



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(Coram: Ojwang, J)
CRIMINAL CASE NO. 51 OF 2005

REPUBLIC PROSECUTOR

-VERSUS-

NAHASHON NGUGI GATARWA 1ST ACCUSED

JOSEPH NGUGI MUIRURI2ND ACCUSED

STEPHEN MUIRURI.....3RD ACCUSED

JOHN KIBORA MWAURA4TH ACCUSED

RULING

A. THE BACKGROUND, AND THE LAW APPLICABLE WHEN THERE IS A SUBMISSION OF “NO CASE TO ANSWER”

The information in this case was first laid against six accused persons, *Nahashon Ngugi Gatarwa, Joseph Ngugi Muiruri, Paul Kibuku Kibara, Stephen Muiruri, Stephen Macharia Mwangi, and John Kibora Mwaura*, but by the time of plea-taking on 30th May, 2005 before *Rawal, J* there were only the four accused named in the caption herein above. After several mentions before *Ombija, J.* this matter came up before me on 3rd April, 2006, when I selected as the assessors *Ms. Rose King’ang’a, Mr. Michael Kosgey Cheptum, and Mr. John Okello.*

I began hearing witnesses on 4th April, 2006 and by 12th July, 2007 as many as 29 prosecution witnesses had testified, whereupon counsel for the accused persons made submissions of no case to answer.

The law on whether the prosecution case discloses a case to answer, and so the accused persons ought as a matter of law to be put to their defence, is stated in a decision of the East African Court of Appeal, *Ramanlal Trambaklal Bhatt v. R* [1957] E.A. 332 (p.335, *per Sir Newnham Worley, P*):

“A mere scintilla of evidence can never be enough; nor can any amount of worthless, discredited evidence. It is true... that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a ‘prima facie case’, but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”.

My apprehension of that authority, which is to guide me in determining the issue placed before me in this case, in the same way as it did in ***Republic v. Cosmas Mwaniki Mwaura***, H.C.Cr. Case No.11 of 2005, was in that case clearly (I believe) expressed:

“The basic principle applicable in criminal trial is that, any doubts in the prosecution case, at the end of the trial, will lead to the acquittal of the accused. The corollary is that the prosecution case, before the accused is accorded a chance to respond, must be so definitely cogent as to bear compelling need for an answer. Without such prima facie justification, there is no legal basis for putting the accused through the trouble of having to defend himself. It is the responsibility of the Court to determine, upon a careful assessment of the evidence, whether to conclude the proceedings by early judgment, or to proceed to the motions of hearing both sides before pronouncing judgment.”

I have no way of determining the legal question of placing upon the four accused persons the obligation to defend, or disposing of the whole matter by early judgment, other than by deciding from the very lengthy *evidence* on record. I will, therefore consider all such evidence, and assess its merits especially with a view to seeing how it points to the hands of the accused persons in the killing of the deceased.

Against the accused persons, the Hon. the Attorney-General had laid information carrying a charge of *murder* contrary to s. 203 as read with s. 204 of the Penal Code (Cap. 63, Laws of Kenya). The particulars of the offence, to which the accused persons pleaded not guilty, read as follows:

“1. NAHASHON NGUGI GATARWA 2. JOSEPH NGUGI MUIRURI 3. STEPHEN MUIRURI 4. JOHN KIBORA MWAURA on the 25th day of April, 2005 at Kamwangi Village in Thika District within Central Province, jointly with others not before the Court murdered ***MARTIN KIRAGU NDUNGU”***.

B.EVIDENCE LED BY THE PROSECUTION

PW1, ***Hillary Njagi Kirori***, was sworn on 4th April, 2006 and gave his testimony in the Kikuyu language, being interpreted by the Court Clerk, ***Mr. Ndung’u***. He said he was a farmer in Barigitu Village, Kangari Sub-Location in Thika District. After he woke up from his sleep on 25th April 2005 (the material day) he left for the local town, Kamwangi, at 9.00 a.m. His intention was to take tea at Kamwangi, as he waited for the District Commissioner’s meeting which was due to take place later, at the District Officer’s grounds at the town. After taking tea PW1 went to some elevated area of the town, to have a chat with his friends; and from there he had a good view of the DO’s grounds where he was to go for the said public meeting. As PW1 was chatting away with his friends, he saw at some distance, a moving crowd of restless people, shouting as they approached a neighbouring river valley. This same crowd, after some 25 minutes of activity by the river, now marched up towards higher ground, even as they expressed happiness and satisfaction. Why? They said, according to PW1, *“they had [just] killed the beast”* [!] PW1 heard those in the crowd saying the *“killing of the beast”* would work in their favour as coffee farmers, as they would be able to sell their coffee at good prices. PW1 heard voices from the said crowd identifying *“the beast”* as one ***Gaddafi***. So he got interested, for ***Gaddafi*** was the nickname of the deceased herein, ***Martin Kiragu Ndung’u***, and he and PW1 had grown up together in the same village, and he was married to PW1’s cousin. PW1 went up to the DO’s office for the purpose of reporting what he had just heard; and while he was there, he saw crowds coming from the *locus in quo*; the movement of this crowd coincided with the arrival of the District Commissioner who was to address the scheduled meeting at the DO’s grounds. PW1 after making his report, was given six Police officers to accompany him to the *locus*

in quo; they left the motor vehicle transporting them a distance from the *locus in quo*, then walked thither, finding that, indeed, **Gaddafi** had been killed. At the place where **Gaddafi**'s corpse lay, certain items were found randomly scattered – stones, sticks, avocado fruits. There was an avocado tree nearby. PW1 confirmed that the deceased was **Gaddafi**; and the Police removed the objects scattered around the body. PW1 said certain items had been found on the deceased: grey trousers; blue shirt. The deceased's head was badly beaten and fractured, and his hand appeared as if it was shrunken; every part of the body had injuries, bruises; his clothes were torn; his shirt was unbuttoned, and the injuries could be easily seen. A small boy, who had followed the Police team, was sent to bring a blanket, which was used to cover the body, and it was kept under Police guard. The Police took **Gaddafi**'s body away in the evening, during which time PW1 was present.

PW1 testified that the many sticks found on the ground surrounding the body of the deceased, appeared to have been freshly wrenched from the bush. Such sticks included coffee trees and timber removed from impermanent built-up structures; some of them were still sappy, while others were dry. The stones found at the scene were of varying sizes: some the size of a fist; others as large as the Bible; yet others twice the size of a Bible.

Shown several sticks and stones in Court (MFI 1; 2A, 2B, 2C, 2D, 2E, 2F, 2G) PW1 said the coffee-plant sticks resembled the ones he had seen at the *locus in quo*, though he wouldn't say they were the very ones he had seen on that occasion. Of the stones, PW1 said the ones in Court could well be some of the many stones he had seen at the *locus in quo*. The witness's answer to the question whether he knew **Gaddafi**'s killer, was this:

“As I stand here, I do not know who killed the deceased”.

The issue of public interest at Kamwangi on the material day, PW1 testified, was conflict in the management of the coffee-farming sector. There was disagreement on whether the plural set up of coffee co-operative societies should continue as usual, or should be merged to focus on a reduced number of coffee factories. The District Commissioner was coming to Kamwangi to address coffee farmers in particular, on the issue which had generated disagreement in that locality. Unsuccessful attempts had already been made previously to amalgamate coffee production and processing units.

By the time PW1 left the *locus in quo* and came to the DO's grounds, the DC's meeting was already in progress. So sharp was the conflict on the merger issue in the management of coffee, the audience was infuriated by the DC's diplomatic endeavours to speak on non-amalgamation topics; disorder ensued, and the matter was not concluded.

On cross-examination by learned counsel **Mr. Njanja**, PW1 testified that after he arrived at Kamwangi on the material date, at 8.30 a.m. he had observed a crowd of people shouting and, apparently, giving chase – he did not recognize who was doing what, within that crowd. This unrest was taking place a few minutes after 9.00 a.m., and it was about an hour later that he and six Policemen had gone to the *locus in quo*, at the valley.

In relation to the accused persons herein, PW1 thus said:

“I did not see the accused persons among those who were fighting at the *locus in quo*. I just saw people running. I didn't know if anyone was being chased.”

The period of commotion and fighting at Kamwangi on the material day, PW1 averred, took about one hour; “*there were two groups, those for merger; and those resisting the pro-merger group*”. The deceased was a close friend of PW1; but PW1 “*did not know **Gaddafi** was a coffee farmer; he was a businessman selling avocados – buying these from farmers, and selling in Nairobi*”. **Gaddafi** had no land, and was living on a rented plot at Kanyoni.

PW1 had not met the deceased, a “*large, tall and huge man*”, on the material date. He noticed after **Gaddafi** died, that he had been wearing a blue shirt; green trousers; black socks; safari boots; and PW1

said: “*These are things I saw personally*”. The body was found some 10 - 15 metres from the river.

On the items which could have impacted on the deceased’s body, PW1 said:

“I saw more than 100 large pieces of stone at the scene. About 1000 sticks were found in the location of the body, as well as more than 1000 green avocados.”

PW1 averred that some 3000 people had been at the *locus in quo*, but they later left and went up to the DO’s grounds for the meeting with the DC, leaving behind some 200 people gathered in the valley. PW1 saw no sharp object such as a *panga* (cleaver) at the *locus in quo*.

PW1’s apprehension was that the deceased had favoured amalgamation in the local coffee industry, but “*the majority did not like this*”. What was **Gaddafi**’s interest in coffee? According to PW1:

“*He was not a farmer, but he had an interest in the coffee money*”.

PW1 was further cross-examined, on 5th April, 2006 by learned counsel **Mr. Agina**, when he averred that he had recorded a statement with the Police on the very day the deceased was killed; he wrote it himself, signed it, and acknowledged it to be his and to be a true statement. PW1 testified that he could not say in his statement to the Police all the things which he now had the opportunity to testify upon in Court.

PW1 was re-examined by learned State Counsel **Mr. Bitwoli**, and he testified that although the DC’s meeting agenda for the material day was concerned with coffee, the DC had attempted (unsuccessfully) to introduce other matters, such as the Constituency Development Fund (CDF) and milk production. There were some 3000 people attending the DC’s meeting.

PW2, **Hannah Mugure Thuo** was sworn on 5th April, 2006 and gave her testimony in the Kikuyu language. She is a maize and arrow-roots farmer at Kamwangi. She recalled that on the material date, she had gone to work in her farm, and was cutting feed for her sheep when she heard screams close by a neighbouring school. She took off and sought safety in her home, from where she observed large numbers of people in commotion, armed with sticks and stones; she did not know what these people were doing with the sticks and stones. She did not know of any death at her farm, at the time; and when she recorded a statement with the Police, it was only to say what sort of numbers of people she had seen at the material time.

On 5th April, 2006 PW3, **David Ngurari Njenga** took the witness stand, speaking in Kikuyu. He said he was a farmer and carpenter from the Kamwangi area. He recalled that on the material date the Thika District Commissioner was to hold a public *baraza* at Kamwangi. PW3 gave testimony that was quite contrary to that of PW1 – and so, it follows that one of the two did not say the truth. Which one? It will be clear in a moment.

PW3 said the DC’s meeting never took place and he never attended it; because, just as he was heading to the venue of the meeting, a white Toyota Pick-up motor vehicle, Reg. No. KAC 326G was driven along carrying people who gave chase at PW3’s group (including the deceased). PW3’s testimony runs as follows:

“One of the occupants [of the pick-up truck] pointed to [**Gaddafi**, within my group] and said, that it is **Gaddafi**. It was a [motor vehicle] belonging to **Gatarwa**. Someone – **Gatarwa** himself – said: ‘It is **Gaddafi**! Run after him! Kill him!’”

This statement, which was rendered in a rather obtrusive and somewhat unnatural mode, averred that PW3 had been in the company of some three or four people – including **Gaddafi**, one **Baraza**, and one **Willy Rucu** – when the 1st accused ordered the killing of **Gaddafi**. PW3 said the white Toyota Pick-up truck, Reg. No. KAC 326 G had been carrying some 10 persons, three in the driver’s cabin, and seven in the back. These people, PW3 said, were carrying “*vitu vya vita*” (war items), such as metal rods, stones,

sticks, and they now dispersed PW3 and his company and started “*chasing Gaddafi*”.

PW3 said: “I went up to River Karimeri. I crossed the river, and went to Gituamba Market. I remained at Gituamba up to evening time [5.00 p.m.]. **Gatarwa** came there in the same pick-up motor vehicle. He got into the bar of a **Mzee** called **Gitutha**. I heard him telling others at the bar: ‘*Nimeuwa jitu moja; nitangojea wale wengine*’ [Kiswahili for: ‘*I have killed one monster; I will now seek the rest of them*’]. He said he was all alone when he heard the 1st accused utter those words. PW3 said **Gaddafi** had taken a separate route when he and his friends (such as PW3) had been dispersed by attackers from the said pick-up motor vehicle. PW3 said the following three persons from the pick-up truck are the ones who had chased **Gaddafi**: (i) **Mburu wa Nderi**; (ii) **Mburu Kanene**; and (iii) **Maina Kirika** – none of whose names has ever appeared in the criminal case herein, in the capacity of accused. These three persons said to have given chase to **Gaddafi**, were armed with sticks, stones, metal bars, *pangas* (cleavers). There is other evidence, (especially that of PW29), to be recalled later in this ruling, that **Gaddafi**’s death had been caused only by the use of crude weapons, such as tree branches plucked from the bush, and stones, and it is for certain that sharp implements such as *pangas* had not been the immediate cause of death. Recall that PW3 had earlier testified that he alone was present when he heard **Gatarwa** (1st accused) bluster that he had “*killed that monster*”. PW3 did not establish any link between **Gatarwa** and the death of the accused, aside from the foregoing allegation; and then he subsequently said: “*I do not know who killed Gaddafi*”.

The foregoing review of PW3’s evidence-in-chief leaves uncertainties in that witness’s testimony. Let us see the picture on PW3’s testimony which emerges after cross-examination.

To cross-examination by learned counsel **Mr. Njanja**, PW3 testified that he had left his home at 7.00 a.m. on the material day; he reached Gituamba, 1 km away, at 7.30 – 8.00 a.m; he met others at Gituamba who, like himself, were going to attend the DC’s meeting at Kamwangi, some 8 km away; he then walked 2 km to Kanyoni, and took public transport to Kamwangi, being in the company of one **Timothy Waweru**; one **Ngugi**; one **Gacheru**; one **Kamau**; and one **Ng’ang’a** – all PW3’s neighbours and friends. These six men alighted at the Kamwangi bus stage, and then started walking towards the DO’s grounds where the DC’s meeting was to take place.

Why was PW3 and his friends concerned to attend the DC’s meeting at Kamwangi? He said he had a garden, three-quarters of an acre in size, where he planted bananas, vegetables and other subsistence crops. PW3’s companion on the material day, **Ngugi**, has no land; his other friend **Gacheru** too has no land; both **Kamau** and **Ng’ang’a** are subsistence-crop farmers. According to PW3, the DC’s meeting was not a coffee-industry meeting, “it was a public meeting”; but this testimony is contrary to that of other witnesses, especially that of the Investigating Officer (PW29).

In cross-examination, PW3 gave testimony which was not on all fours with his evidence-in-chief. He said he and his friends had been walking from the road towards the DO’s grounds at about 10.00 a.m, and he then went on to say:

“I did not witness any fight going on at Kamwangi. I didn’t know there had been a fight at Kamwangi that morning ... I don’t agree that a fight was going on at 10.00 a.m. The fight would have started at the DO’s gate at about 10.00 a.m. It is not true that the fight ended at 10.00 a.m. I did not know when the fight ended. I went away. I never saw a crowd 3000 people anywhere at Kamwangi. From Kamwangi bus stage to the DO’s office is 100 metres”.

Not only does the foregoing averment carry no clear message, it runs round in circles, and is self-nullifying, so that no meaning, and no sincere report emerges from it. From that statement it appears that some of the evidence is conjectural, and not based on perception by one of the witness’ five senses. Such a position is, in my opinion, contrary to the natural setting of truthful accounts; and this Court being under legal duty to decide on the basis of *evidence*, must at this stage conclude that PW3 is not a truthful witness.

PW3, who said he was walking along with his friends towards the DO’s office which was some 100 metres away, testified that he had at the time no view of the DO’s office; in his words:

“From the [bus] stage you cannot see the [meeting] venue; it is hidden [behind] buildings, trees ... you can't see it from 100 metres away.”

But, of **Gatarwa's** motor vehicle he then went on to say:

“**Gatarwa's** vehicle stopped on the main road, near the gate to the DO's office. We were not far from the meeting venue; but we were on the road. Some minutes after 10.00 a.m. **Gatarwa's** motor vehicle stopped close to us. It is not true that by that time **Gaddafi** had long died. I had not mentioned the name **Gaddafi** among those who were with me. ... But **Gaddafi** was one of our group as we walked from the road. **Gaddafi** had not yet died by 10.00 a.m.”

Of the motor vehicle allegedly belonging to **Gatarwa** (1st accused) which features in PW3's testimony, he further said:

“The pick-up [truck] that stopped as we walked along [had been carrying] people who alighted with weapons. Of those people, I knew **Gatarwa** and three others. I saw sticks being carried, but I did not identify them very well”.

Is it the sticks that PW3 saw, but did not identify very well? It can't be so; either he saw sticks, or he didn't? If PW3 saw sticks in the alleged motor vehicle of the 1st accused, then he would have said what they looked like. I have to conclude that this aspect of the testimony is untrue; PW3 saw no sticks at all in a vehicle belonging to **Gatarwa**.

In still further self-contradiction, PW3 said, of the time when he claims to have seen sticks in **Gatarwa's** car:

“It is from that moment that the battle started. I took off, and I don't even know if the [DC's] meeting took place.”

PW3 goes on to say:

“I could not report [**Gaddafi's** death] to the Police; I had more fear than I have ever had in my life. I saw people with *pangas* [cleavers] coming towards us. I saw *pangas* and *rungus* [clubs].”

There is more-reliable evidence, in my opinion, coming from PW1; when he heard that **Gaddafi** had been killed, he was able to report the matter straightaway; to go with the Police to the scene; and on the same day, to record a statement with the Police.

I have already stated that PW3's statement cannot be based on his perception of the events of the material day; and it follows that the statement he recorded with the Gatundu Police Station two days later, could not have been a true statement. Of his said statement of 27th April, 2005 PW3 thus said:

“At our shopping centre I heard that those who had information should report to the Police, so I went to report. I never went to the place where it was said **Gaddafi** was killed.”

When asked if he had seen any of those causing commotion and mayhem at Kamwangi on the material date, after being hired to disrupt the DC's meeting, PW3 said:

“It is not true that a group had been hired to disrupt the coffee meeting. I was not hired to go and disrupt the meeting. It is not true that I came to Kamwangi in a motor vehicle, armed and paid, along with others, to disrupt the coffee-industry meeting. It is not true that a fight then followed, and **Gaddafi** was a victim”.

In his statement of 27th April, 2005 to the Police at Gatundu, and regarding the death of **Gaddafi** on 25th April, 2005 PW3 had said, “*all of us are pro-merger [of the local coffee factories]*”; which clearly made

him, at the very least, a protagonist in the struggle for different modes of managing the coffee industry – the very subject that was to feature in the DC’s meeting on the day the deceased died. When learned counsel **Mr. Njanja** asked questions about that recorded statement, PW3 now said he did not understand the meaning of the word “merger”; and he said it was not true that he was working with the pro-merger local parliamentarian, to ensure a rival prospective parliamentary candidate was entangled in a murder case stretching well beyond the campaign - period for the forthcoming general elections. PW3 denied that he and his companions had come to Kamwangi on the material date, wearing a particular dress-code which marked them out as a gang fighting in the cause of merger of coffee factories in the locality. On that occasion, PW3 had clearly seen the deceased, whose dress-mode he now described: “[**Gaddafi** was wearing blues – blue sweater, green trousers, blue shirt, safari boots”.

Learned counsel put to PW3 the details set out in his own report to the Gatundu Police on 27th April, 2005; he had recorded:

“We ran away. I was ahead of **Gaddafi**. I saw him being attacked I hid in the coffee plantation. I heard that **Gaddafi** had been killed”.

PW3 admitted that he had not given such testimony before this Court; and he also admitted that he had told lies.

On further cross-examination, on 19th June, 2006 PW3 said those who had chased **Gaddafi** and killed him, had come directly from the DO’s office; and he, the witness, had crossed the river and run on to Gituamba, where he never mentioned at all that **Gaddafi** had been killed.

From the foregoing review of PW3’s evidence, which ended with the averment that he only knew the 1st accused and not the other three, *it is the finding of this Court that all the testimony of this witness is based purely on imagination*, and not on any honest perception of the unfolding of events, on the material day.

On 19th June, 2006 P.W.4, **James Ndung’u Kabunga** was sworn and gave his testimony in Kiswahili. He said he is a farmer and trader living at Kanjuko village, Kamwangi Division in Thika District. He said his friend, **Mwicipi Muiruri** (3rd accused) had called him to a meeting sometime in January, 2005, for the purpose of giving him “some work” to carry out, together with one **Joseph Mungai Ndia**. This work, according to PW4, was the killing of ten particular persons, starting with four, namely: the **Hon. Muiruri** (the local Member of Parliament); **Muteti** (a businessman at Kamwangi); a certain councillor **J.N.** (at Gituamba); and **Kiragu Ndung’u** (the deceased, also known as **Gaddafi**). PW4 said a “consideration” was agreed in the sum of Kshs.300,000/=, for the discharge of the task. PW4 testified that part of the agreed money (Kshs.100,000/=) was paid up-front, and the balance was to be paid after the work assigned had been done. This money, PW4 said, was paid by the 1st accused; and he and **Joseph Mwangi Ndia** then divided it between themselves equally. PW4 said:

“We decided to divide [the sum of Kshs.100,000/=] ... but do no work. From that moment I was avoiding **Mwicipi**. Every time he saw me he had asked about the matter, as the work had not been done. I told him **Joseph [Mungai Ndia]** was minding the matter, and I was waiting for [him]”.

PW4 testified that he and **Joseph Mungai Ndia** did not perform the work which **Mwicipi Muiruru** had entrusted to them. And on 25th April, 2005 he had travelled to Kamwangi, as he was supporting the pro-merger group, and this was to be the subject of the District Commissioner’s address. Earlier on a Government Minister, the **Hon. Nduiga**, had led a meeting which supported the merger of coffee co-operatives, with Githothokoni Co-operative (of which PW4 was a member), Gathaiti Co-operative, and Gatei Co-operative merging under the umbrella of New Gatukuyu Co-operative. PW4 supported the proposed merger, but **Mwicipi Muiruri** did not.

According to PW4, there was thus a confrontational setting surrounding the DC’s planned meeting at Kamwangi on 25th April, 2005. PW4 said he was in the company of **Gaddafi** as he approached the DO’s grounds, where the DC’s meeting was to take place. It was his testimony that when he arrived at

Kamwangi, a white pick-up motor vehicle, part of the registration number of which was KAC, which belonged to the 1st accused, drove by, and stopped; this vehicle was carrying people bearing weapons; **Gatarwa**, who had been the one driving, and in the company of **Muicigi** and **Macharia**, came out of the vehicle and gestured at **Gaddafi**; **Gatarwa's** passengers gave chase, forcing PW4, **Gaddafi**, **Njoroge** and **Kinyanjui** to run away, in the same direction. PW4 said he hid in the bushes as he went towards the stream, and then heard the screams of **Gaddafi** who had crossed the stream, as he fell down, being beaten up. PW4 said he hid in tall grass, some 200 metres from the stream, and from there he could see exactly what was happening yonder. What did he see from at least 200 metres away: "people beat **Gaddafi**, he screamed, and fell silent." In PW4's own words:

"I saw **Gatarwa**, **Muicigi**, **Macharia** – I saw them beat **Gaddafi**; also among them were **Ngugi Muiruri**, and **Kibora Mwaura**. There were others; but the ones I have named are the ones I can identify. Those are the people who came from the pick-up [motor vehicle]."

From his alleged hide-out, P.W.4 also heard the 1st accused say: "*Kazi imeisha*" [Kiswahili, meaning: "*The job's done*"], and exhorting the crowd to disperse.

PW4, as to what he then did from 200 metres away, testified:

"People dispersed. I saw **Gaddafi**. I went up to there. I saw that he was dead."

He then went home, feeling fear, and he did not go to the DC's meeting at the DO's grounds; because, in his words: "I feared I could be killed". He went to the **Hon. Muiruri**, the local Parliamentarian, and told him that **Gaddafi** had just been killed. The Parliamentarian then asked PW4 to go to the Thika District Criminal Investigation Office and to record a statement, on the incident.

Not only did PW4 testify that, from his hiding place in tall grass he was able to see those who were killing **Gaddafi**, he also made the general statement in Court:

"The people who killed **Gaddafi** are well known. We grew up in the same neighbourhood. They are in the dock. I know them. They know me"

PW4 testified that the pick-up motor vehicle which had carried the killers of **Gaddafi** also contained weapons of assault, with **Macharia** carrying a forked hoe; **Gatarwa** carrying a metal bar; **Muicigi Muiruri** carrying a *panga*; the remaining passengers carrying sticks.

Upon cross-examination by learned counsel **Mr. Njanja**, PW4, whose nick-name is Lion or *Simba*, testified that in the controversial coffee-management issue in Kamwangi, he was a supporter of the merger concept and stood together, on this question, with the local parliamentarian, **Mr. Kariuki Muiruri** and "with the Government."

PW4 testified that "*a long time ago*" he had been charged in Court with the offence of robbery with violence; he has been charged in Court three times though "*not for killing anyone*"; he is a "*broker*" and "*even Muicigi Muiruri knew [he] could do the work*" of carrying out an agreement to kill a person; and in his own words:

"I have been a dangerous criminal. There are those like **Muicigi**, who know me as a criminal in the Gatundu – Thika area".

At the same time P.W.4 said: "*I am a Christian; I have sworn to tell the truth; I have not been hired to give evidence.*"

Also relevant is the following testimony of the witness:

"I knew of **Gatarwa's** plot to kill people in January, 2005. I did not report to the Police. The deceased was killed on 25th April, 2005. I saw the killing. I watched the killing. I did not report that

day to the Police. I wrote a statement on the second day. In my first report, I called the local M.P. I called the **Hon. Mr. Kariuki Muiruri** on the second day. I wanted to inform him of what had happened. He asked me to go to the Police; so I went”.

PW4 said he had written two statements - the first one recorded at the Gatundu Police Station after two days of **Gaddafi**'s death, and the second at Thika Police Station, after four days of **Gaddafi**'s death.

Why did PW4 enter into an agreement under which he was allegedly paid money, to kill certain people? His answer thus runs:

“I attached no significance to the ‘work’. I didn’t think I would do it. I wanted to ‘eat’ the money”.

PW4 testified that he only came to know PW3 (**David Ngurari Njenga**), whose testimony shared many common features with his own, after the death of **Gaddafi**. PW4 said he and **Gaddafi** had run in the same direction when **Gatarwa** and his group from the pick-up motor vehicle gave chase. But in the cross-examination, PW4 contradicted the evidence he had himself given during the examination in chief: where was he, and where was **Gaddafi** when the latter was killed? PW4 now said:

“I went with **Gaddafi** in the same direction. I ran very fast. **Gaddafi** fell behind me. I hid in the grass, and I could see those who were battering **Gaddafi**.”

This is materially different from his earlier claim, that he hid in tall grass even as **Gaddafi** went ahead, crossed the river, and then was caught and killed.

PW4 had said in the evidence-in-chief that he had seen **Gatarwa** and the other accused persons kill **Gaddafi** down the river; but in cross-examination he now said:

“I don’t know what **Ngurari** (PW3) said as to whether **Gatarwa** [pointed] out **Gaddafi** and immediately drove off. I was in hiding At some point I had gone to the scene of the killing. **Gatarwa** was using metal to beat the deceased. He came with the metal from the pick-up. I saw it from far. It was metal used in building, about one metre long. **Muicigi** was using a *panga*. **Ngugi** was using a stone which can be carried in one hand.”

The witness’s testimony, in my assessment, just like that of PW3, lacks rhyme or reason – and *cannot thus be true*. Was PW4 seeing the persons battering the deceased from the rather long distance of some 200 metres? At what point did PW4 go to the *locus in quo* and find **Gatarwa** or any of the other accused persons assaulting **Gaddafi**? At what stage did PW4 run away, fearing for his life? In view of the more credible testimony of PW1, that at the *locus in quo* there had been some 3000 *enraged persons* bashing the deceased with the crudest of objects plucked out of the bush, how could PW4 lying in long grass some 200 metres away have so clearly identified the four accused persons as the ones who were killing the deceased? In the absence of sensible answers to these questions, the testimony of PW4 easily falls in the same category as that of PW3 – as accounts utterly shorn of truthfulness.

PW4 said he “*only saw some ten people involved in the killing [of Gaddafi]*”. He said that at about 11.00 a.m. he had gone up to the *locus in quo*, and that **Gaddafi** had been killed between 10.00 a.m. and 11.00 a.m.; and he averred that “*anyone saying Gaddafi was killed before 10.00 a.m. is not saying the truth*”.

PW4 denied the statement in the testimony of other witnesses, that sometime before the scheduled DC’s meeting at Kamwangi, he had had a secret meeting with **Gaddafi** and others, to plan on how to create mayhem, to neutralize the “anti-merger” group.

PW4 maintained that he was a man of good character who was not a witness-for-hire. Part of his testimony on his perception of himself ran as follows:

“My personal record is good. I am a farmer and businessman. Those who asked me to go and kill

misunderstood me. They thought I could do it, but I don't kill people. I was paid to kill, but I did not and could not kill people.”

I have found it curious that PW4 could have been contracted to hunt and kill certain individuals in the community, and he indeed received money as consideration; then all he did was to consume that money and thank his god for the windfall, but not alerting either the Police or the intended victims about it; and then he now comes to Court to declaim it! So unnatural and unlikely is such conduct, which could well have landed the witness with the offence of being involved in a *conspiracy to murder* – and I will take judicial notice that testimony of such a kind carries only the bravado of false witness. I hold, therefore, at this stage, that the testimony of PW4 is in the very same category as that of PW3 – *false testimony*.

PW5, **Paul Njuguna Mungai** was sworn on 21st June, 2006 and gave his testimony in the Kikuyu Language, being interpreted by the Court clerk. He said he was a coffee and pineapple farmer in Kanjuko, which was some 3 – 4 km from Kamwangi.

This is the only witness, out of 29 who gave testimony about happenings at Kamwangi on 20th April, 2005 – five days before the material date. He said that on that occasion, even as the Kamwangi District Officer stood up to announce that the DC's meeting would be held on 25th April, 2005, **Gatarwa** (1st accused) came along with **Stephen Muicigi Muiruri** (3rd accused), one **Amos Karanja Gatoro**, one **Macharia wa Eva**, one **Nathan Muhoro** and one **Nguru wa Kameme**, and each of these six persons stood up and called upon members of the gathering to come and disrupt the proposed meeting. PW5 said no reason was given for the intended disruption of the scheduled DC's meeting, and that the D.O. himself was present when the said inciting call was being made by the six named persons. PW5 said the crowd being addressed on that occasion (20th April, 2005) comprised some 50 people, and that they became violent immediately and began throwing stones at innocent people and assaulting them. The witness said he only heard that the DC's meeting when it fell due, on 25th April, 2005, had been disrupted. This suggests, of course, that PW5 was *not at Kamwangi on 25th April, 2005*; but he said he had gone to Gatundu Police Station on 27th April, 2005 to record some statement. The witness told the Court that he was part of the pro-merger group in the conflicts in the management of the local coffee industry.

On cross-examination by learned counsel **Mr. Ngaruiya**, PW5 now said he had, after all, *been at Kamwangi* on the material date; his words on this averment may be set out:

“The DC's meeting was to start at midday at the DO's grounds. I found many people there at 2.00 p.m. I left at about 2.30 p.m. I didn't count the people who were attending. I didn't know I would be asked that question. The 50 people [which the witness talks of in relation to 20th April, 2005] were part of the gathering at [the DC's meeting]...”

How could PW5 have seen 50 particular members of the public at the DC's *baraza*, and remembered so precisely that these were the same people who had been incited by some of the accused persons at the DO's office five days earlier? From the evidence given by many witnesses, of the size of attendance at the DC's meeting, it can only be concluded that PW5 *did not give true testimony*.

PW5, on further cross-examination, admitted that he was at the moment an accused person before a Gatundu Court, charged with house breaking and stealing, and that he had been released on bond. He denied that he knew PW4, **James Ndung'u Kabunga**; in his words:

“Even if [PW4, like myself] supports merger, the society has many members; so I don't know him. Even if he recorded his statement the same day I did, I don't know him.”

He said:

“*Nobody has paid me to give evidence*”.

On further cross-examination by learned counsel **Mr. Agina**, PW5 said he had been released on bond by

the Gatundu Court trying him for *stealing and housebreaking*, so he may appear as a witness before this Court. He said his testimony was not about 25th April, 2005, but instead, about 20th April, 2005. He now contradicted the testimony he had given in the evidence-in-chief, by saying: “*I never went to Kamwangi on 25th April, 2005*’. He further said:

“I never met [the deceased] on that day. I never saw **Stephen Muiruri** [3rd accused] on 25th April, 2005. I never saw **Joseph Muiruri** [2nd accused] on 25th April, 2005. I never saw the four [accused] killing **Gaddafi** on 25th April, 2005. I never attended [**Gaddafi’s**] funeral.”

For the reasons already set out earlier, but in particular in the light of PW5’s testimony set out in the foregoing paragraph, I hold that *his testimony is worthless*, when tendered in proof of the charges laid before the four accused persons herein.

PW6, **Michael Waweru Kimotho** was sworn on 21st June, 2006 and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He said he was in the transport business, renting out two vehicles (the full registration numbers of which he could not remember, but bore the alphabetic numberings KTH and KMR) from his base at Kanyoni, near Kamwangi.

The witness could recall the events of 25th April, 2005 at Kamwangi; and he gave a background to those events, going back to 23rd April, 2005. **Gaddafi** [the deceased] had gone to see PW6 on 23rd April, 2005 and asked him to take the owner of one of the vehicles he [PW6] had been renting out to a meeting, to be attended by the local parliamentarian and the local Councillor. The meeting, which had been described as a “planning meeting”, was to take place at Gatukuyu, and the planning was with regard to the DC’s meeting which was to take place on 25th April, 2005. So at midday on 23rd April, 2005 PW6 and **Gaddafi** took a minibus to Gatukuyu, and attended the said planning meeting, in a bar belonging to one **Wanjui**, located in a storied building. At that venue, PW6 found a substantial crowd, of some 150 young men – a number comparable to the number in the Courtroom at the time of hearing this matter. **Councillor J.N.** was already seated, though the local parliamentarian had not arrived.

At the meeting, firstly, **Councillor J.N.** expressed concern about **Gaddafi’s** late arrival; **Gaddafi** was so important, the meeting couldn’t proceed without him. **Councillor J.N.** then said the meeting was in preparation for the projected functions of Monday, 25th April, 2006. **Councillor J.N.** reminded the gathering that **Gatarwa** (1st accused), who was anti-merger [of the coffee sector], “*had always caused trouble to the [current local] Member of Parliament*”. **Councillor J.N.** told the gathering that they were to take action to ensure that **Gatarwa** and his ally, **Muicigi** (3rd accused) “*would not come to the [DC’s] meeting [on 25th April, 2005];*” and, to facilitate that cause, the Councillor had announced that he had been given Kshs.100,000/= to pay to “*the [whole] army that was [now gathered]*” at the bar-room at Gatukuyu. **Councillor J.N.** directed those attending the meeting to sub-group themselves, on the basis of their local coffee factories; they would then indicate who they knew, within their coffee-growing areas, to be opposed to the merger idea in the local coffee industry; and any opponents of merger were to be subjected to physical violence.

PW6 testified that soon after the death of **Gaddafi** he had been taken in **Councillor J.N.’s** motor vehicle to Gatundu Police Station; PW6 was told that he was to record a statement with the Police, and if he didn’t do so, then his own motor vehicle would be impounded. The witness said he was not asked to record any statement at Gatundu Police Station, save that a businessman by the name **Muteti**, who was also at the Police Station, recorded something which he (PW6) was then asked to sign. On two different occasions, PW6 was asked to sign a statement written by **Muteti** – and he (PW6) was told that the two statements would help to ensure his motor vehicle was not impounded. PW6 was also told at the Police Station that the said statement would protect him against arrest. PW6 had not known he was in any danger, but he was told he was in danger, by **Muteti** and the Police officers at Gatundu.

At this point the prosecution counsel, **Mr. Bifwoli** objected to his own witness’s line of testimony. He thus urged:

“It’s the statements of witnesses on record, that enable the Attorney-General to proceed with prosecution. I am informed by my investigating officer that witnesses have been refreshed through the statements recorded – including the witness now in the witness-box. The witness admits that he has signed the statement. Up to this point, not a single word in the evidence touches on the statement as recorded. We called him as a prosecution witness on the basis of the statement Since his testimony is the opposite of the recorded statement, we cannot continue to say the witness is giving [the expected evidence].... The Attorney-General cannot be leading evidence which he does not know at all What interest of justice will be served if the witness does not further our case?”

Mr. Bifwoli asked to have PW6 stepped down, pending the making of an application to treat him as a hostile witness. After hearing all counsel present, I made a ruling (which may be set out in part):

*“PW6 **Michael Waweru Kimotho** has given evidence which, in the course of testimony, learned State Counsel **Mr. Bifwoli** found to have no connection with the statement (indeed, two statements) which PW6 had earlier recorded at the Police Station.*

*“**Mr. Bifwoli** has found difficulty with such a line of evidence coming from a prosecution witness; and he has requested time, during which PW6 may be stood down, to examine the records again and to apply for leave to cross-examine the witness.*

*“**Mr. Bitwoli** says he has been taken by surprise, and is so placed as not to be in a position to discharge his task of leading the evidence.*

*“**Mr. Bifwoli** underlines the recorded statements of witnesses; they are the basis upon which the Attorney-General was able to take the crucial decision to prosecute. So, if such recorded statements suddenly change, at the pleasure of the witness testifying in Court, then the substratum of the Attorney-General’s prosecutorial decision disappears; and the Attorney-General is now well and truly deprived of the merits which will move his case forward.*

“Besides, the recorded statement has already been brought for a second time, to the attention of the witnesses, so that they may refresh their memory; so if a witness unilaterally, and so belatedly, renounces the statement he had recorded, then he is no longer a genuine prosecution witness whose testimony could lead to the conviction of the accused.

“All counsel for the accused persons, by contrast, have submitted in unison that the hearing ought to proceed. They have submitted that PW6 is a witness for the Court, and his evidence will help the Court to come to the truth

“Different sections of statutes, such as s.150 of the Criminal Procedure Code (Cap.75) and s.161 of the Evidence Act (Cap.80) have been brought to my attention as relevant to the question in hand.

“I have considered the representations of counsel on both sides, and I have addressed my mind to the whole purpose of a criminal case such as the instant one.

“One important procedural point which counsel have not addressed is the established common law technique which is to be regarded as an aspect of the general law of this country. This is the adversarial method, which enables each party to adduce the most cogent evidence and to prosecute his case, knowing very well that the other side is also free to challenge and to controvert that evidence. This leads to a discharge of the burden of proof, on particular standards which differ as between criminal and civil cases.

*“I am in agreement with learned counsel **Mr. Bifwoli**, in the first place, that this case would not have been commenced at all if the Attorney-General’s office knew it could not rely on the recorded statements.*

“Secondly, there is no basis on which a witness who has recorded and signed a statement can properly renounce that statement as having been the work of others alien to him.

“It is also not possible for the prosecution to lead evidence in the normal manner where a witness suddenly denies all the things he had recorded as the true position.

“In the workings of this Court, the prosecution must have a chance to make its case, by tendering evidence founded upon recorded statements. If this cannot be realized, then the established trial method in criminal cases would become inoperative.”

PW6 was stepped down for some time, and on 27th November, 2006 **Mr. Bifwoli** applied that he be declared a hostile witness, by virtue of s.161 of the Evidence Act (Cap.80). On that occasion I ruled as follows:

“The earlier ruling and the direction then given, lead me now to declare the witness, PW6, a hostile witness. PW6’s evidence is in the first place hostile towards the prosecution; but insofar as the prosecution is then disabled in the conduct of its case in Court, PW6’s position is an impediment to the discharge by this Court of its dispute-settlement mandate; and therefore, in every sense, PW6 is a hostile witness, and I now declare him to be so.

“The prosecution may cross-examine PW6.”

Sworn again and testifying in the Kikuyu language, PW6 responded as follows to cross-examination by the prosecution counsel.

PW6 restated his earlier averment, that on 23rd April, 2005 at 12.30 p.m., he and **Gaddafi** had boarded a mini-bus to Gatukuyu, for the purpose of attending secret meeting called by the local parliamentarian, and one **Councillor J.N.** They found some 150 people already present for the said meeting. **Councillor J.N.** (whose full name was **Ngandu Ruigu**) directed that some 500 young men, among them the participants at the Gatukuyu meeting, would identify and assault all those who would come to the DC’s meeting at Kamwangi, on 25th April, 2005 who opposed the merger of the various coffee factories in the locality. The Councillor said it was known that **Gatarwa** (1st accused) and **Muicigi** (3rd accused) were the leaders of the anti-merger group, and called upon those at the meeting to stop any anti-merger activity during the DC’s meeting. PW6 testified that armed youths of the pro-merger group should beat up the anti-merger individuals, and should go as far as killing certain persons in the anti-merger group, in particular: **Gatarwa** (1st accused); **Muicigi Muiruri**; (3rd accused) a teacher by the name **Gatimu**; and **Councillor Wohoro**. **Councillor Ngandu Ruigu (J.N.)** announced that the pro-merger youths would be armed with forked-hoe handles costing a total of Kshs.5000/=, and they would use these as weapons on the material day. Those jembe-handles were to be cut to shorter sizes, so they could be more easily concealed by their users. At the end of the meeting, **Councillor Ngandu Ruigu**, the deceased (**Gaddafi**), and one **Gachau** called PW6 aside and asked him to name his price, for the hire of his motor vehicle for use in conveying weapons for use on the material day. It was PW6’s testimony that he refused to allow his vehicle to be used for carrying the crude weapons, as such weapons could easily cause the death of persons; whereupon **Gaddafi** retorted: *“the Government is on our side”*. Later on the same day, at 8.00 p.m. PW6 saw **Councillor Wohoro**, and told him of the plot to kill him (**Wohoro**) which PW6 had heard about earlier; and the following day PW6 passed a similar caution to teacher **Gatimu**.

On Sunday, 24th April, 2007 three persons in the pro-merger group, **Gachau**, **Muteti** and **Chege** went to PW6’s place at Kanyoni; and they asked him to take his motor vehicle to Kanyoni, for the purpose of loading therein the jembe-handles which had already been purchased by **Gaddafi**. **Gaddafi** had already cut these crude weapons to shorter lengths, and kept them at Kanyoni, in the workshop of one **Ndung’u**, which was located close to his own shop. The sticks were kept in sacks. As PW6 refused to carry the sticks, **Gaddafi** and his friends placed them in the saloon car in which they had been driving, a KZD registration number. There was hardly any space in the car, and so all the three – **Chege**, **Mutetu** and **Gachau** – shared the front seat, sitting on the laps of one another.

On the material day, 25th April, 2005, PW6 woke up early, had repairs done to his motor vehicle, and had it parked at his place of business at Kamwangi. Right from 8.00 a.m., people were already gathering in groups, at Kamwangi. In view of the uncertainty about public safety at Kamwangi, PW6 and his colleagues in the transport business decided to close shop, and to drive their motor vehicles home. From those early hours of the morning, old and young men were just hanging out at Kamwangi, making antagonistic speeches, and the place looked, on the whole, unsafe. As PW6 drove home at about 9.00 a.m. he met several people, at Gatitu school, who had been at the “planning meeting” at Gatukuyu, on 23rd April, 2005; these were **Gachau; Muteti; Chege; Gaddafi; Baraza**. These people appeared to be set for an occasion; they had a dress code – caps with front facing backwards; right trouser-leg folded upwards. They were in the company of a substantial group, of about 300 people. These were fairly young people; for instance: **Gaddafi**, aged 33; **Gachau**, aged 40; **Muteti**, aged 38; **Chege**, aged 33; **Baraza**, aged 36. The large crowd of some 300 people had begun unleashing violence on passers-by. A victim of this “pro-merger” violence was one **Ng’ang’a**, hit on the head, and found prostrate by the road, by PW6; and gangs of youths were marching along hounding insulting words at the injured man. PW6 stopped his motor vehicle and spoke to **Gaddafi**, asking that he be allowed to take injured **Ng’ang’a** to hospital; but **Gaddafi** objected, for the likes of **Ng’ang’a** were “*the people to be stopped from attending the meeting*”. PW6 cautioned **Gaddafi**: that “*if Ng’ang’a died, and people [came to know] Gaddafi was the ring-leader and chief campaigner for the area M.P., then he would be arrested*”. This made **Gaddafi** climb down in attitude, and he even gave PW6 Kshs.1000/= to be used to buy fuel, so **Ng’ang’a** could be taken to hospital. So PW6 had to turn his motor vehicle, and drive back towards Kamwangi. PW6 saw large groups of people at Kamwangi, and he passed on to Igegani, some 10 km away, where the hospital was located. While at Igegani he had from a passenger alighting from a motor vehicle from Kamwangi, that there was heavy fighting at Kamwangi, and “*the people of the area MP [were] being beaten by the coffee farmers*”. It was while PW6 was at Igegani, at 10.30 a.m., that he heard from those coming from Kamwangi that **Gaddafi** had been killed. PW6 endeavoured to confirm – by calling **Gachau** and **Gaddafi** on their cellphones; but there was no answer. One **Maina** at Kanyoni called PW6 on the cellphone and asked him to escape, as there was a mob yelling that “*they were looking for my head on a stick, as they were also looking for Hon. Kariuki Muiruri the local M.P.*” So PW6 gave the patient money for bus fare, and asked him not to go in the Kamwangi direction after being treated. PW6 himself drove to Gatundu, and remained there till 6.00 p.m.; and he then took another route which led him to his home at Kanyoni. He found many people at his home, who had feared he might have been killed.

On 27th April, 2005 **Muteti**, being driven in **Councillor Ngandu Ruigu’s** [i.e., **Councillor J.N.**] motor vehicle, came to PW6’s home and asked him to go with him to Gatukuyu to meet the local M.P. He went with **Muteti** up to the bar building, where there had been an earlier meeting on Saturday, 23rd April, 2005. PW6 found the local M.P. and **Councillor Ngandu Ruigu**, who were in conversation, and were saying it was **Gatarwa’s** group, which had killed **Gaddafi**. PW6 was asked to sit down, and the area M.P. announced that this, again, was a planning meeting – planning on how they would record statements in Thika and Gatundu, on the death of **Gaddafi**. It was agreed that, for those who did not know how to write, statements would be recorded for them. PW6 at the time informed the local M.P. that he was not at Kamwangi when **Gaddafi** was killed, on 25th April, 2005, whereupon the M.P. uttered a word of insult; in PW6’s words: “*he ... said even the others weren’t there. He ordered that I shouldn’t argue with him over the matter. He asked me to get out, but remain in the vicinity*”; PW6 complied, and waited outside until he was called in again by the area M.P., half an hour later. And what then followed? In PW6’s words:

“He told me **Muteti** would go and write the papers for me, because it was being alleged it was my vehicle which had carried the sticks [used by the pro-merger youths on the material day], [and this was necessary] so that my motor vehicle may not be impounded”.

It was PW6’s testimony that the area M.P. also said, on that occasion at Gatukuyu, that someone known as **Ndung’u** [PW4] (nicknamed Lion, or **Simba**) and another person called **Joseph** (PW17) would also come to the Police station and record that they had received from **Gatarwa** (1st accused) the sum of Kshs100,000/= as consideration to go and kill both **Gaddafi** and the M.P. himself. All the people gathered with the M.P. at Gatukuyu on that day, who were to make statements to the Police, were then driven in the motor vehicle of **Councillor J.N. [Ngandu Ruigu]** up to Gatundu Police Station. At the Police

Station, PW6 and one **Njoroge Karuru** who could not write their statements, were left to wait outside, as the others entered a room where they wrote their statements; and **Muteti** said he would write a statement for PW6. Indeed, at about 6.00 p.m. **Muteti** returned to PW6 with a written document, asking him to sign; and **Muteti** told him these papers would protect his motor vehicle from being impounded. Thereafter **Councillor Ngandu Ruigu's** beige-coloured pick-up truck, part of the registration number of which is KAB, took the several potential "witnesses" to their homes. Two days later (and that would be on 29th April, 2005) **Muteti**, in a Police flying squad motor vehicle (bearing No. KAQ as part of its registration), came to PW6's home with yet more papers to be signed; and PW6 was told he had to sign these papers to *protect himself* against arrest. PW6 was familiar with the said motor vehicle, beige in colour, as he used to see it with Police officers from Thika. PW 6 signed the papers, and **Muteti** & co. left.

PW6 heard no more of that business for another six months; but in November, 2005 **Gachau** came to tell him that the local M.P. wanted him (PW6) to attend a meeting at the MP's Nairobi office, at Continental House. Of this report by **Gachau**, PW6 said: "*He [Gachau] told me that, for those of us who [had written] statements, we were to be advised on what to say in Court. I told him I had written no statement. Gachau told me the papers I had signed were the ones I was to be advised on. Gachau said he had no money for transport, but a refund would be made after I had come to Nairobi*". So PW6 went to Nairobi on the following day, arriving at 12.00 noon. PW6 was kept waiting outside for 30 minutes, and when he was called into the local MP's office, he found 17 people already seated; and 16 of them were from the Kamwangi area and were known to him. PW6 knew the 17th person only by appearance, and he was able to identify the man, who he had been told was an *advocate*, in Court. The local MP had told the gathering that this 17th man would advise them, in his capacity as an advocate. The MP began quarrelling with PW6 straightaway, when he entered the MP's office, and told PW6 that he would get into trouble if he did not do as the MP demanded. What was PW6's response? In his words:

"I said I would [tell the Court] what the Advocate would advise I told [the MP.] I would agree to come and say what he had said He removed kshs.2000/= ..., and called **Kinuthia** of his office ... to take that money and give me as my [bus] fare."

It was PW6's testimony that the said MP had directed the men sitting in his office as to how they should testify in Court, in relation to **Gaddafi's** death, as follows:

"... We should say **Gatarwa** had come with a pick-up, where **Gaddafi** was, and pointed him out to be killed; and that motor vehicle had many people in the back; and in the front **Gatarwa** was driving and sat together with **Muicigi** and **Macharia wa Eva** ... We were also to say **Macharia wa Eva** had a hoe in his hands, **Muicigi** had a *panga*, and **Gatarwa** had a metal bar; on how **Gaddafi** was killed, we were to say **Gatarwa** had used a metal bar, **Muicigi** had used a *panga*, **Macharia wa Eva** had used a *jembe*, **Kibora** had used sticks, and **Cehu** had used a stone"

The MP, according to PW6, had noted that some people had said **Gaddafi** was wearing a jacket when he was killed, while others said **Gaddafi** was not wearing a jacket; the MP wanted the potential witnesses to say in Court that **Gaddafi** had not been wearing a jacket. PW6 said such testimony would be false. In the words of PW6: "But I will say in Court that I left **Gaddafi** wearing a Jeans – jacket". **Gaddafi**, PW6 said, also had a T-shirt, similar to the one he (PW6) was wearing in Court – beige-green in colour, with a darker middle section; **Gaddafi** was also wearing green trousers, and safari boots.

The MP had wanted all the intended witnesses to be sure of the place where **Gaddafi** had been killed; but "*only one person [Hillary Njagi Kirori (PW1)] knew the exact place [where Gaddafi was killed]; he had gone there. All the rest of us did not know where Gaddafi was killed*". This position had emerged from the answers given by all the intended witnesses, in response to a question by the MP's advocate who was at the Continental House meeting. In the light of the obvious spuriousness of the testimonies intended to be brought to Court by the crowd meeting in the MP's Continental House office, the MP had urged that "*it should not be proposed that the Court should visit the scene*".

This is the context in which the witness (PW6) came to Court on the first occasion to give evidence; and the witness now testified that his testimony did not please the MP in question – and he (PW6) suffered

harassment in the aftermath, death threats, and the impounding of his vehicle, after he testified in this Court on 21st June, 2006. His pick-up motor vehicle Registration Number KMR 067 was impounded on 12th September, 2006 and it had not yet been restored to him. On 9th November, 2006 P.W.6 was summoned to Gakoe Police Station and *held in custody*, on the claim that he was driving an uninsured and unlicensed motor vehicle; he was held for two days and denied bond/bail. Only after members of the public protested in favour of PW6, and after he hired an advocate, was he able to secure his release on bond, through a *Court of law*. The *truthfulness* of this evidence was confirmed to the Court by the production of the said bond. But after his release on bond, PW6 had to take cover, as he feared the possibility of compromise to his *personal security*.

This Court did not doubt PW6's complaint about threats to his personal security, and, on 27th November, 2005 I made orders as follows:

*“In the light of the evidence which has been given in Court today by PW6, **Michael Waweru Kimotho** of Kanyoni in Gatundu North, that on account of his role in this trial as a witness his personal safety has been shown to be at risk, I now direct that the Commissioner of Police shall enforce mandatory directions to his officers who may be concerned, to ensure that the personal safety and personal freedom of the said **Michael Waweru Kimotho** is guaranteed against any molestation or harassment such as may emanate from any quarters whatsoever.”*

As **Mr. Bifwoli** for the prosecution was not ready to proceed with cross-examination at this stage, counsel for the accused persons were given the opportunity to ask questions, and learned counsel **Mr. Njanja** cross-examined the witness, who further testified as follows.

Martin Kiragu Ndung'u, the deceased also nicknamed **Gaddafi**, was well known to the witness, as they had grown up together in the same local area. PW6 also well knew the accused persons, who come with him from the same constituency. It was well known to PW6 that **Gaddafi** was the man in charge of the “gang or army at the local MP”, and occasionally **Gaddafi** would even hire PW6's motor vehicle for the purpose of doing the MP's work. There were several members of the MP's gang, known to PW6, such as **James Ndung'u** [Lion, or *Simba*] (PW4); **James Kinyanjui Kigo** (PW7); **David Njenga Ngurari** (PW3); **Paul Njuguna Mungai** (PW5); **William Watari Ruchu** (PW8). All these individuals had been present at the “planning meeting” on 23rd April, 2005 which had been held at a bar at Gatukuyu, in preparation for the DC's meeting of the material day. The MP's gang, PW6 testified, served to assault members of the public and get them to desist from opposing what the MP stood for; for instance, the MP wanted a *merger* in the coffee industry, but this was *opposed* by many people. In PW6's reckoning the pro-merger people could number about 1000, against some 6000 who opposed merger. At the Gatukuyu “planning meeting” of 23rd April, 2005, the sum of Kshs.100,000/= was entrusted to **Gaddafi** by **Councillor Ngandu Ruigu**, for paying the MP's “army” for its “work” to be done on the material day. A motor vehicle was to be hired for the purpose, and PW6 was given Kshs.1000/= for fuel; and *he was later paid Kshs.3000/= so he may carry the assault sticks in his motor vehicle*. In the words of PW6:

*“The gang was to come from all places where a coffee factory was located, so as to identify anti-merger people from all factory-areas – to be beaten up. Anti-merger people were beaten throughout Sunday [24th April, 2005], in the Kamwangi area... [The DC's meeting was to be held on 25th April, 2005]. *The merger people wanted to have a field-day, all their resolutions being approved.*”*

It was PW6's evidence that **Gatarwa's** motor vehicle did not come into Kamwangi, on the material date, until after **Gaddafi** had been killed. And in the meantime, there were as many as 3000 people in Kamwangi, protesting about the local MP's gang; “this large crowd knew people had been beaten up throughout the night, and that their property was being *merged* forcibly”.

PW6 said he was not in Kamwangi when **Gaddafi** was being killed; but his understanding was that it was the *anti-merger people* who killed **Gaddafi**. According to PW6, the Police in Kamwangi very well knew what had happened in the run-up to and including 25th April, 2005; and even the DC himself whose

meeting took place on the material day, would have known of the mob-action which occasioned the death of **Gaddafi**.

To the question whether he came to know that **Gatarwa** had been involved in the killing of **Gaddafi**, PW6 testified:

“The evidence that **Gatarwa** was seen killing **Gaddafi** is false; for I was present *when this evidence was being created*”.

There was further cross-examination by learned counsel **Mr. Agina** on 28th November, 2006, and PW6 testified as follows.

It is for certain that PW6 attended the local MP’s “planning meeting”, on 23rd April, 2005 at Mitero Bar, at Gatukuyu; and that meeting was led by **Councillor Ngando Ruigu** (or **Councillor J.N.**). At the said meeting, a decision was taken to kill some people: **Gatarwa**, **Mwalimu Gatimu**, **Councillor Wohoro**, and **Mwicigi Muiruri**. Why? In the words of PW6:

“We were not told why these [persons] were to be killed. [The local MP] does not like being questioned – but he was not there at the [planning] meeting. The meeting was taking place up to about 4.00 p.m.”

On the material day (25th April 2005), PW6 had gone to Kamwangi, and he was there just after 7.00 a.m. As he left Kamwangi, between 9.00 a.m. - 9.30 a.m. he saw many people entering that town, and these people moved in group-formations, dressed in strange codes. At 9.30 a.m. , as PW6 drove out of the town, he came across **Gaddafi**, with his group of something like 500 people, at Gititu school which is only one kilometre from the DO’s office at Kamwangi. At that time, **Martin Kiragu Ndung’u** (or **Gaddafi**) had a stick, a hoe-handle some two feet long, in his hand, and one of his trouser-legs was rolled back. After talking to **Gaddafi**, PW6 proceeded to Igegani, to have an injured man, **Ng’ang’a**, treated at the hospital.

When PW6 left Gititu school for Igegani that morning, **Gaddafi** and his group were busy stopping members of the public who were proceeding to Kamwangi for the DC’s meeting. It was PW6’s testimony that he did not see anyone beating up or killing **Gaddafi**. He also said that while at Kamwangi on the morning of the material date, he did not see the four accused persons there.

PW6 remained at his home at Kanyoni on 26th April, 2005, but on 27th April, 2005 he went to Gatundu Police Station and was asked to *sign* a statement which *was already written* when he saw it. When shown the papers brought to Court as his statement, PW6 could identify the signature he had appended at one point in those papers, but he also showed signatures which purported to be his, but were not. He said these papers were not even signed inside a Police officer’s office; they were brought to him right outside where he had been directed to wait – and the one who brought these papers to him was a not a Police officer, but **Muteti**, a businessman and active supporter of the local parliamentarian: “The Policeman remained inside; it was 27th April, 2005, two days after **Gaddafi** died”.

The said papers signed on 27th April, 2005 showed the date as 25th April, 2005 at 6.00 p.m., but PW6 made it clear that: “*on that day when Gaddafi died, we never went to the Police Station*”. PW6 added: “*If the statement says I saw those who killed Martin Kiragu Ndung’u, it is not true. I never told the Police I saw those who killed Gaddafi. I went to Gatundu on 27th April, 2005 and I went there with others*”.

Similarly the second set of papers which PW6 signed were brought to him at Kanyoni *already written*. This was 29th April, 2005 at 4.30 p.m. when a Police Flying Squad vehicle carrying non-uniformed persons and **Muteti**, called him to the Kanyoni Administration Police Camp and caused him to sign these papers *six times, on different pages*. In his testimony, there was no Police officer whom he knew by the name **Njagi** (testified to by PW29) among those who came to him at Kanyoni on 29th April, 2005. PW6 pleaded complete ignorance about the content of the “*statement*” said to have been signed by him at Kanyoni; in his own words:

“I didn’t know that statement was saying I had been at Kamwangi on 25th April, 2005 at 10.30 a.m. I would not have known if the statement claims I did see the killing of **Gaddafi**. I did not know what was written in the statement. I know the vehicle that came to Kanyoni belonged to the Police Flying Squad; it was **Muteti** and three others; I can’t know if they were Police”.

Of **Muteti**, PW6 said this was a campaigner for the local MP, and the one member of the *literati* who “used to write for us in English whenever this was required. He also writes proposals [to go with] applications for Constituency Development Fund [CDF] money”. Proposals of such a kind have in the past been used to obtain CDF money for those “*claiming to have planted trees, even when it is not true; each person comes up with his own plans; the local MP used to tell his close followers to come up with [such] plans ... People would form groups, and approach the MP’s chief campaigners – Gachau, Muteti, Chege ... The CDF Committee is the MP’s own committee and acts according to his instructions ...*”

PW6 testified that during the meeting which the local MP held at his Nairobi office in November 2005, the MP’s advocate had asked the intended witnesses to pay a visit to the scene where **Gaddafi** had been killed. The witness said:

*“Up to today I haven’t gone there. I attended **Gaddafi**’s funeral; I was in charge of co-ordination. He was buried in a parcel of land bought for him by the MP in Kanyoni”.*

PW6 said that in the run-up to this trial, the local MP and his friends had organized *two planning meetings* – one on 27th April, 2005 at a bar at Katukuyu (Mitero Bar); and the other at the MP’s Continental House Office in Nairobi, in November, 2005. The first of these meetings had been attended by one **Ngurari** (PW3); one **Gachau**; one **Njoroge Karuru** (PW9); one **Joseph Kinyanjui**; one **Njuguna Muteti**; one **Willy** (PW8); one **Andrew** (PW18) one **Maina**; and one **Ndung’u** (alias Lion) (PW4); and in that group, **Joseph Kinyanjui** and **Ndung’u** (alias Lion) were the ones to testify about monies supposedly paid to facilitate the killing of the local MP. The Gatukuyu meeting was “concerned with the manner in which our statements were to be recorded at the Police Station. The MP’s name and that of **Councillor J.N. [Ngando Ruigu]** were not to be mentioned in the statements”. Each “witness” was told to mention specific people by name, for involvement in the killing of **Gaddafi**; and the 2nd accused, was to be implicated by those “witnesses” who came from his locality, Kanjuko. The 3rd accused, who is a brother to the 2nd accused, was known to be opposed to the merger of the coffee factories in the Kamwangi area.

On being further cross-examined by learned prosecution counsel, **Mr. Bifwoli** on 12th March, 2007 PW6 testified as follows. Those who had attended the first Mitero Bar meeting at Gatukuyu, on 23rd April, 2005 would have been about 150 people; and the purpose of that meeting was to “*come up with a strategy for preventing the [DC’s] meeting of 25th April, 2005*”. Participants at the meeting were told to stop anti-merger people from attending that meeting; and PW6 specifically had been assigned the task of identifying those coming from Kanyoni Coffee Factory who were anti-merger. Responsibility was assigned in the same way to those from other coffee-factory areas.

PW6 testified that he had himself been a *member* of the local parliamentarian’s gang, along with **Gaddafi** and the others such as **Ngurari**; **Njoroge Karuru**; **Joseph Kinyanjui**; **Ndung’u** alias Lion; **Gachau**; **Maina** – but he left that gang, for the reason, in his own words: “I have my own motor vehicles for hire”. PW6 had received word, just after the killing of **Gaddafi**, that the crowd at Kamwangi was howling for his blood too, because he was in the local parliamentarian’s camp, and because PW6’s car was believed to have been contracted to *carry assault-sticks* on behalf of **Gaddafi** and the local parliamentarian, on the material date. PW6 gave **Mutua** as the name of the local MP’s advocate who was giving instructions to potential witnesses in this case, at the local MP’s office in Nairobi, in November, 2005.

PW7, **James Kinyanjui Kigo** was sworn and gave his testimony in Kiswahili on 22nd June, 2006. He said he is a banana, avocado and tomato farmer at Kanjuko, near Kamwangi. He testified that he was at Kamwangi at 9.00 a.m., on 25th April, 2005, for the purpose of attending the DC’s *baraza*. He was in the company of one **Ndung’u** and one **Njoroge**; and the two of them met **Gaddafi** “and his friends” as they walked on, towards the venue of the DC’s meeting. Before getting to the DO’s grounds, PW7 said, they

came to Kwa-Maina where a pick-up motor vehicle, part of its registration being KAC, drove up to the place where he and his companions were; it stopped; a passenger in the front alighted and uttered the words: “That is **Gaddafi!**” – as he pointed at the deceased; and at that point, people came out of the pick-up motor vehicle bearing weapons; the driver came out with a metal bar; all passengers on the pick-up vehicle alighted and began chasing. PW7 said he and his colleagues fled from the attack; and he said he knew some of those attacking: **Muicigi Muiruri; Nahashon Gatarwa; Kibora; Macharia; Ngugi Muiruru;** but he could not remember the others. He said the man who screamed, “**This is Gaddafi!**” was **Gatarwa**, who came out with a metal bar used in constructing houses; **Muicigi** had a *panga*; the rest had stones and tree branches. What happened to the motor vehicle? PW7 said:

“The vehicle was left at the road. I don’t know what happened to it; I ran away.”

PW7 said he did not reach the river, but **Gaddafi** went ahead towards the river. PW7 said he got into a farm of Napier Grass and avocado, and hid there. The witness said:

*“I hid and I did not see anyone near me. I was told somebody running away had been caught down the river. It is a sloping area where I hid. When I looked down the slope I saw that **Gaddafi** had been caught, on the other side of the stream”.*

This witness avers that he was *alone*, at his hiding place; but he then says he was *told* somebody running away had been caught; he does not say who told him so. Therefore this evidence must be adjudged to be *untrue*; and *equally untrue* is PW7’s claim that the alleged information which he received, *caused him* to look down the river and to see that **Gaddafi** is the one who had been caught, just across the river.

It follows therefore, that *this Court does not believe PW7* when, of **Gaddafi**, he avers:

“He was being beaten. I saw him being beaten – with metal, pangas, sticks, stones.”

The *untruth* in PW7’s allegation is, in my judgment, *confirmed* when he says he saw the act of killing **Gaddafi** using metal bar, *pangas*, sticks and stones from a distance of some two football-field-lengths away, i.e. about 200 metres. He maintained that from his hide-out, “*I could see down the slope very well*”. He claimed also that from that distance he heard somebody say: “*Our work is finished*”, and that this was **Gatarwa** (1st accused) speaking; he saw **Gatarwa** very well; he was familiar with **Gatarwa’s** voice. He said he had seen **Gatarwa** clearly at that moment, as **Gatarwa** directed the crowd gathered at the *locus in quo* to now leave. PW7 said he saw **Gatarwa** with others in his company, and that the total number of people at the *locus in quo* was 20. Apart from **Gatarwa**, PW7 said he saw at the *locus in quo*, **Macharia Mwangi; Muicigi Muiruri; Ngugi Muiruri;** and **Kibora**; he did not take note of the identity of the others.

PW7 said that after **Gaddafi** was killed, he stealthily found his way out of the area, leaving for his home at about 11.00 a.m. He said **Gaddafi** was being beaten up between 9.30 a.m. and 10.30 a.m. on the material date, and that he did not know why or how violence had been thus meted out on **Gaddafi** by those who killed him.

On cross-examination, PW7 denied that he had been in *jail*, at the time of the last general elections. He said he very well knew the accused persons, and he knew **Gaddafi**, as well as **James Ndung’u Kabunga** alias Lion (PW4) – and the two are close relatives of his. He said he didn’t know anything about **Kabunga’s criminal record**, and that he and **Gaddafi** and **Kabunga** had not been part of any political gang in the Kamwangi area. He said he was not involved in *crime*, but later testified:

*“Even if I was involved in crime, I have left it. It was long ago that I served a prison term – for fighting over a farm. I have not robbed violently. I have not jointly engaged myself in crime with **Gaddafi** or **Kabunga**.”*

PW7 said he did not know if **Gaddafi** had been an ardent follower of the local parliamentarian, in political matters.

He said:

*“I would not know if the MP was using **Gaddafi** to do all sorts of nasty things to the people in the locality”.*

PW7 said he had written and signed a statement with the Police, following **Gaddafi’s** death, and he acknowledged that the statement shown to him in Court was indeed his. This statement was dated 27th April, 2005. While saying he did not know why **Gaddafi** was killed, he immediately *contradicted*, by his recorded statement, what he had just told the Court. He had thus recorded on 27th April, 2005:

*“All I know is that [**Gaddafi** was] a supporter of [The Hon.] **Kariuki Muiruri**, the M.P. for Gatundu North.”*

Why had he given such a record? In his own words:

“That is what was in my head. I could have said so to the Police”.

PW7 denied that he had been part of the group plotting to disrupt the DC’s meeting of 25th April, 2007. But in the light of the evidence of PW6, and of my assessment thereof, the *witness who speaks the truth on this point is, as I do hold, PW6 and not PW7*. The averment made by PW7 on this point is no more than a *bold denial*, whereas PW6’s testimony is *most detailed, specific, and incapable of being so readily and automatically constructed*, in the manner in which PW7 simply *denies*.

PW7 stated that he had left his home for Kamwangi at 8.15 a.m. on the material day, and then **Gatarwa’s** pick-up motor vehicle came along carrying as many as 20 armed persons. Since earlier-on PW7 had said there were 20 people at the scene where **Gaddafi** was killed, I understand him to be saying that it is precisely the 20 people he says came in the white pick-up motor vehicle, who were at the *locus in quo* and no one else. That is in contradiction to the testimony of other witnesses, *particularly PW1 who the Court believes to have keenly and personally observed and testified upon the state of the scene, and the numbers of people who had been there*. I will hold, therefore, that PW7’s account about the number of people who participated in the killing of **Gaddafi**, is a *false account intended to delude this Court in its findings*.

Even though a major meeting conducted by the D.C. was due to take place at Kamwangi, on the material date, and so sufficient security arrangements would have been on hand – a fact of which, given the prevailing circumstances, this Court must take judicial notice – PW7 said he saw *no policemen at all* along the road at Kamwangi, and he averred that “the Police did not see the weapons [allegedly brought to the town in **Gatarwa’s** pick-up motor vehicle] ...” On this point, once again, I have to hold that *PW7 has not told the Court the truth*.

PW7 said that when **Gatarwa** and the 20 people in the pick-up vehicle lodged an assault on him, **Gaddafi** and all their companions, everybody ran away and he did not see where his colleagues ran to. I hold this to be *so improbable* that it *cannot be a true account*: that he never at all saw where all his many associates ran to, during the alleged chase!

PW7 did not admit his knowledge of **David Ngurari Njenga** (PW3), a man who gave an account before this Court very much like that of PW7. If it is true that PW7 and his friends ran away on seeing the pick-up motor vehicle said to belong to **Gatarwa**, and that PW7 took cover in the bush, it *cannot be true that he would fail to see PW3 who did precisely the same thing*. I therefore hold that the story about bush-cover for PW7 as he observed **Gaddafi** being killed down the river, from a distance of some 200 metres, is a *false one*. PW7 said, on cross-examination, that in the morning of the material day, he did have tea with **Gaddafi**; but PW3 too says he was with **Gaddafi** at that time. How can it be that PW7 never saw PW3? I must conclude that *PW7, just like PW3, is not at all a truthful witness*.

Even after testifying that **Gaddafi** had gone ahead of him crossed the river, and gotten caught by his pursuers, PW7 still averred: “As I ran away, **Gaddafi** was either in front, or behind. He was a heavy

person. I was looking only at myself; I don't know if **Gaddafi** was left behind. **Gaddafi** could not have been ahead of me”.

Is PW7 telling the Court what he saw when he avers:

*“I saw five people beating **Gaddafi**. I saw nobody else beating **Gaddafi**. They beat him until he died. I was seeing what was happening to **Gaddafi**, from my hide-out in the Napier Grass”?*

From the foregoing analysis, I have no doubts that PW7 has *made up the evidence* he brings to Court; he did not, I do hold, perceive with one of his five senses the killing of the deceased herein.

This is further confirmed by the fact that, by the equally *unreliable testimony of PW4 (James Ndung'u Kabunga)*, as many as 10 persons would have beaten up the deceased until he died; yet PW7 declaims his absolute clarity of vision when, from 200 metres away, he saw the accused herein killing **Gaddafi**.

The *falsehood* in PW7's testimony speaks for itself when he alleges, on cross-examination, that from 200 metres away he saw **Gatarwa** hitting the deceased with a metal bar; **Muicigi** cutting the deceased with a cleaver; **Ngugi** hitting the deceased with a stone; **Kibora** pounding the deceased with a stick; **Macharia** gouging out the deceased's flesh with a forked hoe. PW7 claims that he perceived those individuals, from his rather distant hide-out, *“hit every [part], head, body legs [of the deceased] – and a lot of blood was coming out”*. Indeed, from that distance, could he even see the flow of blood from the body of the deceased? That is not possible, with normal human capacity to perceive things – I would take judicial notice.

A more credible witness, PW1 (**Hillary Njagi Kirori**) had said that **Gaddafi** had been killed by *a large crowd, possibly as many as 3000 people*, and that the death had taken place by 10.00 a.m. This is denied by PW7 who says: *“There is no such a thing; it is not true”*. He denied the question put to him, that he and **Gaddafi** had been part of a terror gang on the material day, and the irate crowd overpowered his and **Gaddafi's** gang and killed **Gaddafi**.

Learned counsel brought to PW7's attention the list of names he (PW7) had given to the Police as indicating those who killed **Gaddafi** – and *in that list neither the 1st nor the 4th accused appeared*. Since he maintained in Court that **Gatarwa** (1st accused) was one of those who killed **Gaddafi**, counsel asked why this name had not been recorded with the Police; and his answer was clearly disingenuous: *If I have not mentioned **Gatarwa**, 'shauri yake!' [meaning, that's his own business] ...”*

Then he went on to say:

*“I have now said I saw **Gatarwa** pounding the deceased with a metal bar. I saw it; what I saw is what I am saying. What I say is the truth. It was twisted metal used for construction.”*

PW7 admitted that he made no statement to the Police immediately after **Gaddafi's** death; he recorded his statement two days later; and his reason was: *“I was still confused”*.

Of this particular witness I did record my impressions on *demeanour*, as follows (22nd June, 2006):

“Witness looks stubbornly insistent even when he has given two contradictory accounts. He maintains that he did indeed correctly perceive.”

PW7 admitted that he had been *sent to jail* in the past, but, in his words:

“It was a long time ago, like 1976 or 1978 that I was jailed, and it was only for six months”.

As PW7 made this statement, he at the same time showed a *demeanour* which I thus described in the Court record:

“Witness gets hot-tempered”.

PW8, **William Watari Ruchu** was sworn on 4th October, 2006 and gave his testimony in the Kikuyu language, being interpreted by the Court Clerk. He said he is a fruit, maize and beans farmer in Gatukuyu Sub-location, Thika district. Between 8.00 a.m. and 8.30 a.m. on 25th April, 2005 he left his home for Kamwangi, for the purpose of attending the DC’s meeting. He travelled in the company of one **Andrew Ngigi**, and at Kamwangi he met **Waweru, Muteti** and **Gaddafi**, with whom he started walking towards the DO’s grounds. As the four, in the company of many others, were walking towards the meeting-place, PW8 said he saw coming from behind a white Toyota Hillux pick-up, registration No. KAC 326G – with three people in the front, and some 10-15 people in the back. PW8 said the three people in the front cabin were known to him: **Ngugi Gatarwa; Muicigi**; and **Macharia wa Eva**. PW8 said he knew only two passengers in the motor vehicle’s open carrier; **Maina Kirika** and **Wanderi**. The pick-up motor vehicle stopped behind PW8 and his companions; and those in the front cabin alighted; the driver came out with a metal bar – and he was **Nahashon Ngugi Gatarwa; Muicigi** came out with a *panga*; **Macharia wa Eva** came out with a forked hoe; and **Gatarwa** then said: “This is **Gaddafi**, kill him!” – in Kiswahili. This caused PW8, **Gaddafi, Muteti, Waweru** and **Ngurari** to start running away. Many other people also ran away. PW8 jumped over a fence into a Napier Grass, avocado and coffee farm. He said he had *climbed the avocado tree*, and from there he was able to see what was happening. He said he could see where the people from the said pick-up truck caught up with **Gaddafi**; and he could see those who were beating up **Gaddafi**. This avocado tree was 200 metres from the place where **Gaddafi** was caught. PW8 said he could recognize the accused persons from his perch in the avocado tree; he said he saw **Ngugi Gatarwa, Muicigi, Macharia wa Eva**, and the others, and that they were battering **Gaddafi**:

“About six people were beating up Gaddafi; when they started beating him, there were no other people”.

After 10-20 minutes, villagers came to the scene –

“because somebody had been killed”.

Much like several other witnesses whose evidence I have already determined to have been *untruthful*, PW8 said that **Gaddafi** was killed by **Gatarwa** using a metal bar; **Muicigi** using a *panga*; **Macharia wa Eva** (not charged) using a forked hoe; the next two attackers using sticks; the last one using stones. Of the said stones, PW8 averred: “The stones were those which could be held in one hand ... He was picking them up [which appears to mean, repeatedly retrieving the stones] and throwing them at the deceased”. PW8 said: “*If I saw the stones, I would recognize their size;*” whereupon he was shown some stones in a green plastic bag, and he remarked: “*These are the stones ... I saw the stones when I went to the scene; now that I see them, I can say they are the ones*”.

Although palm-size stones, by occurrence, are numerous and appear in all shapes and sizes, PW8 could tell the Court that the stones he was being shown were the ones used by some of the accused persons to kill the deceased. He did not, however, point out any characteristic of those stones which demonstrated that they were the ones that caused **Gaddafi’s** death; and I hold this to be *proof* that the evidence of PW8 on this point was not conscientiously given, and he could not have been testifying out of perception, but instead, out of a less-than-honest attempt to display a pre-designed script. This is the logical inference I would draw; but it is also, I would hold, supported by the *testimony of PW6* to the effect that sometime in November, 2005 a number of the intended prosecution witnesses had been *coached* by a parliamentarian and an advocate on the manner in which they should testify in Court, during the hearing of this case. PW8’s *evasiveness* became still clearer when he was subjected to cross-examination.

While saying that on 25th April, 2007 **Gatarwa** had brought into Kamwangi those who attacked him and his friends, and then chased and killed **Gaddafi**, PW8 could not say what then happened to the pick-up truck said to have been left along the road. In conflict with some of the prosecution evidence, PW8 said it was “*not true that Gatarwa brought his people in a motor vehicle, and then took off*”.

Although PW8 knew that at the DO’s office, only 200 metres from the place where he claims **Gatarwa**

and others started chasing him and **Gaddafi**, there were armed administration Police officers, ensuring security, he *never went to them*, but instead preferred to run into the bush, and then up an avocado tree. The account definitely smacks of *falsehood*.

PW8 had maintained that he was up an avocado tree, some 200 metres away, as he observed the killing of **Gaddafi** take place. He now said he had, after some 30-35 minutes, approached **Gaddafi's** body though without getting to it; he found *nobody* around the *locus in quo*; he found the body covered with cloth; yet he saw none-the-less, that this same body had blood, particularly on the jacket. This line of testimony is inherently illogical, which shows lack of *truth*; and secondly it contradicts the more credible testimony of PW1 who had arranged for a blanket for covering the body of the deceased, and who had given clear indications as to the presence of people at the *locus in quo* throughout until the body was taken away by the Police. I must conclude once again, that PW8 is *not a truthful witness*.

Want of truth, on the part of PW8 is compounded when, on cross-examination, he says there was a crowd and there were policemen at the *locus in quo* following the killing of **Gaddafi**; and when he now says he was at the *locus in quo*, and even spoke to the Police Inspector who was at the scene; he says: “*I did not tell the Inspector who killed Gaddafi, because he had also seen what had happened; I went home*”. That can't possibly be true: that PW8 had clearly seen the killers of **Gaddafi**, and then, when the Police Inspector comes along, PW8 leaves him to his own devices – because “*he had also seen what had happened!*”

There are several Police stations in the Kamwangi area – (i) Administration Police Camp at the DO's office, Kamwangi, (ii) Kanjeri Police Post; (iii) Gatundu Police Station; (iv) Gatukuyu Administration Police Post. To none of these did PW8 go, to make a statement on a death, the authors of which he claimed to know very well, not until two days later, when he now went to write a statement at Gatundu Police Station; but *PW6 has testified, in a manner such as ought to be believed*, that the several statements made to the Police on 27th April 2005 by witnesses herein, were all made at the instance of some two individuals in the Kamwangi area, and all made with a particular slant, meant purely to serve the ambitions of those two individuals. PW8's excuse, which this Court cannot accept, is that on 25th April, 2005 he was still in “*a state of shock*”; and on 26th April, 2005 he was “*still waiting to hear what was happening*”.

On further cross-examination by learned counsel **Mr. Agina**, PW8 now said that when he had approached **Gaddafi's** body, he found it covered, and he could only see the legs. This *contradicts* his own earlier testimony that certain parts of the body were covered with blood.

PW9, **Anthony Njoroge Gathogo** was sworn on 11th October, 2006 and gave his testimony in the Kikuyu language, being interpreted by the Court Clerk.

The witness said he was a maize, vegetable and coffee farmer at Kamwangi. He said that he was heading for the DO's grounds for the DC's meeting at 8.00 a.m., on the material day, when he saw a white pick-up motor vehicle being driven along the road. The driver was **Gatarwa** (1st accused). He stopped the motor vehicle, and out of it came persons some of whom he knew: **Muicigi**, **Macharia wa Eva**, **Ngugi** (**Muicigi's** brother). **Gatarwa** came out running, with a metal bar in hand; **Muicigi** had a *panga*; and they began chasing the witness and his party including **Gaddafi**, who took off in flight. **Gatarwa's** motor vehicle was left on the road – and PW9 did not see that motor vehicle again until later at Gatundu where he went to record a statement. **Gatarwa**, in PW9's testimony, had cried out: “*This is one of the dogs; he should be killed!*” – and he (PW9) ran away down slopy ground, and hid in a coffee farm. He said his hiding place was 30 metres from the *locus in quo*; and that he could see **Gatarwa** and the other three killing **Gaddafi**. PW9 said he remained in the coffee plantation for three hours, from 10.00 a.m. to 2.00 p.m., and he only moved from there when Police officers arrived at the *locus in quo* (presumably at 2.00 p.m.). He said he saw **Gatarwa**, hitting the deceased with an iron bar; **Muicigi** cutting the deceased with a *panga*; **Macharia wa Eva** using a forked hoe to deal blows upon the deceased; **Ngugi** throwing stones at the deceased – and this process of killing **Gaddafi** took 30 minutes. PW9 said he was in shock and did not see the killers leave the *locus in quo*; he did not know what happened to the weapons they were using. He

said there were as many as *200 people* when the accused persons were killing the deceased. He also said he did not go to the *locus in quo*; and he said those who killed **Gaddafi** were in Court as the accused.

I did not find the witness to be sincere as he made the foregoing remarks, as I was not getting the impression that he truly had perceived the things he was recounting. I made the following record on the demeanour of PW9:

“I am not impressed by the demeanour of the witness – in terms of sincerity. He doesn’t answer straight; he sweats unnecessarily; he looks unsure; he forgets things which he has said only a short while earlier.”

PW9 did not know the details of the pick-up motor vehicle which had dropped off the alleged killers of **Gaddafi** at Kamwangi; he said this vehicle was white in colour; but he could not say what later happened to it, after it had been left by the road. He said:

“I did not pass [along] the route where the pick-up had been; so I don’t know if it was still there. I was scared; I did not attend [the DC’s] meeting. I went home.”

When cross-examined by learned counsel **Mr. Njanja**, PW9 expressed doubts as to whether **James Kigo** (PW7) knew him; but he later said PW7 comes from his village, and he, **Kigo** and **Gaddafi** had been together on the morning of the material day, at Kamwangi. PW9 denied seeing some of the witnesses who have told the same story he was telling the Court: that **Gatarwa** had come along with his accomplices in a white pick-up motor vehicle, and chased everyone including **Gaddafi** who they caught and killed by the river. He denied knowing that **James Ndung’u** (PW4) or **Kinyanjui Kigo** (PW7) had been involved in *criminal activities*. PW9 denied having seen PW4 at Kamwangi on the material morning, though he said he had seen **Gaddafi** then. On cross-examination PW9 said something unsupported by any other testimony from the prosecution witnesses:

*“I was three metres from **Gaddafi** when we had to run away. At that moment a pick-up [motor vehicle] came along the road, and stopped. **Gatarwa** called out: ‘We will first kill this dog!’ I saw no dog around. He came out with a metal bar and hit **Gaddafi**, saying: ‘This is the first dog’. At that point he hit **Gaddafi** with a metal bar. **Gaddafi** fell down. I ran away I left **Gaddafi** having fallen ... Many people ran away **Kinyanjui Kigo** [PW7] was not with us; I did not see **James Ndung’u** [PW4].”*

So in this testimony it would then be untrue that **Gaddafi** ran up to the river and cross, before he was caught and killed by **Gatarwa** and his friends?

I have already noted that most of the witnesses being called before PW9 *have not told the truth*; and the obvious *contradictions*, and want of sequential logic in PW9’s testimony, now show this witness too, to be intent on *misleading* the Court through *false testimony*.

PW9, although swearing he saw **Gaddafi** being killed, and knew the killers, now told the Court this unbelievable story:

*“I knew, there were policemen at the DO’s office. But I could not look for the Police; I was in shock. I went into a farm. I ran for ten minutes, covering some 40-60 metres. I was trying to see if I could get the Police. One of my legs has an injury; so I ran, fell down and slept for about ten minutes. I remained unconscious, and later stood up and walked to my home. I was unconscious because of my leg. I was not watching the beating of the deceased. **Gaddafi** was being beaten [as he lay on the ground]”.*

Lack of rhyme or reason, in the foregoing testimony, was so apparent to the Court, it was necessary to observe witness *demeanour* and to make a record thereof; and that record is as follows:

“It is clear the witness does not believe what he is saying; he quips in an inconsistent manner;

and he sweats a lot”.

Even after saying he fell unconscious at the time **Gaddafi** was being killed, this certainly-insincere witness went on to testify – in perjured mode, no doubt:

*“I was on a slopy place, and down the ridge I could see what was happening. The beating was taking place 20 metres away; so I could see it all. Those who were beating **Gaddafi** were **Gatarwa, Muicigi and Muiruri**. I could see five people killing **Gatarwa**. I saw **Gatarwa** hitting the deceased with a metal bar. I did not know which parts of the body they were beating.”*

Completely contrary to what PW9 had said, that he watched the killing of **Gaddafi** from a distance of 30 metres; that he was unconscious all that time; that he rose from his unconscious slumber and went home? he now averred that after *three hours of hiding*, he went to the *locus in quo*, finding that the body of the deceased had been collected and he thus did not see it. He said:

*“That day I was in shock, so I did not report [the killing of **Gaddafi**]. I reported at Gatundu the following day.”*

PW9 said he did not tell even his wife that he had witnessed the killing of **Gaddafi** until the following day, 26th April, 2005 – and this was because, in his own words: *“My wife had asked why I was in shock”*. It was only two days later, on 27th April, 2005 that PW9 went to the Police station at Gatundu to report the killing of **Gaddafi**, and there, he signed a statement; he recorded that he had seen **Gatarwa** hit the deceased with a metal bar.

When he had recorded his statement with the Police at Gatundu, on 27th April, 2005, PW9 had stated that he *only heard* that **Gaddafi** had been killed, and he *later confirmed* that this was so. This was quite different from his claim in Court – that he indeed *saw **Gatarwa*** and the other accused killing the deceased. It is a clear indication that PW9 had intensely *perjured himself* in Court.

PW10, **Peter Njau Githuka** was sworn on 14th March, 2007 and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He said he is a farmer and businessman trading in avocados at Kamwangi. He said he is a coffee farmer who takes his coffee to the Githobokoni coffee factory, and in this capacity he had set out to attend the DC’s meeting at Kamwangi which was concerned with coffee farming. The meeting should have taken place on 20th April, 2005 but the DO had notified farmers that the meeting would instead take place on 25th April, 2005.

It was PW10’s testimony that right at the beginning, on 20th April, 2005 the accused herein were opposed to the merger idea, in the coffee industry. In PW10’s words:

*“**Gatarwa, Mburu Kanene, Nathan Wohoro, Macharia wa Eva, Gatoto and Muicigi** each stood up before the DO [on 20th April, 2005] and told the congregation that they should refuse merger, if the DC were to come and propose it.”*

So what did PW10 do or perceive on 25th April, 2005 (the material day); in his words:

“Twenty fifth May, 2005 was the day of the meeting. I went for the meeting at the DO’s grounds. I observed the situation. I was for merger; and I was clever; I saw the situation, and went home. There was noise at the DO’s place ... At about 10.00 a.m. about 1000 people gathered. I left them and went home.”

Only on the following day, 26th May, 2005 did PW10 learn that **Gaddafi** had been killed the previous day; but he was later asked to record a statement with the Police station at Gatundu.

Not only is it clear PW10 knew nothing about the death of **Gaddafi**, he was also quite confused, as it

emerged from the cross-examination that he was not certain about the date when the alleged DO's meeting to announce postponement of the DC's *baraza* of the material date, took place. While testifying that **Gatarwa** had threatened at the DO's meeting that somebody would be killed if the DC later came and supported merger in the coffee industry, PW10 acknowledged that he had not made a report of the threat to the Police; but he insisted he was saying the truth. In PW10's words:

*"I heard **Gatarwa** say somebody would be murdered, but I did not report to the Police; for the anti-merger people were always saying it; there was no need for me to report."*

PW10 went on to say:

*"Anyone saying **Gaddafi** died on 25th April, 2005 ... I would not know if he is lying in Court."*

Such a line of testimony by a witness, to this Court, bespoke lack of certainty, and want of sincerity, and therefore *lack of truthfulness*; I thus recorded my observation:

"That answer clearly lacks conviction".

And, about the demeanour of the witness, I recorded:

"Some contretemps; witness gets angry at learned counsel Mr.Njanja, and says: 'You are not supposed to abuse me!'"

It became necessary for me to *warn the witness* in Court, and to record the same, against *ill-temper* during testimony.

In all the circumstances, I have to draw the conclusion here that PW10 was not only an *inconsequential witness* whose testimony could not possibly *link* any of the accused persons to the offence charged; but like several other witnesses whose testimonies I have already disqualified as a basis for this Court's judicial determination of relevant questions, PW10 was *not a truthful witness*. I believe he was a witness speaking to a pre-conceived *script*, a script whose content repeatedly broke down when the spot-light of cross-examination fell upon it, and the witness was then unable to raise an answer based on true perception, and he had to resort to ill-temper to parry off intrusive scrutiny. I will disregard the testimony of PW10 as evidence that makes proof of the charges herein.

PW11, **Lucas Njenga Macharia** was sworn on 14th March, 2007 and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. A coffee farmer at Kamwangi, PW11 recalled the material day, when the DC was to hold a *baraza* at the DO's grounds at Kamwangi. The subject of the meeting was the controversial question as to whether the several coffee factories in the Kamwangi area should be merged.

PW11 arrived at Kamwangi for the meeting at 12.00 noon, and the DC's meeting started at 1.00 p.m. The witness met some 100 young men as he walked towards the venue of the meeting; they had in their hands sticks and stones, which they used to harass and to molest coffee farmers coming to the meeting. PW11 hid for some time, until the molesters had passed, and then he got into the meeting grounds, with the DC arriving at about 1.00 p.m. Prior to the commencement of the meeting, some 3000 farmers had retreated behind the dais to be used by the DC; and they agreed on a memorandum to be presented to the DC. It was about 1.30 p.m. when the DC called the meeting to order. After addressing the meeting, the DC gave the farmers a chance to ask questions; and one of those given a chance to speak was **Gatarwa** (the 1st accused). The meeting ended without any consensus being reached; but it was a peaceful ending. The DC was calling for a merger of the coffee factories; but the farmers objected, on the ground that their opinion on that question had not been sought.

Only later, after the meeting, at about 3.00 p.m. did PW11 hear that somebody had been killed earlier in the day, and that the deceased was **Gaddafi**. He testified that he had not known **Gaddafi**, and he did not know who had killed **Gaddafi**.

On cross-examination by learned counsel **Mr. Njanja**, it became clear that the *substance of PW11's testimony in this Court was consistent with the statement he had recorded at the Police station*. He confirmed that the 100 or so young men he had seen when he arrived at Kamwangi, were identifying and assaulting those who were anti-merger in the coffee industry. PW11 had not seen **Gatarwa** (1st accused) arrive at Kamwangi, but he saw **Gatarwa** seated next to the District Commissioner, at about 1.30 p.m. PW11 said the 3000 or so farmers who retreated to prepare their memorandum, before the DC's meeting began, had an anti-merger position and, in the words of the witness, "it's like everyone was anti-merger". PW11 said he had not seen **Gatarwa** or any of the accused persons kill **Gaddafi**.

PW12, **Abraham Ng'ang'a Mwaniki** was sworn on 14th March, 2007 and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He lives at Kanjuko where he also runs a café, some 2km from Kamwangi.

At 10.00 a.m. on the material date PW12 was inside his Magomano Café, which is situated along the road to Githobokoni Coffee Factory. He heard screams from the outside; and when he checked, he saw some 40 young men wielding sticks and shouting, and moving in the Kamwangi-to-Kanjuko direction. PW12 and his customers sought hiding places, as the said young men appeared to be in a fighting mood. Among the young men were three people whom PW12 recognized: **Gaddafi**, **Peter Njau Githuka** (PW10) and **Njoroge**. They passed and re-passed, and as they did so, they appear to have helped themselves to some of the food items in PW12's café. PW12 did not attend the DC's meeting at Kamwangi; and the next day 26th April, 2005 he heard that **Gaddafi** had been killed on the morning of the previous day. He said he did not know who killed **Gaddafi**. As PW12 and his customers sought hiding places on the material morning, he saw a white pick-up motor vehicle, KUR number place, being driven by one **Waweru** (PW6) towards Kamwangi. This motor vehicle was carrying people in unascertained numbers, who were brandishing sticks and *rungus* (clubs); and these people appeared to be acting together with the group among whom **Gaddafi** was. All of these young men had a dress code: their shirt collars were turned inside, and their trousers-legs were folded on one side; they wore caps with front facing backwards. **Gaddafi** had appeared to be the leader of the whole group of young men assaulting those along the road who appeared to be anti-merger in the coffee industry. On cross-examination, PW12 testified that **Gaddafi** "usually leads the campaign for the local M.P" and the MP was calling for merger in the coffee industry. PW12 further said:

"Gaddafi's group was beating us all anti-merger people. I am a coffee farmer. The majority of coffee farmers were against the merger. I know Gatarwa, and I know he is an aspiring MP for the area There is bitter rivalry between Gatarwa and the MP When Gaddafi and others were beating up [anti-merger farmers] I did not see Gatarwa. I never saw Gatarwa inciting anyone to [assault] others I didn't see those in the dock beating up anyone, or inciting the beating up of anyone".

On being re-examined by learned State Counsel **Mr. Bifwoli**, the witness said:

"I confirm, the current MP and Mr. Gatarwa are political enemies. I confirm that I didn't hear that the MP did attend the DC's meeting."

Throughout the testimony of PW12 I was impressed with his candour, and I made the following record on *demeanour*:

"This particular witness, by his demeanour, impresses me as a thoughtful and essentially a truthful witness. I have found his testimony to be mostly relevant, and quite matter-of-fact".

PW13, **John Maina Waweru**, was sworn on 14th March, 2007 and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He said he is a pineapple farmer at Kanyoni, some 8 km from Kamwangi.

PW13 could recall the events of the material day. He was selling pineapples at Mbawine, one kilometre from Kanyoni, at 9.00 a.m. on that day; and at 10.00 a.m. **Mr. Gatarwa** (1st accused) came along and

bought pineapples from him. PW13 knew the DC had a meeting at Kamwangi, but he did not attend. Sometime before 27th April, 2005 one **Muteti** called PW13, and asked him to go to Gatukuyu as the local MP wanted to see him there; and he was told to go with others to Gatundu to sign some statements; so on 27th April, 2005 he was at Gatundu, where he signed a statement, but, in his words: *“It was not my statement”*.

At this stage learned counsel **Mr. Bifwoli** urged that the witness had disowned his own statement. He asked that the witness be stepped down, to enable him to make an appropriate application subsequently. I subsequently, on 19th March, 2007 allowed the prosecution, by virtue of S.161 of the Evidence Act (Cap.80) to treat PW13 as a hostile witness and to cross-examine him.

PW13 testified that what he had been asked to sign as his statement, on 27th April, 2005 was a statement written by **Muteti** and it was not his own statement. **Muteti** had got him to sign the statement by claiming: *“Since **Gaddafi** had died and was my [PW13’s] friend and we were both working for the [local MP], those who killed him can also kill me. I signed the statement to protect myself from being also killed”*.

It was PW13’s testimony that after he had signed **Muteti’s** statement, he and others were invited to meet the local MP at Continental House in Nairobi. PW13 was among a goodly number of potential witnesses who were, in the presence of the local MP, being “advised” by an advocate. This advocate, PW13 said, *“was explaining to us how to come and say the accused was killed; how the killers were dressed; the implements they used. Iron bars, stones and other implements were mentioned. I came to learn that I was to testify in Court, saying I saw the killing taking place. In fact, I never saw the killing take place”*.

As **Mr. Bifwoli** felt unable to cross-examine the witness at this stage, the first opportunity went to learned counsel **Mr. Njanja**; and in response to his questions, PW13 testified as follows:

The witness knows all the accused, who come from his home area; he was not at the place where **Gaddafi** was killed, and he did not know if the accused persons are the ones who caused **Gaddafi’s** death. PW13 testified that he has never made a statement implicating the accused persons in the killing of **Gaddafi**. After he had been made to sign **Muteti’s** statement, PW13 and more than 10 other people were summoned to the local MP’s Nairobi office, and they were directed to come to Court and implicate the accused persons in the killing of **Gaddafi**. On that occasion, each of the prospective “witnesses” was given Kshs.2000/= for personal use, except that the advocate who had been coaching them on the “evidence” was paid more. Among those present during witness-coaching, PW13 testified, were: **James Ndungu Kabunga** (alias Lion) (PW4); **David Ngurari** (PW3); **Michael Waweru** (PW6); **William Rucu** (alias **Ngwiri**) (PW8); **James Kinyanjui Kigo** (PW7); **Joseph Mungai Ndia** (PW17). PW13 testified that those witnesses who took directions at Continental House, before hearing began, have told lies before the Court, and that when they have complied with the script, the local MP has kept them on a payroll; and those who have spoken out of turn have not been kept on the MP’s payroll. It was PW13’s testimony that during the said Continental House meeting for the preparation of testimonies, the local MP had said “the 1st accused would be released after [the next] [general] elections”.

PW14, **Njeri Waithaka**, was sworn on 14th March, 2007 and gave her evidence in the Kikuyu language, being interpreted by the Court clerk. She said she is a maize and coffee farmer at Kamwangi, and she remembered the happenings of the material date. At 6.30 a.m. on 25th April, 2005, PW14 had gone to Mubaweni, several kilometres from Kamwangi, and at about 9.00 a.m. she was still there with five other people waiting to board a bus to Kamwangi to attend the DC’s meeting. When the bus to Kamwangi arrived it was nearly full, and only PW14 was taken on board; and she alighted at the DO’s premises at Kamwangi. PW14 immediately saw five young men wearing caps with the front facing backwards, shirt collars turned inwards, and one trouser leg folded. As she feigned inattention, to enable her to hear what the five young men were saying, PW14 saw a man inside a shop signalling to her that the place was not safe; he indicated to her she should leave Kamwangi, as “things were not good” At that moment a gang of some 100 men came to the scene, and started assaulting those who were arriving by bus for the DC’s meeting. Shopkeepers hurriedly closed their shops, in view of the threat to the peace which was being enacted. The conductor of a motor vehicle which was leaving, quickly ushered PW14 into his vehicle,

which departed from Kamwangi at that moment. She was dropped off at Mubaweni where she had come from. PW14 remained at Mubaweni until she saw a motor vehicle being driven towards Kamwangi, by **Gatarwa** (1st accused). She spoke to **Gatarwa**, and told him not to go towards Kamwangi, “*because things were not very good [there]*”. **Gatarwa** heeded the advice, and turned back, and even left the main road and drove a long a footpath. The footpath was leading towards Githoeti and ultimately towards the DO’s office.

On cross-examination by **Mr. Njanja** PW14 testified that the unruly young men she had seen at Kamwangi were armed with *pangas* and hoe-handles that bristled with affixed nail-heads.

PW14 testified that when he first saw **Gatarwa** driving his motor vehicle, on the material date, he had three passengers, one in the front cabin (*one Gicheha*), and two persons were behind. It was at 11.30 a.m., and PW14 spoke to **Gatarwa** and urged him not to drive towards Kamwangi; she had told him: “*Son, don’t go to Kamwangi*”. By that time, it was PW14’s understanding, **Gatarwa** hadn’t been to Kamwangi; and he said he would just reach Mubaweni and then turn; but later he decided to take a footpath leading towards Kamwangi.

On cross-examination by **Mr. Agina**, PW14 said it was only after she had turned and gone home, that she heard of the death of a person called **Gaddafi** who was, however, not known to her. She did not know who killed **Gaddafi**, or when he would have been killed. She had left Kamwangi at 10.00 a.m., and the information she received was that **Gaddafi** would have been killed just about that time.

PW15, **Samuel Chege Kaniu**, was sworn and gave his testimony in Kiswahili, on 19th March, 2007. He said he was the Assistant Chief of Kiriko Sub-Location, Gituamba Location, Gatundu North Division. He recalled that 25th April, 2005 was the day of the DC’s public meeting on coffee-industry issues, at the DO’s grounds, Kamwangi. He said he left Kiriko for Kamwangi at 11.00 a.m. and when he was on his way, he saw **Gatarwa’s** pick-up motor vehicle which had in it some ten farmers from Kiriko; **Gatarwa** stopped, and took PW15 on board – and they all arrived at the DO’s grounds sometime after 12.00 noon. **Gatarwa**, after dropping off all the passengers, parked his motor vehicle at the DO’s grounds. The DC was already present, even though the meeting had not started; and the farmers attending had taken a retreat, for the purpose of agreeing on their positions to be placed before the DC. At this moment PW15, who was in his administration uniform, joined his fellow – administrators in attendance; and he now learned that at *about 10.00 a.m.* there had been a fight along the road, which had claimed the life of **Martin Kiragu Ndung’u (Gaddafi)**. The DC’s meeting went on until about 4.00 p.m.

On cross-examination by learned counsel **Mr. Njanja**, PW15 said he well knew **Gatarwa**, whose home was at Gituamba, fairly close to Kiriko. When PW15 had left Kiriko for Kamwangi and on the way come across **Gatarwa** who gave him a lift to Kamwangi, the time had been about 11.30 a.m.; and they reached Kamwangi at about 12.45 p.m. At that time **Gatarwa** was coming from his home, and he was proceeding to Kamwangi, to attend the DC’s meeting in respect of coffee farming. PW15 said he personally knew the several farmers who **Mr. Gatarwa** was carrying in his white pick-up motor vehicle as he proceeded to Kamwangi, on the material day; they were mainly old men who had difficulties making it to Kamwangi on foot. PW15 did not see **Gatarwa’s** passengers bearing any arms. Only after they reached Kamwangi, did PW15 come to learn that somebody, **Gaddafi**, had lost his life in a commotion several hours earlier.

PW16, **Rachel Wanjiku**, was sworn and gave her testimony in the Kikuyu language, being interpreted by the Court clerk, on 19th March, 2007. She said she was a businesswoman at Kanyoni in Gatundu North, and the deceased, **Martin Kiragu Ndung’u**, was her husband. She had attended at the Gatundu District Hospital on 5th May, 2005 on the occasion of the post-mortem examination on the body of the deceased. She identified the body, post-mortem examination was conducted, the body of the deceased was then handed over to her and others for burial.

The sole importance of PW16’s testimony is that it confirms that **Martin Kiragu Ndung’u**, indeed, *died*. This testimony has no bearing on when, where or how the deceased met his death. It is not surprising that none of the counsel for the accused persons had any questions in cross-examination.

PW17, **Joseph Mungai Ndia** was sworn on 14th May, 2007 and gave his testimony in Kiswahili. He said that in January, 2005 **Muicigi Muiruri** (3rd accused) had tried to recruit him into a conspiracy to kill several people including: the **Hon. Kariuki Muirui**, MP; **Muteti**; and **Kiragu**; and it was agreed that the sum of Kshs.300,000/= was to be paid for the performance of the intended object. PW17 said the sum of Kshs.2000/= was immediately paid out and was shared between PW17 and one **James Ndung'u** (PW4). PW17 said **Gatarwa** later paid to him, through **Muicigi**, the sum of Kshs.100,000/= and he shared it out with **James Ndung'u**. It was PW17's testimony that **James Ndung'u** (PW4) told him, on 25th April, 2005 in the evening, that one of those whom the two were asked to kill, **Martin Kiragu Ndung'u**, had already been killed; and the following day the two went to the local MP to "tell him" who had killed **Martin Kiragu Ndung'u**.

Such is strange evidence coming from PW17, as he has not given any evidence that he saw those who killed **Martin Kiragu Ndung'u**. So, was he and **James Ndungu Kabunga** (PW4) in a position to "tell the MP" the names of the killers of **Gaddafi**? Clearly not. And it is not surprising the witness goes on to say:

"[The MP] told us he did not have a Police station in his pocket; we should go Thika CID and write a statement."

PW17 says he and PW4 went to the Police station and wrote statements.

On cross-examination by **Mr. Njanja**, PW17 admitted that he had in the past been *sent to jail*; he said that was many years ago, and it had been for the offence of affray; he served in jail for *three years*.

In further cross-examination by learned counsel **Mr. Agina**, PW17 said of the deceased (**Martin Kiragu Ndung'u**):

*"... I never knew him; he wasn't my friend. I never attended the funeral of such a person. I was only told. I never knew **Kiragu. James Ndung'u Kabunga** [PW4] is the one who told me about that [man] **Kiragu** ... Even those we were told to kill, I didn't know most of them"*

PW17 said he had gone to the Police station to make a statement on 28th April, 2007 following **Gaddafi**'s death three days earlier. Why did he have to do it? In his words:

*"I made a statement which was read to me, and I signed. My friend **James Ndung'u Kabunga** [PW4] and my common sense told me to go to the Police station and report."*

Of the Kshs.100,000/= allegedly paid to PW17 and his friend to kill certain persons, he said:

*"Nobody has claimed the Shs.100,000/= from me. I didn't hand it back. I saw **Muicigi** was a killer; so I deceived him; I deceived nobody else. On 25th April, 2005 I never saw **Gatarwa**, and I never saw **Muicigi**; of the accused persons, I have seen none since January, 2005."*

It is quite clear to me that the entire testimony of PW17 is *not based on perception*, and sheds no light at all on the circumstances in which the deceased died. This evidence, in terms of *connecting* any of the four accused persons to the death of **Martin Kiragu Ndung'u**, is, in my assessment, worthless evidence, apart from being *not truthful* in many respects.

On 21st May, 2007 PW18, **Andrew Ngige Mbugua** was sworn and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He said he lives in Thika District, where he is a maize, beans, arrow-roots and coffee farmer. On 25th April, 2005, at 10.00 a.m. he was at Kamwangi, in the company of **Martin Kiragu Ndung'u** (deceased) and one **Willy Watari** (PW8). They were going to attend the DC's meeting, which was to take place at the DO's grounds. It was PW18's evidence that, just before he and his friends got to the meeting place, a white pick-up motor vehicle Registration No. KAC 326G belonging to **Gatarwa** (1st accused) came along carrying men who were armed with *pangas*, sticks and metal rods. These people jumped out even before the motor vehicle came to a stop; and **Gatarwa** who was

driving came out brandishing a metal rod; **Muicigi** came out with a *panga*; **Macharia wa Eva** came out with “an implement”; **Gatarwa** gestured at **Gaddafi**; and all those from the pick-up truck, including **Gatarwa**, came straight after PW18 and his companions, forcing them to flee.

PW18 said he and **Gaddafi** followed the same path as they fled from the attackers. They ran for some time, and then PW18 got into a coffee bush, behind a banana plant. As he cowered in his hide-out, he says, “*I could see the deceased, as they beat him up – about 80 metres away*”. PW18 goes on to say: “*I saw **Gatarwa** there; he hit the deceased with a metal rod. They beat him. He died. I saw that they had killed him*”. PW18 further said:

“***Gatarwa** came, took the forked hoe from the one who had it; he hit **Gaddafi** with [it] ... It fell on the head*”.

PW18 said he even heard what **Gatarwa** said as he killed **Gaddafi**: “*Let me kill this elephant.*”

It was PW18’s testimony that **Gatarwa** and his fellow-accused just left the *locus in quo* once **Gaddafi** was dead; and he (PW18) remained in hiding for 45 minutes, sneaking out when “there was nobody in sight” – at about 11.00 a.m. He went and peeked at **Gaddafi**’s body without checking where the injuries had been inflicted, and then just left. He saw the Police coming to the *locus in quo*, but did not wait for them; he says: “*I was afraid, I ran away ...; I went home.*” He said he recovered from the shock only *two days later*, and then went to the Police station to write a statement.

On cross-examination, PW18 admitted that he had, on a previous occasion, been sentenced to a probation term after being found guilty of an *offence of assault*. PW18 said he had been with **Gaddafi** at Kamwangi, when **Gatarwa** and his companions came and chased them away; but he didn’t see PW7 (**James Kinyanjui Kigo**) who had also said he was in the company of **Gaddafi** at the time of the said chase. PW18 also said he did not see either PW3 or PW4 or PW10 – all of who said they had been in the company of **Gaddafi** when **Gatarwa** and his co-accused drove along and launched an assault upon them.

PW18 said he saw no Police officers in Kamwangi at all, until after **Gaddafi** had been killed. He said he forgot that the DO did have Administration Police in attendance; he knew there were three Police posts in the neighbourhood; but he did not run to any of them, he went to hide in the coffee, banana and Napier Grass plantations around. Although he had earlier said his hide-out was 80 metres from the site of the killing, in cross-examination he now said the *locus in quo* was only 50 metres from his hide-out. Such *inconsistencies* show definite lack of conviction which, it is clear to me, is the general mark of PW18’s testimony.

PW18 testified that there were barely *ten people* killing **Gaddafi**, and he could see all of them very well from his hide-out; in his words: “*I did not see anyone else. I didn’t know all of them; I knew **Gatarwa**, **Muicigi**, **Njuguna wa Nderi**, **Macharia wa Eva**, **Maina Kirika***”. PW18 said: “*I did not see when they started beating **Gaddafi**; I saw when they were finishing; **Gatarwa** hit him with a metal bar, and a forked hoe. He hit the deceased on the face with a forked hoe; he took the forked hoe from **Macharia wa Eva***”. He said that from his hide-out, he (PW18) could see blood over the body of the deceased.

This evidence, I hold, cannot be coming from genuine observation. From a distance of 80 metres or so, it would not have been possible – I take judicial notice – for the witness to *see blood oozing out of the body of the deceased*. His testimony is, moreover, quite contrary to that of those witnesses who speak with clearer credibility, and who say there was a large crowd at the *locus in quo* when **Martin Kiragu Ndung’u** was killed; all the credible evidence shows great numbers of people to have converged at the *locus in quo*, so that it would not have been possible for a person in the bush long distances away to see and to hear just the accused persons herein being involved in the killing of the deceased. Indeed, PW18 on cross-examination, sharply *contradicts his own earlier evidence* when he says: “*I could not see how many times **Gatarwa** hit **Gaddafi**; he was being hit by many people*”.

In PW18’s statement to the Police, which he was not now restating before the Court, he had thus said:

*“I hid and covered myself with a green jacket. From where I hid, a stone’s throw away, I saw the acts of killing; **Macharia wa Eva** with a fork-jembe; **Muicigi** cutting with a panga; **Njuguna wa Njeri** cut him with a panga on the leg; **Maina Kirika** cut him in the abdomen Yes, that is what I saw.”*

PW18 could not tell the Court why he had not mentioned *all the names* he had given in his statement at the Police station several days after **Gaddafi**’s death.

On 22nd May, 2007 PW19, **John Kimacia Kabui** was sworn and gave his testimony in Kiswahili. He said he is a farmer and local leader in Kanyoni Sub-location, Kamwangi Division, Thika District. At 7.30 a.m. on 25th April, 2005 the witness was walking towards the Kamwangi market place. He came across many young people calling on those they met *“Tangaza msimamo!”* (“Declare your stand!”), and beating up all those who gave an unwanted answer. At that point where PW19 met these young men, there was a white pick-up motor vehicle, Registration No. KUR 835, with passengers in it. This motor vehicle which followed the rowdy young men closely, was the property of one **Michael Waweru Kimotho** (PW6). One group of the young men was led by **Peter Njau Githuka** (PW10), and when this group accosted PW19, it is PW10 who calmed them down by urging: *“Leave the old man alone!”* The deceased was at the rear, and these several organized groups of youths were running out of Kamwangi, and in the direction of Kanyoni. **Gaddafi** at that moment made a negative reference to PW19: *“Even this man talks about coffee!”* – which egged on one of **Gaddafi**’s followers to hit PW19 on the head. PW19 pleaded for sympathy, and was left free, and went into Kamwangi market. He was worried, as the rowdy young men were in numbers, something like 80, and they were confronting and assaulting farmers who were coming to the DC’s meeting due to take place at Kamwangi. After a march towards Kanyoni, the youths turned back and re-entered Kamwangi, wielding hoe-stick batons and dressed in a menacing code – caps turned front-backwards, collars turned inwards, one trouser-leg folded upwards. These young men, PW19 said, *“were looking dangerous”*; and he decided to avoid them by walking some 60 metres away from the road; but **Gaddafi** then followed him and hit him thrice with a baton, saying: *“You dog! What are you doing here, you want me to call that group to kill you?”*. The terror of the youthful gangs caused closure of the Kamwangi shops; and PW19 just ran away.

As PW19 took off in search of safety, he met the area Assistant Chief, who told him he (the Assistant Chief) had already complained to the local Police about the state of insecurity at Kamwangi that morning; but the Administration Police Officers had responded by asking him to *“leave the rioters alone.”* PW19 sought refuge in a bar, Beer Garden Bar, where he was known and where those present shut themselves in. Sometime before 11.00 a.m. there were shouts outside, and an affirmation was heard, that **Gaddafi** had been killed. From that moment, shops began to open again, and even the bar where PW19 had hidden, also re-opened its doors to normal business. PW19 was now able to come out, and he quickly found his way to the safety of his home. He did not come to know the exact place where **Gaddafi** had been killed.

PW19 testified that the purpose of the DC’s meeting had been to iron out coffee-growers’ hardships, at a time when the local MP, the **Hon. Patrick Kariuki Muiruri** had initiated a new outfit known as New Gatukuyu Co-operative Society, and he wanted other coffee growers’ organizations to *merge* with it. It was PW19’s understanding that the local MP had organized his supporters to keep out of the DC’s meeting of 25th April, 2005 all anti-merger supporters. In the words of PW19:

*“The MP had an ‘army’ led by **Gaddafi**, to thwart the anti-merger lot. Notorious criminals were in that group headed by **Gaddafi** – among them **Michael Waweru Kimotho** (PW6); **James Ndung’u Kabunga** (alias Lion) (PW4); **James Kinyanjui Kigo** (PW7); **David Ngurari Njenga** (PW3); **William Watari** (alias Willy) (PW8) There were many others ...”*

The said group had met in the morning, on the material day, and had armed itself, with **Michael Waweru Kimotho**’s pick-up truck No. KUR 837 ferrying arms for their use; and they were attacking all those who did not support merger in the coffee industry. The purpose was to *“disperse the anti-merger people, so they don’t attend the DC’s meeting.”* As many as 3000 farmers had turned up for the DC’s meeting, and all were opposed to the merger plan.

PW19 testified that all the accused persons were known to him; and he said:

“I didn’t see **Gatarwa** at Kamwangi; I didn’t see the 2nd accused, even the 3rd and 4th accused; I never saw them around Kamwangi.”

On cross-examination by learned counsel **Mr. Agina**, PW19 said he well understood the current leadership issues of the locality around Kamwangi, and he knew that **Gaddafi**, who was a strong young man, “had been hooked by the local MP and given money to do dirty work”.

On re-examination by learned state counsel **Mr. Bifwoli**, PW19 testified as follows:

“There’s rivalry between the area M.P. and **Mr. Gatarwa** [1st accused]. **Gatarwa** shows he is the strongest person in the area who can unseat the current M.P.”

PW20, Administration Police No.89123916, **Sgt. Robert Mwaniki** was sworn on 6th June, 2007 and gave his testimony in Kiswahili. On and about 25th April, 2005 PW20 was based at Kamwangi DO’s office and carried responsibility for ensuring the safety of persons and property. On the material day the DC was to hold a meeting at the DO’s grounds, with coffee farmers. By about 10.00 a.m. there were some 300 people at the venue, and they left the place and went upto Kamwangi Market. These people and others, now numbering about 500 returned to the venue at 10.45 a.m., and were addressed by one **Stephen Macharia Mwangi**, a local farmer. Anger was apparent in his speech, mainly directed against the local MP, and with regard to the manner in which this MP was committing the financial and economic resources of the locality. The D.C. soon arrived, and at the time he was addressing the gathering, it was whispered around that “somebody” had that morning been killed at Kamwangi. The DC asked **Chief Mbugua** to check on the matter; and the chief asked PW20 to take the DCIO to the *locus in quo*; PW20 did so, and saw the DCIO conducting interviews at the place, with the OCPD also present.

On cross-examination by **Mr. Njanja**, PW20 said **Gaddafi’s** body had been found lying about one kilometre from the DO’s office at Kamwangi, but the scene could not be seen from far. On cross-examination by **Mr. Agina**, PW20 said he was in the first group of police officers to go to the *locus in quo*; and he found that close to the body, no member of the public was standing, but there were crowds of people on the slopes surrounding the body, at a radius of about 100 metres. The body was found in a garden of arrow-roots, vegetables and trees. The spot where the deceased lay was freshly ploughed, most likely on that same day. Apart from the hoe belonging to the lady-owner of the garden, there were only hoe-handle batons, ordinary bush sticks, and stones surrounding the body.

In response to questions by the Court, PW20 said the people who observed **Gaddafi’s** body were standing some 100m away, and could not see the body very well, where it lay in the cleared central square. These people had positioned themselves in trees and Napier grass in the surrounding farms. The body had a cut on the left region of the head; its left hand was twisted; there was a cut on the left leg; the body was generally battered.

PW21, **John Ndung’u Mwangi** was sworn on 6th June, 2007 and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He said he is a lorry driver living at Kamwangi. On 25th April, 2005 PW21 was at his home between 9.00 a.m. to 10.00 a.m., when five people led by **Gaddafi**, **Gachau** and **Njoroge** (alias **Karuru**) walked in. These people asked PW21 to state his position on the coffee merger question. **Gaddafi** hit him with a nail-studded club before he could answer, and then several blows were landed upon him before the gang of five left. Although he reported this matter at the DO’s office, PW21 got no assistance; and so he went to Gatundu Police Station on 28th April, 2005; he was given forms for a medical report (PW3 forms) which he took to hospital, and later recorded a statement with the Police station. But on 29th April, 2005 the same police officer to whom PW21 had made his first report at the DO’s office, went to the witness’s home and *arrested* him; PW21 was detained at Gatundu Police Station for 14 days, before being released without being told why he had been arrested.

On cross-examination by **Mr. Njanja**, PW21 said that when the said five people went to his home on the

morning of 25th April, 2005 they had *beaten him up* using batons which appears to be from hoe-handles. The DO's office gave the witness no help, but instead had him *arrested and held in custody*.

On cross-examination by **Mr. Agina**, PW21 said he had heard that **Gaddafi** died, but he never saw **Gaddafi's** body. When **Gaddafi** and his friends had come to assault PW21 on the material day, they were wearing caps with front facing backwards, and they had folded one of their trouser legs.

On 6th June, 2007 PW22 **Mwangi Ngandu**, was sworn and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He said he is a coffee and tea farmer at Gituamba, in the Kamwangi area. At 10.00 a.m. on the material date he was walking to hospital, being escorted by one **Ndung'u** (PW23). When they reached a place called Bucana, **Gatarwa** in his pick-up motor vehicle caught up with them, and gave them a lift. They drove on, coming to Mubao, where they met **Njeri Waithaka** (PW14). **Njeri Waithaka** stopped **Mr. Gatarwa** at 11.10 a.m, to tell him she had just escaped from Kamwangi where heavy fighting was going on. The passengers alighted, as **Gatarwa** could not proceed, in the light of the news of violence from Kamwangi. **Njeri Waithaka** and **Gatarwa** were left behind at Mubao, as the several passengers took a mini-bus and went on up to Ititu, only two kilometers from Kamwangi. While at Ititu, PW22 and his colleagues saw a white pick-up motor vehicle with passengers who carried batons; they did not know the driver of that vehicle. PW22 was able to get into hospital at Kamwangi and, just before he got in to be seen by the doctor, the DC arrived for his scheduled meeting. PW22 produced medical treatment documents showing that he was attended to on 25th April, 2005. He waited for medication until 2.00 p.m., and then attended the DC's meeting which was just about to end.

On cross-examination by **Mr. Njanja**, PW22 said that, at the time **Mr. Gatarwa** had given him a lift, the other persons in the motor vehicle had included the Assistant Chief **Mr. Samuel Chege Kaniu** (PW15); **Mwangi Nduati**; and a certain lady. The witness said the passengers in **Mr. Gatarwa's** motor vehicle had no weapons, and that he had been with **Gatarwa** at about 11.30 a.m. Mubao, where **Njeri Waithaka** (PW14) had stopped **Gatarwa**, was some 4 km from Kamwangi. PW14 had cautioned against driving on to Kamwangi as, in the words of PW22, "there were people for [the local MP] who were [assaulting] [other] people". And what was **Gatarwa's** response, at that time, at 11.30 a.m. at Mubao? In PW22's words:

"Gatarwa said he would wait until things cooled down, before he would go to Kamwangi".

Only at about 3.30 p.m. did PW22 hear that **Gaddafi** had been killed in the morning hours.

PW23, **Ndung'u Gitau** was sworn on 6th June, 2007 and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He is a coffee farmer at Gituamba. On 25th April, 2005 he left his home with **Mwangi Ngando** (PW22), at about 11.00 a.m., walking in the direction of Kamwangi. **Gatarwa** caught up with PW22 and PW23, and he (**Gatarwa**) took both of them on board his pick-up motor vehicle. After driving on for about a quarter of a kilometer, **Gatarwa** and his passengers stopped to talk to **Njeri Waithaka** (PW14). When **Gatarwa** told PW14 he was driving to Kamwangi, where he and his passengers were to attend the DC's meeting, she dissuaded them against driving on, "for people were being beaten up at Kamwangi". **Gatarwa** drove on for a short distance, and then informed his passengers that he ought to wait for some time, before driving on. So **Mwangi Ngando** (PW22) who had to get medical attention in a hospital at Kamwangi, suggested he and PW 23 should get into a mini-bus which came by and was headed towards Kamwangi. They did so; and at the DO's grounds at Kamwangi, PW 23 saw groups of young men numbering about 200, wearing caps with front facing rear, and also saw moving along with the said young men, a white pick-up carrying batons. These young men were stopping members of the public who were arriving at Kamwangi for the DC's meeting. After some time, a much larger group of people, numbering *about 3000*, arrived at the DO's grounds; they were carrying coffee-tree branches; and they were announcing that they would meet with the DC, and they wanted him to address them. This large crowd saw the DC arriving, and they went to meet him. After the DC had come into the meeting-venue and opened the meeting, **Gatarwa** came in with the Assistant Chief, **Samuel Chege Kaniu** (PW 15) and **Mwangi Nduati**. Only after the DC's meeting had ended at about 3.00 p.m. did PW23 hear rumours that someone had been killed, sometime between 9.00 a.m. and 10.00 a.m. on

that very day.

On cross-examination by learned counsel **Mr. Njanja**, PW23 said that when **Mr. Gatarwa** had given him a lift on the material day around Bucana, at about 11.00 a.m., he was on board the 1st accused's pick-up motor vehicle with others: **Mwangi Nduati**, and three women who were going to Kamwangi market. There had been no weapon in **Gatarwa's** motor vehicle while PW 23 was aboard. The witness said the 200 or so young men he saw when he arrived at Kamwangi were in a particular dress-code – caps worn facing backwards; shirt collars turned inside; trouser legs packed inside their socks – and were in a fighting mode. PW23 reckoned the time **Gatarwa** arrived at the DC's meeting to have been about 12.00 noon, and the meeting was already in progress. PW23 said he saw **Gatarwa**, but not **Gatarwa's** co-accused, arrive at the DC's meeting on the material day.

On cross-examination by learned counsel **Mr. Agina**, PW23 said there had been *thousands of people* at Kamwangi on the material date, and he did not know which ones among them could have killed **Gaddafi**; he did not know **Gaddafi**; he could not help in identifying **Gaddafi's** killer.

On 7th June, 2007 PW24, **Charles Kiragu** was sworn and gave his testimony in English. He holds a Higher Diploma in psychiatry, and is a psychiatric nurse at Gatundu Sub-District Hospital. On 9th May, 2005 four "patients" – **Stephen Muicigi Muiruri** (3rd accused), **Joseph Ngugi Muiruri** (2nd accused), **John Kibora Mwaura** (4th accused) and **Nahashon Ngugi Gatarwa** (1st accused) – were brought to him for mental-status assessment. PW24 found all of them to be mentally sound; he produced his report to that effect.

On cross-examination by **Mr. Njanja**, PW24 said he had not used the normal mode of medical reporting on a P3 form which would be in respect of injuries; he had done "other kinds of examination"; the "patients" had no blood stains, and no physical injuries.

On 7th June, 2007 PW25, **Gicheha Gathu** was sworn and gave his testimony in the Kikuyu language, being interpreted by the Court clerk. He said he was a coffee farmer at Gituamba, Gatundu North. He had left his home at 9.30 a.m. and a few minutes later when he reached Gathanje, **Gatarwa** (1st accused) caught up with him, and gave him a lift in **Gatarwa's** pick-up motor vehicle. From Gathanje which is about 4 km from Kamwangi, 1st accused and PW25 drove to Bucana, where they took on board **Ndung'u Gitau** (PW23) and **Mwangi Ngandu** (PW22). As they reached Mubao, near Kanyoni, **Gatarwa** and his passengers met **Njeri Waithaka** (PW14) who was coming from Kamwangi. **Njeri Waithaka** stopped **Gatarwa** at about 11.30 a.m., and cautioned against proceeding to Kamwangi, "for there were people there beating up others with batons". **Gatarwa** stopped, and most of his passengers took a mini-bus plying in the Kanyoni direction; he was left with PW25, and they later decided to drive along a dust path; they drove on to Kiriko, then Kariua where they stopped. At Kariua, **Gatarwa** was informed that the fight at Kamwangi had now stopped. He then drove on slowly, with PW25 and a few others who were also going to attend the DC's meeting at Kamwangi. The Assistant Chief, **Chege Kaniu** (PW15) was also taken on board. At about 12.30 p.m. **Gatarwa** and his passengers arrived at the DO's grounds, finding the local Chief who arranged for the parking of his motor vehicle.

On cross-examination by learned counsel **Mr. Njanja**, PW25 testified that he had boarded **Gatarwa's** motor vehicle at 10.30 a.m. at Gathanju, when only the two of them were on board; and when they reached Bucana they took on board PW22 and PW23. They spent some 30 minutes at Mubao, after getting word from PW15 that there was a fight at Kamwangi. When **Gatarwa** and his passengers stopped at Kariua, they got word that the fighting at Kamwangi had stopped at 12.00 noon; and **Gatarwa** decided it was wise to avoid the main road, and instead follow the dust road into Kamwangi.

PW25 testified that he had found **Gatarwa's** motor vehicle unoccupied by passengers, when he got on board; at no time, in his presence, was that motor vehicle used to chase anybody. PW25 remained at the DC's meeting until it ended at about 3.30 p.m. There were Government officials at the meeting, and many policemen were present. The D.C. did give **Gatarwa** a chance to address the meeting.

On cross-examination by **Mr. Agina**, PW25 said he had not known the deceased, **Martin Kiragu Ndung'u**; he had only heard in the evening news, on *Inooro F.M.*, that somebody had been killed at Kamwangi on the day of the DC's meeting. PW25 knew **Gatarwa** but did not know the other accused persons.

PW26, Police Force No.66266 **Police Constable Kennedy Gitonga** was sworn on 7th June, 2007 and gave his testimony in English. On 5th May, 2005 at 4.00 p.m. he had been at Gatundu Hospital Mortuary to witness the post-mortem examination on the deceased, **Martin Kiragu Ndung'u**; he was in the company of the deceased's wife, who identified the body to the doctor. The doctor conducted the post-mortem examination and duly filled in the post-mortem forms, which he later gave to PW26, and PW26 then recorded a statement.

PW27, Police Force No.46191 **Sgt. Joseph Gichuki** was sworn on 7th June, 2007 and gave his testimony in English. He is attached to the Gatundu CID office, where he conducts general investigations. On 9th May, 2005 PW27 and **Police Constable Gabriel Njagi** (not called as a witness) escorted the four accused to the Gatundu Sub-District Hospital for medical examination, in particular for: age, mental status, and any recent injuries. They were later examined by a psychiatrist who later filled in P3 forms for each accused. These forms were then given to PW27 who took the four accused into custody at Gatundu Police Station.

PW28, **Dr. Jack Ndung'u Ndirangu** was sworn on 9th July, 2007 and gave his testimony in English. He said he is a holder of the M.B.Ch.B degree, and was at the material time serving at the Gatundu Sub-District Hospital. On 5th May, 2005 he was requested by the Gatundu CID officer to conduct a post-mortem examination on the deceased, **Martin Kiragu Ndung'u**. He said the report placed before him stated that the deceased had been killed at about **9.30 a.m. on 25th April, 2005**, at Kamwangi. It was part of this history that the deceased was *killed during a confrontation between rival groups of farmers*.

PW28's report showed that the deceased was a man of huge build, 6ft 6 inches tall, and aged 39 years; he was of dark complexion and was of Kikuyu descent. He had been wearing a blue long-sleeved shirt, with white stripes at the shoulders; light green trousers. The body of the deceased was covered with blood stains and dust. The body had undergone normal *rigo mortis*, and had skin changes, with pale extremities, and pale mucous membrane; he had blood clots in the scalp, nose, face, mouth and right lower-limb. He had a deep-cut wound in the right supra-orbital region; deep-cut wounds in the left parietal region; deep-cut wound in the right leg, exposing tendons; deformity in the left-upper arm; fracture in the right leg. Internally, PW28 found that the deceased had sustained fractured ribs, both right and left; there was blood in the left chest cavity; the lung had a sooty appearance; the cardio-vascular system was laden with fatty tissue; there was a left skull-base hemorrhage.

PW28 drew the conclusion that **Martin Kiragu Ndung'u** had died of *cardio-pulmonary arrest due to shock and severe brain injury likely to have been occasioned by assault*.

The prosecution's last witness, PW29, Police Force No.230679 **Inspector John Muu** was sworn on 10th July, 2007 and gave his testimony in English. He said he is the officer-in-charge at the Gatundu CID Office, and was within the Gatundu area on and about 25th April, 2005 (the material date).

At 11.30 a.m. on the material date, PW29 received a telephone call from the District Criminal Investigations Officer at Thika. PW29 was asked to proceed to Kamwangi, where somebody had been killed; and he did so at 1.00 p.m. He found **Martin Kiragu Ndung'u's** body lying by a stream, some two-to-two-and-a-half kilometres from the DO's office at Kamwangi. PW29 found other police officers already at the scene: Deputy OCPD Thika (now deceased); DCIO Thika (**Chief Inspector Harrison Meme**); and other officers from Thika and Kamwangi. These officers were guarding the body at the scene.

PW29 saw several injuries on the body of the deceased: on the head, legs and hands. He also saw at the scene "several sticks, stones [and] avocado fruits used to [hit] the deceased." He called the scene-of-crime

officer, **Inspector Kiio** (now deceased) who conducted the photographing of the *locus in quo*. The body was then moved to Gatundu Sub-District Hospital, for post-mortem examination.

PW29 was designated the Investigating Officer in this matter; and in that capacity, he recorded statements from witnesses. Later on he had the 1st, 3rd and 4th accused arrested, and then forwarded his investigations file to the Attorney-General's office for advice. As part of his investigations, PW29 collected sticks and stones from the *locus in quo*.

A number of witnesses have mentioned the name **Muteti**, as the man who led the preparation of witness-statements, and arranged for these to be *signed* by those who had little knowledge of the content of the same. PW29 now said he did not know about **Muteti**; he said:

“No such a person was involved in recording statements. We had **Benjamin Wambua**, one of our officers. He assisted in recording some of the statements. **P.C. Njagi** was also one of our officers. He was involved in investigations **Njagi** recorded the evidence of **Michael Waweru Kimotho** [PW6] and **P.C. Wambua** recorded the evidence of **John Maina Waweru** [PW13] and another statement of **Michael Waweru Kimotho** (PW6) **P.C. Wambua** is still at Gatundu Police Station. **Njagi** is now at CID, Keruogya. If PW13 said his statement was recorded by **Muteti**, it isn't true.”

PW29 said PW6's first statement was taken at 6.00 p.m. on 25th April, 2005 at Gatundu Police Station by **P.C. Wambua**; and his second statement was taken on 29th April, 2005 at 4.30 p.m. at Kanyoni Trading Centre, by **P.C. Njagi**. The witness said PW13's statement was recorded at Gatundu Police Station on 27th April, 2005 at 5.00 p.m., by **P.C. Wambua**. He said both PW6 and PW13 had voluntarily come to the Police station to record their statements.

PW29 referred to the photographs of the *locus in quo* taken by **Inspector Kiio**, and he showed the Court other photographs of a pick-up motor vehicle, Registration No. KAC 326G which he said belongs to the 1st accused. *What was the connection between the photographs of the motor vehicle, and the commission of the offence charged?* PW29 said:

“It belongs to the 1st accused. Witnesses said this vehicle was at a place close to where the deceased was killed, it was being driven by 1st accused; it had people carrying crude weapons; 2nd, 3rd and 4th accused were on that vehicle and were directed by 1st accused to beat up the deceased.”

PW29 said he had become aware of **Martin Kiragu Ndung'u's** death at 11.30 a.m. on the material day. He arrived at the scene at 1.00 p.m., and collected blood-soiled sticks and stones lying around the body. He merely kept the sticks and stones, and did not have any laboratory analysis done on them. Although the photographs of the scene showed stones, sticks and avocados, the witness had not collected the avocados – because they were perishable. He said the sticks he found were “more than ten”; and the stones were “more than seven”; there was “no need to collect everything”. The witness testified that: “Those sticks and stones were the weapons used to kill the deceased”.

As part of the investigations, PW29 had spoken to the owner of the garden where the deceased was found – **Hannah Mugure Thuo** (PW2), whose house was located 100 metres from the *locus in quo*; and she had not seen those who killed the deceased. Did PW29 talk to anyone else? In his words:

“I only talked to **Hannah Mugure Thuo** who was nearest to the scene. She was working in her *shamba* – the *shamba* in which the deceased lay. I arrested the 1st, 3rd and 4th accused. The 2nd accused was arrested by one **Inspector Oloo**. I arrested 1st accused at Thika Police Station. I am told he had gone [to Thika] to see either the OCPD or the DCIO. I told him I was arresting him for the alleged offence of murder. I arrested the 3rd accused at the Nairobi Law Courts, same with 4th accused. *I did no search on all those persons I arrested.* No weapons were recovered from any of

the accused persons. When I arrested them I told them it was a case of murder. I went to the scene. I had talked to my witnesses. *They said they saw crude weapons being used to kill the deceased.* There was no mention of *pangas* or such weapons. The weapons used were *all left at the scene.* The ones shown in the photograph were the weapons – sticks, stones, avocados Those were the things used to kill the deceased.”

While some of the prosecution witnesses testified that they saw some of the accused persons cutting the deceased with *pangas*, PW29 contested this. In his words:

“I am surprised if witnesses say they saw the deceased being cut with *pangas* and *jembes*. There is no reason for me to go and look for any weapons. There was no reason to search for such weapons.”

PW29 said he was an experienced crime investigator of some 14 years’ standing, and he knew that there would be no significance attached to blood staining where the deceased was not cut; in his own words:

“In the case of the deceased I found no blood staining on the clothes of the accused persons. I did not take any blood samples from the deceased for any purpose; and no blood samples were taken from the deceased for any kind of matching.”

Who caused the death of **Martin Kiragu Ndungu**? These are the words of PW29:

“I believed the deceased died out of violence from a mob. It was absolutely unnecessary to take any blood samples from the accused persons. I don’t agree I didn’t take the samples because the accused persons were innocent.”

In the course of cross-examination it became abundantly clear, in my opinion, that the Investigating Officer had *no particular reason* for laying charges against the four accused persons; the following passages in his evidence tell the tale:

“I came across those who said they saw the killing; others said they didn’t. **Gicheha Gathu** [PW25] told me about his meeting with **Gatarwa**, on the material day; the [two of them] met PW22, PW23 and PW14. The witness told me PW14 told them not to go to Kamwangi. I remember what PW14 said about her meeting with 1st accused. **Mwangi Ngandu** [PW22] said just what the lady [PW14] said; and **Ndung’u Gitau** [PW23] said 1st accused gave them a lift. According to witnesses [**Martin Kiragu Ndung’u**] was killed at 10.00 a.m. at Kamwangi. Bucana is a distance from Kamwangi.

“There are other witnesses who witnessed 1st accused being along Kanyoni – Kamwangi Road, [setting-up these men against] the deceased, and they saw the beating-up of the deceased. The struggle started at about 10.00 a.m. along the road. I believe some witnesses but not others. **Gicheha Gathu** ... told me the truth.”

Now **Gicheha Gathu** (PW25) had stated in his evidence that he had been *in the company of the 1st accused*; they had *no arms* on the motor vehicle they were using; the two drove along and arrived at Kamwangi at 12.30 p.m. and the 1st accused was received, and even given a chance to speak to the gathering by the District Commissioner.

Although **Gicheha Gathu’s** avowedly truthfully evidence would show only *innocence* on the part of the 1st accused, PW29 said he had charged the accused because, in the time-span preceding **Gatarwa’s** arrival at the DC’s meeting at 12.30 p.m., he (**Gatarwa**) *could* have committed the crime. PW29 said:

“**Gatarwa** wasn’t far from the scene of the killing, though he was in a different place.”

PW29 said he was not surprised witnesses such as **John Kinyanjui Kigo, David Njenga Ngurari,**

Anthony Gathogo, William Watari, Paul Njuguna Munga, James Ndung'u Kabunga were saying the same thing more-or-less in their evidence-in-chief; “*those witnesses were together*; according to their statements, they were all together”. PW29 conceded that **William Watari** has said he did not know **John Kinyanjui Kigo**; and that both PW6 (**Michael Waweru Kimotho**) and PW13 (**John Maina Waweru**) testified that the local MP had assigned them the task of dispersing anti-merger people on the occasion of the DC’s meeting at Kamwangi. PW29 testified that he had not investigated the claim that the local MP had dispatched his agents to assault those who were seeking to attend the DC’s meeting on the material date.

There is clear *contradiction* between the Investigating Officer’s evidence and that of other prosecution witnesses, regarding **Mr. Gatarwa’s** pick-up truck which is alleged to have brought armed people who then killed **Martin Kiragu Ndungu**. Other witnesses say the 1st accused was the one driving the said motor vehicle, and all occupants left and chased the deceased, up to the place where he was killed by, among others, the 1st accused. But PW29 now says:

“I investigated how the vehicle was left behind, while its occupants went to kill. That was true according to my evidence. That vehicle was driven off as some alighted and went to kill. Witnesses told me **Gatarwa** drove away just after pointing out **Gaddafi** to those who were in the vehicle.”

I do not find that testimony to be clear-minded; or indeed to *link Mr. Gatarwa’s vehicle to the killing of the deceased* on the material morning. PW29 himself was not at the scene, and his testimony can only be *hearsay evidence*; but what’s more serious, PW29’s evidence is completely *contradictory*: the 1st accused could not possibly have driven off in his pick-up motor vehicle, yet at the same time he was *chasing the deceased on foot and killing him*. I would hold the testimony regarding the pick-up motor vehicle, delivering killers to chase and murder the deceased, to be *without any element of truth*.

Apart from the several flaws in PW29’s evidence, he went on to say he was relying on the testimonies of **James Ndung’u Ndia** (PW17) which, as already remarked herein, have all the makings of *perjured evidence*; in PW29’s words:

“*I relied on their statements*. I had no reason to doubt them. I never talked to those said to have been threatened by **Gatarwa** ...The people allegedly threatened did not complain, so we never followed up.”

Learned counsel at this point asked PW29: “Why were you so eager to take such a story from one group while ignoring the other side?” His answer was:

“I looked and balanced both sides. I had no reason not to believe them. I was not paid anything to concoct a story.”

PW29 also said he did not have the *criminal records* of the bulk of the witnesses whose statements he was relying on – PW4, PW5, PW7, PW8, PW9, PW18. He said Kamwangi, on the material day, had *large numbers of people*, and so he was seeing all his witnesses only as “members of the public”. These witnesses, PW29 said, “are members of the public, and they are the ones I spoke to ... I saw them as just good citizens.” PW29 averred that he had been under no duty to receive instructions from anybody, in his investigations, “except the Attorney-General”.

PW29 said he had recommended six persons to the Attorney-General for prosecution, but the Attorney-General charged only four. According to PW29, “It is the *six persons* mentioned – (i) **Nahashon Gatarwa**; (ii) **Joseph Ngugi Muiruri**; (iii) **Paul Kibora**; (iv) **Stephen Muiruri**; (v) **Stephen Macharia**; (vi) **John Kibora Mwaura** – who killed **Kiragu Ndung’u**”. To this unsubstantiated allegation, PW29 then said “there were still many others”, and he mentioned five names. It is to be doubted whether, firstly, this Investigating Officer had properly discharged his duty of conducting professional investigations, and secondly, *whether this kind of hearsay evidence should have been tendered in Court, in proof of the serious charge of murder*. So casual was the witness, he went on to say: “They were mentioned by the

witnesses; my findings were based on what witnesses said; as investigating officer, I prepare an investigation diary; an investigation diary does not show conclusions, it only shows what has been done *I just went by statements of witnesses. I had 30 witnesses. About nine-to-ten have adversely mentioned the accused persons, out of 30 Their evidence is consistent. I think that is because those witnesses were at the scene of crime together. I don't know if they said in Court they hadn't been together.*"

C. LINKAGE TO OFFENCE MISSING, WITNESSES UNTRUTHFUL: SUBMISSION OF NO-CASE-TO-ANSWER

Learned counsel for the accused persons, **Mr. Njanja** and **Mr. Agina**, on 20th July, 2007 submitted that the prosecution had made no case on the murder charge, to be answered.

Mr. Njanja submitted that the prosecution had failed to show that any of the accused persons had the *intention* to kill the deceased, and had preceded to *cause the death* of the deceased. Counsel urged that none of the 29 witnesses had satisfied the Court of any *mens rea* and *actus reus* in the accused persons crystallizing in the killing **Martin Kiragu Ndung'u**.

Evidence showed that, on 25th April, 2005, between 9.00 a.m. and 10.00 a.m. a fight had erupted between *two contending coffee-farmer groups* coming for a public meeting presided over by the Thika District Commissioner, at Kamwangi. A group of young people armed with *crude weapons*, fell upon farmers suspected to oppose the merger of coffee factories, attacked them and unleashed a state of mayhem. Many witnesses including the Investigating Officer (PW29) testified that the *deceased had been the ring-leader* of the pro-merger group, which was fighting to exclude anti-merger farmers from the DC's meeting.

Twenty-two of the 29 witnesses said they either witnessed the commotion taking place at Kamwangi on the material day, or were in the general vicinity at the time. Did these 22 witnesses perceive the four accused dispatching the deceased?

According to **Dr. Jack Ndung'u Ndirangu** (PW28) who conducted a post-mortem examination on the deceased, the body had severe cuts, as well as wounds caused by blunt objects. Was there evidence that any of the four accused was seen applying to the deceased either sharp or blunt weapons or implements?

The evidence on that question, learned counsel submitted, varied significantly as between the said 22 witnesses. Fourteen of them testified that they did not see any of the four accused persons killing **Gaddafi**; and these are witnesses from the Kamwangi area and who knew all the accused persons. This, counsel urged, is a clear indication that the *charge of murder by either of the four accused, had not been properly laid*. Among these 14 witnesses, **Hillary Njagi** (PW 1) had been at Kamwangi at 9.00 a.m., for the purpose of attending the DC's meeting on the material day. He was up a ridge, and saw a commotion take place, involving some *3000 farmers*; and in that commotion, **Martin Kiragu Ndung'u** was killed, and this act had taken place by 10.00 a.m. PW1 did not see or identify the person or persons who killed the deceased.

The owner of the farm in which the deceased was killed, **Hannah Mugure Thuo** (PW2), was in that very farm when she saw the deceased being chased. At the place where she retreated, in her house, some 100 metres from the *locus in quo*, PW2 *could not identify the killer or killers of Gaddafi*; she only saw a *large mob* at the scene. None of the crucial witnesses – PW1, PW2, PW3, PW5, PW6, PW11, PW12, PW13, PW14, PW15, PW19, PW21, PW22, PW23 or PW25 – has claimed to have seen any of the accused persons at the scene of the killing.

PW25, **Gicheha Gathu**, an old man of 74 years, was on his way to attend the DC's meeting at Kamwangi; and on the way the 1st accused, who had just driven his pick-up motor vehicle out of his home, caught up with him (PW25) and gave him a lift. The time was 9.00 a.m. – 9.30 a.m., and they were coming from their Gituamba village, heading towards Kanyoni, Kamwangi being still further ahead. **Gatarwa** then, with PW25, now gave a lift to still other persons – PW15, PW22, PW23 – who were also on their way to Kamwangi for the DC's meeting. They could not immediately proceed, however, as **Njeri**

Waithaka (PW14) who had fled Kamwangi informed them that fighting was taking place at Kamwangi, along the tarmac road. So **Gatarwa**, after waiting for some time, took a dirt road, arriving at Kamwangi just before 1.00 p.m. That PW25's testimony was truthful, was testified to by the Investigating Officer (PW29). Learned counsel submitted that the most reliable evidence adduced in this case shows that the 1st accused, all along from 9.00 a.m. to about 1.00 p.m., had been nowhere near the *locus in quo*, and so could not have been the offender, and in the same manner, there was no evidence at all that any of the other accused had been anywhere near the scene of crime, during those hours. Counsel remarked the consistency in the evidence of PW14, PW19 and PW25, to the effect that **Gaddafi** had led a gang of youths in fighting off farmers opposed to merger in the coffee industry who were coming to attend the DC's meeting at Kamwangi, on the material day ? a position which is confirmed by the testimonies of PW11, PW12 and PW21. Counsel noted that PW6 had been clear in his testimony, that his white pick-up motor vehicle Registration No. KUR 837 had been hired by **Gaddafi** and his allies to transport crude weapons for use by the pro-merger group which was fighting the anti-merger farmers.

Mr. Njanja submitted that so many witnesses, PW1, PW2, PW11, PW12, PW14, PW15, PW19, PW21, PW22, PW23 and PW24 had given reliable evidence that the accused persons were not involved in the crime charged, and following the cross-examination of these witnesses they were *not even re-examined* by the prosecution counsel. The evidence of all those witnesses, it was urged, goes unchallenged; their evidence "completely dispelled the prosecution case; "so, what right has the prosecution to claim the accused persons committed offences?"

Learned counsel noted there were *eight prosecution witnesses who claimed they saw the accused persons killing the deceased*. But all these eight witnesses gave stereotyped evidence which could not have arisen from personal perception; and when these witnesses – PW3, PW4, PW7, PW8, PW9, PW10, PW17 and PW18 were cross-examined, they now gave *different accounts*. Some of them claimed they saw the accused persons committing the offences; some said they did not see the offence being committed; and besides, they were not agreed on the *time* when the deceased was killed. These witnesses had *conflicting accounts on how, by whom and by what*, the deceased had been felled and killed; they could not even describe the scene of the killing; PW18 did not even remember the vegetation which covered the *locus in quo*. These witnesses said they had run away for dear life, and were in shock and could not even make a report of the killing of **Gaddafi**. They were not themselves being chased, so why did they run away? And why did they not immediately report at the several police posts that dotted the locality in which the deceased died? Why did they have to consult with their local parliamentarian before, as much as two days later, they would now present themselves to the Police station for the purpose of recording statements? Were such statements *genuine statements*?

Learned counsel urged that the eight witnesses who claimed to have seen the accused persons herein killing the deceased, were not truthful. The one witness who the prosecution was relying on, but had a change of heart and said what he saw on the material day, **Michael Waweru Kimotho** (PW6) was declared a hostile witness upon an application by the prosecution, by virtue of S.161 of the Evidence Act (Cap.80). PW6's testimony was cross-examined by both the prosecution and defence, *to qualify it as evidence*; and in the end, what emerged from PW6's testimony perfectly coincided with the testimonies of PW11, PW12, PW14 and PW19 who had shown that the accused persons were not involved in the commission of the offence charged.

Counsel urged that PW6's evidence was *truthful*; and it showed that the several witnesses being relied on by the prosecution –PW3, PW4, PW7, PW8, PW9, PW10, PW13 and PW18 – had conspired on 24th April, 2005 to work under the leadership of the deceased, to cause mayhem in Kamwangi, just before the DC's meeting of 25th April, 2005 and to eject all those who opposed the merger of coffee co-operatives. It was during the fighting occasioned by **Gaddafi's** group, PW6 testified, that he (**Gaddafi**) was killed in *mob action*. Counsel submitted that this evidence was quite consistent with the reliable testimonies of PW11, PW12, PW14, PW19 and PW21. PW6 testified that he had not seen the 1st accused's pick-up motor vehicle at Kamwangi during the morning hours of the material date. PW6 had been forced to *sign statements* he knew nothing about, when he was reminded that since his own pick-up motor vehicle had been used to ferry crude weapons by the **Gaddafi** group on the material day, his own safety could not be guaranteed. It was right, in the circumstances, counsel urged, that PW6 should *disown the statements*

being shown to him in Court as his.

Learned counsel urged that the fact that PW6's testimony regarding the fabrication of evidence in November, 2005, for the purpose of fixing the accused persons, was not at all controverted by the prosecution through *cross-examination*, or the *calling of witnesses* who perceived a different set of facts, was *proof* that what was being laid before the Court were trumped-up charges, and it was an *abuse of the process of the Court*. PW6's evidence was consistent with that of PW13, who was also examined as a hostile witness, after the prosecution had made an application by virtue of S.161 of the Evidence Act (Cap.80).

In these circumstances, **Mr. Nyanja** urged, there was no basis whatsoever for bringing charges of murder against the accused persons. Even the Investigation Officer (PW29), counsel urged, and in my opinion, quite correctly, had given his testimony "under embarrassment". PW29 did not find any of the accused with a murder weapon; or with blood stains; there was no connection to the offence charged. Counsel proposed, in the circumstances, that PW29 "was stage-managing a case against the accused [persons] on the basis of instructions from people he knew ...[He] was the point-man in a concocted case against the accused persons." The significance of PW29's testimony, learned counsel urged, is that it completely displaces the prosecution case: he did not know how **Gatarwa's** motor vehicle was removed from the road where it was allegedly left, when the accused persons were committing the crime charged; he did not investigate the claim that the 1st accused was carrying a weapon, and using it upon the deceased; he merely took statements which he told the Court he routinely believed, from his eight "eye-witnesses", but carried out no investigation. The accused were charged in Court within the shortest time-span, without proper investigations being undertaken.

Counsel urged that there was no need for the Court to hear a defence to the prosecution case, since the case was, in effect, self-defeating.

Relying on the authority of **Bhatt v Republic** [1957] E.A. 332, **Mr. Njanja** submitted that where the evidence adduced is *barely enough*, at the end of the prosecution case, then there is no need for the defence to respond; and where the Court finds *doubts* in the prosecution case, then again, there is no need to call upon the defence to respond.

Learned counsel urged that the prosecution was relying on the evidence of *eight witnesses* who made stereotyped testimonies, but testimonies which were then nullified by the more credible evidence from PW6 and PW13 – both witnesses examined as hostile witnesses by virtue of s.161 of the Evidence Act (Cap.80). In the circumstances, counsel urged, nothing has been placed before this Court on the basis of which a conviction could be reached.

On the basis that a Court of law has the mandate to assess all evidence placed before it (**Kimeu v. Rep.** [2002] 1 KLR 756), learned counsel considered the evidence placed before this Court, and urged that the evidence of PW6, PW13, PW19 and PW25, who are key witnesses, had the effect of destroying the prosecution case.

Counsel urged that the testimonies of several prosecution witnesses – PW3, PW4, PW5, PW7, PW8, PW9, PW10, PW17 and PW18 – showed these witnesses to be *untruthful*; they had given stereotyped testimony which was wholly unreliable. Pertinent in this regard, is the fact that many of these witnesses have a *criminal record*, and so their evidence should be taken with caution.

Mr. Njanja urged that the four accused are innocent, as no case had been established against them. He urged that they be acquitted at this stage.

Learned counsel **Mr. Agina** adopted **Mr. Njanja's** submissions, and urged that the four accused persons be acquitted under s.306(1) of the Criminal Procedure Code (Cap.75), as no *prima facie* case had been made against any of them.

D. PRIMA FACIE CASE EXISTS, THERE WERE EYE-WITNESSES: RESPONSE BY

PROSECUTION COUNSEL

Learned State Counsel **Mr. Bifwoli** submitted that, by direct, *viva voce* evidence, a *prima facie* case had been made for the four accused persons to be put to their defence. Counsel urged that five of the witnesses, PW4, PW7, PW8, PW9, and PW18 had testified that they were close to the *locus in quo* and did see the accused persons killing **Martin Kiragu Ndung'u (Gaddafi)**. Counsel recounted the very averments of the said five witnesses: that as they stood along the road, the accused persons came in a pick-up motor vehicle, stopped, 1st accused gestured at **Gaddafi**, the chase began, ending in the killing of the deceased "some metres away from the road"; the witnesses said they saw from their various hide-outs the killing of the deceased, as it was executed; they said the accused were armed with a metal bar, a *panga*, and coffee-tree branches; they said the killing of the deceased took place at 10.00 a.m.; the accused persons were known to the five witnesses before the incident, and so they easily identified the accused.

Mr. Bifwoli relied on the clearly questionable evidence of PW4 and PW17, in contending that the four accused persons had been paid to kill **Gaddafi**, and so they had the *mens rea* which, when it coincided with the *actus reus* of the killing, testified to the commission of a murder. He contended that the accused persons, who by the evidence of some witnesses, had gravely assaulted the deceased, are to be taken to have intended the death of **Martin Kiragu Ndung'u**. Counsel urged that murder was, in this case, proved further by the testimony of PW28, **Dr. Jack Ndung'u Ndirangu**, that **Gaddafi** had not died from natural causes.

Notwithstanding the clear tone of *apology* in the whole tenor of the Investigation Officer's (PW29) evidence, **Mr. Bifwoli** urged that PW29's testimony went to prove commission of the offence by the four accused persons. He urged that PW29 "had produced sticks and stones used in the killing", as well as photographs of the pick-up motor vehicle belonging to the 1st accused. However, the production of photographs of **Mr. Gatarwa's** motor vehicle, with much respect, *bore little relation to the place where the same were taken*, and by no means showed that that motor vehicle, and less still, the 1st accused himself, had anything at all to do with the killing of the deceased.

Mr. Bifwoli devoted some time to contesting the testimony of PW6, who was examined as a hostile witness, and who, especially during cross-examination, gave vital evidence on the happenings at Kamwangi on the material day. Learned counsel called for a careful examination of the testimony of PW6; and indeed, I have done so, but only come to the *conclusion* that this was a person ill-used by others for personal ends; he ultimately objected to such abuse, and was willing to tell the truth in Court, regarding the circumstances obtaining at Kamwangi in the run-up to the killing of the deceased. I would agree with counsel for the accused persons, that PW6's testimony, which was little challenged by the prosecution, is in substance *truthful evidence*, and it fatally undermines the case brought against the accused persons. This Court would believe PW6 when he says he had been compelled to sign ready-made statements, placed before him by one **Muteti** (who, however, was not called as a witness).

E. FINAL ANALYSIS OF EVIDENCE AND SUBMISSIONS

(a) *Preliminary Note*

Since the decision to prosecute falls squarely to the Attorney-General, there may well have been some cause for amending the information to exclude two persons originally charged with the four accused herein. Indeed, from the testimony of the Investigation Officer (PW29), many more people would have been charged with the murder of the deceased. That background alone clearly creates a puzzle as to the circumstances in which only the *four* accused had been charged.

It is to be noted that the bulk of the case, as attempted to be made through *29 witnesses*, revolves around just the *1st accused* who is said by some witnesses to have gone to the murder scene from one contraption – the pick-up truck, Registration No. KAC 326G, owned by the 1st accused. From the turns in the evidence, it is clear that if no case properly lies against the 1st accused, then, neither can it lie against any

of the remaining accused persons.

(b) Did the Prosecution adduce Evidence that connects 1st Accused to the killing of the Deceased?

PW11, **Lucas Njenga Macharia** testified that the DC's meeting at Kamwangi, which attracted some 3000 farmers, was called to order at about 1.30 p.m. on the material day. After addressing the meeting, the DC gave coffee farmers a chance to speak; and one of the persons he gave the podium was **Nahashon Ngugi Gatarwa** (1st accused) who was sitting close to him. This is confirmed by PW 25, **Gicheha Gathu** who was in the company of the 1st accused at Bucana, several kilometres from Kamwangi, at 11.00 a.m. and travelled in 1st accused's motor vehicle which reached the meeting-venue at 12.30 p.m. PW14, **Njeri Waithaka** too, was with 1st accused at Mubao, some distance from Bucana, at 11.30 a.m. on the material day; and it is PW 14 who told 1st accused it was not safe at Kamwangi and he should not drive there. **Gatarwa** therefore spent some time at Mubao and only drove on to Kamwangi when he received word that there was no fighting anymore there. It was PW25's testimony that it was the local Chief who showed 1st accused where to park his motor vehicle at 12.30 p.m., and then gave him a seat next to the DC. The testimonies of PW11, PW14 and PW25 concerning the movements of 1st accused during that whole morning, are confirmed by PW22. PW25 also testified that there had been no weapons in **Gatarwa's** pick-up motor vehicle, and that this vehicle had not been used on the material morning to chase anybody along the streets. The Court had no reason to disbelieve the testimonies of these witnesses, and indeed, in relation to PW22, made the record that this was a truthful witness.

Not all witnesses claiming they perceived or knew about **Gaddafi's** killing, are agreed on the *time* when the death took place. PW1, says the unrest spawning the killing of **Gaddafi** was in progress at about 9.00 a.m.; and an hour later the deceased had died, and PW1 with Police officers were going to the *locus in quo*. PW4 says the deceased was killed between 10.00 a.m. and 11.00 a.m. PW3 says that by 10.00 a.m. the deceased was still alive. PW 28 who did the post-mortem examination, indicates in the historical part of his account that the deceased was killed at about 9.30 a.m.

During the times said to coincide with the death of the deceased, 1st accused would still have been in the company of several reliable witnesses as already noted above, and would have been several kilometres outside Kamwangi where the death took place.

It is also not doubted, in all the reliable evidence adduced in Court, that at all times during which, on the material day, the 1st accused moved over any significant distance, he did so in his pick-up motor vehicle, Registration No. KAC 326G. Those witnesses who travelled with 1st accused from his home in Gituamba, through Bucana and Mubao to Kamwangi (where he arrived at 12.30 p.m.) testified that this vehicle mainly carried ageing passengers on the way, none of whom was armed, and that there were no weapons at all kept on the said vehicle. These witnesses, who I have no reason to disbelieve, also said that **Gatarwa's** motor vehicle, on the material date, was used only for lawful purposes, and it chased nobody along the roads. PW19 testified that there had been a white pick-up truck of similar colour to that of 1st accused, but its Registration No. was KUR 835, and this other motor vehicle had been seen to be at the disposal of restless youths wielding batons and attacking farmers who had set out to attend the DC's meeting. That other motor vehicle, it was testified by several witnesses (notably PW23), belonged to PW 6.

From the circumstances as set out above, this Court finds that there are no accusing fingers pointing in the direction of 1st accused – and therefore, of all the other accused – as regards the killing of **Martin Kiragu Ndung'u** on the material day.

If, therefore, there would be no basis for bringing a charge of murder against the accused persons, then this position is signally fortified by the *manner* in which, from all the reliable evidence laid before the Court, the deceased met his death.

It is the general position among reliable witnesses that, on the material day, there were about 3000

farmers at Kamwangi, coming to attend the DC's meeting. PW23, **Ndung'u Gitau** saw some 3000 farmers armed with branches plucked from coffee trees, and entering the venue of the meeting, at about 11.30 a.m. Given the testimonies that the numbers of coffee farmers entering Kamwangi had been swelling since 9.00 a.m., it must follow that the said "armed" thousands of them must have gone *some place*, and they were now returning to the DC's meeting at about 11.30 a.m.

At the *locus in quo* where the body of **Martin Kiragu Ndung'u** lay, only *crude weapons* had been found and blamed (especially by the Investigation Officer (PW29)) in relation to the killing – coffee- trees branches, some still sappy (about 1000 such sticks, according to PW1); stones of varying sizes (as many as 100 large ones, according to PW1); numerous green avocado fruits. The Investigation Officer (PW29) stated firmly before this Court that only *stones and sticks* had been used to kill the deceased; and this senior Police officer also stated in his testimony that the fate of the deceased was occasioned by *mob killing*. No wonder, no reliable witness appearing before the Court testified to having *seen or identified those who caused the death* of **Martin Kiragu Ndung'u**. PW11, just like PW1, PW6, PW12 and PW23, was clear in his testimony that there had been as many as *3000 farmers* at Kamwangi who strenuously resisted the violence inflicted upon them by a group of young men led by the deceased, who tried to prevent them from attending the DC's meeting and to express their opposition to official intentions to merge their coffee co-operatives.

Since the testimony of the Investigation Officer (PW 29) shows that **Martin Kiragu Ndung'u** had died in *mob violence*, it is, in this Court's view, incomprehensible that he should have relied on questionable statements of certain witnesses, mostly with criminal backgrounds, as reason to signal to the office of the Attorney-General, that the four accused persons could properly be arraigned in Court on murder charges. PW 29 disowns professional prosecutorial responsibility by averring that the matter had moved to the Attorney-General's docket, and it was now *solely the business of the Attorney-General* to take such action as he saw fit. PW 29 was apparently not struck by the egregious statements made by witnesses such as PW7, PW17 and PW18 – witnesses with past criminal records; the Investigation Officer says he was merely treating them as "good citizens" and did not bother to check their background.

As already noted in the course of this Ruling, certain witnesses, notably PW3, PW4, PW7 and PW9, came to Court with clear intentions to *perjure* themselves. Indeed, with close investigation, which I hereby recommend, such witnesses may be the subject of fuller investigations, with a view to *prosecution for perjury*.

The investigations preceding the prosecution case were, in my assessment, not diligently or conscientiously conducted, and several witnesses (notably PW10) were called who had nothing at all to contribute; there was a failure to call such essential witnesses as **Muteti**, and the several Police officers said to have recorded witness statements at Gatundu Police Station and at Kanyoni (**P.C. Njagi** and **P.C. Wambua**). So serious was the challenge to the claimed origin of the witness statements, professional prosecution would have occasioned the calling of those who took those statements. The conduct of the police at Gatundu, in relation to the mounting of this prosecution, would raise serious doubts as to the *bona fides* of the Police officers involved. It is difficult to understand, for instance, the apparently *oppressive treatment* accorded PW6 and PW21 at the Gatundu Police Station. From the evidence of the Investigation Officer (PW29) it is clear to me that the charges in this case were laid *without any credible link established between the accused persons and the crime committed*; in PW29's testimony, the charges were brought simply because there existed a *chance* of the accused persons being involved in the killing of the deceased; so it was their responsibility to prove they were not *involved*. That would be an abuse of the established principles applicable in criminal justice. I would declare a prosecution of this nature an *abuse of the criminal process*.

(c) Orders

I will make specific orders as follows:

1. By virtue of s.306(1) of the Criminal Procedure Code (Cap.75), I find that none of the four accused persons has a case to answer; I hereby acquit each of the four accused persons, and

order that each of them shall forthwith be set at liberty, unless lawfully held in a different cause.

2. Being convinced that some of the witnesses, as indicated in this Ruling, have committed perjury, I direct that the Attorney-General and the Commissioner of Police shall cause professional investigations to be conducted in respect of those witnesses, to the intent that, in a proper case, prosecution be mounted against them by virtue of the provisions of Chapter XI of the Penal Code (Cap. 63, Laws of Kenya).

3. In view of the apparently elaborate scheme of the perjured evidence given before the Court, the Attorney-General shall cause investigations to be conducted on the possible existence of a conspiracy to defeat ends of justice, especially as contemplated in s.117 of the Penal Code (Cap.63).

4. The Deputy Registrar shall, by due protocol, ensure that this Ruling and its orders are brought to the attention of the State officials concerned, to secure compliance.

5. In view of the Ruling herein, the assessors are hereby discharged.

DATED and DELIVERED at Nairobi this 18th day of September, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Tabitha Wanjiku

For the Accused: Mr. Njanja, Mr. Agina, Mr. Nyaberi

For the Prosecution: Mr. Bifwoli