



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Criminal Appeal 259, 255-257, 261 & 275 of 2008

BETWEEN

SGT. JACOB MUTHEE & 8 OTHERS.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya

at Nairobi (Ombija, J.) dated 18th December, 2008

in

H.C.CR.C. NO. 49 OF 2002)

JUDGMENT OF THE COURT

The history of the entire saga giving rise to this appeal is, to say the least sad. Sad because, what was a straight forward felony which could have been handled and finalized much earlier in the year 2001, became protracted and was never finalised till now, well over twelve (12) years. All this is apparently because the Senior Prison Officers who reported to the scene of the incident immediately the six prison inmates lost their precious lives on the night of 3rd and 4th September, 2000, preferred to protect either themselves or their prison warders or the name of the prison. Whichever they preferred, the result was a protracted inquest in which over 50 witnesses gave evidence, a protracted police investigation thereafter by a Police Investigating team led by the then Acting Commissioner of Police **P.M. Mwangi** which

finalised its report on 2nd April, 2002. We find it necessary to say that apparently these actions were taken only after complaints were raised by the Civil Society and the Standing Committee on Human Rights on the incident and the poor investigations earlier on carried out by the police and were it not for those complaints, perhaps none would have known beyond the prison precincts what had taken place on that night. That was only known to an extent after the inquest. To a large extent, we think the learned Judge had good reasons to support his finding that there was massive cover-up of the events of that night and who could have been responsible for that if not prison authorities all of whom apparently saw none attacking the inmates despite massive medical evidence by all the three doctors who carried out postmortem examinations at various times and dates and were all certain that certain injuries could not be explained in terms of the allegations set out by the prison authorities.

Be that as it may, all the appellants in this appeal namely **Sgt. Jacob Muthee Mathiu, Warder Joseph Lenana Rukwaro alias Wakanyungu, Warder Ceasar Mwangi Njoka, Sgt. Samuel Kamau Ngugi, Sgt. James Mugo Karanja, Warder John Kariuki Njuguna alias Chizi, C.O. James Sise Boit, Warder Noor Mohammed Kumo and Warder Joshua Onyango Nyakundi alias Mwalimu**, the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth appellants respectively were each working as prison officers at Nyeri Prison also known as King'ong'o, and were each charged with six counts of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars cited in all the counts were the same except the names of the deceased. Each offence was alleged in each particular to have taken place at Nyeri Prison, otherwise known as "King'ong'o" in Nyeri District within Central Province. It was alleged in each count that they jointly murdered each of the six deceased. The deceased were **Peter Loyarar Lumukunyu, James Irungu Ndungo alias Joseph Kamande Mwangi, John Njoro Njuguna, Julius Mungania M'Muraa, Peter Ngurushane, Emashe alias Kingori and Peter Koring**, victims in first, second, third, fourth, fifth and sixth counts respectively. The said deceased were all inmates at Nyeri Prison (King'ong'o) and were all together with three others confined to cell No. 4, Block E of that prison. The other three were one **Bernard** who was left in the cell under circumstances in dispute at the trial, **Ipomai** who escaped completely. **Bernard Kimathi M'Mwirichia** (PW1) who left the cell 4 Block E but alleged to have run away when he saw his life in danger under the circumstances that were also in dispute at the trial.

Each of the appellants pleaded not guilty. There were some submissions before us that the appellants were not arraigned on the first count in respect of which they were sentenced to death after being found guilty and convicted. We however note that the record shows that the appellants pleaded to count 2 twice so that in the end the pleas were taken in respect of count 2 twice and that was clearly a mistake on the face of the record. We also note that the appellants' pleas were taken in the presence of Mr. Wandugi, the learned counsel who represented eight of them in the High Court throughout and never raised any anomaly. Further, that offending plea was taken on 8th October, 2003 and the hearing continued for over a year without the appellants claiming that they knew nothing about that charge. We do not in the circumstances of this case attach any importance to that apparent mistake on the face of the record. After full hearing which went on up to 18th December, 2008, all the appellants were, in a rare lengthy judgment covering 166 typed pages, found guilty, convicted and sentenced to death. The sentence was incorporated in the judgment and no mitigation was made before sentence nor was any opportunity afforded the appellants to address the court in mitigation before the sentence was passed. We shall revisit that later in this judgment. In convicting the appellants, the learned Judge of the High Court (Ombija, J) had this to say *inter alia*:

"I find and hold that the inmates were bulgeoned (sic) to death by the prison officers, warders, members of the warders' families and their visitors who responded to the siren/alarm. Even if they were escaping from lawful custody the force used was excessive in the circumstances. It cannot avail the accused the defence to the charge of murder....."

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

These findings were made after the assessors who aided the learned Judge at the trial, for the trial was conducted with aid of assessors, had all returned a verdict of not guilty in respect of each appellant.

Each appellant was dissatisfied with the conviction and sentence. Each appealed to this Court. Each appellant filed home-made grounds of appeal which were all filed on 24th December, 2009, after each had filed a Notice of Appeal on 9th December, 2008. Later some appellants acquired the services of various advocates and several supplementary grounds of appeal were filed. Specifically, the first appellant **Jacob Muthee Mathiu** filed, according to the record before us, three supplementary memoranda of appeal. These were filed on 12th March, 2010, 17th March, 2010 and on 9th April, 2010. The second appellant **Joseph Lenana Rukwaro** filed one supplementary memorandum of appeal. The third appellant **Cesar Njoka** filed one supplementary memorandum of appeal. The fourth appellant **Sgt. Samuel Kamau Ngugi** filed one lengthy supplementary memorandum of appeal covering thirty seven (37) grounds of appeal, the fifth and sixth appellants did not file any supplementary memoranda of appeal and seventh appellant, **C.O. James Kipkemboi Boit Sise**, filed two supplementary memoranda of appeal while the eighth appellant, **Mohammed Kumo** filed one supplementary memorandum of appeal whereas the last appellant **Joshua Onyango Nyakundi** filed one supplementary memorandum of appeal.

As the file is extremely voluminous, we may not have cited all the memoranda and supplementary memoranda of appeal that were filed in the record but we are certain that all have been duly perused and anxiously considered by us. Equally it would not be realistic to cite each of the grounds contained in all those memoranda as they were many memoranda and supplementary each raising several grounds of appeal. However, most of the grounds raised by the appellants were in essence similar. A summary of those grounds covering all of them will suffice. They were that the learned Judge of the High Court erred in basing the conviction of the appellants on the evidence of **Bernard Kimathi Mwirichia (PW1)** hereinafter referred to as **Mwirichia** while the same evidence was not reliable and was contradicted by some other prosecution evidence on record; that the learned Judge erred in convicting them whereas there was no evidence of their actual participation in the crime – in short no *actus reus* was proved; that the learned Judge erred in law and in fact in rejecting the assessors opinion without advancing any good reasons for doing so; that the learned Judge erred in law in failing to appreciate that the evidence adduced against the appellants was all circumstantial evidence which was not proved within the standards required in law; that the learned Judge failed to appreciate that the prosecution case was riddled with unresolved contradictions which rendered the entire evidence that was adduced by the prosecution unreliable and incapable of sustaining conviction; that the learned trial Judge failed to give any weight to the fact that no expert witness was called to show that the metal grill allegedly cut to facilitate escape by the inmates was not cut by a hacksaw blade; that the medical evidence adduced at the trial was contradictory and should not have been relied upon to convict the appellants; that the learned Judge erred in law and in fact in dismissing the escape theory as it was demonstrated that the deceased fell in the course of their attempts to escape from the prison; that the charge was defective; that no evidence was led to establish malice aforethought as well as motive; that the learned Judge erred in basing the convictions upon the evidence of **Ng'ang'a (PW2)**, **Fredrick Kamotho (PW3)**, **Waigwa (PW7)** and **William Mjumbe (PW5)** to the effect that they saw the appellants in the kitchen; that theory of escape should have been accepted as the demonstration showed that an inmate did pass through the alleged gap of the grill; that the sleeping-in officers journal which was necessary to show what happened that fateful night was not produced; that the learned Judge erred in failing to consider and to give any weight to the evidence of the gatekeeper who denied allowing any armed prison officers into the prison; that the learned Judge formed an unbalanced view of the evidence and hence came to a wrong conclusion and that the defence of each appellant as well as the evidence of the defence witnesses were not considered appropriately.

These were on the main, the grounds of appeal that cut across the entire board as regards the home-made grounds of appeal. As we have stated, there were several supplementary memoranda of appeal. These raised to an extent similar grounds in effect as the home-made grounds only that they were properly tailored in legal terminology. We will endeavour here to set out those grounds that we feel were new to the grounds in the home-made memoranda and again we set them out in a summary form. They were that the learned Judge's judgment leading to conviction of the appellants was on the main founded on conjectures and assumptions which were themselves not founded in law; that the learned Judge proceeded in his judgment on wrong hypothesis by assuming that there were two opposing theories namely one from

the defence and the other from the prosecution and having done so the learned Judge arrived at a wrong conclusion to the prejudice of the appellants; that the learned Judge failed to ascertain the language that the appellants preferred and despite protestations which were unrecorded, the trial proceeded in a language that was not of the appellants choice; that the appellants were not accorded fair trial as some of the matters they raised were not recorded; that the judgment is faulty as the appellants were convicted of only one count but the court purported to suspend sentence in respect of the other counts in respect of which they were not convicted; that the learned Judge erred in law and in fact in finding that PW16 saw the fourth appellant at the scene whereas that was not so; that the learned Judge misinterpreted the evidence of PW19 who never said he saw any appellant in full uniform; that the trial court erred in relying solely on the evidence of Mwirichia to convict the appellants without warning himself of the grave dangers of doing so whereas the antecedents of Mwirichia demonstrated that he could not be a reliable and credible witness; that the trial court erred in disregarding the evidence of the majority of the doctors who testified before him preferring the evidence of a single doctor; that the court failed to consider the evidence of PW36 which was important as it indicated the character of Mwirichia, the main prosecution witness; that the learned Judge failed to consider that the only person who remained in the subject cell confirmed the escape theory in his statement to PW36; that he erred in failing to consider all the evidence showing that the inmates (deceased) escaped from lawful custody; that he erred in finding that the appellants and others were responsible for the non-availability of important documents such as the sleeping in officers journal; that the learned Judge misconstrued the word “*discharged*” appearing on the gate register and erred in refusing to accept evidence on the same gate register; that the learned Judge failed to give full consideration to the proceedings in **Nyeri Chief Magistrate’s Court Criminal Case No. 3630 of 2001** and erred in relying only on the mere fact that Mwirichia was acquitted by the court while other evidence in the same proceedings showed he was unreliable; that prosecution failed to call crucial witnesses and the Judge failed to consider that aspect; that the court on one occasion sat up to past midnight till the appellants could no longer follow the proceedings but failed to record the same; that the ingredients of the offence of murder under **Section 203** as read with **Section 204** of the Penal Code were not proved and the learned Judge failed to appreciate that; that the provisions of **Section 169 (1) and (2)** of the Criminal Procedure Code were not complied with; that the learned Judge pronounced sentences on the appellants without any conviction being entered against them; that the learned trial Judge erred in convicting the appellants without considering the case advanced by each appellant as regards the death of each deceased; that the learned Judge made the contradicting findings as to the acts of the appellants resulting into the death of the six victims; that the learned Judge erred in overlooking evidence of **Dr. James Njue** and **Dr. Kirasi Olumbe** as to the cause of death and he erred in preferring the medical evidence of **Dr. Zambezi Mutuma** to that of the other two doctors on the cause of death of all the deceased; that the learned Judge failed to exercise caution when accepting the evidence of **Dr. Mutuma** while the circumstances made it necessary to do so; that material witnesses were not called to the prejudice of the appellants particularly one **Kionga Esokon**, the inmate who allegedly did not accompany the other inmates when leaving the cell; that some material exhibits linking the appellants to the alleged murder of the deceased such as bloodied clothes and/or linen were not produced to prove the allegations of murder; that the learned Judge erred in law in convicting the appellants without first establishing that all the appellants formed common intention to murder and did murder the deceased persons; that the learned Judge failed to consider whether if the deceased were escaping, proportional force was used in the circumstances of the case; that the learned Judge erred in law in convicting the appellants on count 1 while no plea had been taken on that count; that the learned Judge erred in law in convicting the appellants on the basis that each appellant was part of the mob that killed the six inmates whereas there was no actual evidence adduced before him on the theory of mob justice and the participation of each appellant in that mob justice resulting in the death of the inmates; that the learned Judge erred in law in applying the provisions of **Section 111 (1)** of the **Evidence Act Cap 80** which was not applicable in the case; that the learned Judge erred in law and in fact in holding that there was cover up by the appellants whereas there was no evidence in support of that proposition; that the learned Judge was biased in his evaluation and analysis of the evidence before him as he admitted that throughout the proceedings he formed an opinion that the prison authorities were economical with the truth and thus he disbelieved them; that the learned Judge proceeded with the trial on 26th May, 2004 without any record as to whether the assessors were present or not; that the learned Judge erred in his interpretation of the doctrine of common intention to the assessors and in finding that one appellant’s action was taken by all appellants having common intention; that the learned Judge failed to record the demeanour of prosecution witnesses

while recording the demeanour of the defence witnesses; that the learned Judge erred in failing to find that suspicion, however strong could not be the basis of a conviction; that the learned Judge introduced extraneous matters in his judgment to the prejudice of the appellants; that the entire prosecution of the appellants was oppressive and an abuse of the criminal justice system and the appellants right to a fair trial pursuant to **Section 77** of the Constitution, was violated; that he failed to appreciate that the trial of the appellants on more than one count of murder was undesirable; that he erred in law in suspending the sentences on counts 2, 3, 4, 5 and 6; that the learned Judge erred in law in shifting the burden of proof to the appellants; that he erred in relying on the hearsay evidence to convict the appellants; that the learned Judge failed to consider relevant materials before him such as inquest proceedings, related civil proceedings and interlinked criminal proceedings, and as a result made a wrong decision of the matters that were before him; and lastly in respect of each appellant that the learned Judge failed to consider appropriately their defences some of which raised the defences of *alibi* and also that the learned Judge did not consider the evidence adduced by the defence witness.

In support of the several grounds, the various learned counsel for each appellant filed written submissions. This was after the court had adopted that procedure with the consent of each learned counsel representing each appellant. Those counsel were Mrs. Naeku for the first appellant, Mr. Ogesa for the second and third appellant, Mr. Wandugi for the fourth appellant; Mr. Kibe Mungai for the fifth appellant, Mr. Sane for the sixth appellant, Mr. Katwa Kigen for the seventh appellant, Mrs. Betty Rashid for the eighth appellant and Mr. Nyachoti for the ninth appellant. Each of the learned counsel for the appellants further addressed us in highlighting the same written submissions. Again we would not pretend to set out every matter raised in those written and oral submissions for the mere fact that the volume of the submissions both oral and written make it practically impossible to do so. In a summary, the first appellant's submissions were that there was no *nexus* between the injuries suffered by each deceased and the first appellant and that there was no proof that the first appellant intended to cause death to any of the deceased. In short, according to the first appellant's learned counsel, Mr. Naeku malice aforethought and *actus reus* were not proved by the prosecution. In his view, the learned Judge failed to pin-point who killed who on that fateful night as he stated that members of the public, their warders, their families all killed the deceased without specifying who actually did what in perpetrating the offence and under what circumstances. That question was never answered by prosecution witnesses and it remains; that malice aforethought was not proved in the entire case as the evidence adduced by the prosecution negated malice aforethought and thus the case against the first appellant was not proved within the standards required in law.

He further submitted that as the court placed the burden of proof on to the first appellant, the duty of the prosecution to prove guilt of the appellant was waived and that was not proper in law. Further, appellant stated that the standard of proof required to establish common intention was not reached in this case as there was no evidence adduced to show that the appellants pre-arranged the assault on any of the deceased; that none of the weapons allegedly used in the commission of the alleged offence was produced as is required by law, and that the trial court shifted the burden of proof on to the first appellant to prove his whereabouts and the contents of the sleeping-in officers journal. This, according to Mr. Naeku, was not proper in law and resulted into injustice to the first appellant. In his view the application of the provisions of **Section 111 (a)** of the **Evidence Act** was misplaced in this matter but **Section 111 (2)** could have been appropriate. In any case, he submitted, the first appellant offered a reasonable explanation to his defence on record on the whereabouts of the sleeping-in-officers journal. Referring to evidence of **Shamalla** (PW36), Mr. Naeku submitted that the escape theory was founded and there was proof of it as he saw the cut grill as well as a string of make shift blanket which was hanging on the perimeter wall and what Esokon Kionga, the only prisoner left in cell 4 told Shamalla, together with Shamalla's evidence that Mwirichia had confessed to him of having scaled the wall. Further, he submitted, the evidence adduced was not sufficient and could not attract conviction. A number of witnesses were not called to give evidence whereas their evidence was material. The court therefore should have made an inference from the evidence not adduced that such evidence would have been against the prosecution.

On the cause of the deaths, the first appellant's take through his learned counsel was that in the absence of any convincing evidence that Dr. Kirasi Olumbe and Dr. Moses Njue had deliberately given a wrong report, the trial court erred in disregarding their evidence in preference to that of Dr. Mutuma. In any

case, he submitted, the past character and conduct of Mwirichia indicated that he was not a witness upon whose evidence, a conviction could ensue and he gave a lengthy list of parts of Mwirichia's evidence that were questionable and were doubtful to indicate that Mwirichia's evidence could not be reliable and credible. He also submitted that the learned Judge erred in preferring evidence of some witnesses who were all police officers to the evidence of prison officers but without assigning any reasons for doing so, and without any analysis of the two sets of evidence. However, according to Mr. Naeku, even the evidence of the preferred witnesses showed that the escape theory was founded; thus, the learned Judge did not analyse evidence before him and give it due weight. Further, he said, there was no evidence that the appellant was armed as in any case no weapon of any description was exhibited. He cited four prosecution witnesses namely PW6, PW7, PW3 and PW14 who, he alleged, saw the deceased escaping and urged us to accept that the deceased attempted to escape and died in the course of that attempt. He stated further that the learned Judge misdirected the assessors in several aspects, but we feel that as all the assessors returned opinions of not guilty, that aspect is neither here nor there as we cannot find that the assessors acting in such alleged misdirection, arrived at decisions prejudicial to the appellant.

Lastly Mr. Naeku submitted that as the judgment delivered on 18th December, 2008 was a draft judgment, it could not in law be treated as a judgment particularly as in any case, the learned Judge did not comply with the requirements of **Section 169 (1)** of the Criminal Procedure Code in that he gave no reasons for the conviction of the appellants and never specified the counts in respect of which the appellants were each found guilty. The learned Judge passed the sentences upon the appellants without receiving, recording and acting on mitigating facts. This was not proper in law. He urged us to allow the appeal by the first appellant.

Mr. Ogesa, the learned counsel for the second and third appellants Warder Joseph Lenana Rukwaro and Warder Ceasar Mwangi Njoka, respectively as we have stated filed written submissions which he highlighted in his oral submissions before us in court. All in all, his submissions were that as the grounds raised by the two appellants in challenging their conviction and sentence were similar, the arguments in support of the same grounds would also be to an extent similar, and these were that malice aforethought or intention was not proved as against the two appellants; that the two were, on that fateful night warders in Block E where the condemned criminals were held but there was evidence that warders on duty were locked in the blocks and could only come out when the gates were opened from outside and they could not access the cells as they had no keys to the cells. In the circumstances, Mr. Ogesa submitted the two could not move out of Block E. The evidence of PW23, and PW24 supported that assertion, he said. The deceased died outside the prison wall. Considering the evidence of PW31 on the movement of the keys in the prison, there was no proof that the appellants had taken part in killing the deceased and further no evidence was adduced to demonstrate that they had any malice aforethought. There was no evidence, Mr. Ogesa submitted, that the appellants were at the scene of the alleged murder and the learned Judge erred in finding so. He further stated, the escape theory was not challenged and was confirmed by evidence of many prosecution witnesses. As the facts inculcating and convicting the two appellants were not incompatible with their guilt, they should have been found not guilty as the case depended almost wholly on circumstantial evidence. He submitted further that as the court had formed two opinions namely that for the prison authorities and that for the prosecution, it meant there was already a doubt on the entire case. That doubt should have been resolved in favour of the two appellants.

Lastly Mr. Ogesa submitted that the trial court in its judgment failed to comply with the provisions of **Section 169 (1)** of the Criminal Procedure Code as he failed to give reasons for his decision and also erred in failing to pass the sentence on each appellant but rather passed a general sentence.

The submissions in respect of the fourth appellant were made by his learned counsel Mr. Wandugi, who had represented eight of the appellants in the High Court. He also, like all others, put in written submission which he later highlighted orally before us. He submitted that the entire prosecution case was full of contradictions and the evidence against the fourth appellant was scanty and wholly discredited, as the conviction of the

appellant was based on the evidence of a single witness namely Mwirichia whose evidence was so discredited that the court should not have relied upon it to convict, but the court failed to apply the proper

principles as regards the standards to be applied in such a case and hence a wrong decision. Further, he contended that the learned Judge did not warn himself on the dangers of convicting on the evidence of a single witness. Mr. Wandugi submitted further that the learned Judge erred in splitting the prosecution case into two categories terming one version of the prosecution's case the prison authorities version and the other version is the one he considered as prosecution's case whereas all the prosecution witnesses were called by the prosecution and should have all been treated as witnesses for the prosecution notwithstanding their places of work. Had he done so, Mr. Wandugi continued, he would have appreciated that there were serious contradictions in the prosecution case that warranted acquittal of the appellants. That mistake, he maintained, was so fundamental that it led to a flawed judgment. Mr. Wandugi referred to several pages of the record and cited several pages that he contended demonstrated the various, serious contradictions as regards the fourth appellant. He argued that throughout the entire case only Mwirichia gave evidence at large touching on the fourth appellant. His other point among the many issues he took with the decision was that the learned Judge sat well beyond the acceptable hours in law. He in fact prepared and served an affidavit in support of this contention but on perusing the file, it became clear that the only recorded time when court sittings went beyond 5.00 p.m., was at the request of and with consent of the counsel conducting the case. On that being pointed out and on its being indicated that the law allowed such a situation, Mr. Wandugi did not pursue that complaint further. We have mentioned it here because it was included in his written submissions and is a ground in more than one other memoranda of appeal we are yet to deal with. Be that as it may, Mr. Wandugi submitted further that as the learned Judge made a finding that the deceased were killed by a mob, it meant that he was in doubt as to who actually killed each of them. There was also material contradiction as regards the identity of the fourth appellant particularly as pertains to what he was wearing on the night in question. Further he referred to the proceedings in **Nyeri Chief Magistrates Court Criminal Case No. 3630 of 2000** in which Mwirichia was said to be an unreliable witness even going by the evidence that was adduced in that case apart from his evidence being at variance with that of PW2 and PW3. Mr. Wandugi also felt the court should have accepted the medical evidence of Dr. Njue and Dr. Olumbe as to the cause of death which was stated to be a fall from a height in respect of each deceased. He was of the view that the court erred in preferring the evidence of Dr. Mutuma to that of the first two doctors as the court gave no reasons for such preference at all. In conclusion, Mr. Wandugi submitted that had the trial court properly analysed the evidence that was adduced, it ought to have acquitted the fourth appellant immediately after the close of the prosecution's case upon no case to answer, but as a result of failure to analyse the evidence properly the trial court made several decisions on matters of fact which were completely against the evidence that was before it. He set out some of those incidents. Lastly he felt the learned Judge had no basis for dismissing the assessors opinion and for rejecting the appellants defence as he did.

The next learned counsel was Mr. Kibe Mungai. He is the learned counsel for the fifth appellant **James Mugo Karanja**. His written submissions were filed on 2nd October and he did highlight the same in his address before us at the hearing of the appeal. The totality of his submissions was that the only witness who mentioned the fifth appellant was **Patrick Kariuki Kamotho** (PW3). All PW3 said, according to Mr. Mungai, is that the fifth appellant was one of the prison officers who was in civilian clothes on that fateful night. He did not state what the fifth appellant did and did not give sufficient evidence to identify the fifth appellant as one of the officers with bloodied clothes. That evidence was not corroborated by any other evidence. The fifth appellant was not identified as one of those who bludgeoned the deceased to death. Mr. Mungai maintained that the general and collected findings that included the fifth appellant as one of the perpetrators of the offence was a misdirection. He further submitted that the fifth appellant was not on duty on the material night and evidence of PW3 did not put him at the scene of the crime neither does that evidence show he had knowledge of the commission of the crimes. Lastly Mr. Mungai submitted that the findings of the Judge in his judgment went against the evidence that was before him and touched on the absurd giving as example the Judge's acceptance of the evidence that the inmates were led out of their cell and then killed as there would be no reason why such a proposal should be found reasonable. He asked that the fifth appellant's appeal be allowed.

Mr. Sane, the learned counsel for the sixth appellant also put in written submissions and as well highlighted the same. He urged us to allow the appeal by his client on grounds *inter alia* that the prosecution's case fell far short of proving the guilt of the sixth appellant beyond reasonable doubt as is required by law; that the entire case against the sixth appellant was, based on circumstantial evidence

which evidence did not demonstrate at any stage that the sixth appellant took part in the killing of any of the deceased either alone or with others before court or not before court. He referred us to **Section 206** of the Penal Code and submitted that no proof of malice aforethought was advanced to the standards required in law. He submitted further that the sixth appellant was not at the scene at the time it is alleged the offence took place; that he was not at any rate identified as having been there; that Mwirichia did not mention the sixth appellant as one of the attackers who allegedly took the deceased outside the cell and killed them outside the prison perimeter wall. It was PW2 who said he saw the sixth appellant at the kitchen holding a *panga* and a *rungu* and had a lot of blood on the boots and he had blood stains splashed all over the jacket; but no such jacket with blood was ever recovered and produced in court as exhibit. As in cross examination, the same witness said the sixth appellant was in uniform, it becomes difficult to know which jacket he was talking about and whether indeed it was a civilian jacket; Mr. Sane felt that piece of evidence could not be relied upon to convict the appellant as was done in this case. Again, Mr. Sane took issue with the evidence of PW3 to the effect that the appellants went to the kitchen in riot gear and their clothes were bloody, yet there was no evidence to the effect that the appellant was supplied with such riot gear. Mr. Sane mentioned that the appellant's unsworn evidence in court was formidable and created a cloud of doubt on the prosecution case, which doubt should have been resolved in favour of the appellant as the totality of the evidence against the appellant only leaves him as a high suspect in the subject deaths and nothing more whereas suspicion however strong cannot be the basis of a conviction in criminal offences.

Further he said the prosecution of the sixth appellant was oppressive and an abuse of the Criminal Justice System in that the learned Judge in convicting the appellant ignored the assessors' opinion having not properly constituted and guided the same assessors and further failed to give reasons for his disagreement with the assessors. As to who went to the kitchen with an axe and panga, Mr. Sane's views were that PW2 who incriminated the sixth appellant contradicted himself when he stated it was **Noor Mohammed** who had an axe with something whitish on it and later that it was **Muiruri** who told him so. That being the case, he invited us to attach no importance to the evidence of PW2 on that aspect and invited us to note that Mwirichia did not see the sixth appellant that night. He went into detailed analysis of the evidence of PW2 and PW3 and ended by submitting that these two witnesses so heavily contradicted each other that no reliance could be placed on their evidence to convict the sixth appellant.

On medical evidence Mr. Sane felt the learned Judge had no basis of preferring the evidence of Dr. Mutuma to that of Dr. Njue assisted by Mr. Kirasi Olumbe. Lastly Mr. Sane submitted the learned Judge erred in law in failure to consider the *alibi* defence by the sixth appellant. He also spent quite some time on the importance of discovery in respect of criminal cases but did not in our view attach that need to the appeal before the case in that he did not suggest that such discovery was requested and refused by the Judge or how lack of the discovery affected the appellants case.

The seventh appellant **C.O. James Kipkemboi Boit Sise**, apart from the original submissions filed on his behalf by Mr. Katwa Kigen on 13th April, 2012, filed two other supplementary written submissions. His counsel Mr. Kigen also addressed us in highlighting those various written submissions. We do not think it was proper for this learned counsel to file the other two supplementary submissions, but the nature of the case demands that we consider all the submissions since they are on the record. The totality of the submissions were that the learned trial Judge erred in law in pronouncing sentence of death upon the appellant without first convicting him of any offence; that the learned Judge sentenced only six appellants and not his client who was the seventh appellant. This, he added, was in the draft judgment read in open court four months before the perfected judgment was released to the appellants. Mr. Katwa was of the view that the draft judgment in which six people were sentenced was the proper judgment; that he erred in convicting the appellant whereas *mens rea* (malice aforethought) was not found as there was evidence that the seventh (7th) appellant was asleep in his house with his girlfriend within the prison on that fateful night and was awakened by gunshots. He thus had no time to form an intention to kill the deceased. Mr. Kigen further submitted that *actus reus* was not proved as none of the witnesses saw the appellant commit any offence and none placed him at the scene; that bearing in mind that several people responded to the siren and gunshots that prevailed at the relevant time it was not possible to connect the seventh appellant with the murder of the deceased. In his view, the learned Judge relied wholly on circumstantial evidence that did not meet the standards required in law for a conviction to ensue. Having found that first, second

and third appellants were on duty on that fateful night and that fourth, fifth, sixth, seventh, eighth and ninth appellants only responded to the siren on the morning of 4th September, 2000 the learned Judge erred in putting all the appellants at the scene of the incident notwithstanding that the seventh appellant fully explained where he was and that he attended a party at the home of PW31 (where he stayed till 2.30 a.m.) on 4th September, 2000, and thereafter was with his girlfriend **Tabitha Muthoni Waithera**.

Mr. Katwa Kigen next complained to us that the learned Judge erroneously admitted and relied on contradictory evidence. He cited several instances in support of the submission, the main one being that there were two versions as regards facts of the case one being advanced by prison authorities and that was that the deceaseds met their death in the course of escaping from prison and the other version was that eight prisoners, six of whom were killed were led out of their block and thereafter bludgeoned by the appellants together with others. He submitted that faced with that scenario, the learned Judge erred in electing to disbelieve the evidence of prison authorities on the most vital aspects of the events of that fateful night and ended up convicting the appellants as a result of contradictory and inconsistent evidence. Further he stated that the prosecution witnesses were chosen in a selective and discriminatory manner, leaving the witnesses who could have given evidence on vital aspects of the entire case such as members of the public some of who allegedly bludgeoned the deceased to death. In his view, the court shifted the burden of proof onto the appellants and that was in law not proper. Mr. Kigen was also of the view that the evidence of Dr. Geoffrey Zambezi Mutuma should not have been preferred to that of Dr. Njue and Dr. Kirasi Olumbe who had carried out postmortem examination on the deceased at the appropriate time. He submitted that the learned Judge erred in relying on the evidence of Mwirichia to convict the appellant whereas Mwirichia was a witness whose character did not allow for any reliance of his evidence. Equally evidence of **Francis Nganga Ndungu** (PW2), and **Fredrick Kamotho Kariuki** should not have been relied upon as their characters were such that no court properly considering a case such as was before the trial court, could convict on their evidence.

Further, Mr. Katwa Kigen submitted that the learned Judge erred in law in differing from the assessors' opinion without giving proper reason for his refusal to accept their opinions as is required by law. He also cited several instances that he submitted were lapses in procedural and substantive aspects of the proceedings and submitted it was unsafe to convict the appellants on the face of all those lapses; that the learned Judge failed to decide on the issue of whether or not, the deceased and two others were attempting to escape from lawful custody and lastly that the learned Judge erred in law in failing to address his mind to the proposition that if the deceased were escaping from lawful custody then proportional use of force was necessary and in failing to give the appellant the benefit of the fact that the State through the Attorney General had filed defence against a suit that was brought against the Government as relates to the subject action. Mr. Katwa Kigen also raised the issue of the Gate Book. He then compared the evidence of Nganga (PW2) to that of Kamotho (PW3) and submitted that the evidence of the two together with that of Cpl. Kariuki (PW19) should not have been believed by the learned Judge.

For the 8th appellant, his written submissions were highlighted by Mrs. Rashid, his learned counsel who stated that no plea had been taken on count 1 and so the learned Judge erred in law in convicting and sentencing him on that count as plea taking is a vital part of the proceedings and as the record shows no plea was taken on count 1, the proceedings are a nullity and further, she submitted, as that was the count in respect of which the appellant was sentenced to death whereas sentences on all other counts were suspended, the entire conviction and sentence were unlawful. Mrs. Rashid further stated that the trial Judge erred in law and facts in that he relied on the contradicting, inconsistent and unreliable evidence to the prejudice of the appellant. She based that contention on what she termed two versions given in evidence in the court namely the escape theory alleging that the prisoners met their death as they were attempting to escape from lawful custody and the other version being that the prisoners were led out by the prison warders and once out of the perimeter wall, they were bludgeoned to death except two who escaped. She maintained that the learned Judge erred in electing to disbelieve the version advanced in evidence by the prison authorities and as a consequence he arrived at an erroneous conclusion. In her view, the improper finding made by the learned Judge to the effect that the deceased were bludgeoned to death by prison officers, wardens, members of the wardens' families and their visitors and that the appellants were the ones who bludgeoned the deceased to death left the unanswered question of "*how many people participated in bludgeoning the six (6) inmates to death?*" which was not answered by the

evidence that was adduced in court.

The next point was that the learned Judge failed to consider the appellant's defence and further erred in convicting the appellant on uncorroborated and contradictory evidence of PW2 a convict, while disregarding the evidence of the appellant and prison officer. PW2's evidence that he saw the eighth appellant with an axe with blood and boots could not hold any water as the same axe and the boots were not produced as exhibits and no forensic tests were carried out on them to exclusively connect them and the eighth appellant to the crime. In any event, she contended that PW2 contradicted himself as regards the eighth appellant saying at one time that he saw him with an axe and at the other time that he had a sword, and again at another time that the eighth appellant had a panga.

Lastly Mrs. Rashid, like the other learned counsel, felt the learned Judge should not have preferred Dr. Mutuma's evidence to that of Dr. Njue and Dr. Olumbe as to the cause of death, and also felt no intention was proved as required by law and certainly in her view common intention to kill the six deceased was never proved.

Mr. Nyachoti, was the last learned counsel to address us on the appellants' side. He addressed us on behalf of the ninth appellant. His submissions were like that of the other learned counsel, while highlighting his written submissions filed on 17th April, 2012. On grounds 1, 2, 3, 4, 5 and 7 of his memorandum of appeal, Mr. Nyachoti maintained that the learned trial Judge failed to evaluate the evidence adduced before him and had he done so, he would have found that the additional evidence adduced did not place the ninth appellant at the *locus in quo*. Mr. Nyachoti also took issue with the learned Judge's categorisation of the evidence before him as those of the prison officers and those of the police officers and wrongly believing the version allegedly given by the police officers as opposed to that of the prison authorities. Further, Mr. Nyachoti stated that the prosecution had the burden of proving whether or not the deceased died as a result of a fall from the perimeter wall or as a result of assault by the prison officers and others, and the prosecution did not discharge that burden as is required by law. Mwirichia was the only alleged eye witness to the part of the incident but he did not identify the ninth appellant as one of those on duty on the material night and in any event, his evidence could not be relied on as he was intoxicated having smoked *bhang* and this was the first time he had taken *bhang*.

As to the evidence of Francis Ng'ang'a who allegedly saw the ninth appellant with a *rungu* and a Somali sword, Mr. Nyachoti's take was that Ng'ang'a did not witness the ninth appellant assault anybody whereas that evidence was also contradicted by that of Fredrick Kariuki Kamotho, who stated that the ninth appellant was not on duty on that day and, therefore, was not in uniform as Ng'ang'a alleged. Further, he stated, that evidence was also contradicted by that of **John Waigwa** (PW7) who said the ninth appellant did not go to the kitchen that night and did not perform breakdance in the kitchen as alleged by Ng'ang'a. Mr Nyachoti also referred to the evidence of **Cyrus Munene Gacharu** (PW13) and what **Esokon**, the only prisoner left in this subject cell told him and asserted that the officers on duty had nothing to do with the deaths of the deceased persons. **Peter Musili Muthami** (PW17) also said that the ninth appellant was on duty at the car park and did not go to the kitchen. The evidence given by the ninth appellant was not contradicted and he deserved the benefit of doubt. On grounds 6, 8, 9, 11 and 12 of his grounds of appeal, Mr. Nyachoti submitted that the learned trial judge erred in law in pursuing the guilt of the ninth appellant whereas the prosecution had failed to establish malice aforethought and further, as far as the ninth appellant was concerned, there was no evidence documenting *actus reus* as it was never proved that he was at the scene. Thus in conclusion, Mr. Nyachoti submitted that the ninth appellant was convicted wrongly on the opinion and theories of the learned judge which theories and opinion were extraneous.

Before we conclude this summary of the submissions by all the learned counsel for the appellants, we need to add that all of them felt and submitted strongly both in their written submissions and oral submissions that the learned Judge failed to consider the various defences advanced by the appellants, eight of which were sworn and one unsworn. Again, we must add with full appreciation the various authorities which were well researched, and all of which we have anxiously considered as it is our duty to do.

The prosecution did not file any written submissions, but Mr. Monda, the Principal State Counsel addressed us at length in response to the appellants' various and detailed submissions, both written and oral. In his view, the learned trial judge did scrutinise the evidence that was before him, evaluated it and made correct findings on the matter. The information that was before the court was proper and was not defective as claimed. On taking of the plea on count one, Mr. Monda submitted that the record reveals a typing error and this is what resulted into count 2 having been seemingly read out twice. It is clear that the first count was read out and a plea taken on it. He referred to the information on the record and contended that that was the information that was read out and on which plea was taken. As the appellants were all represented by counsel as the record reveals and if the plea in count one was not taken, then counsel could have known. In his view, the deceased were led out of their cells and the prison officers were involved in that action. He continued and stated that the medical records by Doctors Njue, Olumbe and Mutuma did not contradict each other at all on the cause of death of each of the deceased persons and their findings were that the fall from a height could not have been the sole cause of death in respect of each deceased. He referred us to Form 23A in the record. The learned Judge duly analysed the evidence that was before him to see if the allegations by prison witnesses could be crucial; but he found it lacking and completely non-viable. In doing so the learned Judge did not embark on his own theory but took into account the evidence that was before him. Mr. Monda felt the Judge was entitled to accept the evidence of Mwirichia, Ng'ang'a and Kamotho as witnesses of truth despite their being convicts. He conceded that there could have been some contradictions in the evidence of the three but submitted that those contradictions were not material because the circumstances at that time were not difficult for identification by recognition; that this is a case of recognition and the appellants were properly placed at the scene. As for Mwirichia, Mr. Monda submitted that he was charged with the offence of escaping from lawful custody but was after trial acquitted. He referred us to the record and submitted that according to the record it was clear that the deceased and him were recorded as having been discharged at the material time. The theory of escape as can be seen from exhibit 28 is an afterthought. Mr. Monda submitted that the learned Judge gave proper reasons why he did not agree with prison authorities on the escape theory. The learned Judge analysed the evidence that was before him thoroughly and made independent findings. In his view the judgment, met the threshold of **Section 169** of the Criminal Procedure Code and any arguments to the contrary are misplaced. He referred us to the judgment of the trial judge and submitted that the Judge had considered the defence of each appellant thoroughly as is required by law. On the hearing going beyond the time set out by law, Mr. Monda submitted that it was to the appellants' benefit and no prejudice had been suffered. Lastly, Mr. Monda invited us to consider the evidence of PW15, PW16, PW21, PW22, PW24, PW29, PW33, PW34 and PW36 and submitted that these were all witnesses of truth. He urged us to uphold the findings of the learned trial judge and to dismiss the appeal both on conviction and sentence.

The above were the grounds of appeal filed by each of the nine appellants and the submissions in support of each by the various learned counsel together with the response to the same by the learned Principal State Counsel. As we have stated above, we have anxiously considered them as will be seen hereafter in this judgment, but first a summary of the facts giving rise to the entire saga.

As of the night of 3rd and 4th September, 2000, all the appellants were prison officers serving the Prison's Department and based and GK Nyeri Prison. They were serving in various capacities with the seventh appellant serving in the capacity of Chief Officer I, while the fourth and fifth appellants were Senior Sergeants, the first appellant was a sergeant and the second, third, sixth, eighth and ninth appellants were all warders. On that night, the first appellant, **Sgt. Muthee** was on duty as the sleeping-in officer. He was on duty with the second appellant Warder Joseph Lenana Rukwaro and the third appellant Warder Ceaser Mwangi Njoka while Warder Joshua Nyakundi Onyango, the ninth appellant was guarding the car park together with about 30 others. The second and third appellants were night guards at Block E at Nyeri GK Prison commonly known as Kingo'ngo'. The fourth, fifth, sixth, seventh and eighth appellants were not on duty that night but their houses were near the prison if not within the prison precincts.

The deceased were prisoners at the same prison. They were six and, together with others, were in Block E cell 4 as condemned prisoners. The two others were Mwirichia (PW1) and one who remained in the cell after the incident the subject of this appeal. The record talks of another called Ipomai who was allegedly released by the prison authorities earlier just before the time of the incident.

The above, that is, that the appellants were prison officers and the six deceased were prisoners at King'ong'o Prison being held as on the night of 3rd and 4th September, 2000 in Cell 4 Block E of the prison are the only facts that were common in the entire saga. From, there on, the facts were completely at cross roads and we think in law, and bearing in mind the decision of the predecessor of this Court in the case of **BUKENYA & OTHERS vs. UGANDA, (1972) EA 349**, where that court stated that at a criminal trial, the Director of Prosecutions has a duty to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent and that while he is not required to call a superfluous number of witnesses, if he calls evidence which is barely adequate, the failure to call the other witnesses will entitle the court to draw an inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution's case, we think the prosecution did well to put before the court all evidence that was available both in support of its case and against its case. Having done so, the prosecution made it clear to the court what its case was. Being a first appellate court, we are duty bound to set out in this judgment a summary of both versions of facts.

The first version was the version authored by Mwirichia whose evidence was that on 3rd September, 2000 at about 10 am as he was outside cell 4 Block E, basking in the sun, he was called by first appellant Sgt, Mathew Muthee. One of the prisoners on death row called **Godfrey Ipomai** told him that he might be a free man that day. He asked how that would be and Ipomai said it was possible. Mwirichia thought it was Ipomai's usual jokes. They went for lunch and after lunch they went back to bask in the sun and later went back to the cell for normal routine procedures before they went to bed. They were nine in number in that cell 4, Block E. As they were sleeping, third appellant Ceasar Mwangi peeped through the pigeon hole and called out prisoner Godfrey Ipomai and gave him a sheet of paper which was part of the Bible – Gideons – in which something was wrapped. That was *bhanga* known as *mashoto*. They smoked *bhanga* and slept. Later in the wee hours of the night, first appellant **Jacob Muthee** in company of second appellant, Lenana and the third appellant, Ceasar Mwangi Njoka, the two who were on duty at Block E opened the cell. First appellant ordered everybody to take his belongings. He thought they were being taken on transfer. They left and when they reached gate E first appellant pushed it and it opened. Second gate was also opened by another guard who had a Marvin hood on his head. Outside they met four guards one of whom was known to him and that was the fourth appellant Senior Sgt. Kamau. He could not identify the other three warders. Fourth appellant told first appellant to do a search on the prisoners. Before the search, fourth appellant called Ipomai and went away with him. When he (fourth appellant) returned to the scene he was alone. He then told his colleagues to finish the prisoners. Immediately, Julius Mungania the deceased in the fourth count was hit with a club. He fell and then all the prisoners took off wailing. Mwirichia ran towards the staff houses of the prison guards. He eventually entered a coffee plantation and stayed there till the next morning. He was later re-arrested and charged with escaping from lawful custody at the Chief Magistrate's Court at Nyeri but was after full trial acquitted of the charge. Thus, that version is that the deceased were removed from their prison cell No. 4 by first, second and third appellants and were led to a place where they were killed at the command of the fourth appellant with only Mwirichia escaping. Godfrey Ipomai had been, according to this version, released by the fourth appellant under unclear circumstances. Mwirichia stated further that when he was at the vegetable garden where he was hiding, he saw warders beating the deceaseds. That version got support, albeit not directly from the evidence of Francis Ng'ang'a Ndung'u who was a prisoner but was that night in the kitchen nearby as a cook and was in charge of four others one of whom was Fred Kamotho (PW3).

At midnight, they were dozing and so they spread a gunny bag so as to sleep. About 2.00 a.m., he heard a scream from the Block G. Four minutes later, he heard a whistle and then saw bullet smoke. He then saw the eighth appellant carrying an axe and saw blood on the axe. He also saw the ninth appellant who had a *Maasai rungu* and a Somali sword. The ninth appellant performed break dance saying that they had killed some people and warned him that he too could die. They asked for porridge and he gave them. The eighth appellant asked him to smell the blood. The sixth appellant also went to the kitchen holding a *panga* and a *rungu*. He had a lot of blood on the boots and on the jacket he was wearing, whereas seventh appellant also was in the kitchen wearing a riot cap with protective glasses and a *rungu* which had blood. The seventh appellant was in charge and ordered that they be taken back to Block A. Later after 6.00 a.m, this witness said after distributing *uji* to other inmates, they were told to go and write statements to the effect that they saw some people attempting to escape which was not true as he did not see anything unusual

from Block E. He, however, confirmed in cross examination that he did not see any of the officers he mentioned as being in the kitchen beat anybody; that from the kitchen he could not see anything and that the officers he mentioned were in uniform when they found the witness in the kitchen that fateful night. As will be discussed herein later, there were several discrepancies and contradictions in the evidence of this and other witnesses but this is a summary of the general aspects that the prosecution put forward for its case. The other witness on this theory was Fredrick Kamotho Kariuki (PW3). He was also an inmate but was on that night assigned the duties of cooking in the kitchen. He was therefore with Ng'ang'a. His evidence was that the first and second appellants were on night shifts that night with first appellant being the sleeping-in officer. He was the one to count the prisoners and to lock the prisoners inside the cells while second appellant was in charge of Block E. The third appellant was also on duty in Block E. About 1.00 a.m., he heard a whistle by Waigwa (PW7) and he also heard siren and gunshot. All this as he was in the kitchen together with Ng'ang'a. They went to where Waigwa was blowing the whistle. Five minutes later, all nine appellants entered the kitchen all in riot gear. Their clothes were bloody and they had *rungus*, *simis* and axes. This witness and other inmates who were working in the kitchen stayed there for another 25 minutes and they were taken to Block A where they slept. Seventh appellant according to this witness said "*You have done a good job*" whereas ninth appellant said they had come from far. Fredrick did not know what they were talking about. The next day their cell was opened at 9.00 a.m. and they started working. Later the following day first, second and fourth appellants showed them in cell 4 block E a place they alleged was cut on the grill for the escape of the deceased and the others who attempted to escape from lawful custody. He claimed to have seen the window the previous evening and it was normal. In cross examination, he also said he did not see any appellant kill anybody. Again, as we have stated above, this witness contradicted Ng'ang'a in a number of aspects but we will deal with that hereafter in this judgment.

Anna Wanjira Macharia (PW11) was during that period staying at King'ong'o prison. She was selling things at the prison canteen. On the night of 3rd and 4th September, she heard a whistle twice at about 2.00 a.m. Thereafter she heard siren and saw a person running towards her kiosk with warders hot at his heels. That man was naked. She told them that man followed the road. Looking at the entire record before us, we feel certain that that naked man Anna saw running with warders hot on his heels was probably Mwirichia. We say so because Mwirichia's evidence to the effect that he ran away from the scene naked was not challenged whether it was after his colleagues had been led out of prison cell as he alleged or after his colleagues had fallen down from a height of 24 feet as other witnesses to whom we shall hereafter refer alleged.

Thus according to these witnesses, the deceased persons namely Peter Loyarar Lumukunyu, James Irungu Ndugo, John Njoro Njuguna, Julius Mungaina M'Muraa, Peter Ngurushane Emashe and Peter Koring, the deceased in respect of the first, second, third, fourth, fifth and sixth counts respectively were killed by the prison officers some of whom were on duty that night and some not on duty but all of who after the killing entered the kitchen some with blood on their clothes and shoes. Other witnesses that tended to support this version, which was the prosecution's version were peripheral but nonetheless adduced evidence corroborative of that version. This is where the evidence of **Cyrus Gachami** (PW13) Deputy Commissioner of Police who said that a signal was sent to the Commissioner of Prisons on 4th September, 2000 to the effect that 8 prisoners had escaped but 6 were killed during a fierce fight with warders while two were still at large and the evidence of **Warder Samwel Ndegwa** (PW28) who alleged he saw pieces of sticks, wood and stones at the scene. Whether that version is the correct one or not, there was no dispute that six inmates, whose names are cited above died that night. It is not certain the exact time as for some unknown reason, no evidence was adduced directly as to who saw them dying. This is rather unhappy because whatever happened, whether they were led outside and killed as Mwirichia's evidence and to an extent the evidence of Ng'ang'a and Kamotho's tend to suggest, no good Samaritan even existed at the scene on that night to rush them to the hospital. Be that as it may, after their death, many senior prison officers and police officers visited the scene at the prison. Quick investigations were carried out.

Elijah Kona Shamalla (PW36), the then OCPD Nyeri went to the scene and saw on top of five bodies broken sticks and clubs which were tainted with blood. Other witnesses such as Gachami said in their evidence that immediately after the whistle was blown and siren activated there was a large crowd at the scene outside the perimeter wall and some of those people were carrying sticks and crude

weapons. Shamalla asked I.P Gregory Ng'ang'a (PW15) to load the bodies on to a vehicle and take them to Nyeri Police Station. I.P Ng'ang'a complied and the bodies were taken to Nyeri Police Station and handed over to **Inspector Joseph Kitheka**, the in-charge of crime. The bodies were later taken to the hospital mortuary.

Dr. Moses Njue Gachuki, a pathologist, then serving with the Ministry of Health went to Nyeri Hospital Mortuary where he found the bodies of the six deceased. Later he was joined by prison authorities. He first ordered X-ray examination in respect of all deceased. That disclosed no gunshot wounds. He, together with a team of consultants which included Dr. Kirasi Olumbe, did postmortem examination on the deceased to ascertain the cause of death in respect of each deceased. His findings were that the deceased in respect of the second count, **James Irungu Ndungu** died of head injuries due to a fall from a height but he added a rider which was that it was difficult to associate some bruises on the body with a fall and went on to state: -

“Bruises on the neck could be explained by trauma. Depressed fracture which had no assured lacerated was associated with either a stone or a rungu.”

If one fell from a height head first, it would be difficult to explain his injuries on the foot and the head simultaneously.

At the scene, I did not see any windows on the wall or stones on the ground that would have caused such injuries.”

In respect of the deceased in the first count, Peter Loyarar Lumukunyu Dr. Njue's opinion was that the cause of death was head injury which was in keeping with a fall from a height head wards. But again he added: -

“(a) it is difficult to explain the fracture of the distal fibia on the basis of the same fall or whether it occurred otherwise. No bullet wounds found contrary to police story. In my opinion the injury on the head could have been caused by a fall. But the injury at the back of the head is basically a defence kind of injury.”

As regards the deceased in respect of count 3, John Njoro Njuguna, Dr. Njue stated: -

“OPINION: Cause of death was head injury due to a fall from height. The fracture of the lower limb could not be explained on the basis of the fall- headwall. In my opinion it was inflicted by a third party. The swelling on the right hand was on the back which consistent (sic) deface and of injury. The deceased was trying to ward off an attack. Spinal fracture of libia and fibula was consistent with twisting by first of the limb.”

In Dr. Njue's view, the deceased in respect of the fourth count Julius Mungania M'Moraa died as a result of head injury due to a fall from height, but he also came up with exception like in the other cases and that was that:

“Injury on the right upper limb were covered by sharp objects and did not fit with the fall theory alone.”

Interestingly, Dr. Njue, conceded in his evidence which was meant to convey to the court his professional opinion arrived at after careful professional tests on the deceased, that later after he spoke to a relative of the deceased that the deceased did not die from a fall from a height, he also had doubts. Hear him: -

“I also had doubts. Even I visited the scene hence I raised comments that some of the opinions consistent with sharp object did not fit in the fall theory.”

The next deceased was Peter Ngurushane Emashe. Dr. Njue examined his body and found the cause of

death as head injury due to a fall from a height but ended up adding:

“As above i.e fall from a height. The fracture on both ande joints cannot be explained on the basis of a fall headwords theory.”

In his conclusive remarks concerning all deceased, Dr. Njue while stating that they each died from a fall from a height, made it clear that there were some injuries such as those by sharp objects which could not be explained on that fall from height theory. In short, our understanding of Dr. Njue’s evidence is that it was not conclusive on the issues that were before him. This is supported by the fact that he too was of the view that some injuries particularly on the hand could have resulted from defence of some deceased as they were under attack.

Dr. Jane Wasike Simiyu who had worked with Dr. Kirasi Olumbe and knew Dr. Olumbe’s signature very well produced the postmortem examination reports prepared by Dr. Olumbe under the provisions of **Section 33** as read with **Section 77** of the Evidence Act. Dr. Olumbe had prepared the postmortem reports on 20th September, 2000 at Nyeri Provincial Hospital Mortuary. The first report Dr. Simiyu produced in court was that of the deceased in respect of count 6 who was Peter Kering. In Dr. Olumbe’s view the cause of death in respect of that deceased was head injury due to a fall from a height. However, he too made a comment in that report which was that: -

“Findings of autopsy are not consistent with circumstances of death as indicated in Kenya Police form 23A.”

In form 23A, it was alleged that the deceased died while trying to scale the prison perimeter wall with others in a bid to escape from the G.K Prison. Dr. Olumbe found this inconsistent with his autopsy findings. This finding that the cause of death was due to a fall from a height was made by Dr. Olumbe in respect of all the deceased persons and in respect of most of them, he also found that there were certain injuries that were not consistent with the circumstances narrated in the form 23A, we have referred to above.

Apparently because of the public interest that the incident generated, a third doctor Dr. Mutuma had to carry out another postmortem on the deceased bodies and this was long after the bodies had been interned at the cemetery at Nyeri. The bodies of the deceased were exhumed on 1st November, 2000. He was in company of a team of doctors including Dr. Njue, Dr. Kagera, Dr. Grace, Dr. Kithinji, Professor Sedail Rodge and M.O.H Nyeri Provincial Hospital. Police officers under the OCPD Mr. Shamalla were also in attendance. He conducted the postmortem examination on the six bodies on 2nd November, 2000 at the Lee Funeral Home in the presence of all the doctors mentioned hereinabove. His opinion on the cause of death of each deceased was in a summary as follows: -

“(a) Peter L. Lumukunyu – deceased in count 1 died as a result of head injuries in a man with multiple fractures of extremities. He then proceeded and added:

‘The postmortem findings of the deceased man were not in keeping with the circumstances of death....I concluded that there was no reason to believe that the cause of death of Peter Loyarar Lumukunyu was head injury.’

(b) Joseph Kamande Mwangi alias James Irungu Ndungu, the deceased in count 2, was found to have died as a result of head injury in a man in multiple fractures of extremities.

(c) Dr. Mutuma made the same findings in respect of the cause of death of John Njoro Njuguna, the deceased in count 3 and gave specific comments similar to the comments in case of the deceased in the first count namely that the postmortem findings were not in keeping with the circumstances of death.

(d) Julius Mungatana M’Muraa also died the same circumstances.

(e) Peter Ngurushane Amale alias Kingui also died, according to Dr. Mutuma as a result of head injury

in a man with multiple fracture of extremists.

(f) Peter Kiring the deceased in count No. 6 died of the same cause.

Dr. Mutuma was finally of the view that the injuries in all the six bodies could have been caused by a blunt object to the head. In respect of the deceased in count 1 Julius Mungania M'Muraa, he found a round depressed fracture of the skull, whereas in respect of the deceased in count 2, Joseph Kamande Mwangi, he found a depressed round fracture. He then made suggestions as to the type of weapon that could have caused the injuries and having done so, he ended up his evidence-in-chief as follows; -

“These six inmates who were preparing to escape could have landed very safely from a height of 24 ft. If there were injuries they could only be fractures of the lower limbs if he fell first front. But if he fell head first, then could be injuries to the head but not the feet. However if a fall is from the feet injuries would be on the feet. If a fall is by the head then the injuries would be to the head. All depends on the circulation of the body at the time of the fall”.

In cross-examination, this witness stated in part: -

“It will depend on what the body meets with during the fall or on the ground. There could have been variables during the cause of the fall. But 6 inmates could not have severe injuries from a fall from same height – without some avoiding other injuries apart from the head.”

Again in re-examination, he stated:

“If one was to fall from a height of 24ft, he would have jumped. In that event if was a wall, he would land about 5 ft away from the wall. People who fall from height if they are aware would not fall directly on the ground near the walls they would fall 6 or so ft away from the wall.”

He ended his testimony with a word of caution and that was that the postmortem he carried out was done on bones alone as no soft tissues were available on the bodies for examination. But in his view the absence of soft tissue would not have made any different results as in forensic science bones were enough for conclusive results. Thus, according to the material facts presented to the trial court by the prosecution, the deceased were led out of their cell – cell 4 Block E by first, second and third appellants and at the command of the fourth appellants, they were beaten to death by the same prison officers and others and thereafter Ng'ang'a saw some of the appellants in the kitchen with bloodied clothes and shoes whereas Kamotho, it would appear, saw all of them in the kitchen. Whichever is the version, some appellants bragged that they had done a good job and one broke into a break dance while in the kitchen. The cause of death as given by the three doctors was different but in our mind only to the extent of whether the cause of death in all the deceased was head injury as a result of a fall or head injuries as a result of being hit with other blunt weapons. We say that as the difference on the main because a critical analysis of all the three sets of the postmortem reports clearly reveals that all the doctors agreed on one thing and that was that the injuries on all the bodies were not consistent with the circumstances that were entered in Form 23A that they all died as a result of injuries encountered by a fall in the course of escaping from lawful custody.

As is clear above, and as we have alluded to, there was the other theory which as we have stated, it behoved the prosecution to put before the court and that was that all the deceased who were together with Mwirichia and another in cell 4 Block E, had earlier planned to escape from lawful custody. Elijah Kona Shamalla's evidence was partly that in the month of March, 2000, he got information from sub regional coordinator National Intelligence the late Mr. Muliro that some capital remandees at Capital Prison Nyeri were planning to escape or to be rescued by force by other people when their case was going to court for judgment or that they could also be rescued within the prison. Mr. Shamalla said this was a verbal communication, but nonetheless he informed the prison authorities at King'ong'o and security arrangements were put in place just in case such plans came to fruition. He went on leave from April to 4th September, 2000 but instructed his deputy to keep monitoring the events at the prison and that arrangement continued even in Shamalla's absence while on leave.

The evidence of Shamalla is the basis of a second version of facts in the case. That version in a summary is that eight condemned prisoners in cell 4 Block E, planned to escape from the prison and in order to execute their plan they cut the grill in the window of their cell by the use of three pieces of hacksaw. After cutting the grill, they passed through it; climbed over to the roof of firewood store nearby and thereafter to the roof of tailoring section and to kitchen roof and then landed on to the perimeter wall which had pieces of glass. Once at the perimeter wall they started scaling the 24ft high wall downwards using a makeshift rope made of old prison blankets, prison uniforms and nylon in a bid to escape from the prison. In the process, six of them fell head-ward first and hence the death of each of them. Two escaped, one of whom was Mwirichia who was arrested the next day. The other Godfrey Ipomai was at large but was later reportedly gunned down while in another unrelated matter at Nanyuki.

This version was supported in evidence in the record by Warder John Waigwa (PW7), a warder on duty that night and stationed at the kitchen guarding Ng'ang'a, Kamotho and two other inmates who were cooking in the kitchen. At 1.50 a.m. he heard slight noise at the roof of the tailoring workshop. That noise became louder and louder. The kitchen where Waigwa was, borders Block E. He looked at the roof and saw two nude people against the wall that surrounds the prison. He shouted enquiring where they were going to. Immediately six other people rose from the roof. All were naked. The six people started throwing *akala* shoes at him, as the first two were holding a white material which he identified in court. Waigwa kept on shouting and blowing the whistle at the gate of the kitchen. He said that he saw the persons on the roof jumping one after the other. He could not identify them but assumed they were prisoners. He did not know what happened to them when they jumped down but he stated that as a result of his shouting and whistling, Acting Guard Commander **Ruoro** joined him and also saw the last four prisoners jumping. Later in the same evidence, Ruoro is described as warder and not Acting Commander. Ten warders went to the kitchen and at the same time warders in the watchtower were firing at random as according to Waigwa, lights surrounding the perimeter wall went off. According to this witness, the ten warders went to the kitchen at about 2.10 a.m. In the meantime warder Gabriel Kinyua Muguso (PW6) was on duty as a sentry at watchtower No. 2. His version of events differ to an extent from that of Waigwa as to time, in that he heard whistles from the direction of the kitchen area at 1.30 a.m. He then looked at the kitchen roof and saw about 8 people. He saw them with the assistance of light from the kitchen although he admitted that on the roof of the kitchen there was no light. He blew his whistle but he could still see those people crawling towards the main prison wall. He fired 8 rounds of ammunition in the air. Four minutes later the security lights in the perimeter wall went off. The perimeter wall, according to the witness is about 24 ft high. He climbed down and ran towards the staff quarters in an attempt to intercept and stop the escapees but by the time he reached staff quarters, he did not see anybody. Staff quarters were only 20 metres away. Instead of going further to find out who were attempting to escape, he decided to take cover in a green vegetation comprised of shrubs near the houses of the officer in-charge of women prison. As he was there, he heard people saying the officer in-charge of the prison had come and that the Provincial Prisons Officer had also come. He then left his hide out and joined the people who had assembled nearby. That is when he saw bodies of five people who were on the ground and one body which was a few metres away. It is rather baffling that he did not see them fall and did not hear them fall and from the time he saw them crawling towards the main prison wall to the time he walked out of his hide out these people had all died. Be that as it may, when he saw the bodies, they were motionless and had injuries all over them. He did not know how the bodies got to the scene where they were.

In cross-examination, he said he saw one person jump down the wall but thereafter the light went off and he could not see what happened next and admitted that by the time he came out of his hideout a huge crowd had formed and further that the bodies he saw were at the bottom of the perimeter wall. In his evidence none of the appellants was in that crowd. Waigwa and Kinyua did confirm one material aspect on this evidence and that was that when there is an alarm everybody else runs to the scene to check what the matter is.

The above were what we would term the main evidence in the two versions that the prosecution presented to the court namely the version based on allegations by Ng'ang'a and Kamotho and to an extent Dr. Mutuma, that the deceased inmates were led out of their cell in Block E by the prison warders and killed or as the learned Judge put it, bludgeoned to death, and the version that the deceased were six of those

who perhaps had planned to escape from lawful custody and decided to experiment that plan on that fateful night with the serious consequences that they died while jumping from a height, namely a 24 ft prison perimeter wall and died in that attempt. That version is also to some extent supported by the postmortem reports prepared by Dr. Njue and Dr. Olumbe. We say to some extent in both cases as far as those two medical reports go because they were not conclusive and they also agreed that there were some injuries on all the six bodies which could not be explained by the fall theory.

In our view all the other myriad of evidence in this huge record fall into the two categories, i.e those supporting the escape and fall from a height theory as the cause of death and those indicating that the deaths could have occurred not as a result of the fall from a height but that the deceased were killed by the appellants and as the learned Judge adds for unknown reasons, that the relatives of the warders and members of their family also took part in bludgeoning the deceased to death. Most of the evidence on either side are based on what the witnesses heard from others, their investigations and alleged discoveries and what they gathered as a result of the same or in general. What they did after being informed of the deaths. We shall refer to each as we continue in this judgment. Matters such as whether the records showed the deceased were recorded as having been discharged and the interpretation of that were all matters that resulted from investigations.

The record shows that the deaths generated a lot of public interest particularly as to the public, no immediate action was taken to apprehend and charge anybody with the alleged deaths of the six inmates. Mr. Mwirichia had been charged before the Chief Magistrate at Nyeri with the offence of escaping from lawful custody, but that was not felt as being enough. The record shows that the Standing Committee on Human Rights decided to invest was necessary. The file was thus put before the Chief Magistrates' Court at Nairobi being **Inquest No. 122 of 2000**. That inquest commenced on 21st October, 2000 and ended vide a ruling dated and delivered on 8th February, 2002 by Mrs. Odero Senior Principal Magistrate (as she then was). As a result of her ruling, which we do not deem proper to cite here, the police carried out another investigation and as a result, the nine appellants were arrested and charged with the offences stated above in an Information dated 8th October, 2003 almost one and a half years later. Put to their defences, the appellants offered varied defences. We shall again set out below only a summary of each appellants defence.

The first appellant's defence was given on oath and was in a summary that in September, 2000, he was at King'ong'o as a sergeant and was in charge of shifts among other duties. On 3rd September, 2000, he was on duty from morning hours but took a break on his own at 3.00 p.m. and reported back to work on night duties at 6.30 p.m. The work was handed over to him by one Chief Officer 2 Ougume. He was the sleeping-in-officer that night and he admitted that a sleeping-in-officer is the overall in charge of night operation. Handing out to him, he said, entailed giving him the lock-up sheet by Ougume and that lock up sheet contains the record of all prisoners inside the prison as per their blocks and cells. A physical count is done to tally with the lock up sheet. Guard Commander was also that to ensure physically that all cell doors were locked and that the number of keys for cell doors tallied with the number of cells. Eventually a gate clerk also checked the keys and put them in a key canvas which was sealed with wax and then the canvas is stamped and was handed over to him and he kept them. Ongume left. On that night one warder **Thuku** and one **Albert Gacheru Mwangi** were the gate clerk and gate keeper respectively while **Cpl. Kibiti** was the guard commander. The key to the main gate and two keys to the metal box were kept by the duty officer. He said that of all the keys left after lock up, none of the keys would open any cell or ward and the guard commander kept the keys that were opening the gates for purposes of exchanging the guards. All these events are all recorded in the sleeping-in officers journal and he recorded all the events in that journal.

About 1.50 a.m. he was called by the gate keeper, **Joseph Kinyua** who told him that he (Kinyua), guard commander, warder Ruoro, and warder Mutua had heard some voices and whistle blowing from the kitchen and Block E and that warder Ruoro had responded to the same. Soon thereafter Ruoro and Kinyua got into his sleeping-in-officers room and informed him that prisoners from Block E were escaping and had been spotted by Waigwa. He ordered Kinyua to activate the siren and Kinyua complied. He also told Kinyua to inform the telephone operator to inform the officer in-charge of Nyeri Prison **ACP. Mungo Longit** (PW31) who was stationed within the prison. Kinyua again complied. Thereafter Kinyua opened

the inner gate for this appellant and Ruoro, the guard commander. The two went to the kitchen and to Block E. According to him the keys to the main gate 1 and to the inner gate were with the gatekeeper. The appellant and Ruoro entered the kitchen at about 1.50 – 2.00 a.m. Waigua told them that they had seen prisoners on top of the tailoring roof adjacent to the kitchen. As they were still talking to Waigua, Ng'ang'a and Kamotho in the kitchen, firing started from the watchtowers. He himself did not see anybody on the roof at that stage. Thereafter Ruoro opened block E where they met second and third appellants. They did not enter cell 4 in that block although second and third appellants told them that prisoners had escaped from cell 4. They peeped inside cell 4 through the peeping hole and saw only one prisoner in the cell. He checked the cell, and saw the wire mesh in the window was folded on the outside and one metal bar was missing, but he admitted they did not test the metal bar in that window and so could not say whether the metal bars in the windows were secure.

The prisoner left inside cell 4 Esokon Kionga told him he did not know where his other colleagues were. About 2.00 a.m. he went back to his office. By that time firing and sirens were still going on. He denied having opened cell 4 for prisoners to come out as was stated by M'Mwirichia. He also denied that he was helped to remove the prisoners by the second and third appellants but admitted that second and third appellants were manning cell No. 4 in Block E. By that time he had not broken the canvas and all the keys were still on the canvas but duplicate keys were either with ACP Mungo Longit or his deputy Muthani. He then proceeded to the duty office where he met seventh appellant Boit who was in civilian clothes. He narrated to Boit what he had heard and what he saw. He then produced the canvas carrying keys and in the presence of Boit and Mokuu, the telephone operator, he broke the canvas on the instructions of the seventh appellant. He gave out keys to the armory to warder Miriti and seventh appellant who entered the armoury. He removed keys to the cells later when the prison bosses had come. Later that night Mungo Longit and the other officers approached him and he took them to Block E and to other places but did not enter cell No. 4. He explained his movements within the prison together with other prison authorities such as Mungo Longit and others.

Between 2.45 a.m. and 3.30 a.m. on instructions from SACP Gacharia, he got the keys to Block E cells and opened cell No. 4. He denied ever having opened that cell till later on behest of SACP Gacharia. The cell was in darkness and torches had to be used. He never saw fourth, fifth, sixth and eighth appellants till next the morning. He however saw seventh and ninth appellants and the ninth appellant was stationed at the car park. The first time he went out of the prison gate was between 4.00 a.m. and 5.30 a.m. and that was when in company of Longit, SACP Gacharia, photographer of the scenes of crime. They went towards watch tower No. 2. That is when he saw a body of a person lying on the ground. They turned towards tower No. 3 and when they reached a place adjacent to staff houses he saw five bodies. He presumed they were bodies of the inmates who were attempting to escape. He saw there a crowd consisting of prison officers, police officers and other people he presumed, were living in staff quarters.

Lastly in his evidence-in-chief he denied beating any of the deceased to death. In cross-examination he stated that whoever said such as Longit said that the sleeping-in-officer kept the keys to the main gate would be telling a lie. When shown his statement he had given to police and his evidence in court in the case of Mwirichia earlier, he admitted that there were many parts of that statement that contradicted his evidence in court. As we did with the brief facts of the prosecution witnesses, we shall not delve into details and the contradictions and discrepancies in the evidence of the appellants till late in this judgment. It is thus enough to say at this juncture that cross-examination of the appellant elicited certain contradictions to be visited upon later.

The second appellant **Joseph Lenana Rukwaro** said in his defence that on that fateful night, he was a night guard on shift. He reported on duty at 6.30 p.m. and was only together with third appellant Cesar Mwangi Njoka. He entered Block E at 7.00 p.m. The gatekeeper at Block E opened the gate for them. He then went round with the officer who was handing over to him and after going round and checking is when the work was handed over to him. On handing over to him no keys to the cells were given to him. At 10.30 p.m. there was change of guard and he, together with the third appellant went to the guardroom to sleep. At 1.00 a.m. he resumed duties at Block E. Warder Ruoro opened the gate to Block E for him. He did not know the prisoners in Block E by names as he was not familiar with them. He did not know Mwirichia and did not hear third appellant talk to the prisoner Ipomai (now deceased). About 2.00

a.m. he heard movement of logs of wood and he presumed cooks were taking firewood into the kitchen. He then heard cats playing on the roof top of tailoring block and Block E. They checked and found one person in cell 4 of Block E but he could not see him as there was no light in the cell. That prisoner Esokon Kionga said his cell mates had escaped. Using light from cigarette lighter held by Ceasar Njoka, the third appellant he saw that the wire mesh in the window of that cell 4 had been pulled on one side and one metal grill had been cut. Only Kionga had remained in that cell out of nine inmates that had been there. Up to that time no warder had opened that cell and he denied Mwirichia's evidence that a warder had opened the cell for the inmates. When they resumed work at 1.00 a.m. they had checked the cells and the grill to that cell was intact. He was awake after 1.00 a.m. and did not see any prisoner being removed from cell 4 to the main gate of Block E. On his discovery, this appellant was shocked. He banged the wall with his wooden baton and they i.e second and third appellants started blowing whistles. He suddenly heard Waigwa screaming and then heard gunshots and heard somebody running towards the kitchen. He heard warder Ruoro and Waigwa talking and saying prisoners were escaping. Through the peeping hole he saw Ruoro running towards the main gate and he heard an alarm. He denied helping any prisoner to escape. He however heard a lot of movements. He said warder Ruoro, who according to the record, disappeared after discharge had the keys to the gate to Block E and to all other blocks. Between 2.10 and 2.20 a.m. Ruoro and Longit entered the place where this appellant was. Shooting was still proceeding. Thereafter there were several prison authorities who visited Block E and like ACP Gacharia (PW13) asked this appellant and third appellant questions on the matter. He told Gacharia that the subject prisoners had escaped. After these people made some checks on Block E and a photographer who also came there left, this appellant and third appellant were left and they left at 7.00 .am. He vowed that during all that period he did not see any officers beat up any prisoner and he too did not beat any of them. He too had made statements earlier to the police and part of his evidence contradicted what he told the police.

The third appellant ***Ceasar Mwangi Njoka's*** evidence in his defence was that he joined prison service in 1989. On 3rd September, 2000, he reported on duty at 6.30 p.m. and was on night shift at Block E in the same shift with the second appellant. On taking over, they checked the padlocks to the cells and they were intact. Everything was secure. They worked till 10.30 and had a short rest to go and sleep. They resumed at 1.00 .am, and once again, they checked the cells and all was secure. At about 1.30 – 1.40 a.m. he heard movement from the roof of tailoring section but as they did not have keys to the cells, it was not possible to enter the cells. When they heard such movement which appeared to be that of human beings on the iron sheets of the tailoring building, second appellant went to check on cells 4, 5 and 6 while he checked cells 1, 2 and 3. He did not notice anything unusual. He talked to the prisoner in cell 4 through the peep-in hole. That prisoner told him he was sick and had been given sleeping tablets and that the other prisoners had escaped. Although there was no light in cell 4, he could see that the wire mesh on the window of that cell was folded on one side and one metal grill was missing from the ventilation window of the cells. He told second appellant that prisoners had escaped. He then blew the whistle immediately. Nobody opened the cells to let out the prisoners. He denied selling cannabis sativa to Ipomai and his co-inmates. Thereafter he heard shouts from the kitchen and then gunshots. Shouts were from Waigwa. First appellant and guard commander, warder Ruoro entered the prison and went towards Block E together with other warders. The said appellant told them they assumed the prisoners were escaping. He stayed inside Block E upto 7.00 a.m. when he left. He denied releasing the prisoners and also denied causing the death of any prisoner. He was cross-examined at length on his evidence in court as compared to what he said in the Principal Magistrate's Court **Criminal Case No. 3630 of 2000** where Mwirichia was the accused in respect of the subject incident and he did admit in several instances that there were several variations in his defence as compared to his evidence at that other trial.

Senior Sergeant Samuel Kamau, the fourth appellant, said in his evidence-in-chief in his defence that he felt the prisoners fabricated a case against him mainly because he was, apart from any other duties, charged with disciplining the inmates and he did this on daily basis as he was the only officer dealing with all matters of discipline. By reason of that line of duty, he was very unpopular. On 3rd September, 2000, he was not on duty. He had travelled to his rural home on 1st September, 2000 and was off-duty upto 3rd September, 2000. He was to resume duties on 4th September, 2000. He came back on 3rd September with his son who was en-route to Karimi Boys High School. They arrived back to his house within prison quarters at 8.00 p.m. on 3rd September, 2000. He prepared supper, ate and retired to bed at

10.00 p.m. About 2.00 a.m., he heard gunshots, whistles being blown and siren. He was shocked but looked outside to check and after about fifteen (15) minutes he dressed up in civilian clothes and went to prison – about 150 meters away. On reaching the prisons main gate he found many warders being issued with firearms and seventh appellant ordered him to remain at the armoury store to protect any armed warders from getting access to the prison compound. Boit was issuing arms outside the perimeter wall through the service window. He reached there about 3.00 a.m. He denied assisting the escapees to get out of the prison compound insisting he was in his house as he was not on duty. He also denied ordering other warders to finish the inmates and he did not know why Mwirichia fabricated that story against him, but he could not remember when he disciplined Mwirichia. He was at the armoury for about 30 minutes and later, he went with other police search teams. He did not take part in rounding up the inmates neither did he witness any warden mishandling inmates outside the prison. He was with the search team for another 30 minutes and while he came back, he saw the alleged jump up point and found very many people at that jump up point. That is when he observed many dead bodies of the inmates. People at the scene were over 1000 and included civilians, warders and senior officers together with other visitors, as officers living within the quarters were allowed to have visitors. He went back to his house at 5.30 a.m. When he went back on duty at 6.00 a.m. is when first appellant took to him a piece of makeshift rope made of prisoners' uniform and three pieces of hacksaw, and a cut grill. The same were returned to the prison-in-charge. Boit said he had collected other items from Block E area. He was also cross-examined particularly on the discrepancies and contradictions between his evidence in court and the earlier statements he gave to police. His son **Duncan Wanjohi Ngugi** (DW5) gave evidence in support of his allegation that he travelled with the appellant to Nyeri from their rural home on the relevant date and retired to bed at 10.00 p.m. and woke up to sounds of gunshots and alarm at about 2.30 p.m. His father responded to the alarm and went to prison but without any weapon. In cross-examination, he admitted that he had written his statement at the offices of his father's defence counsel and that he did not know what his father did when he went out to prison.

The fifth appellant **Senior Sgt. Artisian James Mugo Karanja** also gave a sworn statement in his defence. He said he joined Prisons Department in 1989 and was posted to Nyeri Main Prison known as King'ong'o. He was not on duty on 3rd and 4th September, 2000. He went to his home in Kirinyaga and travelled back to prisons quarters on 3rd September, 2000. He arrived back at 10.00 p.m. and went straight to bed. About 4.00 a.m., he heard noises around the house. He woke up. His house to prisons quarters is about 250 meters. Those making noise were members of a nearby family. When he enquired what was happening, they told him there was noise from prison. He went to prison and on reaching the main prison he saw a police land rover moving from watch tower 2 to *sukuma wiki* garden. He saw many senior officers there and then he returned back to his house. He never heard an alarm, whistles or gun fire. He denied beating any of the inmates and felt he could have been mistaken for another officer who was also serving and was called **Karanja**. He denied evidence of Kamotho implicating him in the offence. In cross examination, he admitted he had told police in another statement that he had a blackout as a result of having taken *muratina*, some pilsners and also smoked cigarettes and thus the evidence he gave was to some extent not the same as what he told the police.

The sixth appellant **John Kariuki Njuguna** gave an unsworn statement in his defence. He stated in that statement that he was not on duty that night and was in his house within the prison compound. In the morning of 4th September, 2000, he was woken up by gunshots, siren and whistles. He went to his door and checked whether it was properly locked and then returned and sat on his bed. He never went outside till dawn, about 4.00 a.m. when he left his house and went towards prison gate, but just before the prison gate he met some warders and asked them what was the matter. These warders told him that eight prisoners had escaped from Block E. Six of them had died and two had escaped. Later as he went on enquiring, some warders showed him the jumping off point and he also saw some stains of blood. He went back to his house and reported on duty at 8.00 a.m. that same morning. He maintained it was a lie that he had gone to the kitchen that night as was alleged by Ng'ang'a and Kamotho. He thus denied having been one of the perpetrators of the crime.

The next to give his defence was the seventh appellant **Chief Officer James Kipkemboi Sise Boit**. In a summary his sworn defence was that on Sunday 3rd September, 2000, he was attending a party at the house of the officer-in-charge Nyeri Main Prison, King'ong'o, although he was supposed to be on duty

that night. He went to the party at 8.00 p.m. instead of going to work. Other senior officers were at that party. He left the party at about 12.30 a.m. on 4th September, 2000, went to his house and slept together with his girlfriend **Tabitha Muthoni Gachara**. At about 2.00 a.m. he was woken up by gunshots and alarm from the prison. He rushed to prison. Warder Kinyua opened the gate for him and he met first appellant who informed him that prisoners had escaped from Block E having first passed through the main gate. He talked to Esokon Kionga, the prisoner who had remained in cell 4. On being asked what had happened, Kionga said the prisoners had escaped. Kionga showed him the ventilation which had one bar missing. He saw it using a torch at the peeping hole in the cell. He thereafter met Waigwa in the kitchen, and other warders and gathered information from various officers. He went to the armoury and ordered first appellant to break the seal of the canvas so as to access the key to the armoury safe. The seal was broken in his presence but he did not see first appellant enter the breaking of the seal in the record for such entries. However, first appellant gave the key to the armoury to warder Miriti. Thereafter he supervised the issuance of firearms, guns, teargas, batons, ammunitions, shields, helmets, shin guards and registers for issuance of all those items. That took about 10 to 40 minutes. Then warder Kinyua instructed the non commissioned officers to form search parties to comb various areas of the prison so as to apprehend the escapees. He then went to jump-off point but on reaching watch tower No. 1 he saw one naked dead body next to the watch tower No. 1. About 40 – 50 metres away he found the other dead bodies. There were many people where the bodies were. He rushed back to prison and found Longit and Gacharia who had been to the scene earlier. He joined the two and visited a number of areas within the precincts of the scene and then went to his house and thereafter officially reported on duty. He did not encounter the escaping prisoners at any time and he did not know how the same prisoners met their death. He did not participate in beating them. It was not true that all the appellants entered the kitchen; he never handled any weapon other than the pistol and he did not congratulate his officers for a job well done as was alleged by some witnesses. As regards the statement he made to the police, his take was that he made it before he knew he was a suspect as he was lured to make it being told that he was only required to make a further statement to the police but was not warned that he was a suspect in the matter. On cross-examination, he also admitted certain contradictions between his statement in court on oath and statement he made to the police.

Noor Mohamed Kumo, the 8th suspect also gave a sworn statement in his defence. On 3rd September, 2000, he was off duty and visited his friend in Nyeri. He reported back at 7.30 p.m. and after supper he went to bed at 10.00 p.m. He heard siren at about 2.30 a.m. on 4th September, 2000. He also heard whistles and gunshot. In compliance with the regulations of the prisons department, he woke up, put on his tracksuit and proceeded to the prison. On reaching the gate, he found Boit and warder Miriti outside the main gate. Some other people were also there. Boit told him that some condemned prisoners had escaped. Boit ordered him to take a firearm and warder Miriti issued him with a G3 rifle with 20 rounds of ammunition. He signed for the same in the Arms Movement Register. He had no weapon. Boit ordered him to join the search team and to arrest anybody he found naked. After 1½ hours search they did not succeed and went back to the station. This was at about 10.00 a.m. on 4th September, 2000. In the course of the search he heard some movement in the coffee farm and as it was dark, he fired 2 bullets in the air to see if there could be any response. This was later recorded in the Arms Movement Register. He denied ever going near the kitchen and having any blood stained clothes and no one in the kitchen washed his shoes and weapons. According to him Kamotho was not telling the truth about him and could have mistaken him for other Somalis in the Force at the time with similar names of Mohamed Noor and Mohamed Kumo. He denied seeing any dead bodies at the prison and denied assaulting and/or causing the death of any inmate. He denied the charge but admitted that his normal duties prior to that day was to do searches on prisoners and that involved stripping the prisoners and was happening on daily basis. We observe at this juncture that the learned Judge, having observed the demeanour of this appellant made notes after his evidence as follows:

“In line with Section 199 of the Criminal Procedure Code I make an observation that the witness appeared to be fairly reliable and dependable.”

As we have stated above, we will revisit this aspect later in this judgment.

The last appellant - the ninth appellant **Joshua Nyakundi Onyango** gave sworn evidence in his defence.

On the night of 3rd September, 2000, he was guarding the car park. He was with **Kimani, Tergech** and **Michael Nderitu** at the car park. They were on two shift in and his shift which he was with Tergech was to start at 10.30 p.m. The car park is in front of the main gate. They were to be on duty from 10.30 p.m. to 1.00 a.m. At 1.00 a.m. they exchanged with warder Kimani and warder **Ndioki** and they went to the guardroom to sleep. He was armed with self loading rifle – G3 with 20 rounds of ammunition. He was in his entire uniform the whole night. While in the guardroom, he heard sound of siren, whistles, shouts and gun fire. He woke up and rushed to the duty office to enquire what had happened. The shouts and whistle were coming from the kitchen and the Block E areas. He went to the direction of the distress call. He found warder Kinyua near the main gate. First appellant told Kinyua to open for him. Others had joined him and they were now about 20. They did not enter Block E, but entered the kitchen area, as the door to the kitchen area was opened by Warder Ruoro. All of them entered the kitchen. They asked warder Waigwa what had happened. He denied talking to Waigwa personally and denied performing a jig dance; denied speaking to cooks; denied taking any porridge or any meal. At that time he denied going there with any weapon. Waigwa told them he sighted people jumping from the roof of the tailoring room to the perimeter wall. They left the kitchen area and went to Block E. First appellant opened the gate to Block E. They did not enter any of the cells of Block E. They found second and third appellants at Block E. On command from first appellant, they checked the door of each cell and he noted that there was no light in cell No. 4 and also saw one convict inside the cell. He saw all these through the peeping hole of that cell. He saw the wire mesh and the grill both appeared bent. They then stood at the entry gate to Block E and senior prison officers, PW17, PW31 and PW13 and others joined them there. They proceeded with these senior prison officers to industry section, particularly to tailoring section in search of the escapees. At the roof of tailoring section he saw a rope made out of in-mates uniform and manila sack, which was recovered by one officer while another officer recovered *akala* shoes and an open prison white shirt but he did not check whether the shirt had any prison number. He denied going out of the main gate. He also denied assaulting any of the prisoners at King'ong'o or causing the death of any prisoners, he saw the first, second and third appellants that night but had no idea where the 4th – 8th appellants were that night as he did not see them. He denied the charge. In cross-examination, he admitted that it was warder Ruoro who opened the door to the kitchen for the 20 of them and not first appellant. He too had made certain contradicting assertions in his statement to the police as compared to his evidence-in-chief.

In addition to the above, the defence also called three other witnesses, who, in our view were properly called as their names had featured in the entire case and it was only necessary to have them testify as to what happened that night. These were warder **Joseph Kinyua** (DW11), **Cpl. John Gunjiri Waweru** (DW12) and warder **Michael Kariuki Nderitu** (DW13). In a summary warder Joseph Kinyua stated in evidence that on the night of 3rd - 4th September from 1.01 a.m., he was a gate keeper at the main gate and inner gate and he had custody of the keys to the two gates. He had the Gate Book which showed that Gachane entered the prison at 2.15 a.m. on 4th September, 2000. Mungo Longit also entered the prison at 2.15 a.m. but these were later corrected by warder Ngunjiri as they were not accurate. In the same Gate Book there were entries for discharges marked in red ink and they showed that the deceaseds were discharged from prison at 2.00 a.m. This is when he was at the gate but he did not make the entries. Those entries were made by warder Ngunjiri. He denied letting out first appellant with a group of in-mates from the time he was on duty till he left. That Gate Book was marked as Exhibit 29 (a). He is the one who activated the siren but he did not record that incident. He responded to alarm and witnessed first appellant breaking the canvas seal. First appellant then gave him the keys from the block which houses the subject cell. He activated the siren after first appellant told him that the inmates had escaped from Block E, and it is the same first appellant who told him to activate the siren. He remained at the main gate till 7.20 a.m. then left. He denied letting out any witnesses through the main gate when he was still on duty. He admitted that the entries to the Gate Book were not complete as he did not record the entries of senior prison officials and ended up his evidence-in-chief by saying that there were unusual events that night.

In cross examination, warder Kinyua said that according to the Gate Book, the Gate Keeper by night were Cpl. Kibiru and warder Ruoro and as per entries of 4th September, 2000, the Gate Keeper by day were Wesonga and warder Ngunjiri. Warder Ngunjiri is the one who recorded the entries of the events of the night of 3rd/4th September, 2000 on the morning of 4th September when he reported on duty. He admitted that that was strange because he was the person who was supposed to make these entries as the entries

were supposed to be made contemporaneous with the incident. He admitted that he made a mistake on the entries of 3rd September and warder Ngunjiri whitewashed them and made other entries without his having told him of those events. He denied the allegations of warder **John Sapur** (PW18), Cpl. Kahiti, (PW19), Peter Kirimi (PW25) and Mungo Longit that the sleeping-in-officer was the one keeping the keys to the main gate. The keys to the cells are kept in the safe in the custody. Kinyua also said if first appellant said he recorded the entry relating to the breaking of the seal much later, he would be telling a lie.

The other witness was **Cpl. John Ngunjiri Waweru** (DW12). He was a gate clerk. His duty involved making entries like those of prisoners attending the court, prisoners to be escorted to hospital etc. He maintained that in his capacity as clerk he could make changes to entries made by officers even in his absence. He was not on duty on the 3rd September, 2000 but he was informed there had been an escape, when he reported on duty on 4th September, 2000 at 6.30 a.m. and this is when he was informed of the escape. He then described what the Gate Book is and for what purpose it was used. Though he was not on duty on 3rd September, 2000, he nonetheless made entries relating to discharges. When he reported on duty at 6.30 a.m. the Guard Commander, Ruoro told him that some prisoners had escaped the previous night. Warder Ruoro told him that he and the sleeping-in officer who was the first appellant could not get committal warrants to establish the names of those who escaped. He was given committal warrants by an officer whose name he could not remember and those are the names he put down in his discharge. He cited the names of the six deceased persons. He defined discharge as:

“A discharge means any prisoner who leaves illegally or legally.”

But admitted that that was not the definition in the Prison Act, but was his own understanding of the word “discharge”. He said in explaining that definition that if a prisoner dies during the night inside the prison the entry marked “discharge” would be made whereas prisoners taken to hospital at night could not fall under the name discharge. Prisoners taken to court would be entered as discharges and also remandees taken to court must be entered as discharges. The time they all go out must be entered whereas the time they came back would be entered as admission. Relating to the deceased in this case, he entered them under the heading “discharges” as they escaped. He was unable to remember the name of the person who checked the entries. In cross-examination he said among others that he did not know who made the wrong entries on 3rd September, 2000 which he whitewashed. He also admitted that the entries of discharges made on 4th September were in fact discharges of 3rd September, 2000 and not of 4th September, 2000 but again said he could be shocked if he was told that the events actually took place on 4th September, 2000 and not on 3rd September, 2000. In answer to questions from the court, this witness stated that it was Mungo Longit who told him to alter entries he made on 3rd September, 2000 which were signed by three persons to 4th September 2000 which did not have all the three signatures.

The last of the defence witnesses was **Michael Kariuki Nderitu** (DW13). On 3rd September, 2000, he was on duty at the prison. He was to guard the car park and the main gate. They worked up to 10.30 p.m. and were released by the ninth appellant and Tergech who worked up to 1.00 a.m. while they were in the guardroom sleeping. Thereafter he and Kimani resumed duties. Between 1.00 a.m. and 2.00 a.m. he heard voices coming from inside the prison. It was a whistle. He rushed to the prison gate to confirm what was going on. Before reaching the gate he heard footsteps of people running inside the prison. He heard a hail of gun fire from tower No. 3. At that time according to this witness, the ninth appellant and warder Tergech were at the guard room. He rushed to tower No. 2 to check what was happening. He talked to the officer manning tower No. 2 one **Sammy** who told him they were shooting to resist the prisoners who were jumping from the wall. He denied seeing Senior Sgt. Kamau anywhere near the main gate and did not see anybody coming out of the prison between 1.00 a.m. and the time of whistling and said the door to cell No. 4 was locked between 1.00 a.m. and the time the whistle was blown. He did not see any naked person criss-crossing around the car park. In cross-examination, he also said he saw two figures following each other but when the first figure reached the middle of the perimeter wall the flight went off. He also fired to prevent the two figures from running away. He took cover and from where he was, he saw a figure running towards staff line. That figure ran towards the coffee plantation next to staff line. He

(witness) went back to staff line. As he was going to the staff line, he met senior officers and briefed them. He and the other officers then went towards coffee plantations and returned the following day.

That was the entire case adduced by the prosecution and the defence in this case as can be deciphered from the huge record before us. We do not apologise for the length of what we call a summary of facts above. We say so because we have endeavoured to crystallise the evidence that was before the trial court and which covered well over 500 pages but any shorter record would have ended in vital aspects of the case being ignored.

We have anxiously considered the charges that were before the trial court, the evidence adduced in support of them together with what we termed evidence that was inevitable if all the facts of the entire case were to be before the court as the law requires. We have considered the judgment of the trial court in response to that evidence. We have considered all the memoranda of appeal together with supplementary memoranda of appeal in the record, the able submissions of each learned counsel representing each appellant, the various exhibits annexed to the record. We have also considered the assessors' opinions and the reason for each assessor's opinion and finally, we have, as we must do, considered the law. We note that several grounds of appeal raised in the several memoranda and supplementary memoranda raise essentially the same complaint. We therefore do not intend to set out and address each ground of appeal separately as that would not only result in unnecessary duplication but also render this judgment unnecessarily lengthy.

It is not in doubt that all the six deceased persons died on the night of 3rd/4th September, 2000. It is also not in dispute that all were prisoners at Nyeri Main Prison commonly known as King'ng'o and that on the fateful night, they were all together with Mwirichia, Ipomai and the one who remained behind in cell 4 of Block E. It is also not in dispute that on that night and between 1.30 and 2.00 a.m. Sergeant Muthee, the first appellant, warder Joseph Lenana, and warder Ceasar Mwangi Njoka were among the prison officers who were on duty at the relevant time with the first appellant being the sleeping-in-officer while the second and third appellants were on duty guarding among others prisoners in cell 4 Block E where the subject prisoners were kept. It is also, in our view, not in dispute that Ng'ang'a and Kamotho were prisoners who on that night were among those assigned the duty of cooking and were there in the kitchen under the guard of Waigwa. It was not in dispute that Mwirichia was one of the prisoners locked up in cell 4 Block E prior to the incident. The last point, which we think was not in doubt, is that in respect of each deceased, whereas the immediate cause of death was said by Dr. Njue and Dr. Kirasi Olumbe to be as a result of a fall from a height whereas Dr. Mutuma was of the view that all died as a result of head injuries in a man with multiple fractures of extremities, all the pathologists agreed that there were injuries on each of the deceased which could not be explained on the theory of a fall from a height. It also does not appear, and this was also not in dispute that whatever was the cause of death, by the time the various witnesses saw the deceased persons, each of them was either dead or about to die. We mention this and view it as important because it tends to paint out the cause of death as a fall. In our considered view, Dr. Njue and Dr. Kirasi Olumbe's acceptance that the cause of death as a fall from a height, could not explain several other injuries in the deceased, meant that their reports as to the cause of death were not conclusive and it was thus proper to secure the services of Dr. Mutuma to carry out another fresh postmortem albeit on the bones of the deceased. In the end, in our mind, all Dr. Mutuma stated in his report and evidence was no more than unraveling the mystery that Dr. Njue and Dr. Olumbe had also identified. To that extent the three doctors did agree that the cause of death was due to head injuries. The only part where they differed was as to whether it was through a fall from a height or it was in a man with multiple fractures of extremities. In any event, the evidence of a fall from height is clearly ousted by the statement made by SSP. Peter Muthaimi and the signals all of which clearly say the prison authorities engaged the deceased in a fierce fight. We shall revert to that later hereinafter.

The next issue is how did they come to the scene where they allegedly died, i.e outside the perimeter wall or put in a different way, how did they leave their cell – cell 4 Block E. Directly connected to that question is the other question of whether for purposes of the law, it was necessary to resolve that question i.e whether it did matter for the purposes of law whether they died while escaping or on being released from their cell, if it is established that either way they were killed and thereafter is the question of, if killed, then by who were they killed and of course that assumes that they were killed together at the same

time.

The evidence of Muguso, Waigwa, first, second and third appellants was putting forward a theory that the eight condemned prisoners who were housed in cell No. 4 Block E escaped from their cell by cutting the grill in the window of their cell with a hacksaw and folding the wire mesh hitherto covering that cell's window aside and thereafter escaping through that window by climbing over the roof of the firewood store adjacent to the block on to the roof of tailoring section and then to the kitchen roof which enabled them to reach the perimeter wall. Once on the perimeter wall, they used "a makeshift rope" made from their uniforms and blankets and scaled the perimeter wall which was 24 ft high jumping down with the result that six died on the spot while two escaped one of whom was later apprehended. Most of the witnesses who were employees of the prison department gave evidence supporting this theory. This theory is indeed attractive particularly when one considers that it would be the main reason within the prison set up that would attract a series of spontaneous punishment to a prisoner from prison officers for any attempt to escape from lawful authority. It is in general a challenge to the personnel entrusted with the duty to ensure security of such person to ensure no escape takes place. Further and in this particular case it is even more attractive theory as Elijah Kona Shamalla said in his evidence that in the month of March, 2000, he had information from sub-regional coordinator, Nairobi Intelligence that some capital remandees at King'ong'o were planning to escape or to be rescued by other people en-route to the court for judgment. It is not clear whether any of the deceased was a remandee in March, 2000 but that idea of staging an escape was mooted and thus the escape theory was attractive. We have considered it anxiously as we have stated above, but several aspects as are apparent in the record, in our view militate against our taking a different view from that which was taken by the learned Judge and as is also clear from the decision of the Senior Resident Magistrate at Nyeri in **Nyeri Criminal Case No. 3630 of 2000** and also taken by the principal Magistrate at Nairobi (as he then was) in inquest **Case No. 122 of 2000**. The latter two matters were annexed as exhibits and we are aware that the evidence there was not evidence in the appellants trial and the appellants did not have any opportunity to cross-examine any of the witnesses in them, but we are also aware that the proceedings were extensively used in cross-examination of witnesses in the trial before the learned Judge. We obviously cannot rely solely on the same proceedings but in so far as they were referred to and annexed as exhibits, we are entitled to refer to them. Waigwa said in his evidence that he first heard slight noise at the roof of the tailoring workshop. That noise became louder and louder. He suspected a cat on the roof. He looked and saw two nude people against the perimeter wall. He shouted at them and six others emerged from the roof. All were naked and they started throwing "akala" shoes at him. The first two were holding what later was allegedly described to be a make shift rope and he saw the people on the roof jumping one after the other, yet he merely kept on blowing a whistle and even when joined by other warders like Ruoro, first appellant and others numbering a total of ten, he never went out to see where they were jumping to and to stop the escape. Again, in cross-examination, he gives a different story that the ten other warders went to where he was long after the siren had been activated and long after he saw people on the roof and contradicts the evidence-in-chief by saying that only first and second appellants responded to his alarm and by that time there was commotion all over. One is left wondering when this witness saw the eight people escaping and why he did not go to the gate and find a way of going out to apprehend the alleged escapees. Secondly, the escape theory cannot be explained in the light of the evidence given by prison warders to the effect that the escape was made possible by a grill that was cut in the window of the cell. The evidence shows that the prisoners were under full search twice a day and during such searches, they could be stripped naked. There is also evidence that the cell was being subjected to thorough check up and that there were two warders perpetually manning the small corridors leading to the cells. Any cutting of the grill at any time would have been heard by the warders and the hacksaws that were allegedly being used were very small. It would have taken long time for anybody cutting the grill to realise his goal and such a person would have not escaped being found out. Thirdly the first appellant, in his evidence in court explained the escape theory on the main ground that the only key that could have opened cell 4 was in a sealed canvas which was waxed and stamped and which he only opened in the presence of seventh appellant and warders Kinyua and Miriti, and warder Mutua. He said as follows on that aspect;

"I narrated to Boit (A7) what I had heard and what I saw. That was in the presence of Miriti, gate keeper, telephone operator. I produced the seal canvas so that we could open the main key safe to the armoury. I did this in the presence of C.O. Boit (A7) warder Kinyua, warder Miriti, warder Mukua

(telephone operator). I broke the keys. It is officer 2 Boit (A7) who instructed me to break the seal so that arms could be distributed to officers who had responded to the alarm.”

As we have stated, this part of the first appellant’s evidence was clearly meant to emphasize that the inmates could not have left cell 4 of Block E through the door of that block as the keys to that cell were in the sealed canvas which was only open after they had been spotted by Waigwa out of the cell. In short, it is meant to prove that the eight inmates escaped as stated by the prison warders. However, a close perusal of the entire record shows what this same appellant had stated in his evidence before the Senior Resident Magistrate in **Criminal Case No. 3630 of 2000**. He was PW7 in that case and as to the key to cell 4 he said: -

“I went to the scene and confirmed that the inmates from cell No. 4 of “E” block had escaped. This cell No. 4 had 9 inmates. I only found one inmate in it. I did not open the cell. I saw it from the peeping hole. I went and collected keys and opened the cell No. 4 and removed the inmate who was there and put him in cell No. 5.”

That the keys to that cell were not in a sealed canvas had support of the third appellant who was PW2 in that case. Ceaser Mwangi Njoka said of the key in that case in cross examination: -

“The keys to the cells are kept in the safe at the gate watch.”

The second appellant who was PW5 in this case also said: -

“The key to the cells is kept in the main cell.”

Mungo Longit’s evidence suggests he got into cell 4 before he saw first appellant – see his evidence at page 291 of the record. In short lack of the ready availability of the key to that cell could not have been the reason why they could only have left the cell by escaping as described by the proponents of the escape theory. The key theory as given at the trial was an attempt to improve on the earlier position which left the other theory open to acceptance by the court.

The next reason why we think the escape theory cannot sell is that of the eight inmates who left the cell at the relevant time. Six got so heavily injured that they died almost on the spot while two others – or to be fair one – M’Mwirichia escaped any injuries save that which he said he got as a result of being scratched by a barbed wire as he was allegedly running away for his life. If all of them escaped as described then what spared the life of this witness and with no injuries at all? The other one Ipomai allegedly escaped into the thin air that night and only met his death much later and elsewhere under different circumstances. Clearly he must have left the prison precincts in one piece to be able to escape on foot completely. No explanation had been advanced by the prison officer on duty that night as to why this could be so. At least one would have expected that they would be injured to an extent even though alive.

Further, if they escaped, is there evidence that the six were apprehended and were re-arrested or that efforts were made to re-arrest them within the precincts of the prison and that they offered resistance to that. If not then what was the reason for the signal that was sent by Barnabas Mungo Longit (PW31), who was the Senior Assistant Commissioner of Prisons and who alleged in evidence that he found the deceased naked but groaning on the ground with warders all over yet he never got any warder that intercepted the escapees. His signal was to the Commissioner of Prisons and Longit said it was to *“explain the occurrence.”* He said that signal was drafted by Nyongesa but under his instructions. The signal read:

“Regret to report escape of eight (8) special category prisoners from inside the prison cell on 4.9.2000 at about D150 Hrs. Their names are as follows: -

NYR /1864/99 Con. Joseph Kamande Mwangi

NYR/122/2000 Con. Peter Koring.

NYR/247/2000 Con. Geoffrey Ipomai alias Driver.

NYR/249/2000 Con. Peter Gurushana *alias* Maina Kingori

NYR/351/2000 Con Peter Lumukunyu

NYR/548/2000 Con. John (sic) Nyoro

NYR/765/2000 Con. Julius Muigwa M'Muraa

NYR/766/2000 Con. Bernard Kimathi M'Mwirichia

They were committed into the prison for offences of robbery with violence c/sec. 296 (2) and sentenced to death. Please note that when escaping six (6) of them were killed during the fierce fight with warders but two are still at large. Stapol Nyeri please assist to apprehend the escapees. Comp. Miriti... full escape report to follow.”

This suggests that to Longit's knowledge or information, the deceased were apprehended as they were escaping and a fierce fight broke out between the warders and the inmates. If that be so, then one would have expected that those warders who intercepted them and engaged them in the alleged fierce fighting could have been availed to justify their action, but that did not happen and none from prison including those on duty at the car park or in the various places of the prisons saw anybody fighting the so called escapees. It was only one woman civilian witness **Anne Wanjira Muchaina** (PW11) who said in evidence at the trial that at about 2.00 a.m. on the night of 3rd and 4th September, 2000, she heard a whistle, and siren and on looking on what was happening she saw a naked person running towards her kiosk with the warders hot on his heels. She told the warders that the man had taken off following the road. That allegation to an extent supports Mwirichia's story although Mwirichia said he hid himself at a place not far from the scene and he could still see what was happening at the scene. What looks even more interesting is that four days later, in another signal dated 8th September, 2000, prepared by Longit, the original stand that the inmates had engaged the warders in the fierce fight is dropped and this time the story peddled is that of a fall from a height as the cause of death. We note that before 8th September, 2000 and to be precise on 5th September, 2000, only one day after the signal that talked of a fierce fight as the cause of death of the six inmates, Longit did a letter to the Commissioner of Prisons and apparently discarded the fierce fighting report saying that was based on assumption at the time. We are of the view that this officer who reported to the scene immediately after the alarm was raised must have seen and known what had happened and his attempts to change his story represents serious afterthought. That allegation of a fight was not only made by Longit, Peter Musila Muthami (PW17) in his evidence at the trial did not make it but a look at his statement to the police shows that he stated: -

“On arrival at the main prison I entered my office briefly and picked up my riot gear. I came out of the main prison immediately and ran towards the eastern side of the prison perimeter wall. By the time I arrived at this perimeter wall the eight special category prisoners had already jumped over the perimeter wall and were engaging our warders in a fight near the perimeter wall and inside the staff line. We mounted the operation to subdue and capture them for about one hour. At about 0300 hours, six special category prisoners had been killed while fighting and two had disappeared in the darkness.”

Like Longit, he too made a retreat in another short statement recorded on 17th October, 2000 in which he stated that by the time he arrived at the perimeter wall the inmates had already jumped out of the perimeter wall and six of them had died beside the perimeter wall and two had disappeared. He ended that statement by categorically saying there was no fight between warders and prisoners as he had earlier stated. Yet he had not stated in the earlier statement what he was informed. He had stated what he saw and did.

Lastly on this, this tendency of changing story was also evidenced when Shamalla gave evidence. In his statement to police he said the first report of this incident he got was that five prisoners had been shot

dead. Dr. Njue also received initial report that the deceased had been shot dead while trying to escape. Indeed in his cross-examination, he said he never saw bullet wounds.

In short, their stories leave only one alternative, and that is that the escape and fall from a height story is an afterthought.

In any event, logistically, much as we appreciate that in criminal cases possibilities can be accepted and when an incident is possible, the benefit of doubt goes to the accused and hence it was possible that the deceased could have squeezed themselves through the small hole in the grill, yet all this could have been accomplished in one night – i.e cutting the grill and escaping through it without the second and third appellants knowing or having a clue as to what could have been going on within the distance between them and the cells which was no more than a wall. Further, as the learned Judge rightly argues, it is not easy to appreciate how the alleged make shift rope could have been held with nothing to tie it on to or to hold it at the top of the perimeter wall as all that were there were pieces of glass which common sense dictates could not hold a rope as human weight is hanging on the other end. Again as the learned Judge observed if one was to remain holding the rope on the perimeter wall, then how would that person come down after all have jumped down?

The next matter that makes it difficult to accept this version are the medical reports by all the doctors as to the cause of death. As we have stated above all the doctors agree on one thing about the death of each of the six inmates and that is that certain injuries could not be explained on the theory of a fall from a height. Of course, as we have observed from the evidence in the record and particularly in the various exhibits, there was a clear indication from Longit and Muthami that there could have been what they called a fight between the inmates and the warders although the warders had no injuries to support that proposition, nonetheless if the escape theory is accepted then the element in all the doctors report that certain injuries could not be explained on that theory only means that the inmates could not have come to where they were eventually found outside the perimeter wall through escaping and falling from a height. We also agree that if they were people jumping from a height in an effort to escape then their bodies must have been prepared such that the injuries each sustained could not have occurred and further, they could not have fallen so close to the wall with one of them falling away from the others which clearly indicated, he did not use the same makeshift rope to escape.

We think we have said enough to indicate that doing our duty of a first appellate court in this appeal, and therefore revisiting the evidence afresh, analysing it, and evaluating it – see case of **Okeno v. Republic (1972) EA 32**, we too agree that the evidence and therefore defence put forward that the deceased found themselves at the scene of their demise as a result of their attempting to escape from lawful custody and thus met their deaths as they jumped from a height cannot be correct.

The other version, which as we indicated is the version that the prosecution put forward as its case is that the deceased together with Mwirichia and Ipomai were lured out of their cell by prison warders who were possibly anxious to help Ipomai escape from the prison custody. Once out of the prison the fourth appellant went away with Ipomai leaving other warders to search the appellants who were stripped naked and when the fourth appellant returned to them he told the other warders to finish the inmates.

It is not in dispute that Bernard Kimathi Mwirichia was an inmate and was held in cell No. 4, Block E. It is not in dispute that he was one of the eight prisoners who were in that cell about 1.30 a.m. on the night of 3rd and 4th September, 2000. Other than another prisoner Esogon Kionga who gave evidence in the case against Mwirichia at Nyeri Senior Resident Magistrate's Court and Ipomai who went away that night and was allegedly killed later in another unrelated but for similar offence, this witness was the only one called among the nine prisoners held in that cell before the incident resulting in the death of six of his erstwhile colleagues. He was also the only eye witness to part of the incident.

According to him, after they had been locked in that cell 4 at the usual time, the third appellant peeped through the pigeon hole and called Ipomai, a fellow cell mate. He gave Ipomai a sheet of paper which was part of the bible and in which bhang was wrapped. They smoked bhang and then slept. Sometimes in the wee hours of the night first appellant went and opened the cell – cell 4. First appellant was with second

and third appellants all of who were on duty that night with the last two appellants being on duty at Block E. First appellant ordered all inmates to take their belongings. Eight of them left, being still in their prison uniforms. Gate to Block E was pushed by the first appellant whereas another guard wearing a marvin hood hat opened the main gate. Once outside, four other guards including the fourth appellant joined them. Mwirichia said of the four guards who met them outside he knew the fourth appellant and not the other three. Thus once outside, according to Mwirichia, the first, second, third and fourth appellants and three others were with them. The fourth appellant told ninth appellant to search the inmates. Such a search incorporated being stripped naked. The fourth appellant took Ipomai and went away with him. Fourth appellant returned alone and then he told the other warders to finish them. Immediately **Julius Mungania** was hit with a club. He fell down and all the inmates took off wailing. Mwirichia ran towards staff houses. He was caught by a barbed wire and fell down. A guard chasing him could not trace him. He continued hearing screams and stayed there till the screams subsided. In cross-examination, Mwirichia said that earlier on 3rd September, Ipomai had told them that they might be free men that day and they had told him that if he had that chance they might also utilize it as they were condemned prisoners and that as he lay down in the vegetable garden he heard screams of prisoners saying “do not kill us.” This was the only evidence that was to an extent direct on how the deceased reached the scene when they met their death. It was the main evidence relied upon by the prosecution to establish not only who perpetrated the heinous act but also to indicate how it was done. It was evidence of a single witness of the events that took place at night. Not only that but he was a person serving death sentence for robbery with violence.

We have anxiously considered his evidence as we must do on our own independently. We are aware that in law, a court is required to consider with greatest care the evidence of a single witness and although this legal requirement is mainly in respect of identification. - see case of **Abdala Bin Wendo and Another v. R. (1953), 20 EACA 166**, nonetheless, in our view, it is good law even in respect of other cases such as the present case where the offence took place at night. In any case first, second, third and fourth appellants denied any part in the offence that took place as described by the witness and fourth appellant said he was not on duty that fateful night, and thus the issue of identification or recognition as this was a case of recognition comes into consideration as well. We are however aware that **Section 143** of the Evidence Act provides that:

“No particular number of witnesses shall, in the absence of any provisions of law to the contrary be required for the proof of any fact.”

Finally we are aware that a witness upon whose evidence the court would rely must create an impression in the mind of the court that he is a straight forward person. In the case of **Ndungu Kimanyi v Republic (1979) KLR 282**, this Court differently constituted stated:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence.”

We however do not understand the principle in that case as barring courts from receiving and considering evidence from convicts. In our view, one may be a convict yet be an honest person and after his evidence is considered with greatest care, bearing his antecedents in mind a conviction can still proceed on such evidence. It is in the light of all the above that we proceed to consider the evidence of Mwirichia. The evidence is to an extent corroborated by that of Anna Wanjira to whom we have alluded herein above. Anna said she heard siren and whistle and when she looked out, she saw a naked man running away being pursued by warders who must have been a distance behind as she directed the warders to the direction the naked person had taken. This tallies with Mwirichia’s evidence that once, he saw one of them being beaten with a club he took off and a guard followed him who could not trace him as he had been caught by a barbed wire. The other piece of evidence that also corroborates Mwirichia’s evidence is the signal we have referred to above which Longit who was in charge caused to be raised and to be sent to the Commissioner of Prisons. In that signal Longit clearly says the six deceased prisoners died as a result of a fight with the alleged escaping condemned prisoners. Though he made an attempt to alter the

message in that signal, as we have stated, that information admitted as it was pursuant to **Section 6** of the Evidence Act, showed that there had been a fracas immediately outside the prison. It is clear that the victims had no weapons for such a fight and so a “fight” between the dead prisoners and warder could only have been an explanation for warders beating the inmates.

The other aspects that lends corroboration to Mwirichia’s evidence are the postmortem reports in which all the doctors said certain injuries on each victim could not be explained on the theory of a fall from height. That in effect meant as Dr. Mutuma said that another force must have been involved in their death. All the doctors agree serious injuries were inflicted on the head of each victim, but there were some other injuries and particularly a combination of head injuries and injuries on the lower limbs that did exclude the fall from a height theory. Postmortem report also suggested that some deceased had injuries indicating that they were wading off attackers upon them. Fall from a height theory was advanced to support the allegations that the deceased escaped from their cell through the small space created in the window by cutting one grill on the window, then going to the roof of tailoring block and thereafter to the top of the perimeter wall, and then scaling the perimeter wall by using a makeshift rope and jumping down and thus incurring the fatal injuries. Medical evidence says some of the injuries in each deceased could not be explained upon that theory. That suggests that the deceased could have reached the scene through a different route and Mwirichia said that different route was through first appellant opening their cell for them and then with the assistance of second and third appellant, the first appellant led them through various gates to the scene outside the prison where they were beaten or as the signal by Longit said, where a fierce fight took place between them and the warders whose number now increased by another four and possibly many more later. Then there is the fact that Mwirichia, himself being one of those who were in the cell and who allegedly escaped and did not fall to death. Indeed, not only was he not seriously injured from that fall from a height but he was not scratched at all and was still able to run away with warders in hot pursuit. His only injury was incurred as he was running when a barbed wire injured him. This scenario lends a hand to Mwirichia’s version in that had he escaped together with others as alleged and had he fallen from a height like the others, he would not have lived to tell his side of the story just like the other six or if he had lived, he would have lived a seriously injured man – perhaps rendered lame. His story explains why he lived and that was that he together with others were not escaping but were led out of their cell by those employed to keep them inside the cell.

The next matter that we think corroborated Mwirichia’s version is the entry in the Gate Register to the effect that they were discharged. It is not certain whether this entry was made as they were going out, or at the time they were allegedly seen jumping down from the perimeter wall or after they had been discovered dead outside the same wall. Whatever Warder Joseph Kinyua (DW11) and warder Ngunjiri (DW12) had to say about this entry, the definition by **Scaver Mbogo** (PW34) seems to convey much sense. He said:-

“I now see Gate Register Exhibit 29 (a) and (b). It shows that the prisoners were discharged at 0200 hours i.e 2 a.m. Discharge means somebody has been released. PW1 M’Mwirichia and all the investigators revealed that the 6 inmates were released.

Ngunjiri, witness for the defence made these entries in that register notwithstanding that he was not on duty on the relevant night and whited out the entries which Kinyua had made. All these point to some effort to hide the truth. If the victims had escaped as alleged then we do not understand on what basis they were being entered as having been discharged. This again points to the veracity of Mwirichia’s evidence that they were released from the cells by first appellant who was with the second and third appellants.

We have already said something about the key and where it could have been at the relevant time. That first appellant gave different stories about it as observed above, in our view to an extent leaves Mwirichia’s story tenable.

We need not say anymore. The above will demonstrate that we have considered with the greatest care the evidence of Mwirichia and having done so and considered the surrounding circumstances and also having sought as is required in the case of **Abdalla bin Wendo** (supra) other supporting evidence to enhance our assurance, we have no hesitation in concluding that Mwirichia’s evidence was reliable. We appreciate

that there appeared no proper motive for the action that the first appellant took in opening for the victims and leading them out to their death, but the apparent suggestion as the record shows is perhaps that they wanted to help Ipomai escape. In any case, motive is not a necessity in criminal law.

Having found as we have that the victims were led out of their cell to their death by first appellant, second and third appellant, we will move to consider who killed them. We do not think the issue of whether it mattered or not how they reached them is any longer an issue as we have now found for certain how they reached the scene. Each of the six counts the appellants are facing charges each of them with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The appellants were charged as we have stated that they, the nine of them jointly murdered each of the deceased on the night of 3rd and 4th September, 2000. They are not charged with murdering each of the deceased jointly with others not in court. Thus what the prosecution was obliged to prove was that the nine of them committed each of the offence jointly as between themselves but not jointly with others not before the court. The learned Judge was also only required to deal with the offence as spelt out in the charge sheet. The learned Judge in his judgment drew out “analysis of the evidence” and the first issue in that analysis was as follows: -

“FIRST ISSUE

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

1. **Sergeant Muthee (sleeping-in-officer) – (A1).**
2. **Warder Joseph Lenana Rukwaro – guarding cell 4, E Block (A2).**
3. **Warder Ceaser Mwangi Njoka – guarding cell No. 4, E block (A3).**

It is further clear to me, on the available evidence, that the following accused persons responded to the siren on the morning of 4th September, 2000.

- (i) **Sergeant Samwel Kimani (A4).**
- (ii) **Senior Sergeant Artisan James Mugo Karanja (A5)**
- (iii) **John Kariuki Njuguna (A6)**
- (iv) **C.O. James Sise Boit (A7)**
- (v) **Noor Mohamed Keino (A8)**
- (vi) **Warder Joshua Onyango Nyakundi alias Mwalimu (A9)”**

In our view, the Judge was plainly right in the above analysis as evidence on record together with the defence evidence clearly shows that the first three appellants were on duty on the relevant night and were directly duty bound to ensure the security of the inmates in cell 4 Block E throughout that night. It is also correct, going by the evidence of the appellants that they were not on duty that night except the ninth appellant who was on duty but only upto 1.00 a.m. when he was not on duty though still within the precincts of the prison. It must also be accepted however that there is some evidence that staff quarters where they lived was not far from the prison. By their own evidence in defence, they responded to the siren, whistle and gun fire and the evidence is that that was in compliance with the prison regulations that required them to respond immediately to the siren for that was the purpose of activating the siren.

The learned judge, having set out that analysis, proceeded as follows:

“The foregoing evidence is borne out by the prosecution witness account, duty roster (sic) (Exhibit 4) and the accused persons own statements in their various defences. That puts all the nine accused persons at the scene.”(underlining supplied)

We have anxiously considered this part of the learned Judge’s finding against the other evidence that was before him and the roles each appellant allegedly played in the entire saga and we cannot appreciate that the mere fact that the three appellants were on duty that night and six others responded to the siren put all of them at the scene of the crime. In our view and with respect, that finding ignored certain crucial aspects of the entire case which the learned Judge needed to resolve. It amounted to a finding that whoever responds to an alarm must be taken to have taken part in the perpetration of the offence. We note that the learned Judge, going on that note assigns to each appellant the part that the appellants played and having done so states as follows:-

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

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

It is clear to me, on the evidence, that the officers who were at the scene, which includes all the 9 accused, did use the arms they had on the 6 inmates.”

First aspect which we think the learned Judge needed to consider is whether the alarm was activated at the time the six deceased were being led out, or at the time they were being beaten or after the beating. In short where was the scene of the crime? The next aspect that needed to be resolved was whether all those who responded to the alarm did take part in beating the deceased. That is whether evidence showed that apart from the response to alarm as per regulation, they also took part in the perpetration of the crime, and the last is whether they acted with malice aforethought in beating the deceased if they beat them at all.

In our considered view, we do not think the mere fact that a member of the disciplined Force such as a prison officer responds to an alarm as per his regulation without anything more would mean that he has taken part in a crime perpetrated either before or after the alarm is activated neither would it mean that he has formed the intention to take part in such a crime. It is possible and often happens that one responds to an alarm and on arrival at the scene finds that the matter has been resolved and no more action is to be taken or having responded merely stands by or engages in stopping any crime being carried out. Each aspect must be considered on its own and only those who respond to alarms and take part subsequently in an illegal action knowing or having reason to believe it is illegal could be punished. We thus propose like in all criminal cases, to consider each case in turn and to see what evidence there is against each appellant.

On the evidence we have accepted of Mwirichia, the first, second and third appellants were on duty that night. The prosecution’s case against them is based on circumstantial evidence. We say so because even Mwirichia only dealt with the way they left their cell that night up to the time he says the fourth appellant told the first, second, third and three others to finish them, one of them was hit, they started wailing and he ran away. Although he said he could still hear screams and pleas from the deceased from his hideout, he could not and did not give direct evidence as to who was beating who and how the beating was being carried out. The law as regards the principles that guide the court when considering circumstantial evidence is now well settled. It is found in the decision of the predecessor of this Court in the well known case of **R vs. Kipkering arap Koskei and another (1949) 16 EACA 135** where the Court held:

“That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence

is always on the prosecutions and never shifts to the accused.”

This principle was later in the case of **Simon Musoke vs. R. Criminal Appeal No. 188 of 1956** given more explanation when the court added that at the same time there must not be any co-existing facts in or circumstances which may weaken or destroy that inference of the guilt of the accused person.

On the evidence of Mwirichia which we have accepted, the first appellant got them out of their cell 4 and he was together with second and third appellants. First appellant was in custody of the key to that cell. We have shown that his defence as to the custody of the key at the trial contradicted what he stated earlier in his statement to police and contradicted what the others also said. Once outside and as the warders on orders of fourth appellant started beating the deceased, Mwirichia ran away leaving the first appellant together with the other six with the deceased. At that time beating had begun but as he was in the vegetable garden, he heard the deceased scream and plead for their lives. In such scenario, the only persons or people who could explain what happened to the deceased were the first, second, third, fourth appellants and the other three warders who were unknown to Mwirichia. This is pursuant to the provisions of **Section 111 (1)** of the Evidence Act which states: -

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case with any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially with the knowledge of such a person is upon him.”

This is not in any way shifting the burden of proof as was suggested in the submissions of various learned counsel who addressed us. It is a provision of law which was enacted to ensure among others that those committing such offences should not go scot-free all because their victims are not available to state what happened that resulted in their demise or suffering for that matter. Thus, the first appellant, the second appellant and the third appellant, being on duty at the relevant time when those they were supposed to take care of and whom they removed from their cell to a scene outside the perimeter wall where Mwirichia, being one of the inmates removed bolted as they were being beaten leaving all behind and hearing them immediately thereafter screaming and pleading for their lives, have to explain what happened to the deceased. Without the explanation, which need not be beyond reasonable doubt, an inference of guilt would be made against them.

There was evidence from Ng’ang’a and Kamotho that some warders went to the kitchen where they were, with their clothes having blood and some of them had certain weapons such as an axe. We have carefully considered the evidence of Ng’ang’a and that of Kamotho. We do agree with the learned counsels’ submissions that they contained so vital contradictions and discrepancies that no court exercising its mind to the facts and law would rely on their evidence. For example, in his evidence-in-chief Ng’ang’a stated:

“What followed was that I saw 8th accused (pointing at accused 8). His name is “Afandi –Noor” carrying an axe and I saw blood on the axe and on the boots. “Afandi Noor” was with 9th accused. He is called Mwalimu Onyango who had a Maasai rungu and a Somali sword. He came and started a break dance. He was saying that they have killed some people. Even yourself (referring to us) would die. Mwalimu Onyango called for “uji” (porridge). I gave him. “Afandi Muiruri” also asked for uji (porridge). Afandi Noor asked me to smell it. Accused No. 6 (John Kariuki Njuguna alias Chizi) came to the kitchen. He accused 6 Kariuki was holding a panga and a rungu. He had a lot of blood on the boots. The jacket he was having had blood stains splashed all over. The 7th accused also came to the kitchen. He is called Afandi Boit. He had a riot cap with glasses for protecting the eyes and a rungu. The rungu had blood. Afandi Boit was the in-charge night. He ordered that we be taken back to Block A.”

Thus in his evidence-in-chief he allegedly saw the sixth, seventh, eighth and ninth appellant in the kitchen that night with various weapons some stained with blood and sixth appellant had blood on his boots. However, in cross examination this same witness stated –

“I cleaned the blood from the shoes of Afandi Noor, Muriiri. I cleaned the arm of Boit. Mwalimu Onyango had a small sword and broke into a dance as I washed his Somali sword. Mwalimu Onyango

was smoking bhang. Mwalimu Onyango was in uniform. Afandi Noor, Mwalimu Onyango, Boit, Sergeant Nathan also was in uniform, Caser (accused 2 (sic) also had uniform. Accused 6 – Njuguna alias Chizi was also in uniform. All the above named came to the kitchen and thereafter is when the siren /alarm was raised.

Only immediately thereafter in the same cross-examination to say:-

“I never saw 1st – 5th accused at the kitchen during the commotion that resulted in the death of some prisoners.”

Sgt. Mathew was accused No. 1, whereas Ceaser was accused No. 3. Further this witness in further cross-examination added: -

“I am saying that 6th accused came in the kitchen with an axe and a panga and a panga with brain and blood beings.”

The above are only some of the discrepancies and contradictions in the evidence of the witness Ng’ang’a. We cannot appreciate how any witness worth his salt could forget that he was approached by a person carrying human brain. Not only did he contradict himself seriously on material facts but his evidence was heavily contradicted by evidence of Kamotho. Better still their evidence contradicted each other in several material aspects that it would not be fair and just to rely on either evidence. For example whereas Ng’ang’a’s evidence was that Waigwa did not blow any whistle as he was sleeping on a gunny bag at a corner and could not have known what happened, Kamotho’s evidence is that at about 1.00 a.m. they heard a whistle by Waigwa and heard a siren and gunshot and the four inmates in the kitchen went to where Waigwa was blowing the whistle and Kamotho said all the nine accused entered the kitchen in riot (police) gear.

However, even with the evidence of those two witnesses ignored as we think the trial court could also have refused to rely on them, had it analysed them fully, nonetheless, as to the first, second and third appellants, the circumstantial evidence as narrated above and the provisions of **Section 111** of the Evidence Act which required them to explain what happened to the deceased who were left with them by Mwirichia only few seconds as Mwirichia ran away but died immediately thereafter while they were still in-charge of them and there being on such explanation, point to them as the sole perpetrators of the deceased’s death or as some of those who killed them. We have perused and considered their defence which were in our view contradicting in respect of each appellant and we too reject them.

The next appellant to discuss is the fourth appellant. He was not on duty that night and his evidence in defence to that effect is not challenged. However, Mwirichia said he was the person who ordered the others to kill them. He said he was away that night and his son gave evidence in support of that defence. Mwirichia knew him and referred to him by name. His house is near the prisons precincts Mwirichia says he is one of the four warders who met them at the outside gate and that he took away Ipomai who was never seen again till some information was received of his being killed in Nanyuki later in another matter. Mwirichia said the fourth appellant was not hooded and so he could see him well as there was light at the gate where Kamau and three others met first, second, third appellants together with inmates of cell 4, Senior Sergeant Jackson Gitonga Muitora (PW16) said he saw this appellant in underpants near his door, but it must be noted that this was sometime after the incident for the same witness said he visited the scene and found a crowd of over 300 people there. We think Mwirichia did not make a mistake in his identification of the fourth appellant. Otherwise where is the evidence that explains how Ipomai who was a prisoner and was in the same cell escaped? It is only Mwirichia who explains that this appellant took him away leaving the seven with the first, second, third and the other three warders. He returned to them without Ipomai and Ipomai indeed escaped that night with no evidence of his fall from a height nor of his death. This appellant too is a victim of the provisions of **Section 111** of the Evidence Act.

We have considered whether the lesser offence of manslaughter was available, but the record does not reveal any evidence to support manslaughter as the alleged fight between victims and warders was not

given in evidence in court by any witness.

The fifth, sixth, seventh, eighth and ninth appellants were not on duty that night. Although ninth appellant was on duty upto 1.00 a.m. that night and was still within the prison precincts, he was entitled to go for a rest and as he said he went to the guardroom to rest. He responded to the siren as others did. The learned Judge did well in our view to set out the roles each appellant played in the entire saga. We have discussed the roles which were played by first, second, third and fourth appellants, and how in our view they cannot escape the guilty verdict. As to the fifth appellant, Sergeant Artisan James Mugo Karanja's role what the learned Judge sets out against him is that he heard alarm and went to prison at about 3.00 a.m. – 4.00 a.m. He saw a police land rover coming from watch tower No. 2 and he met several senior officers and that he claimed he was drunk that night but did not record that in his statement to police. We fail to understand how failure to record that he was drunk in his police statement that night which only points to his being economic with truth, left him an offender. We note that the learned Judge, unlike in the case of first appellant, in this case he merely set out this appellant's defence. However, the appellant's evidence that he heard sirens between 3 – 4.00 a.m. of 4th September, 2000 was not challenged. The evidence on record for several witnesses put the time of the incident to be between 1.30 and 2.00 a.m. **Senior Sergeant Tom Opiyo**, whose evidence was accepted by the learned Judge heard sound of a gunshot while he was on night duties as a police sergeant not very far from the prison. If this appellant went to prison in response to the alarm at 3.00 a.m. he must have found only dead bodies and thus could not have been part of the team that killed the deceased. In any case his defence was in effect supported by the evidence of Ng'ang'a who said: -

“I never saw 1st – 5th accused at the kitchen during the commotion that resulted in the death of seven prisoners.”

We are aware that we have referred to the above evidence as an example of the inconsistency of Ng'ang'a's evidence, but as far as this appellant is concerned it was the only reference to him in the record before us apart from the report prepared by Acting ACP Peter Mwangi which was only based on what he gathered in evidence but was not supported at the trial by any witness. Corporal Kaviti who was on duty that night said this appellant was not on duty and PW31 confirms the same. In the case of this appellant, it could not be established as to how he could have been at the scene as the learned Judge found when the incident happened between 7.30 – 2.00 a.m. and he went to prison between 3.00 and 4.00 a.m. In his case, we do not think one would even discuss the issue of whether or not he had malice aforethought as in the first place it has not been established that he was there at the time the deceased met their death or when the fierce fight was ranging if there was any fight at all.

The sixth appellant was also not on duty that night. That is confirmed by Corporal Kaviti as well. He gave unsworn statement in his defence. He says he was awakened by gunshots and he was shocked and as sirens, whistles and gunshots rent the air, he did not venture outside until 4.00 a.m. when he left his house, walked towards the main gate but before he reached there he met some warders who told him what had happened. He proceeded to tower No. 2 and after being shown around he retreated to his house. He denied Ng'ang'a's evidence about his having been to the kitchen.

As we have stated above, Ng'ang'a's evidence was so inconsistent that no reliance could be placed on it. None challenged this appellant's statement that he went to prison at about 4.00 a.m. This was well after several other witnesses had gone to the prison and had seen the deceased. There was no evidence to the effect that anybody saw him either alone or with others whether in a mob or not, inflicting any injuries on any of the deceased. Again as we have said in order to talk of malice aforethought, taking part in the criminal act must first be proved. It was not enough that he was a warder for indeed even if a warder were to arrive at the scene when the deceased is being beaten that alone would not be interpreted as taking part in mob justice unless and until there is evidence that he was not only there but that he was there taking part in the beating. That is when the court would start thinking of whether his intention and that of the others also taking part was common and was to either kill the victim or to cause him grievous harm. We do not see as if that stage had been reached as far as this appellant is concerned for there was no evidence other than the discredited evidence of Ng'ang'a that he took part in the act of killing the deceased inmates.

The seventh appellant Kipkemoi Boit was supposed to be on duty on the fateful night but did not report on duty and did not get permission for his absence. He made private arrangements with first appellant to stand in for him. He was at a party at one of his senior officers' residence. He left the party at 12.30 a.m. and then went and slept. His girlfriend was with him. At 2.00 a.m. is when he heard gunshots and siren. He woke up in his civilian clothes and went to prison. At the prison he met other officers and after being briefed, he made certain orders for the opening of armoury and supply of arms to warders. There is however no evidence as to how he was involved in beating the deceased. His order for supply of arms was to facilitate the search for the alleged escapees. The only other evidence is that of Ng'ang'a and Kamotho which as we have said, was discredited and unreliable. As we have stated, not all who responded to the siren, whistles and gunshots killed the deceased. It is not just enough that a warder or an officer responded to those types of alarm. Indeed it was commendable that the warders complied with the regulation requiring immediate response when such alarm is raised. The bad thing is responding with the intention of committing an offence. Again as it was not clear exactly when the beating of the deceased took place one cannot say that this appellant got there in time to also take part in beating them. Without that, like all the officers who responded such as Longit, there was no reason to charge them with the offences of murder.

As we have observed above, at the end of the eighth appellants' defence, the learned Judge noted in line with **Section 190** of the Criminal Procedure Code that he appeared to be fairly reliable and dependable. However, that remark was not, as the record goes, translated into any advantage to the appellant. We are not saying that remark could have earned him automatic acquittal. All we are saying is that one would have expected to see how despite that remark to the effect that he was reliable and dependable, he was still guilty. This is because in his sworn defence he said he was not on duty and he was woken up from his bed by siren, whistles and gunshots at around 2.30 a.m. and in accordance with prison regulations he woke up in his track suit and went to prison where at the main gate he found seventh appellant and warder Miriti and was ordered to take a firearm and go to search for the alleged escapees and arrest anybody found naked. He joined others in that search. He used two rounds of ammunition when he heard some movements. They did not succeed in the search and returned at 10.00 a.m. He thus had no time to go to the kitchen or to see where deceased were near the perimeter wall. He denied Kamotho's evidence of his having been at the kitchen. That is the gist of the evidence which the learned Judge felt was reliable and dependable. Again his conviction was mainly based on Kamotho's evidence and that of Ng'ang'a which contradicted each other on material aspects to the extent that we find it difficult to place reliance them. For example, the learned Judge felt this appellant's evidence in defence was reliable and dependable. That evidence included the fact that he went to prison in his track suit and not in riot gear whereas according to Kamotho they were in riot gear which were bloody. Again there was no evidence of in what manner this appellant took part in assaulting the deceased and at what stage. Was it before the siren, whistles and gunshots? Was it at the time Mwirichia saw one of them being assaulted and he (Mwirichia) ran away or was it as they were already on the ground being beaten? All these are not clear and hence the benefit of doubt must be given to the eighth appellant as is required by law.

That takes us to the last appellant **Joshua Onyango Nyakundi alias Mwalimu**. Ng'ang'a said of this appellant that he was one of the warders who went to the kitchen holding a Maasai rungu and a Somali sword and started break dance saying they had killed people. He then asked for porridge and was given by Ng'ang'a and he drank it. According to him, the appellant's sword had blood and the appellant was smoking bhang. Kamotho said all appellants entered the kitchen, unlike Ng'ang'a who did not see appellants 1 – 5. Kamotho also said all the appellants were in riot gear. Against this evidence from Ng'ang'a and Kamotho, the evidence of Corporal George Kaviti (PW19) which the learned Judge accepted in his judgment, denies that this appellant had uniform that had blood and denies that this appellant was smoking bhang and carrying weapons. He said:

“No officer I saw was wearing clothes and shoes that were bloody. No officers I saw had crude weapons or simis, axes that night. No prisoner was asked to wash any clothes or shoes of the officers.”

In his judgment, the learned Judge stated *inter alia*: -

“I preferred the evidence of police officers Wafula (PW16), Onyango (PW15) Kenth (sic) (PW19)

.....”

This witness No. 19 was not a police officer. He said he was at Nyeri G.K. Prison and was the corporal in-charge of night shift as on the date of the incident. Further whereas Ng’ang’a said Nyakundi had said they had killed some people and that even Ng’ang’a and others would die, all that Kamotho said this appellant said was that they had come too far, and Kamotho does not talk of this appellant performing break dance a thing which any witness could not have forgotten if indeed it did happen. Other than the discredited evidence from Ng’ang’a and Kamotho, none saw this appellant taking part in the beating of the victims. Lest we be misunderstood, we are not saying that in a case like this which the learned Judge erroneously dealt with as that of mob justice or in a case of mob justice, an accused person cannot be found guilty unless there is direct evidence. That is not what we are saying. We fully envisage cases and they are many where accused can on proper circumstantial evidence be convicted of killing even in cases of mob justice even if no direct evidence was adduced. If for example a person is found with weapons having blood like was being alleged in this case and such weapons with blood are subjected to tests as to the blood group of the blood on the weapon and if such blood turns out to be that of the same group as of the deceased, or if the appellant is found with the deceased’s property allegedly taken from the deceased during the assault, then the accused can still be found guilty of the offence on such circumstantial evidence if the court is satisfied the same has been proved to standards required in law in criminal cases. All that did not happen in this case. All those appellants who were not on duty responded to siren, whistles and gunshots. That was a requirement in their regulations. It was not established when the assault took place and when each of them reached the scene so that it was not possible to establish whether they found the assault finalised, or still going on or whether they took part at the commencement of such assault or towards the end or at all. Further, none saw them taking part in the perpetration of the crime. All that allegedly connected them with the offence was the evidence of Ng’ang’a and Kamotho which as we have stated fell short of proving the commission of the offence. Added to that, is the fact that the alleged uniforms and weapons that were allegedly seen by these two witnesses were, perhaps because of the mess in which the original investigation landed, never subjected to any test to ascertain if indeed the alleged blood was of human beings. It seems even the blood of the deceased were not taken. As we say, this may have been because of the inadequate original police investigations, but the end result is that a court of law cannot convict on no proven evidence and should not ignore such proof only because a mess was made of the initial investigations as to do so may very well mean injustice to innocent person all out of emotional sentiments.

We think we have said enough to indicate that whereas we cannot intervene in the learned Judge’s decision as regards first, second, third and fourth appellants, we feel the rest i.e fifth, sixth, seventh, eighth and ninth appellants were entitled to the benefit of doubt and we have no option but to interfere with their convictions.

Before we do so, however, certain matters were raised which we need to address as well albeit briefly:

First is that, the learned Judge found that the deceased were killed by a mob which consisted of the 9 accused persons, other warders, families of warders, relatives and their visitors. As we have stated, the charges were specific and did not include “jointly with others not before court”. We agree that there was evidence of all sorts of crude weapons including sticks found at the scene and that suggested other people being involved but the prosecution was bound to prove only what they alleged in the charge. However, we do note that this aspect has not prejudiced the appellants as none of them ever suggested that any other person was responsible for killing the deceased. Each said he never took part and never pointed a finger at a mob. We nonetheless feel it was not proper to canvas a theory not before court. All that was before court was that the members of the public were nearby at the scene. It is possible, like in any such situations, that the families of the staff living near the prison and any other members of the public merely went to see dead bodies and not to assault anybody. The principles in the well known case of **Okethi Okale v. Republic (1965) EA 535** is clear on this. As we have stated, that error however does not deserve our intervention as it did not end in prejudice to any of the appellants.

The next matter is that the learned Judge’s decision went against the assessors’ opinion and he never gave reason for that. In our view, the learned Judge gave his reason for differing with the assessors. Hear him: -

“In my view, the assessors failed to comprehend the sum total of the evidence. They equally failed to comprehend the law as summed up to them, particularly sections 206 and 21 of the Penal Code. They also failed to marry the aforesaid two sections of the law to the facts with the consequence that they arrived at a wrong conclusion.”

The law required that when a judge does not agree with the assessor’s opinion, he should give a reason or reasons why he does not agree with them. The law did not say such a reason must meet certain threshold. All it required was that reason or reasons be given. It also did not require the reason or reasons given to be acceptable to the appellants. His reasons for the not guilty opinion by the assessors was their failure to comprehend the provisions of **Sections 206** and **21** of the Penal Code though explained to them in the Judge’s summary. As the law does not require us on appeal to seek certain standards to be met by the Judge in his grounds for differing with the assessors, we will not set out ours and the matter must be left at that.

There was also the complaint that the hearing of this case on one occasion went beyond the time permitted by law. Before the proper hearing of this appeal began, this matter was touched as it was the subject of an affidavit which was filed into the record later. Perhaps because of those preliminary discussions, it was not pursued vehemently at the hearing. We have looked at the record before us. On 30th November, 2007, Mr. Wandugi, the learned counsel for all appellants except the seventh appellant was making his submission before the court. The submission continued upto 5.00 p.m., the official time when the hearing should have adjourned being the last official time set out for hearing cases. Thereafter the record reads as follows: -

“Court: Do counsel allow me to proceed after 5.00 p.m.

N.R.O OMBIJA

JUDGE

Mr. Wandugi: I have no objection. I wish to finish my case. It has taken too long.

Miss. Nyarango: I have no objection. I wish to finish this case. It has taken too long.

N.R.O OMBIJA

JUDGE

Mr. Okello: I have no objection. The case has taken too long.

Order: the case will proceed after 5.00 p.m. by consent of all the counsels (sic) in attendance presenting respective parties.

N.R.O OMBIJA

JUDGE”

Thereafter the hearing proceeded. This was proper. It was with the consent and the desire of all counsel in the matter. The law allows that and we find this complaint a nonstarter

Further, a proper complaint was raised on the manner the sentence was pronounced together with the

judgment as part of the judgment without the appellants being allowed opportunity to mitigate and without any such mitigation being recorded and considered before passing the sentence. This was a valid complaint and we are of the view that the learned Judge was plainly wrong on this aspect. This Court has stated in several judgments one of which is that of **Dorcas Jebet Ketter and another v. R. Criminal Appeal No. 10 of 2012** that after pronouncing the judgment, the trial court is duty bound even in offences that attract capital punishment to allow the accused opportunity to mitigate and such mitigation must be recorded. Thereafter the court proceeds to sentence the accused. In that case it stated:-

“The opportunity that is required to be given to accused persons to address the court in mitigation is not only to enable the court to consider an appropriate sentence in the circumstances of the case but also to have the mitigation on record in cases of any further appeal where the accused’s conviction might be set aside and substituted by a conviction for a lesser offence, for example of manslaughter instead of murder. In such a case, it becomes easier for the appellate court to decide on the sentence if mitigating factors are in the record. Mitigation is also necessary in cases for example where clemency committee is considering a convict’s case. We state that under no circumstances should a court dispense with mitigation for whatever reason.”

In this case that was not done and hence our saying the learned Judge was in error. However, that error has not occasioned any prejudice to the appellants who were understood to have had their sentences commuted to life imprisonment and whose convictions have not been reduced to manslaughter to necessitate this Court seeking mitigation for purposes of considering suitable sentences.

Finally we want to thank all the learned counsel who were involved in this case and who filed written submissions together with lists of authorities and highlighted the same before us. Their submissions and authorities were in our considered view very well researched and were of immense use to us. We do not apologise for the length of this judgment because being a criminal case, and when one considers the public interest that greeted the events of the night of 3rd, and 4th September, 2000 as is apparent in the record and the length of the submissions that followed on the matter and the High Court judgment, it was not possible to produce a shorter judgment on the appeals that were before us and still claim to cover the various aspects that were in the record effectively.

The sum total of all the above is that the appeals by the first appellant ***Sgt. Jacob Muthee Mathiu***, the second appellant ***Warder Joseph Lenana Rukwaro alias Wakanyungu***, the third appellant ***Warder Ceaser Mwangi Njoka*** and the fourth appellant ***Senior Sergeant Samuel Kamau Ngugi*** fail and are hereby dismissed. The appeal by the fifth appellant ***Senior Sergeant James Mugo Karanja***, the sixth appellant ***Warder John Kariuki Njuguna alias Chizi***, the seventh appellant ***C.O. James Sise Boit***, the eighth appellant, ***Warder Noor Mohammed Kumo*** and the ninth appellant ***Warder Joshua Onyango Nyakundi*** all succeed. They are allowed. Each of their convictions is quashed and each sentence is set aside. Each of the five appellants is set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 26th day of April, 2013.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

WANJIRU KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

on;