



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: C. MEOLI, J)**

**CRIMINAL CASE NO. 55 OF 2015**

*(Formerly Nakuru High Court HCCRC No. 79 of 2015)*

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DISMAS AUMA OMUSUGU.....1<sup>ST</sup> ACCUSED**

**DANIEL NJOROGE MBUGUA.....2<sup>ND</sup> ACCUSED**

**DENNIS MUTABARI.....3<sup>RD</sup> ACCUSED**

**FREDRICK MACHARIA NDUNG’U.....4<sup>TH</sup> ACCUSED**

**FRANCIS MATU MWANGI.....5<sup>TH</sup> ACCUSED**

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

1. The five accused before the court are **Dismas Auma Omusugu** (1<sup>st</sup> Accused); **Daniel Njoroge Mbugua** (2<sup>nd</sup> Accused), **Dennis Mutabari** (3<sup>rd</sup> Accused), **Fredrick Macharia Ndung’u** (4<sup>th</sup> Accused) and **Francis Matu Mwangi** (5<sup>th</sup> Accused). They are jointly charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on the night of 3<sup>rd</sup> and 4<sup>th</sup> July, 2011, at G.K Prison Naivasha, jointly they murdered **Joseph Ong’are Ondulo**.

2. Although the Accused took plea before **Omondi J** (Nakuru) on 25<sup>th</sup> October, 2011, denying the charges against them, several scheduled hearings subsequently aborted, and on 29<sup>th</sup> September, 2015, **Odero J** transferred the case to the High Court at Naivasha. Eventually, hearing commenced before the court at Naivasha on 4<sup>th</sup> May, 2016. The Accused persons were represented Messrs. Njuguna and Kimani.

3. The prosecution called eleven witnesses. The prosecution case was as follows. In the material period, and specifically in July, 2011 the five Accused persons, one **Fredrick Kizito (PW10)** and **Joseph Ong’are Ondulo** (deceased) were inmates on death row, having been convicted on different capital offences. The seven men were at the material time incarcerated at G.K Prison, Naivasha and occupying **Cell No. 86** which is located on the 2<sup>nd</sup> floor of prison’s block known as **D Block**.

4. During the night of 3<sup>rd</sup> and 4<sup>th</sup> July, 2011, three prison warders were assigned guard duties by the Duty Officer of the night, **I.P. Chirchir (PW1)**, then Senior Sergeant). The three officers on guard duty in block D were **PC David Okinyi Ochogo (PW2)**, **PC Richard Sang (PW6)** and **PC Charles Mwangi (PW7)**. The security procedure in place was that officers reporting on night guard duties together with the last guard day shift and officer in charge conducted what was known as the lockdown which entailed checking all cell doors to ensure they were securely locked for the night. For this purpose, there were two sets of keys - a servant and master key used to lock each individual cell. Thereafter the night duty officer or officer in-charge would lock the main door to the entire block, locking in the night duty officers.

5. All the cell keys and the keys to main block door would be taken by the officer in-charge and locked up in a safe designed for that purpose. The said safe was in the duty office. There was a guard room inside the block which was used by the night duty guards. In the event of an emergency in the prison block during the night, the night guards could either rattle the knocker on the main block door to attract the attention of the officer in-charge whose office was located some few metres from the block, or blow a whistle to raise alarm.

6. On the night of 3<sup>rd</sup> and 4<sup>th</sup> July, **PW2, PW6** and **PW7** were thus locked up inside the **D Block**. Their responsibility was to patrol the corridors of all the three floors of the prison block. On each floor, the cells were set in a row on either side of the corridor. The cells had

solid metallic doors with a square peeping space (with grills) set at eye level. The corridors had security lights which remained on throughout the night. The working arrangement between the night guards was that one guard conducted patrols in each of the three watches of the night. The officer in-charge would also randomly visit the block to supervise the guards.

7. In the first night watch which started at 630pm and ending at 11.30pm, **PW2** patrolled the corridors without incident. He then handed over to **PW7** and retired back to the guard room. **PW7** patrolled the corridors until 3.00am. During his watch **PW1** came in on inspection. Upon completing his watch, **PW7** retired to the guard room handing over to **PW6** whose watch was to end at 5.00am. **PW6** started his patrol on the ground floor and was on the 1<sup>st</sup> floor when he heard someone call out “*afande*”! The caller was on 2<sup>nd</sup> floor and cell number 86. The time was about 4.30am. On reaching the door, **PW6** found the 1<sup>st</sup> Accused who spoke to him from behind the cell door. The 1<sup>st</sup> Accused reported to **PW6** that one inmate in the cell had committed suicide, pointing to an object behind him which was draped over with a blanket. Other prisoners in the cell were seated and did not speak.

8. The 1<sup>st</sup> Accused declined to answer further questions by **PW6** and demanded that he calls his seniors to the cell. **PW7** went to the guard room and roused his colleagues **PW2** and **PW6** who accompanied him to the door of cell number 86 and confirmed his report. They then used the knocker on the Block’s main door to call **PW1**. **PW1** collected the keys and with **SP Lemasia (PW3)** the day’s duty officer, and **SP Mwangangi** who was on normal rounds, proceeded to the **D Block**, opened and went up to cell number 86.

9. Upon opening the cell door, the officers noted a body dangling from the grill bars of the cell window opposite the door, by a cord made out of blanket strips. The body was draped in a blanket. The right arm had been chopped off. Beside the body was a human arm in a yellow plastic bucket. The cell inmates including the Accused herein sat inside the cell. The cell was immediately locked again and **PW3** directed to make a report to Naivasha Police Station.

10. **PC Ndolo (PW11)** and **CPL Muriithi (PW4)** were among officers who drove to the scene upon receipt of the report. Again, the cell was opened by senior prison officers and the police officers entered the cell. They observed the scene, taking photos. On removing the blanket draping, they noted the body of the deceased hanging by a blanket cord. The right limb bore an amputation from the elbow downwards. There were two pieces of manila paper containing writings which appeared to relate to the death. Police conducted a search in the room. Two razor blades were recovered from the ablution buckets containing the cell waste. Police took away the body and recovered items. They subsequently interviewed all the cell inmates. Handwriting specimens were collected from the cell inmates. The police learned from **PW10** that the deceased had been throttled to death by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused on the material night.

11. The post mortem examination was subsequently conducted on 22<sup>nd</sup> July, 2011. The cause of death, according to **Dr. Titus Ngulungu (PW8)** was asphyxia due to cord pressure application around the neck consistent with strangulation.

12. The handwritten notes on manila paper retrieved from the cell (**Exhibit 2 and 3**) were examined and compared with the specimen from all the cell inmates. The document examiner concluded that the questioned writings matched with the specimen writing of the 5<sup>th</sup> Accused. **CIP Chania (PW11)** produced the relevant report.

13. At the close of the prosecution case, the court found that a *prima facie* case had been established against and placed all the Accused persons on their defence. The 1<sup>st</sup> Accused elected to make a sworn statement, to the following effect. In the material period he was incarcerated at Naivasha Main Prison serving a life sentence since the year 2000. He shared a cell with seven inmates including his co-accused and **PW10**. He stated that there were constant movements in prison and that on the 3<sup>rd</sup> July, 2011 he was in his cell when at 11.00pm **Senior Sergeant Chirchir (PW1)** in the company of two officers, **Pascal Onyango** and another came to the cell and removed the deceased along with his belongings.

14. That later at 200am, the deceased was brought back while being carried in a blanket by some officers. The officers who wore disguises in the form of helmets ordered the inmates, on pain of death, to hoist up the deceased’s body by tying it to the window grills. The officers also instructed the inmates to make a report on the next day to the effect that the victim had committed suicide. Thus, at 5.00am the 1<sup>st</sup> Accused made a report to **PW6**. Senior prisons officers including **PW1** came and mounted a search, locking up and later calling police who came and took photos. The inmates were ordered to remove the body to a waiting vehicle before being separated.

15. Prisons officers interviewed them separately dictating to them that they should say that the deceased had committed suicide. When police came to interview the suspects the 1<sup>st</sup> Accused refused their request to record a “**suitable statement**” such as **PW10**’s.

16. During cross-examination the 1<sup>st</sup> Accused claimed to have pre-existing grudges with prison officers especially **PW1**, asserting that when the body of deceased was returned to the cell at 2.00am, the arm had been cut off and was in a bucket, brought by the officers with the body which had a rope around the neck.

17. The 2<sup>nd</sup> Accused gave an unsworn defence statement. To the effect that he hailed from Kiambu and was an inmate at Naivasha Prison in the material period and housed in cell number **86D** with six other inmates. After supper, on the material night, all the inmates retired to sleep. At 11.00pm the cell door was opened and deceased called out by prison officers. Believing the deceased was going on transfer he continued sleeping. But at 2.00am a body carried in a blanket was brought in. The cell inmates were ordered by an officer to hang up the deceased by the window and to raise an alarm at 5.00am. The prisoners complied, the 1<sup>st</sup> Accused raising the alarm at 5.00am. When **PW6** came, they told him about the body. He called the duty officer **PW1** who came in the company of **SP Mwangangi**. A search having being conducted, the cell was locked.

18. At 6.00am police came in, took photos and removed the body. He and his cellmates were separated and kept in segregation. All the cell occupants except **PW10** obeyed instructions given by prison officers to record statements to the effect that the deceased had hanged himself.

19. Although the 3<sup>rd</sup> Accused had earlier intimated that he would not give any defence statement, he subsequently changed his mind and gave a sworn statement. He stated that he was from Meru and was transferred from Nakuru Prison to Naivasha Prison on 3<sup>rd</sup> July, 2011 and assigned cell number 86 with six cell mates. He slept early on the material night, but at 11.00pm he noted movement in the cell. On waking up he saw **PW10** seated. He observed that the other cell mates (1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup>) had pinned the deceased onto the floor. The 3<sup>rd</sup> Accused was threatened when he questioned them. He then heard someone say that he, referring to the deceased, was “done”. Then the 2<sup>nd</sup> Accused used a blade to cut off the man’s hand and threw it into the bucket.

20. That at 5.00am the 1<sup>st</sup> Accused raised an alarm, reporting that the deceased had hanged himself. The cell door was opened and later when police came, they took photos and removed the body. The 3<sup>rd</sup> Accused was terrified by what he had witnessed and was hesitant to relate it. However, in the first appearance in court, he requested to be allowed to record a statement with the **DCIO** which was placed on the record. He recorded two statements therefore. In cross-examination he stated that he had been convicted for an offence of robbery in 2009 but that the conviction was quashed on appeal. He said he recorded a statement on 26<sup>th</sup> July, 2011 during his appeal and when shown his statement dated 24<sup>th</sup> April, 2016 admitted that his initial statement differed from his defence, the latter being the truth. He denied that his motivation was only to save his skin.

21. The 4<sup>th</sup> and 5<sup>th</sup> Accused persons also gave unsworn statements in which they stated that they were inmates and occupants of cell 86 on the material date and were in the cell on the material night. As to the events of the night, their statements repeat evidence given by 1<sup>st</sup> and 2<sup>nd</sup> Accused. The 5<sup>th</sup> Accused in particular denied being the author of the notes allegedly found in the cell, declaring that piece of evidence to be false.

22. A defence witness **Joseph Mwangangi (DW1)** also a convict held in Naivasha Prison in the material period in cell number 75 gave evidence. He stated that while in his cell on the material night, he noted the cell opposite his being opened by prison officers at 11.00pm. That **PW1** was among the officers who went into the cell and removed a prisoner and took him away. That the said officer also returned on the next day and removed the body of a prisoner.

23. In submissions at the close of the defence, the defence dismissed the evidence of **PW10** and the 3<sup>rd</sup> Accused as accomplice evidence in nature and therefore being of the weakest kind. Thus, they submit that the prosecution case is principally based on circumstantial evidence. They relied inter alia on the decision of the Court of Appeal in **Sawe -Vs- Republic [2003] KLR 364** and **Abanga alias Onyango -Vs- Republic Criminal Appeal No. 32 of 1990 (UR)** and **Musili Tulo -Vs- Republic [2014] eKLR** regarding the principles applicable where the prosecution case rests on such circumstantial evidence. In particular the defence cited the absence of motive in the actions attributed to the Accused persons, and cited the case of **Libambula -Vs- Republic [2003] KLR 683**.

24. The prosecution opted to rely on evidence tendered.

25. The court has considered the evidence on record as well as the defence submissions. Some basic facts are not in dispute. These include the fact that all five Accused persons herein, the deceased and **PW10** were inmates incarcerated at Naivasha Main Prison in the material period upon conviction and sentence for various capital offences. The said seven inmates occupied the death row block known as **Block D** and were all accommodated in cell number 86. All were present in the cell on the night of 3<sup>rd</sup> and 4<sup>th</sup> July, 2011. The cell had been locked during lockdown. All were alive on the next morning, but for the deceased whose body was hoisted up, almost in a standing position against a wall.

26. On his neck was a noose made out of shredded pieces of blanket. The end of the noose was tied up on the grills of the window above the wall against which the body dangled. His right arm had been severed from the elbow joint downwards and lay in a plastic bucket by the body. There is no dispute that the 1<sup>st</sup> Accused is the cell occupant who called out at about 5.00am and reported to **PW6** that one of the cell mates had committed suicide. That following this report several prisons officers including **PW1, PW2, PW3, PW6** and **PW7** and their seniors, including **Assistant Superintendent Mwenda** came to the cell. There is no dispute that soon thereafter police from Naivasha Police Station were called to the scene. They conducted searches and also took photographs of the cell before removing the body. The cell inmates were interrogated by the prisons personnel as well as police.

27. The post mortem examination conducted on 22<sup>nd</sup> July, 2011 revealed the cause of death to be asphyxia due to cord pressure application around the neck consistent with strangulation. The cause of death is not in dispute.

28. The key issue in dispute and requiring determination, is whether the five Accused persons jointly, of malice aforethought caused the death of the deceased herein.

29. The prosecution evidence against the Accused persons is both direct and circumstantial. With regard to the 1<sup>st</sup> and 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons, there is direct evidence from the cellmate **PW10** that they jointly strangled the deceased in the course of the material night and hoisted him by a cord (blanket twine) at the cell window. Secondly, that the 1<sup>st</sup> Accused is the person who called out to the officers on duty on the morning of 4<sup>th</sup> July, 2011 to report the alleged suicide of the deceased. Against the 5<sup>th</sup> Accused, there is additional evidence through **PW9** and **PW11** that writings found hanging on the body of the deceased were authored by him. The writings contained a warning to the effect that ‘informers’ and other undesirables would not be tolerated in that prison.

30. Finally, against all the Accused persons, there is general circumstantial evidence based primarily on their presence in the cell on the material night that they were accomplices in the gory murder and mutilation of the deceased.

31. Of relevance to the joint charge herein are the provisions of Sections 20 and 21 of the Penal Code. Section 20 provides in Subsection (1) that:

**“(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-**

- (a) every person who actually does the act or makes the omission which constitutes the offence;**
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
- (c) every person who aids or abets another person in committing the offence;**
- (d) any person who counsels or procures any other person to commit the offence;**

**and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.”**

32. Regarding common intent Section 21 provides:

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

33. In this case the common intention, or *mens rea* to be proved is an intention to cause death or knowledge that the act or omission would cause death as stated in the definition of malice aforethought in Section 206 of the Penal Code.

34. In the case of **Stephen Ariga & Another -Vs- Republic [2018] eKLR** the Court of Appeal considered the definition of common intent in Section 21 of the Penal Code before stating that:

**“What common intention implies was set out by the predecessor of the Court in Wanjiru d/o Wamerio versus Republic 22 EACA 521 as follows:-**

**“Common intention generally implies premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.”**

35. The court further observed that:-

**“The ingredients of common intention were enunciated in Eunice Musenya Ndui -Vs- Republic, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows:-**

- (1) There must be two or more persons;**
- (2) The persons must form a common intention;**
- (3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;**
- (4) An offence must be committed in the process;**
- (5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful**

36. The Penal Code defines the *actus rea* or causing death in Section 213 as follows:

**“A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases -**

- (a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;**
- (b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;**

(c) .....

(d) .....

(e) ....."

37. The most direct evidence linking the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons to the murder of the deceased was by **PW10** who at the material time was an occupant of the cell number 86. **PW10** described the events of the night of 3<sup>rd</sup> and 4<sup>th</sup> July, 2011 before the inmates retired to bed. He further stated that during the night he was woken up by what sounded like **“very loud snoring”**. He continued to testify that:

**“Security lights on the outside of the cell illuminated the cell. The light is on the veranda (corridor). I saw the four Accused (1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup>) covering the deceased with a blanket and seated on him. When I questioned them Dismas (1<sup>st</sup> Accused) answered:**

**“We have decided. This man has disturbed us (deceased).”**

The man continued to make guttural sounds before going quiet. They made a strip (from) the blanket. Njoroge (2<sup>nd</sup> Accused) used a razor to do so. They put a strip around the neck of deceased and hang him on the metal bars of the window. He (deceased) was dead. All the men I have mentioned took part in carrying him to the window and hanging him there. I was in cell. Dennis (3<sup>rd</sup> Accused) was also there. He got up and sat and did not get involved. Having hanged the man, they removed the left hand from the elbow and it fell down. They used a razor to cut it off at the joint. Njoroge (Accused 2) did so. Others were watching. At about 5.00am the 1<sup>st</sup> Accused (in dock) called out to the night officer - Do not know him - he said:-

**“Afande, mtu amekufa hapa. Amejikata mkono na kujinyonga”**

The officer came over and called other supervisors... We were questioned at length. But I was horrified and could not speak. We were kept in segregation for 5 months. I recorded the first statement with prisons on 5<sup>th</sup> July, 2011. Later we recorded statements with police after about one month. In my first statement I said that I found the deceased hanging on the window. I was very afraid of the cell mates who were still being held with me.”

38. **PW10** was subjected to some extensive cross-examination by the defence. He confirmed making his initial the statement to the prisons officer to the effect that he had only woken up to find deceased hanging by the window. That he took that position out of fear of his colleagues, but later described to the police how the deceased was murdered. He denied that he was influenced to change his initial statement. Concerning the security light on the veranda adjacent to cell 86, he stated that:

**“It is a large security light and the windows were open at back also bringing in more light from other security lights. Yes corridor light though bright is a few steps away from the door to cell. Yes, there were officers on duty in material time (patrolling)..... Yes the loud snoring of deceased woke me up.....I did not shout for help. Naivasha Prisons is a difficult place. Door cannot just be opened. Only officer in-charge can cause doors to be opened. I feared for myself and could not raise an alarm. Yes I spoke asking what they were doing..... Not true I was involved in the murder.”**

39. Two challenges were raised in respect of the evidence by **PW10**. The first relates to the lighting inside the cell to which I will advert later, but the second relates to his own possible culpability in the murder and the two versions of his statements to authorities regarding the murder. The defence during cross-examination of **PW10** attempted to cast him as both an untruthful witness and an accomplice. Was **PW10** an accomplice for purposes of this case?

40. In the case of **Anthony Kinyanjui Kimani -Vs- Republic [2011] eKLR** (Criminal Appeal No. 157 of 2007) the Court of Appeal grappled with this question. The Court observed *inter alia* that:-

**“What legally constitutes an accomplice is not defined in our statutes but Section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime.**

In the case of **Watete v Uganda [2000] 2 EA 559**, the Supreme Court held that **“in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”**. The same definition was restated by the same Court in the case of **Nasolo v Uganda [2003] 1 EA 181** where the court further stated:

**“On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In Davies vs Director of Public Prosecutions (supra), the House of Lords said at 513:**

**‘On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as falling within the category: (i) on any view, persons who are participes criminis in respect of the actual crime charged,**

**whether as principals or accessories before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanors).”(emphasis added)**

41. First of all, in this case, all the inmates of the cell were suspects to the murder by virtue of the mere fact of their presence in the cell with the deceased on the material night. With regard to **PW10**, there is no evidence that he was involved either as a principal offender by dint of Section 20 of the Penal Code or was an accessory before or after the fact. The fact that the witness failed to raise an alarm during or subsequently failed to give *all* the details of the murder at the first opportunity did not make him an accessory thereto.

42. In my view, the admitted omissions at worst amount to no more than a failure to make a report. Further, **PW10** gave what to my mind appears a reasonable explanation for his initial reticence: he feared for his own life as he was held together with the persons against whom he would have given the information. None of the prosecution witnesses or Accused persons in their defenses claimed that **PW10** did any act or otherwise participated in the offence from which all the Accused persons distanced themselves. And this despite the defence severally suggesting to **PW10** during cross-examination that he was involved in the offence but was influenced to lay the blame on the Accused persons.

43. I am not inclined to believe that the facts of this case expose this witness as an accomplice. Even if the court were to find, based on **PW10's** presence at the murder scene and subsequent prevaricating accounts, that he was somewhat of an accomplice, that would not *ipso facto* render his evidence worthless. True, the element of self-preservation is an important motivation to be borne in mind in considering the evidence of **PW10**.

44. In one of the earliest cases on the subject, the Court of Appeal for East Africa in the case of **Republic -vs- Ndara s/o Kariuki & 6 others (1945) 12 EACA 84, at Page 86** prescribed the correct approach in dealing with accomplice evidence as follows:

**“A point which is sometimes lost sight of in considering accomplice evidence is, that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case, the court should record in the judgment whether or not it regards the accomplice as worthy of belief.”**

45. In reiterating the foregoing the same Court stated in **Kinyua -Vs- Republic (2002) 1 KLR 256** that:

**“Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.”**

46. In keeping with the above exhortations of the Court of Appeal, I have given anxious consideration to the evidence by **PW10**. In so far as direct evidence against the Accused persons is concerned, **PW10** was the star witness. He stated that he had been moved from **Kodiaga Prison** to Naivasha Prison in 2010. He had shared the cell with the Accused persons up until the fateful night. His account of the events of the material night is detailed as to what happened and who did or said what. Even before he was cross-examined he volunteered the information that he had been reticent, out of fear for his life during the initial questioning, as to role of the Accused persons in the murder.

47. During cross-examination he repeated this explanation, asserting that at the time of his first interrogation by prison officials, he *“had no assurance”* that after the first statement he would land back in the same cell with the same cellmates. He also reiterated the evidence that the cell was illuminated not only from the corridor light outside the cell but also the security lights facing the window at the rear of the cell. There were seven inmates in the cell in question and with whom the witness had lived for several months prior to the offence. **PW10's** account contains such graphic details of what happened that he could not have invented these details. He was in close proximity with the actors and recognized the voice of the 1<sup>st</sup> Accused. He must have been well familiar not only with the cellmates' physical appearance, but also with their voices, no doubt having interacted with them in the one-roomed cell.

48. Concerning the former, this is a case of recognition of actors within the same room with enough lighting from two sources. In the circumstances described, both the visual and voice identification of the actors passes the tests laid out in **Joseph Muchangi Nyaga & Anor. -Vs- Republic [2013] eKLR** and in **Choge -Vs- Republic [1955] 1 KLR**. Of the former the Court of Appeal observed that:-

**“Evidence of visual identification should always be approached with great care and with caution (see Waithaka Chege -Vs- Republic [1979] KLR 27. Greater care should be exercised where the conditions for a favourable identification are poor (Gikonyo Karuma & Another -Vs- Republic [1980] KLR 23. Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See Abdalla bin Wendo & Another -Vs- Republic, [1953] 20 EACA 166; Wamunga -Vs- Republic, [1989] KLR 42; and Maitanyi -Vs- Republic, 1986 KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him.”**

49. The evidence by **PW10** in my view indicates that the light from both the corridor security and rear security light shone adequate light into the cell to facilitate visibility. Moreover, the incident started with the throttling of the deceased and ending with his hanging and then the amputation of the hand. The witness was present throughout the entire transaction.

50. In **Choge -Vs- Republic**, the court emphasized that the trial court has a duty in considering evidence of identification by voice, to confirm that the witness was familiar with the Accused's voice and recognized it and that the conditions obtaining at the time were such that there was no mistake in testifying to that which was said and who said it. The witness in this case (**PW10**) was well familiar with the voices of his cellmates no doubt, and the circumstances of the material night indeed allowed for no mistake as to who spoke. Although the alleged *actual* words spoken by the 1<sup>st</sup> Accused person and stated by **PW10** in his statement to police slightly differed with the version stated in court, the substance thereof did not change. He told the court in his evidence-in-chief that he woke up in the night due to "loud snoring" to find the deceased on the floor being sat on and throttled by the Accused 1, 2, 4 and 5, . That on **PW10** questioning the action, 1<sup>st</sup> Accused replied: -

**"We have decided. This man has disturbed us (deceased)."**

51. Cross-examined regarding this portion of evidence, **PW10** responded that: -

**"Yes, I spoke asking why they were doing what I witnessed. Then Dismas said they had made a decision. Yes I said to police that they were frustrated that nobody had listened to them. They told me to keep quiet because.....to shut up or suffer. That is what I told the police. I did not use the words "we have determined". Yes my statement did not ascribe the words to Dismas."**

52. He was later to explain during cross-examination that though he did not know why the Accused persons were frustrated, he was aware of existing tension regarding allegations that the deceased was involved in spying for prison authorities. **PW10** may have earlier been reluctant, for valid reasons, to speak the entire truth in initial investigations, but thereafter gave an account of the events of the material night. At the time of giving his testimony, he had already been transferred to a different prison, evidently for his own safety. Reviewing the entire evidence of this witness, and the forthright manner in which he presented his evidence, I was convinced that overall, he was a credible witness and his testimony capable of belief. The next task therefore is to look for independent evidence tending to corroborate his account.

53. Several pieces of evidence give credible and independent corroboration to this testimony. Regarding the cause of death, corroboration is found in the evidence produced by **PW8**. Apart from signs of cyanosis indicating lack of oxygen, **PW8** noted a groove on the front and part of the neck but "not proceeding to back of neck", which would have suggested suicide. And that the disarticulation of the right arm was effected by cutting off ligaments, and happened after death, as indicated by lack of tissue reaction on area hence absence of bleeding.

54. Further, **PW8** found that internally, a delicate bone in the opening of the windpipe was fractured, and engorgement in lungs due to trachea pressure and bruising. He stated that death was due to pressure to the frontal area of the neck consistent with manual strangulation. This evidence was not disputed and tends to confirm the evidence by **PW10** as to the sounds akin to "**loud snoring**" which woke him up in the night and the guttural sounds he heard as the deceased was pinned down by the four men.

55. Regarding the disarticulated arm, **PW10** stated that blades were used for this purpose. Two blades (**Exhibit 4**) were following a search by police and prison officers recovered from the waste buckets in the cell on the morning of 4<sup>th</sup> July, 2011. These blades are captured in the photographs taken by **PW4** at the time and recovered by the police. **PW11** explained that the blades were not subjected to forensic analysis due to the fact that they were inside the cell waste when retrieved. The waste buckets were captured in the photo **Exhibit 6K**. The 1<sup>st</sup> Accused claimed he first saw the blades in this court, but I find it unlikely that **PW1**, **PW3**, **PW4**, **PW7**, and **PW11** and other officers could have fabricated the exhibits on the same morning they visited scene and recorded it by taking photographs. All these witnesses expressed their horror at the scene that they met that morning, and I doubt any of them had the presence of mind to introduce any evidence on the scene.

56. There was no dispute concerning the location of cell 86, which from the prosecution evidence was in a row among others and separated by a corridor with the opposite row of cells. The responsibility of the night guards **PW2**, **PW6** and **PW7** was to patrol the corridors on the night in question. They testified to have done so in turns, and to peeping into different cells whenever necessary through a peeping box in the door of each cell. The officers gave evidence of the patrols conducted in the night.

57. **PW6** who received the 1<sup>st</sup> Accused's report at 4.30am stated in his evidence-in-chief that the cell no. 86 measured about 12 x 9 feet with the shorter length being on the side with the door. Even though it was 4.30am, **PW6** could, from peeping through the box identify the 1<sup>st</sup> Accused and clearly see an object draped with a blanket as he received the report. He also noted the other seated cellmates and that none of them spoke. **PW2** and **PW7** also reported peeping and seeing the covered form or object hanging by the wall, covered by a blanket when they accompanied **PW6** to the cell door moments after **PW6** called them. **PW6** confirmed during cross-examination that the corridor between cells is lit by electric light which remained on during the night. He stated that:

**"The (cell) door has a square hole at eye level with metal grills. When you go close you can see inside the cell. Corridor is about 15 feet wide..... When you enter the cell, the window is to the far end, that is where body hang."**

During re-examination this witness stated that lights were on in the cell and the corridor and that the peeping box in the cell door was sufficient to enable conversation and visibility inside the cell.

58. From this evidence, it is believable that the cell lights may not have been on, there was illumination of the cells from the security light on the corridor to facilitate the night guards to keep an eye on the prisoners' activities in the cells during the night. Secondly, the location of the rear window to cell number 86 was such as to enable external security light to stream into the cell. The work of the night patrol team would have been impossible if there was not enough light on the corridor and in the cells to enable them look into the cells through the peeping box. Even the statements of the Accused persons admit to such a situation obtaining.

59. Similarly, there was no dispute that the cells and in particular cell **number 86** was locked during the material night. **PW2**, **PW6** and

**PW7** gave an account of their watches in the **D Block** during that night. Like **PW1** and **PW3** these witnesses gave consistent evidence regarding the fact that cells could only be opened with the authority of the officer in charge after lockdown. The defence in cross-examining **PW1** never put to him the assertion later made in their defence that he and other officers had on the material night entered the cell and removed the deceased. In particular, **PW6** in whose watch a report was admittedly received from the 1<sup>st</sup> Accused, denied that any intruder could have surreptitiously entered **cell 86** on the material night as suggested by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons.

60. Taking the evidence of the night guards in its totality, there seems to be no likelihood that any intruder or prison officer could have entered **D Block** and managed to open cell 86, removed an inmate and returned his corpse later to the cell without the three night guards taking notice. This is chiefly because the guards were themselves locked up in the block by the officer in-charge who took with him the main door key and individual cell keys at the start of night duty

61. Besides each of the night watches that night involved patrolling the corridors of **Block D** by the officer on duty during the watch, while the two colleagues rested in the guard room inside the Block. The 1<sup>st</sup> Accused claimed that **PW1** and other prisons officers removed the deceased for the cell at 11.00pm on the material night. This specific allegation was not put to **PW1** during his evidence or any of the night guards **PW2**, **PW6** and **PW7**.

62. It appears most unlikely that a team of different officers than those on duty could have made their way into the Block and removed a prisoner, returning him as a corpse carried on a blanket at 2.00am without the commotion being noticed by **PW2**, **PW6** and **PW7**. **PW2** whose patrol duty started after 6.00pm and ended at 11.30pm said nothing untoward occurred during his watch. Ditto for **PW7** who took over at 11.30pm and finishing at 3.00am. Despite his statement that **PW1** also came to check on him, as required of the officer in-charge, at 11.30pm the defence did not put to the witness the allegation that **PW1** or other officers entered cell 86 on the material night removing deceased.

63. **PW6's** watch started at 3.00am and was to end at 5.00am. He stated that the duty officer **PW1** came on routine inspection, which he did for each watch, at 4.30am and that it was when he resumed patrols that **PW6** was called upto the 2<sup>nd</sup> floor by the 1<sup>st</sup> Accused. If indeed some prison officers including **PW1** actually entered cell 86 at 11.30pm and at 2.00am, **PW6** ought to have seen them, being the one on duty at that time. He stated in cross-examination that during his watch he passed by cell 86 while patrolling the cell corridors but had no reason to draw close. He said he had no incident during the watch. He stated that after lock down no intruder or prison officer could enter cell 86 because the main door and cell door remained locked. That he was alert during his watch and heard no commotion. He was categorical that the keys to the main block door and cells were kept in a safe in a separate office by the duty officer and nobody could have accessed the cell on 2<sup>nd</sup> floor without him noticing.

64. **PW1** confirmed in his evidence that as the duty officer on the material night, he kept the keys in his office and on receiving the report, took the keys and proceeded to the cells in the company of other officers, and opened the cell. The day duty officer **PW3** who was just reporting on day duty at 5.45am on 4<sup>th</sup> July, 2011 was one of the accompanying officers. He too confirmed that in the night the cells are sealed and could only be opened with authority, and that on the material morning **PW1** opened the seal. If indeed the night officers had reason to manipulate the truth in their evidence perhaps because the event occurring during their shift, **PW3** had no such reason. He confirmed the security arrangements involving the securing of cells using two keys at night, and ruled out the possibility of anyone secretly opening the cell in the night. . Moreover, the defence did not suggest to **PW1**, **PW2**, **PW3**, **PW6** and **PW7** any conspiracy between them to allow or participate in the events described by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused. For my part, observing these witnesses testify, they presented themselves as straightforward and candid witnesses who were in obvious horror of the events they described.

65. To my mind the sum evidence of the prisons officers regarding the security arrangements in place and events of the night in question and early next day, constitute formidable circumstantial corroboration of the testimony of **PW10** that, first, the killers of the deceased were his cell mates and secondly, that the murder occurred in the cell number 86 and thirdly, that it was witnessed by **PW10**. It is also significant that during cross-examination of such a key witness, the defence never suggested to **PW10** that the deceased prisoner was removed from the cell and later brought back dead by prisons officers. Or that the officers threatened the cellmates in the night directing them that they should report a suicide on the next day. Again this latter assertion was not put to **PW1** alleged by the 1<sup>st</sup> Accused to be one of the night 'intruders' , or to any other officer on duty on the material night.

66. And if indeed such an instruction was made as the 1<sup>st</sup> Accused asserts, it was not directed to any one person in the cell, raising the question of his taking up the role of calling up **PW6** at 5.00am to inform him about the alleged suicide of the deceased. According to **PW10**, when **PW6** came to the cell door the 1<sup>st</sup> Accused told him:

**“Afande, mtu amekufa hapa. Amejikata mkono na kujinyonga.”**

(Translation :

**“Officer one of cellmates has cut off his arm and hanged himself.”)**

67. **PW6** stated that after **PW1** had checked on him at 4.30am he proceeded with patrols on 1<sup>st</sup> floor. He stated:

**“When I was there I heard someone call from 2<sup>nd</sup> floor.” “afande” I followed voice to door of cell number 96 (should be 86). Door has grills I saw the prisoner. His name is Dismas Ouma (Accused 1 identified). He told me a prisoner had committed suicide. We stood at grill door - door separating us.....I asked where the victim was. He pointed at an object behind him covered with blanket.....when I persisted to know more he told me to call my supervisor.”**

68. The 1<sup>st</sup> Accused by his and co-accused's defence admits to making this statement and that this statement was in fact, a lie. Why, out of

the six remaining inmates of cell 86, would the 1<sup>st</sup> Accused feel obligated to 'repeat' this lie on the morning of 4<sup>th</sup> July, 2011? He was not any more at risk of the wrath of the purported murderers than any of his cellmates. Besides, the 1<sup>st</sup> Accused did not appear to this court as a timid person; the record of his various interjections since being arraigned in court bears out the evidence by **PW6** that in the prison the 1<sup>st</sup> Accused did not ordinarily shy away from making demands. And the record of this case clearly shows him as an assertive and almost brazen person. In my estimation, he is evidently not the kind of person to meekly obey instructions without question. More so when such instructions involved covering up a crime on behalf of prison officers such as **PW1**, in respect of whom the 1<sup>st</sup> Accused person displayed undisguised distaste and animus.

69. The evidence by **PW10** contains other utterances and actions by the 1<sup>st</sup> Accused which reveal the motives of the statement by the 1<sup>st</sup> Accused to **PW6**. According to **PW10** there were tensions concerning allegations that the deceased was involved in spying for prison authorities. That when **PW10** questioned the actions of the Accused persons who had pinned down the deceased during the material incident, the 1<sup>st</sup> Accused uttered words to the effect that they had had enough trouble with the deceased, therefore made a decision and he warned **PW10** to "shut up" or risk similar treatment. These words resonate with the words contained in the two pieces of writing on manila paper **Exhibit 2** and **3** which appear to reveal not only the motive for the murder of the deceased, but also confirm that indeed the death was the culmination of a determination and execution thereof by the named killers.

70. As expected, this piece of evidence was the most controversial during the trial. All the witnesses who visited the cell on the morning of 4<sup>th</sup> July, 2011, namely, **PW1**, **PW2**, **PW3**, **PW6** and **PW7** maintained in their evidence that they saw the writings **Exhibit 2** and **3** on the blanket draped over the deceased or alternatively, hanging on the neck of the deceased, even though they admitted in cross-examination that none of them had recorded that finding in their respective statements. **PW1** in cross-examination said the writings were placed on top of the blanket draped over the body of the deceased and denying fabricating the evidence said that the officer recording the statement did not refer him to that matter. **PW2** said the writings **Exhibit 2** and **3** were fixed under the blanket draped over the body, stating during cross-examination that he saw the writings and read them after the blanket was pulled off the body.

71. **PW3** as I said was the day duty officer who came to work in the morning of 5<sup>th</sup> July, 2011 to find the evolving events, and was sent to call police to the scene. He did not refer to any writings in his evidence-in-chief. However when questioned on this aspect, he stated:

**"On going into the cell I saw body covered with blanket on top of the blanket, not sure where exactly, there was a piece of carton with writings. I do not recall exact wording about "mende" and the writings hang on neck of deceased if my memory serves me right.....cannot recall how many they were..... I did read but I do not recall words in full. It spoke of 'mende' and informers. Mende refers to those involved in sodomy.....those who were traitors."**

The witness proceeded to identify the writings **Exhibit 2** stating that he could not recall if writings were "tied" on the neck of the deceased. That he did not refer to this evidence in his statement to police as he was not directed to it or consider it necessary to mention it. He confessed during re-examination that he was mixed up about when he saw the writings but confirmed it was in the cell number 86.

72. As I said earlier, if there was a prison officer with nothing to hide, it was **PW3**. He had no reason, having been away from **D block** in the material night. His answers appeared truthful and sincere, admitting as he did where he had doubt. There is no doubt that when **PW6** first received the information from the 1<sup>st</sup> Accused about the alleged suicide, he saw the form shrouded under a blanket and hoisted up by the window of cell 86.

73. There is uncontroverted evidence that though the initial officers entered the cell in the presence of senior prisons officials before police came, upon confirming the report, they locked up immediately leaving the deceased's body *in situ* by the window under the blanket cover. **PW6** said that the initial stage he stood by the door when the cell was opened, and that equally, when police arrived, **PW6** did not enter the cell but stood at the door. He was truthful to state during cross-examination that he was traumatized by the sight in the cell and that from his position, he could see an object on top of or under the blanket which resembled a piece of carton paper, clarifying during cross-examination that the object was on neck of the deceased and close to the chest.

74. **PW7** stated in his evidence-in-chief that when the blanket cover was removed from the body he saw some piece of paper on the body, yellowish in colour and hanging on the neck of the deceased. He identified **Exhibit 2** as the said piece of paper. The witness reiterated this evidence during cross-examination stating:-

**"I saw one piece of paper on neck of victim. I had never seen anything so horrifying so I did not even have the presence of mind to repeat this to police. Piece of writing (paper) on the neck under the blanket."**

75. The substance of the evidence of the foregoing witnesses is consistent and the fact that they did not include the existence of the writings in their police statements does not mean the evidence was fabricated. On the whole all these officers acquitted themselves well during cross-examination and came across as truthful.

76. **PW4** was the scene visiting officer who took all the photographs of the body starting from the stage when the body was covered and later uncovered. The officer's role was to record the scene by taking photographs which he did, not only of the victim but of the persons in the cell. The fact that he said he did not see any writings on the body appears to be contradicted by the photograph of the deceased's body **Exhibit 6d**. On scrutiny, the court noted that this photograph shows what appears to be a piece of paper hanging from the neck of the victim. It is a fact that scene officers routinely visit many scenes. **PW4** visited the scene some seven years prior to the trial. His memory was probably hazy. Little wonder then that in this case, despite his own photographs capturing seven inmates **PW4** stated in his evidence that there were 4 inmates in cell number 86. In my view, a similar mistake led to the assertion by the officer, despite his photograph **Exhibit 6d** showing otherwise, that he did not notice a piece of paper on the victim's body.

77. Any doubts regarding the writings is removed by the testimony of the investigating officer, **PW11** whose role, it was to collect material

evidence at the scene.

78. According to **PW11**, a piece of paper hang on neck of the deceased by a nylon thread. He identified the said writing as **Exhibit 3**. He admitted that certain aspects of the case had become blurred with the passage of time since 2011. Shown the first photograph of the body he confessed that contrary to his earlier oral statement, the body's head was covered with the blanket and that no writings were visible in that particular photograph, as both writings were under the blanket. He said that though **PW4** took photographs of the scene, he was the one responsible for what exhibits to take from the scene. He identified the writings on **Exhibit 6d** which were visible upon the body being uncovered.

79. In re-examination **PW11** said that while **Exhibit 3** hang on neck of deceased, **Exhibit 2** fell off from body as the blanket was removed. Reviewing the evidence of all these witnesses it does seem plausible that the writings before court were found on the deceased body, one of them at least hanging on his neck. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused in their defences did not make any reference to this finding.

80. For his part, the 5<sup>th</sup> Accused dismissed the evidence as false and stating that the writings were not his. **PW11** has testified that he took the specimen writings of all the inmates, marking them accordingly. Specimen sets from the 5<sup>th</sup> Accused were marked to **F1 to I2 (Exhibit 9f)**. Those specimens together with the recovered writings **Exhibit 2** and **3** were examined by an independent document examiner and his report admitted with the consent of the defence as envisaged by Sections 50 and 77 of the Evidence Act, through **CIP George Chania** a colleague of the examiner who worked with and was familiar with the handwriting of the examiner **Jacob Oduor**. He explained that Oduor left his employment with the CID in 2015. The examiner's report (**Exhibit 11**) shows that the examiner examined and compared **Exhibit 2** and **3** with all the specimens collected from the cell inmates including **PW10** and narrowed in on the specimen by the 5<sup>th</sup> Accused.

81. The report documents the methodology employed in the examination and the peculiar similarities in features found in the specimens of the 5<sup>th</sup> Accused on letters P, N, K, A, G, M, D, W, E, d, a, B and r with regard to: character initialization, terminal strokes, character instructions, pen lifts, pen pressure and ink flow, character spacing and alignment, as well as writing quality and general resemblance. Under cross-examination the witness confirmed that no known writings of the Accused were forwarded but clarified that although such writings are normally examined alongside questioned and specimen writings, the latter two were adequate, pointing to the fact that several sets of specimen writings were submitted for the purpose of examination.. The document examiner being an independent expert has no axe to grind in the matter and would have no reason to pick on the 5<sup>th</sup> Accused for blame. The 5<sup>th</sup> Accused's denials cannot stand therefore.

82. The evidence by the document examiner lends support the testimony of **PW10** as to the 5<sup>th</sup> Accused's role in the murder of the deceased. Looking at the wording in **Exhibit 2** and **3** the author was communicating a warning to informers and the others involved in sodomy that they would not be tolerated in the prison and that was evidently the lesson of the killing. That is the gist of both **Exhibit 2** and **3**. I have examined the smaller piece of paper **Exhibit 3** - it has a small hole at the corner which goes to strengthen evidence that it was a piece reflected in the photo **Exhibit 6d** hanging on the body of the deceased. Out of these exhibits the motive of the murder is clear and is consistent with utterances by the 1<sup>st</sup> Accused to **PW10** that a decision had been made. The messages are consistent with the gory nature of the murder and dismembering and hanging of the victim's body.

83. If indeed the intention was to pass on a chilling message to the prison fraternity, these writings and the gory murder spoke volumes. There is medical evidence that the arm of the deceased was disarticulated at the elbow after death hence the absence of blood in the cell. This gory image also resonates with the writings and the motives of those concerned. One must ask what motive prison officers would have had, and how reckless they would have to be, whether with or without any disguise or covering to hide their identity, to remove a prisoner from a cell in the full glare of fellow prisoners, murder him by strangulation, remove his arm and return body and arm to the same cell under the watchful eyes of cellmates and to order the inmates to hang him up by a window.

84. The very proposition is remarkable and defies belief. If as it appears the officer's intentions was to communicate that the deceased had strangled himself would they be so foolhardy as to dismember his body too? Thus the 1<sup>st</sup> Accused's assertion that the instruction given was to 'report' a suicide makes no sense. Under Section 111 of the Evidence Act, and based on the evidence by **PW1** to **PW8**, all the inmates in cell number 86 must be deemed to have special knowledge of the events in their cell on the fateful night. The Kafkaesque version of events by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused has the ring of extreme horror fiction. The macabre killing to my mind is more consistent with the common intention by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused to rid themselves of the deceased viewed by them as an informer, and to cause fear among those suspected to engage in spying for the prison authorities. It supports evidence by **PW10** that having throttled the deceased to death, they jointly hang him by the window and disarticulated his arm, throwing it in a bucket.

85. The defence by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused person is not believable in the circumstances. It sounds contrived and false. The defences are totally displaced by the prosecution evidence before me. I find the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons guilty as charged and will convict them.

86. Regarding the 3<sup>rd</sup> Accused however, the only evidence against him is circumstantial based on his presence in the cell on the material night. He was exonerated from any wrong doing by **PW10** in the commission of the act that led to the death of the deceased. There is no direct evidence of his participation in the murder or sharing of a common intention with the rest of the Accused persons. In his defence, he adopted the version of events described by **PW10**. There may have been some suspicion against him based on his claim to police earlier that he only woke up to find the deceased hanging on the window, but the evidence supporting such suspicions allows for more than reasonable doubt as to his involvement. In the circumstances I find that the case against him has not been proved and will acquit him under Section 322(1) of the Criminal Procedure Code.

Dated and signed at Kiambu, this 27<sup>th</sup> day of **February, 2019**.

**C. MEOLI**

**JUDGE**

Delivered and signed at Naivasha, this **1<sup>st</sup>** day of **April, 2019**.

**R. MWONGO**

**JUDGE**

In the presence of:-

Mr. Koima for the State -

Mr. G. N. Kimani for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Accused persons

Accuseds - 1<sup>st</sup> Accused Dismas Auma Omusugu -present

2<sup>nd</sup> Accused Daniel Njoroge Mbugua - present

3<sup>rd</sup> Accused Dennis Mutabari - present

4<sup>th</sup> Accused Fredrick Macharia Ndung'u - present

5<sup>th</sup> Accused Francis Matu Mwangi - present

Court Assistant - Quinter Ogutu