REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 5 of 2007

GINARO WACHIRA MURIITHI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 6 OF 2007

PAUL GITONGA WAHOME ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

AND

HIGH COURT CRIMINAL APPEAL NO. 7 OF 2007

CHARLES GUANDARO MWIHATO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

AND

HIGH COURT CRIMINAL APPEAL NO. 8 OF 2007

ROBERT MWANGI WERU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

AND

HIGH COURT CRIMINAL APPEAL NO. 13 OF 2007

FRANCIS MWANGI WERU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No. 2037 of 2004 dated 19th December 2006 by E. J. Osoro –S.R.M.)

J U D G M E N T

The appellants were all charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code in the Chief Magistrate's Court at Nyeri. The particulars of the offence as stated in the charge sheet were that the appellants on the 12th June 2004 at Kalundu village in Nyeri District within the Central Province jointly with others not before court while armed with pangas robbed **AWN** of one Motor vehicle registration number [....] Toyota Pick-up, two radio cassettes, three jackets, one CD machine, one video machine, one colour TV and a box containing documents all valued at Kshs.362,600/= and at or immediately before or immediately after the time of such robbery beat the said **AWN**. The 2nd appellant faced an alternative count of handling stolen property contrary to section 322 (1) of he Penal Code. The particulars being that he on the 19th day of July 2004 at Skuta village in Nyeri District within Central Province, otherwise than in the cause of stealing dishonestly retained one jacket knowing it to be stolen property or unlawfully obtained. In the trial court 1st appellant was the 2nd accused, 2nd appellant was 5th accused, 3rd appellant was 3rd accused, 4th appellant was 4th accused whereas the 5th appellant was the 1st accused. They all pleaded not guilty to the charges and were duly tried.

The prosecution case in a nutshell was that PW1, the complainant was on 12th June 2004 at 1.00 a.m. asleep in his house when he heard some sound as though the window grills were being cut. He went to the sitting room and saw 6 torches flashing at him from outside. He was ordered to co-operate and after the grills were cut 6 people entered and started beating him whilst demanding money. His wife, PW2 parted with Kshs.1000/= but they kept demanding more. PW1 told those people that he did not ordinarily keep money in the house. They should perhaps try his place of business for the same. He decided to drive them there in his motor vehicle. As he reversed the motor vehicle the brake light flashed and PW1 was able to see and recognise the 1st, 4th and 6th appellants. PW1 was then ordered to get out of the motor vehicle and sit down which he did. Prior to that and as he was reversing the motor vehicle other thugs went in to the house and stole household goods; to wit 2 radio cassettes, a box of personal documents, two mobile phones make, Sagem and Erickson, one coloured T.V. and a video cassette player. In between however PW2 managed to escape and alerted her brother in law (PW3) with regard to what had transpired. They drove back and saw PW1's motor vehicle being driven out of the compound. PW3 pursued the motor vehicle and after some distance PW1's motor vehicle veered off the road and landed in a ditch. Those people then abandoned the motor vehicle and the household goods they had stolen except the 2 mobile phones and the money and disappeared in the coffee farms nearby. One of the thugs and who was then driving PW1's motor vehicle was unable to get out of the motor vehicle that fast. He got stuck in the same. PW3 flashed the lights of his vehicle on his face and managed to recognise him as the 6th appellant. However he managed to extricate himself and took off before PW3 could reach him. PW3 then reported the matter to police and police officers came to the scene accompanied by tracking dogs. PW1 told the court that he visually identified the 6th appellant and recognised 1st and 4th appellants at the scene. He knew the 1st appellant. He subsequently positively identified the 6th and 4th appellants at an identification parade.

On the 19th July 2004 PW1 gave the 2nd appellant a lift to his place of business. PW1 recognised the jacket the appellant was wearing as his which he had lost to the robbers on the night of the robbery. PW1 specifically identified the jacket from the damaged collar and zip. When he confronted the 2nd appellant

about the jacket, the 2nd appellant led him to a certain old man by the name of **Joseph Wambugu Wachira** (PW9) who he alleged had given him the jacket. PW9 was interrogated and vehemently denied having given the 2nd appellant the jacket. The 2nd appellant was then arrested. PW1 further told the court that the 1st appellant was his shamba boy. He knew him very well. PW1 knew the 4th appellant too who used to work for him as well. The 2nd appellant also used to relieve PW1's machine operator.

The complainant's wife PW2 testified that on 12th June 2004 they were asleep in their house with PW1 when at about 1 a.m. she heard a loud bang. She peeped out and as the security lights were on she saw about 6 people outside and was able to recognise 1st, 3rd, 4th and 6th appellants. She further testified that she identified the 6th appellant whilst in the house as they were counting the Kshs.1000/= she had given out to the robbers and which was in loose denominations of Kshs.100/= since they kept flashing to torch around. As the robbers escorted PW1 to the garage to get the car so that they could go to PW1's place of business to get more money, one of the robbers held PW2 and attempted to rape her. She managed to pull away and left the thug with her cardigan and ran to her brother in law **Peter Kariuki's (PW3)** home to seek help. As they drove back with PW3, she saw their vehicle being driven from their gate, they pursued it and the vehicle landed into a ditch. The robbers ran away in to the nearby coffee farms and disappeared abandoning the motor vehicle in the ditch. PW2 knew all the appellants. 6th appellant was a neighbour, 1st appellant worked for them upto about March 2004 whereas the 3rd appellant was a neighbour whom she had known for 10 years. PW2 also told the court that during the attack the 6th appellant was armed with a panga, 1st appellant had a club, 3rd appellant had a panga, whereas 4th appellant was also armed with a panga. He saw them clearly as they were facing her bedroom. She further said that she saw the 6th appellant a second time when a torch was flashed at him as they counted the money in the house that she had given them.

PW3 testified that on 12th June 2004 her sister in law, PW2 went and informed him that his brother (PW1) had been attacked by robbers. He together with PW2 drove to the scene and when the robbers saw his vehicle approach they drove away in PW1's motor vehicle. He pursued them. The robbers soon lost control of the motor vehicle and it landed to a ditch 50 metres away. The robbers who were a top the pick-up vehicle ran away. However the driver of the same got struck in the vehicle until PW3 arrived. PW3 flashed the vehicle lights on his face and he recognised him as the 6th appellant. He was a person well known to him. As he alighted from his vehicle the said driver managed to extricate himself from the motor vehicle and ran away. He reported the matter at Gachatha police post and took police officers to PW1's house and also to where the thugs had abandoned the motor vehicle.

PW4 the area assistant chief's testimony was to the effect that on 12th June 2004 at 2 a.m. he received a report that PW1 had been attacked. He proceeded to the scene where he found a crowd gathered. PW2 immediately gave him a list of names of suspects whom she had recognised at the scene during the robbery. These were the 1st, 3rd, 4th and 6th appellants. PW4 knew them well as they hailed from his sub-location save for the 1st appellant who was from neighbouring Kariguini sub-location. He led the police in the operation that resulted in the arrest of the four appellants.

PW5 **CIP Makupe** conducted an identification parade in respect for the 6th and 4th appellants and they were all positively identified by PW1.

PW6 Wanyonyi testified that on 12th June 2004 at mid night he received a report of robbery with violence from PW3. He booked the report and proceeded to the scene with PC Kilome. They found motor vehicle registration number [....] Toyota pick up in a ditch 60-70 metres from PW1's home. The motor vehicle had one TV set, one radio cassette player and 2 speakers. PW6 also recovered 2 pieces of window grills. PW4 then handed him a list of 4 suspects being the appellants save for the 2nd appellant. He was involved in the subsequent arrest of the 4 appellants aforesaid from their respective homes.

PW7 the Clinical Officer one Peter Karanja produced the P3 form. He testified that PW1 was injured and the injuries were probably caused by sharp and blunt objects. He assessed the degree of injuries as

harm.

PW8 testified that on 19th July 2004 at 11 a.m. he was summoned by the investigating officer and informed that PW1 had found a person with his jacket. He proceeded to Ruringu with PC Muthoni and PW1 pointed out the 2nd appellant and the greyish jacket that was stolen in the night of the robbery and which the 2nd appellant had been wearing. The 2nd appellant upon interrogation told them that he was given the jacket by one, Joseph from his village. They went looking for the said Joseph. They did not find him. They left a word for him to report at the police station. Joseph later reported to the police station and saw the OCS and recorded his statement denying that he had given the 2nd appellant the jacket.

PW9 **Joseph Wambugu Wachira** in his testimony told he court that on 19th July 2004 he went to get fodder for his cattle when he returned he found his house broken into by police and ransacked. He later went to the police station the same day to report the issue where he was told that he had given someone a jacket. He denied giving the 2nd appellant the jacket and denied any knowledge of the jacket.

Upon the close of the prosecution case the appellants were found to have a case to answer and were put on their respective defences. Essentially they all denied committing the offence. The 6th appellant in his sworn defence told the court that on 12th June 2004 at 7 a.m., he was awoken by the assistant chief and policemen. They entered the house and conducted a search therein. He was asked for the clothes he had been wearing as well as the shoes which they looked at. PW4 then ordered that the 6th appellant be handcuffed. He was arrested and taken to Gachatha police post where he met the 3rd and 4th appellants. Later they were taken to Nyeri police station and on 15th June 2006 an identification parade was conducted and the witness identified him. The 6th appellant contended that the witness hailed from his village and he knew him. He also questioned the evidence adduced by PW2, PW3 and PW4.

The 1st appellant in his sworn evidence told the court that on 12th June 2004 he reported to his place of work at PW1's home at about 9.30 a.m. However since there was no work, he went back home. While at his home the 6th appellant came and at around noon the area assistant chief and other people went to his home looking for him. He was then arrested and taken to the police station at 10 p.m. The OCS later released him. The following day he was informed by a fellow labourer not to report to work as his employers being PW1 & 2 had hired another person. On 17th June 2004 he was arrested and was arraigned in court on 21st June 2004. He challenged the evidence of PW1, PW2 as well.

The 3rd appellant testified that on 12th June 2004 he was at his place of work and went to his home at about 5 a.m. While he was asleep he heard a bang on the door. He recognised the voice of the area assistant chief and opened. A police officer handcuffed him and demanded a radio permit which gave. He was thereafter taken plus his radio to a vehicle registration number [...] and ferried to Gachatha police post. After a short while the 4th appellant was brought in followed by 6th appellant. They were then taken to Nyeri police station on 15th June 2004. He was subjected to an identification parade but was not identified. On 21st June 2004 he was arraigned in court. He also challenged the evidence of PW1, PW2 and PW3.

The 4th appellant told the court that on 12th June 2004 whilst asleep in his house he heard a bang at the door and people who identified themselves as police officers demanded he opens the door. He opened the door for them and **P.C. Wanyonyi** and the area assistant chief arrested him. He was then taken to Gachatha police post. He stayed there for about 10 minutes and was removed and taken back to his house. **P.C. Wanyonyi** searched the house. Nothing was recovered. He was taken back to Gachatha police post and later to Nyeri police station. That on 15th June 2004 he took part in an identification parade where PW1 identified him. However he stated that the witness knew him as they were only four farms apart from their respective homes. On 21st June 2004 he was arraigned in court. He challenged the evidence of PW1, PW2, PW3, PW4 and PW5 though.

The 2nd appellant told the court in his defence that on 18th July 2004 he met a customer at about 11 a.m. to settle some outstanding bills. He went with his son DW6 to see the customer. On the way they found a motor vehicle which had landed in a ditch. He assisted to push the motor vehicle out of the ditch. As a result his jacket was stained with mud. They proceeded to the home of the customer. When done he asked his customer for a jacket to change and the customer acquisced. The appellant then left his stained jacket and wore his customer's. He did not return the jacket to the customer. Instead on 19th July 2004 at 6.30 a.m. while wearing the same his boss, PW1 gave him a lift to work. While at work he removed the jacket. He then saw PW1 looking keenly at the jacket. PW1 asked him where he got the jacket. The appellant told PW1 that the jacket belonged to someone else. PW1 called his wife, (PW2) who also identified the jacket as belonging to PW1. Shortly thereafter police officers arrived at the scene and arrested him. He thereafter led the police officers to the home of his customer. Police officers broke in and the appellant found his jacket still on the sofa. The appellant told the court that PW1 and PW2 colluded to frame him as they were husband and wife and that if he knew that the jacket belonged to PW1 he would not have worn it to work or he would have escaped while being questioned by PW1. The appellant insisted that PW9 gave him the jacket. His witness who was his son told the court that on 28th July 2004, one, **Joseph Wambugu** went to their home to purchase nappier grass. On the way to hospital to see a patient, he and his father passed through his home to pick the money for nappier grass. On the way to **Wambugu's** home his father and him helped to push a motor vehicle which was stuck and his father's jacket was stained with mud. When they reached **Wambugu's** home his father entered the house and when he came out he was wearing **Wambugu's** jacket. The following day DW6 went to school and when he returned home he was told that his father had been arrested.

The learned magistrate having carefully evaluated the evidence tendered by the prosecution as well as the defence found the case of the prosecution proved beyond reasonable doubt and proceeded to convict the appellants on the charges preferred. Upon conviction the learned magistrate sentenced each of the appellants to the mandatory death sentence. However she made no finding and rightly so in our view in respect of the alternative count that faced the 2nd appellant.

The appellants were aggrieved by the conviction and sentence. Accordingly they each separately lodged the appeals to this court. The appeals revolved around the evidence of identification and or recognition, contradictions in the prosecution case and failure by the learned magistrate to address sufficiently the alibi defences advanced by the appellants. For the 2nd appellant he questioned the application of the doctrine of recent possession in the circumstances of his case.

As the appeals arose from the same trial in the subordinate court and for ease of hearing, it was determined that the five appeals be consolidated. As none of the parties objected to an order of consolidation, the order was subsequently made.

At the hearing of the appeals, the appellants with the permission of the court all tendered written submissions which we have carefully read and considered.

The appeals were opposed by the state. **Ms Ngalyuka**, learned Senior State Counsel submitted that the 1st to 4th appellants were all recognised during the robbery. There was sufficient security light outside the house. The names of the robbers were given to the area Assistant Chief (PW4) immediately after the robbery and the appellants were rounded up and arrested. There was no possibility of mistaken identity therefore. PW1 attended an identification parade and was able to pick out the 1st appellant whom he knew very well. 2nd appellant was found wearing a jacket which PW1 positively identified. The 2nd appellant gave an explanation as to how he came by the jacket which explanation was rejected. She therefore prayed for the dismissal of the appeal.

As we consider the submissions by the appellants as well as the learned Senior State Counsel it must be remembered that as this is a first appeal we are duty bound to examine and re-evaluate the evidence on record so as to reach our own conclusions in the matter, always remembering though that we had no advantage, as the trial court, of seeing and hearing the witnesses – See **Okeno v/s Republic (1972) E.A. 32**.

The conviction of the appellants was dependent of the evidence of identification (recognition) by three witnesses at night. It is recognised that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In **Kiarie v/s Republic (1984) KLR 739** the court of appeal observed that where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction. In the same case, the court went on to state that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken. Although recognition is more reliable than identification of a stranger, such evidence of recognition should be tested carefully seeing that mistaken recognition of close relatives and friends are sometimes made. See **Anjononi and others v/s The Republic (1980) KLR 59** and **Wamungi v/s Republic (1989) KLR 424**.

In the instant case is there any remote possibility that the appellants could have been victims of mistaken identity and or recognition? We do not think so. We are satisfied just as the learned magistrate was after carefully going through the trial record that the circumstances obtaining during the robbery made for a positive recognition of the appellants. 1st appellant was recognised at the scene of crime by PW1 and PW2. According to PW1 he knew the 1st appellant but did not know his home. However his wife, PW2 knew his home and took the police there and he was arrested. According to PW1, this is the appellant who was manning the gate. He was able to see and recognise this appellant courtesy of the light from his brother's vehicle as well as his own. It was his testimony that when the appellant was opening the gate so that PW1's vehicle could be driven out, one of the robbers who was driving PW1's motor vehicle directed the lights at him and he was seen by PW1. Being a person well known to PW1 and having not disguised himself at all so as to make his recognition difficult, we are satisfied that the circumstances would not have made it difficult for PW1 to recognise the appellant. It is on record that PW1 had no grudge against this appellant as would have propelled him perhaps to frame the appellant. Further the appellant was even his employee upto the eve of the robbery. In fact he was PW1's shamba boy. Besides PW1, the appellant was also recognised during the robbery by PW2. She identified the 1st appellant using the security light outside. This was shortly before the thugs disconnected the security light. She recognised this appellant as he used to work for them and she too had no grudge against him. Immediately after the robbery, she passed the names of the suspected robbers which included the appellant to PW4, the Assistant Chief of the area. In turn the Assistant Chief handed over the names to PW6. On the same night the 1st appellant was arrested. The appellant having been familiar to both PW1 & PW2, their recognition of him in the circumstances would not have been difficult. After all they were in close proximity all along.

The 2nd appellant was not however recognised at the scene. His conviction rested entirely on the application of the doctrine of recent possession. On 19th July 2004, a month or so after the robbery he was found in possession of a jacket belonging to PW1 and which had been stolen during the robbery. That jacket was positively identified by PW1 and PW2 through the damaged collar and zip. This appellant did not claim ownership of the same. Instead he claimed that he had borrowed it from a friend and former school mate PW9, **Joseph Wambugu Wachira**. That **Wachira** was availed as a witness and denied having given the jacket to the appellant. As it is therefore, there is no doubt that the jacket belonged to PW1.

The doctrine of recent possession was clearly enunciated in the case of **Andrea Obonyo v/s Republic (1962) E.A. 542**. It is a presumption of fact and not an implication of law from evidence of possession of stolen property unaccounted for. The presumption is that a person in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. Whether the doctrine applies depends on the circumstances of each case and "**..... Factors such as the nature of the property stolen, whether it be of a kind that readily passes from hand to hand and the trade or occupation to which the accused person belongs can all be taken into account ....." (Andrea Obonyo supra page 545)**. In this case the appellant claimed that he borrowed the jacket from PW9. So it matters not really whether the jacket is the sought of item that readily passes hands. It was up to the appellant to explain how he came by the jacket. His explanation was found wanting by the learned magistrate. We also agree with the learned magistrate on this. If his jacket was mud stained, why was it necessary for the appellant to leave it behind with PW9? It is not

suggested anywhere in the proceedings that he left behind for purposes of cleaning or security to ensure that he returned the borrowed jacket. If indeed the jacket belonged to PW9 as the appellant wanted the court believe, then it beats logic that the same person would have denied ownership so as to frame the appellant for no apparent reason, who was a friend as well as a former school mate. The trial magistrate found PW9 a candid witness and this court has no reason to doubt his evidence. The trial court was best suited to assess the credibility of witnesses. This court cannot interfere with the trial court's finding that PW9 was credible witnesses unless on the well known principles. See **Republic v/s Oyier (1985) KLR 353** on the credibility of PW9 as a witness. Nothing has been brought to our attention that would let us hold that the learned magistrate had no basis reaching that conclusion. In our view the doctrine of recent possession therefore was properly invoked by the learned magistrate in the circumstances of the case.

We have anxiously considered the argument advanced by the appellant that he would not have put on the jacket and went with it to PW1's place of business knowing that it had been stolen. That is indeed attractive argument. However no one can ever tell how people think. It is very possible that the appellant thought that PW1 and PW2 could not recognise the jacket and took the risk of wearing it.

The 3rd appellant was recognised at the scene of crime by PW2. As already stated, PW2 indicated that she was able to identify the appellant through the security lights that were on during the robbery. PW2 was inside the house. There is no evidence that the lights in the house were on. If that be the case then if the security lights were on outside and the appellants were standing in the glare of those security lights it would have been easy for PW2 to pick this appellant out. After all he was not disguised and was a person well known to PW2. He was even a neighbour. Cross-examined by the appellant through his then counsel, **Mr. Nderi** on the issue of light, she stated that the security lights were big bulbs. They were four of them located at the 4 corners of the house. They must therefore have provided bright light. She peeped through the window for about 1 – 2 minutes and recognised the appellant among the robbers. She had known him for 10 years and had frequently met him. Much as the time which PW2 took to observe the appellant was short, however for a person well known to her, we are satisfied that it was sufficient for PW2 to positively recognise him. She immediately passed the names of the robbers to the Assistant Chief. Among those names was the appellant's who was subsequently arrested. During the arrest the appellant's clothes and shoes were found wet and muddy suggestive that he had just entered the house. It had also rained on that day. The appellant was subsequently subjected to an identification parade but he was not identified by PW1. However, PW1 could not have identified the 3rd appellant in the parade as he had not identified him at the scene of crime. The person who identified him and should have attended the identification parade should have been PW2. However such parade would have been worthless since PW2 had actually recognised him. Being the sole identifying witness, the learned magistrate ought to have warned herself of the dangers of relying on the evidence of a single witness to convict the appellant. However this was a case of recognition. Much as the magistrate did not warn herself, we are satisfied that on our own evaluation of the evidence on record we are satisfied that this appellant was properly recognised.

How about the 4th appellant? He was recognised by PW1 and PW2. Of course the appellant has argued that this was evidence of a husband and wife. There is nothing in law that bars the court from acting on the evidence of a wife and husband. This recognition at the scene was followed up with a police identification parade in which again PW1 picked him out. Once again that identification parade was unnecessary and indeed worthless considering that the appellant had been recognised by PW1 and PW2 at the scene of crime. He was a person well known to the two. It was the evidence of PW1 that the appellant was in the car park and when he reversed his vehicle, the reverse lights flashed on him and that is why he was able to recognise him. For PW2 she identified the appellant by virtue of the security lights. The appellant having been a former employee, we think that his recognition in the circumstances of this case was irresistible. PW2 even noted that this appellant had a panga.

Finally we now come to the 5th appellant. This appellant was according to the evidence on record identified by PW1, PW2 and PW3. The circumstances under which PW1 identified the 1st and 4th appellant, are the same with this appellant. The same goes for PW2. With regard to this appellant, PW2 saw him twice. First when they were outside and secondly when the robbers gained entry into the house

and as they were counting money given to them by PW2 a torch was flashed on his face. He was a person well known to PW2 as a neighbour. According to PW2 during the robbery he had a panga. She could even tell that he wore a jacket and tied a black scarf over his head. Finally, this appellant was recognised by PW3. He was the one driving PW1's motor vehicle in an attempt to escape. The vehicle landed in a ditch and the other robbers a top the vehicle escaped. The appellant however got stuck in the motor vehicle and when PW3 approached, he flashed the lights of his vehicle on the appellant's face and saw him very well. However as he was alighting from his vehicle the appellant managed to extricate himself and ran off. PW3 knew the appellant very well and told the police as much.

To our mind therefore, the totality of the foregoing is that the appellants were positively recognised by PW1, PW2 and PW3. The appellants have of course raised the issue that the circumstances obtaining could not have made it easy for positive recognition. That PW1 and PW2 were so scared by the attack which was sudden and brutal which fact may have impeded their observation. Secondly, that no inquiries were made by the learned magistrate as to the nature of light obtaining at the scene, the intensity thereof, the position of the light in relation to the appellants and the period taken by these witnesses to observe the appellants so as to be able to recognise them in terms of **Maitanyi v/s Republic (9186) KLR 198**.

Yes, the attack may have been sudden. However some appellants did not gain entry into the house immediately. After the bang, PW2 observed them from the house. They had to cut the grill. She said in her testimony that she observed them for about 1 – 2 minutes. As already stated elsewhere in this judgment this was sufficient period to recognise people whom she knew and who any event were employees. Save for perhaps, the 6th appellant, none of the appellants had disguised themselves. PW1, it would appear spent quite a bit of time with the robbers. When they gained entry they moved with him from the sitting room to the bedroom and thereafter to the car park. He started the car and he was able to recognise some of the appellants. Finally PW3 recognised the 6th appellant in circumstances outlined elsewhere in this judgment. Much as the learned magistrate did not make those inquiries we on our part having carefully evaluated the evidence on record are satisfied that there was sufficient light provided by the security lights that enabled PW1 and PW2 to recognise the appellant. The compound was well lit. Once inside the house, some of the appellants flashed torch lights on others. Once outside and into the motor vehicle, PW1 reversed the same and saw some of the appellants. Lastly, one of the appellants was seen in PW1``s motor vehicle. With all the foregoing we cannot entertain any doubts about the appellants' culpability. Recognition of the appellants would not have been difficult considering that they were persons well known to the identifying witnesses as some of them were either their employees or neighbours.

It does appear to us for reasons we are unable to fathom that the appellants most of whom were employees and neighbours of PW1 and PW2 mounted the attack without as much as caring to disguise themselves. They knew that they could easily be recognised but nonetheless took no steps to disguise themselves. We have not come across any reason that would have pushed PW1, PW2 and PW3 to falsely testify against the appellants and or trump up this charge against them. The appellants knew they were bound to be recognised but did not care.

There may have been contradictions here and there in the prosecution case. However those contradictions if at all were minor and did not go to the root of the prosecution case.

No doubt, the learned magistrate considered the defences advanced by the appellants. However pitted against the strong prosecution evidence those defences dispated into thin air.

The upshot of the foregoing is that we find no merit in these appeals. Accordingly they are all dismissed.

Dated and delivered at Nyeri this 4th day of December 2009

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE