound on the fateful night. This group was armed with all manner of crude weapons. **Exhibits 18 and 19** captures the kind of weapons they had in addition to the evidence of **Peter Miriti Nkuru (PW 26)** who issued the warders with firearms and **batons** which were entered in the Arms Movement Register (**Exhibit 21**). **Warder Samwel Ndegwa (PW 28)** who saw pieces of sticks, wood, stones along the perimeter wall and warder Tom Opiyo (PW29) who saw one warder with an axe and others with the iron bars, rungu, pangas and sticks.

**Shamalla (PW 36)** testified that on top of the five bodies were **sticks and clubs tainted with blood.**

Most significant **Mwirichia (PW 1)**, the only surviving inmate out of the eight, saw Julius Mungania (**deceased in count 4**) being beaten on the head. He bolted. He was re-arrested later. **It is significant that he had no injuries on the head** and was alive while the rest of the six (6) inmates sustained multiple extensive fatal injuries. Perhaps, if he had not ran away he could have formed count 7 of the charges herein. Mwirichia was charged with the offence of escaping from lawful custody contrary to section 123 of the Penal Code in **Nyeri CM Cr. C No. 3630/2000**, but after undergoing the due process of the law was acquitted by the said court. That acquittal is conclusive proof of his innocence. It is proof that the six inmates were discharged at 2.00 hours on 4<sup>th</sup> September, 2000 through the main gate..

In my view there was massive conspiracy to cover-up the circumstances surrounding the death of the six inmates. Significant evidence of this, on the available evidence, includes but is not limited to the following.

- (i) The signals of 4<sup>th</sup> September, 2000 (Exhibits 11 and 12) were later contradicted by signal of 5<sup>th</sup> September, 2000.(Exhibit 28). In my judgment exhibit 28 was a cover up.
- (ii) The major documents – sleeping in officers journal and the Guard Commanders journal – which by Prison Regulations contains events of a given day suddenly went missing after 4<sup>th</sup> September, 2000. In my judgment this was a further cover up. (see section 111 (1) of the Evidence Act (Cap 80)
- (iii) Even Boit (A7) who was at the center of the operations on the fateful night did not see Muthee (A1) make entries of the events of 4<sup>th</sup> September, 2000 as they evolved. In my judgment Muthee (A1) did not make entries of the events. In order to cover up the same he and his cronies disappeared with the sleeping-in-officers journal and the Guard Commanders journal.
- (iv) Original statements of the 9 accused contradict their evidence in court in material particulars.
- (v) Gate Book/Register (Exhibit 29 was falsified by Warder Ngunjiri (DW 12) who was not on duty on the instructions of the then Senior Prison authorities at King'ong'o. Ngunjiri testified that Exhibit 29 is not complete.
- (vi) Throughout the proceedings I formed an opinion as indicated; in each case, that the prison authorities were economical with the truth.

For those reasons, inter-alia, I disbelieve the evidence of prison authorities on most vital aspects of the events of that fateful night.

I preferred the evidence of police officers Wafula (PW16), Onyango (PW15), Kenti (PW19), Golicha (PW21), Mingo (PW22), Chesoni (PW24), Tom Opiyo (PW29), Peter Mwangi (PW33), Scaver Mbogo (PW34) and Shamalla (PW36) to those of the prison authorities. The police officers, in my view, told the court the truth. The prison authorities had a lot to hide. It was a massive cover up of the worst incident of brutality in a Penal Institution in the history of Kenya.

## (2) **SECOND ISSUE.**

In respect of the second issue; how the prisoners left the prison, we have the evidence of:-

- (i) **Mwirichia (PW 1)** that eight prisoners were lead out through the main gate under instructions of Muthee (A1) and Senior Sergeant Samwel Kamau Ngugi (A4). That accused 4 escorted Godfrey Ipomai and when he came back he ordered Muthee (A1) and other warders to “finish” the rest of the prisoners. Julius Mungania M’Muraa (deceased in count 4) was set on with a club. Mwirichia then bolted. That saved his life.
- (ii) The evidence of Mwirichia (PW 1) tallies with the evidence embodied in the **Gate Register ((Exhibit 29 (a) and (b))**, which is evidence that the 8 inmates – John Njoro, Benard Kimathi, Julius Mungania, Godfrey Ipomai, Peter Lumukunya, Peter Ngurushane, Peter Koring, Joseph Kamande – were discharged at 0.200 hours on 4<sup>th</sup> September, 2000.
- (iii) Mwirichia (PW 1) was charged in Nyeri CM CrC No.3630/2000 with the offence of escaping from lawful custody contrary to section 123 of the Penal Code but was acquitted after undergoing the due process of the law (**Exhibit D2**). That acquittal is conclusive proof that he did not escape from lawful custody he was freed.
- (iv) There were pieces of glass stuck on the alleged jump off point/spot on the perimeter wall. The top of the perimeter wall is secured by pieces of glass. For a rope to hang over it, the said pieces of glass had to be removed or else

they would cut the rope. It follows that if a rope were to be used over the wall, one inmate would hold onto one end of the rope as one dropped off the other end. In that event, assuming the rope was not cut, by the edges of the glass pieces, who would then hold the rope at the perimeter wall as the eighth inmate dropped from the other end? That question begs an answer which is not forthcoming. The theory of scaling the perimeter wall is thus not tenable.

(v) The 2cm thick iron bar or bar rod (**Exhibit 9**) allegedly cut off from the ventilation in Cell No.4, Block E was neatly cut. That exercise could not have been executed by three pieces of hacksaw (**Exhibit 8**). Exhibit 8 looks very new. The grooves thereon are all intact. It could not possibly have been used in cutting the iron bar/bar rod (**Exhibit 9**). I find and so hold.

(vi) All in all I believe inter alia the evidence of Mwirichia (PW1), Tom Opiyo (PW29) Peter Mwangi (PW33) and Scaver Mbogo (PW34) in this respect.

(vii) Muthee (A1) was under a duty to record occurrences of 4<sup>th</sup> September, 2000 in “**sleeping officers journal**” he did not do so. Guard Commander was equally under a duty to record the occurrence. He too did not do so. Then the two books disappeared after 4<sup>th</sup> September, 2000. I find and hold that it was part of the cover up by prison authorities.

(viii) Then the firewood store opposite window of cell 4 Block E was demolished immediately after the event (see evidence of PW33 and PW34). This, I find and hold, was part of the cover-up by prison authorities.

### (3) **THIRD ISSUE.**

In respect of the third issue, I take the position, based on medical evidence, that even if the six inmates fell from a height of 24ft they would not have died immediately on impact on the murrum road which passes along the perimeter wall. True, they would have suffered fractures but would not have died instantly. That explains why the sixth body was discovered quite a distance from the alleged jump off point (**see evidence of PW 36**). **In addition thereto there is evidence of Mwirichia (PW 1), Nganga (PW 2), Kamotho (PW 3), Gitonga (PW16), Galgalo (PW22), Opiyo (PW29), Mwangi (PW33) and Scaver Mbogo (PW34).** Opiyo testified that some two inmates were caught and bulgeoned in his presence, in which case the six inmates were alive but killed by the mob.

The evidence of how the six inmates died is borne out by the testimony of Gacharia (**PW 13**): They were killed when they engaged the prison warders in a fight. In support of this fact is the signal **Exhibit 11** and **Exhibit 12 (a) – (f)**.

Then there is the **Press release (Exhibit 5)** by Gacharia (**PW 13**) which is evidence that there was a fight between the six deceased and warders as a result of which two prisoners escaped and six died in the commotion. Exhibits 5, Exhibit 11 and Exhibit 12 were made contemporaneous with the incident and are corroborative of that fact. **I discount Exhibit 28.** It is a case of being clever after the event. It is an afterthought.

Quite apart from the foregoing there are medical reports by Dr. Gachoka (PW20), Dr. Simiyu (PW30) and **Dr. Godfrey Zambezi Mutuma (PW35)**. The lowest common factor in all of them is head injuries. I was particularly impressed by the testimony of Dr. Mutuma (PW35). It is evidence that the similarities of the injuries on the six (6) bodies is too good to be true. I believe the said doctor’s testimony. I rest my judgment on the same.

There is ample evidence that the prison officers, warders, their family members and the visitors present within the prison compound were between 100 - 300 and well armed with all manner of crude weapons.

**Exhibit 1 and 18** captures the variety of weapons they had. In addition thereto there is the evidence of **Peter Nkuru (PW26)** who issued firearms and **batons**, which transaction was entered in the Arms Movement Register (Exhibit 21). **Warder Samwel Ndegwa (PW28)** saw pieces of stick, wood, stone etc along the perimeter wall. The same Ndegwa saw Sgt. Gitonga with a bandage the following day. Warder Mudday told him that Sgt. Gitonga had been assaulted on the night of 4<sup>th</sup> September, 2000 when attempting to restrain warders from assaulting the six inmates. Then there is the evidence of sergeant **Tom Opiyo (PW29)** that one warder had an **axe**. The others had iron bars, rungas and pangas etc.

**Dr. Godfrey Zambezi Mutuma (PW 35)**, opined that in all the six (6) cases, death was due to head injury. That the injuries could have been caused by a blunt object to the head. That there were striking similarities in the case of Joseph Kamande Mwangi alias James Irungu Ndungo (**Exhibit 49**) and Julius Mungania M’Muraa (**Exhibit 51**). That the probable weapon used had a **round head**. That there were striking similarities in the pattern of all the fractures on the six (6) inmates. That the similarities were too good to be true. That most probable weapon used could have been a hammer because a runga cannot fracture a skull.

**Shamalla (PW 36)** testified that on top of the five bodies were **sticks and clubs tainted with blood**. Shamalla was a

police officer and hence his evidence is independent and reliable. I find and hold that Mwirichia (PW 1) the only surviving inmate out of the eight saw Julius Mungania (**deceased in count 4**) being assaulted on the head. He bolted but was re-arrested later. **It is significant that he had no injuries on the head** while the rest of the six (6) inmates had extensive fatal injuries on their heads. Accordingly, I find and hold that the 6 inmates were bulgeoned to death by the prison officers, warders, members of the warders families and their visitors who responded to the siren/alarm. Even if they were escaping from lawful custody the force used was excessive in the circumstances. It cannot avail the accused the defence to the charge of murder.

(4) **FOURTH ISSUE.**

In respect of the fourth issue I reiterate the evidence and my findings in issue number three. For avoidance of any doubt the six inmates died of extensive multiple injuries inflicted upon them by a mob which consisted of the 9 accused persons. Particularly, I base my findings on the evidence of Dr. Mutuma (PW35). A fall from 24ft perimeter wall could not have caused fatal the injuries to the six deceased as borne out by medical science. Dr. Mutuma (PW35) was assisted in his finding by a team of doctors whose knowledge of forensic medicine cannot be faulted.

(5) **FIFTH ISSUE.**

In respect of the fifth issue, it is clear to me that the injuries occasioned to the six deceased, on the medical evidence available, were, multiple, extensive and fatal.

Section 206 of the penal Code defines **malice-aforethought** as:

(a) ***“an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

(b) ***knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

(c) ***an intent to commit a felony;***

***An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”***

I find and hold that the injuries sustained could cause death of or grievous harm to the six inmates and indeed did cause death. That constitutes malice-aforethought under section 206 of the Penal Code.

The mob which consisted of the nine accused were prosecuting unlawful purpose – assault. In doing so they caused the death of the six (6) inmates.

Section 21 of the Penal code provides as follows:-

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

**C O N C L U S I O N .**

**THE FIFTH ISSUE.**

In respect of the 5<sup>th</sup> issue, on the evidence as available, all the nine accused persons were prosecuting unlawful purpose in bulgeoning the six inmates to death. The offence committed was unlawful killing of the inmates. Its commission was a probable consequence of the prosecution of such a purpose. Each of the nine accused is deemed to have committed the offence, which in this case is murder contrary to section 203 as read together with section 204 of the Penal Code. Accordingly, I find all the nine accused guilty of the offence of murder contrary to sections 203 as read together with section 204 of the Penal Code.

Although all the 3 assessors returned a verdict of not guilty in respect of all the 9 accused, I differ with them for reasons given in my judgment herein-above. In my view the assessors failed to comprehend the sum total of the evidence. They equally failed to comprehend the law as summed upto them, particularly sections 206 and 21 of the Penal Code. They

also failed to comprehend the aforesaid two sections of the law and the facts with the consequence that they arrived at a wrong conclusion.

Having found all the 9 accused guilty of murder, I sentence each and every one of them to death on count one. The sentence in respect of the five other counts are suspended. They have a right of appeal of 14 days.

Dated and delivered at Nairobi this 18 day of December, 2008.

**N.R.O. OMBIJA.**

**JUDGE.**