REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 116, 121, 122, 134 & 155 of 2005

KOMORA WARIO BORJO alias GOLICHA…...…APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO.121 OF 2005

JOSEPH MUGO MUCHIRI alias NDUNGU…...….APPELLANT

VERSUS

REPUBLIC ……...……..RESPONDENT

HIGH COURT CRIMINAL APPEAL NO.122 OF 2005

GITHUKA WAIRUNGI MAINA alias MAINA...….....APPELLANT

VERSUS

REPUBLIC……..…….....……..RESPONDENT

HIGH COURT CRIMINAL APPEAL NO.134 OF 2005

LAWRENCE MWANGI MUGO alias KABEN…..…APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

HIGH COURT CRIMINAL APPEAL NO.155 OF 2005

JOSEPH MAINA MWANGI…….……...……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Form original Conviction and Sentence of the Senior Principal Magistrate's Court at Murang'a in Criminal Case No.950 of 2003 by G.K. MWAURA – PM)

J U D G M E N T

These five appeals were consolidated for ease of hearing and because they arose from the same trial in the subordinate court. The five appellants were arraigned in the Senior Principal Magistrate's Court at Murang'a on 6 counts. The first count was a joint one of robbery with violence contrary to *section 296 (2)* of the Penal Code. In the second count the 4th appellant herein **Lawrence Mwangi Mugo** was charged with the offence of being in possession of firearm contrary to *section 4 (1) (2) (a)* of the Firearms Act. In the third count, the same appellant was charged with the offence of being in possession of ammunition contrary to *section 4 (1) (2) (a)* of the Firearms Act. In count 4, the 3rd appellant **Githuka Waruingi alias Maina** was charged with the offence of being in possession of cannabis sativa contrary to *section 3 (1) (2)* of the Narcotic Drugs And Psychotropic Substances Control Act. The 2nd appellant, **Joseph Mugo Muchiri** was also confronted with the charge of being in possession of cannabis sativa contrary to *section 3 (1) (2)* of the Narcotic Drugs and Psychotropic Substances Control Act in count 5. In the sixth and final count all the appellants were charged with entering into a building and committing a felony contrary to *section 306 (a)* of the Penal Code. In the alternative to this count, the 4th appellant was charged with handling stolen property contrary to *section 322 (2)* of the Penal Code. In the second alternative count the 1st appellant, was similarly charged with handling stolen property contrary to *section 322 (2)* of the Penal Code. Finally, the 5th appellant faced the alternative count of handling stolen goods contrary to *section 322 (2)* of the Penal Code. The appellants denied all the charges and their trial ensued. A total of 8 prosecution witnesses were availed and at the learned Magistrate found the 2nd, 3rd and 5th appellants guilty on the first count and sentenced them to death. He also found the 4th appellant guilty on count 3, being in possession of ammunition and sentenced him to 15 years imprisonment. The 3rd appellant was found guilty of being in possession of cannabis sativa and was sentenced to 5 years imprisonment. Similarly the 2nd appellant was found guilty of the same offence and sentenced to the same prison term. On the last count, the 1st, 4th and 5th appellants were convicted of the offence of entering into a building and committing a felony therein and were all sentenced to 6 years imprisonment. At the initial trial, the appellants had one **Joseph Kiragu Nyambura,** as the 6th co-accused. However he was acquitted at the conclusion of the trial.

The appellants were aggrieved by the respective convictions and sentences. They each separately lodged the instant appeals which as we have already observed were consolidated for ease of hearing.

The appellants in their separate petitions of appeal have raised more or less same grounds of appeal. They revolve around identification, circumstances of their arrest, circumstantial evidence, contradictory prosecution evidence, failure to adequately consider their defences and the doctrine of recent possession.

The prosecution case in summary appears to be as follows; On 24th June, 2003, **Lilian Waweru** (PW4) closed his tailoring shop known as Mama Eva's boutique situate in Murang'a town at about 6.30 p.m. However the following day when she reported for business she found the boutique broken into and various items listed in count 6 of the charge sheet stolen. Apparently the thieves accessed the boutique through the window grills. She then reported the matter to the police.

On 26th June, 2003, **Edward Mwangi Gitau** (PW1) then running a shop known as Maragi General Stores, in Mukuyu closed his said shop at 8.30p.m and went home not far away from the shop. He left the shop under guard by his two watchmen **Duncan Gitau** (PW2) and **Peter Kangethe** (PW3). At about 2.30a.m, the two watchmen saw six men approach the shop from the direction of the bus stage. Four of the men were wearing what appeared like police uniforms whereas two were in civilian clothes. The shop as well as the neighbouring premises had security lights on. This enabled the two watchmen to see the six men clearly. The six men pretending to be police officers approached the watchmen and informed them

that they had received a report that there a robbery at the shop. One of the men had a big gun while another one had a pistol. The watchmen denied the presence of robbers in the neighbourhood whereupon the six men remarked that the watchmen were disturbing them and therefore it was necessary for them to record statements. They led the watchmen towards the telephone booth outside the shop whereat they suddenly tied their hands with robes and ordered them to lie down. Soon thereafter a yellow canter motor vehicle was driven towards the shop. The six men broke into shop and stole the items particularized in the first count in the charge sheet which they loaded in the canter motor vehicle. As this was going on the first watchman (PW2) managed to extricate himself and ran away towards the BP Petrol Station whilst screaming. He found some people at the petrol station and they came back to the scene. They found the door to the shop removed and batteries together with medicines scattered on the verandah. Shortly thereafter police officers appeared. Apparently they had been alerted of the robbery by PW1 who had heard his watchmen and other members of the public screaming and blowing whistles as the robbery was in progress and had also been rung by a friend regarding the robbery at his shop. It was then that he contacted the police on his phone. The two watchmen identified the robbers from the security lights and gave their description to the police officers in particular **Corporal Kagombo** (PW8). Investigations then commenced in earnest.

On 28th June, 2005, PW8 received information that a suspect in the robbery had been seen going towards Mumbi estate in Murang'a town. Accompanied by **P.C. Evans Machuki** (PW9) and **P.C. Wambugu**, the trio proceeded to the house of the 3rd appellant. They found him in the house. They searched the hose and found cannabis sativa under the mattress. He was also found with Ksh.3,000/-. He was arrested and taken to Murang'a police station, for further investigations. On further interrogation, the 3rd appellant volunteered the names of the other appellants and the 6th co-accused who as we have already stated was acquitted of being an accomplice in crime. The investigation team then started looking for the other appellants.

On 29th June, 2003 the team received information that the 4th appellant was at Makavillla bar in Murang'a town. They went for him. They arrested him with Ksh.870/= and took him to Murang'a police station. On further interrogation he agreed to take the team to his house at Sagana town. At Sagana and upon searching the bedroom the team recovered a small gun in a yellow bag. A further search yielded live ammunition, six spent catridges, panga, large shears, 3 hats, 14 clothe materials, a blouse, a grey skirt suit, 2 kitenge materials, a yellow sack and Ksh.181/= in coins. From there the 4th appellant took the team to Chakaka bar in Sagana where a while ago and in the presence of the team he had received a call from a person whom he agreed to meet with at the said bar. At the Chakaka bar, the 1st appellant appeared in the company of the 2nd appellant. The team arrested them.

The 1st and 2nd appellants then took the team to their houses in Murang'a town. From the house of the 1st appellant, the team recovered 2 Kitenge clothes and ksh.350/=. From the house of the 2nd appellant, they recovered cannabis sativa weighing 800 grammes. Subsequent thereto the 2nd appellant took the team to Nairobi from where they arrested the 5th appellant. The 5th appellant also led the team to his house in Shauri moyo estate and clothe materials were recovered.

On 8th July, 2003, **I.P. Jackson Bwire Kanamo** (PW6) conducted an identification parade in respect of the 2nd appellant. At this parade both PW2 and PW3 managed to identify the appellant. On the very day the same witness similarly conducted an identification parade in respect of the 5th appellant and again PW2 and PW3 managed to identify the appellant. The same witness and again on the same day and venue conducted an identification parade in respect of the 3rd appellant and again the two witnesses managed to identify the 3rd appellant. It was then that the appellants were charged.

Put on their defence, the appellants all elected to give sworn statements of defence but called no witnesses.

The 1st appellant stated that he was a hawker in Murang'a. That on 29th June, 2003 he went to

Maragua Market where he remained until 5 p.m when he went back to his house at Mjini in Murang'a town. He thereafter proceeded to Wanjerere bar. On the way he came across a C.I.D land rover. A **Mr. Machuki** called him. He then drove him to the police station and asked him whether he sold guns. He also questioned about the instant offences. He denied both accusations. He claimed that **Mr. Machuki** presumably PW9 had a grudge against him arising out of a previous arrest which the appellant complained to the D.C.I.O and he was set free. He denied committing the offence.

On his part the 2nd appellant stated that on 29th June, 2003, he woke up and proceeded to a bus stage to board a vehicle to his place of work. In the afternoon he came back to Murang'a and went to a certain bar for drinks. On his way home he came across two police officers who stopped him. He was arrested and taken to Murang'a police station. On 8th July, 2003 he participated in an identification parade where he was identified by two people. He complained that he had been removed from the cells before the parade was conducted. On 11th July, 2003 he was charged with the instant offences he knew nothing about.

The 3rd appellant had this to say in his defence. That on 28th June, 2003 he left for his place of work. His employer sent him to Embu to sell ice cream. He was in Embu upto about 2.30 when he went back. He had sold ice cream worth Kshs.4,500/=. He came back to his place of work but did not find his employer. He went home. At about 4 p.m a squad of 18 men descended on his house. They were police officers. They arrested him and took him to the police station. On 11th July, 2003 he was charged with the offences he knew nothing about.

The 4th appellant stated in his defence that he was a salesman in their family business. On 29th June, 2003 he woke up and spent the early part of the day in doors. At about 2p.m, he went to Makavilla bar for a drink. Whilst there some people came and introduced themselves as police officers. They told him to accompany them to C.I.D offices. He was then locked up and subsequently charged. He denied his involvement in the crime.

Finally, the 5th appellant testified as follows. He was a businessman at Kabuta area. On 1st July, 2002 he went to the market where he remained until evening. He then went to a shop to buy milk. On the way, he saw a motor vehicle trailing him. Police officers therein called him and told him that they were investigating something. He boarded the vehicle. He was taken to Kabuta police station. The following day he was taken to Murang'a police station. On 8th July, 2003 he was informed of an identification parade. He participated in the same and people who had seen him in the C.I.D offices came and identified him. He was not satisfied with the parade. He was then taken back to the cells and on 11th July, 2003 he was charged with the offences.

When the appeals came up for hearing, the 1st, 2nd 3rd and 5th appellants were unrepresented. However they indicated that they had written submissions in support of their appeals which they wished to tender. The state counsel not objecting we accepted their written submissions which we have carefully read and considered. The 4th appellant was however represented by **Ms Mwai**, learned counsel. The state was represented by **Mr. Orinda,** learned Principal State Counsel.

In urging the appeal of the 4th appellant, **Ms Mwai** submitted that the appellant was convicted on counts 3 and 6 and sentenced to 15 and 6 years imprisonment respectively. That the evidence that led to the conviction of the appellant was tendered by PW8 and PW9 who arrested the appellant from a bar and escorted him to his house where upon search, a gun and materials which had allegedly been stolen from the boutique of PW4 were recovered. The theft was traced back to the appellant by the application of the doctrine of recent possession in respect of count 6. Counsel submitted that for the doctrine to be invoked, it must be shown that the appellant was in physical and or constructive possession of the items recovered and alleged to have been stolen. In support of this submission counsel referred us to **Archibold, Criminal pleading, Evidence and practice, 2002 at page 1824**. Counsel also referred us to the case of **Simon Maina V. Republic, Cr.App. No.114 of 2002** (unreported). Counsel contended that possession in the circumstances of this case was not satisfactorily proved. See also **Geofrey Ekaru Nanok V**

As for sentence on count 6, counsel submitted that the law prescribes a maximum sentence of 7 years for the offence. The appellant was sentenced to 6 years which sentence counsel surmised was excessive and harsh considering that he was a first offender.

On count 3, counsel submitted that the appellant had said that he does not reside in the house in which the ammunition was found. Counsel pointed out that the witness who was in the house when the ammunition was recovered was never called to testify. As regards sentence, the offence attracts a maximum sentence of 15 years. This is the term he was sentenced to yet he was a first offender. The sentence was thus harsh and excessive.

In response, **Mr. Orinda** submitted that he supported the conviction of the 1st, 2nd, 3rd and 5th appellants. That the appellants were identified by PW2 and that coupled by the recovery of items identified by PW1 makes evidence against them reliable. Counsel went on to submit that 4 identification parades were conducted and 2nd and 3rd appellants were identified by PW2 and PW3 respectively. The parades were conducted by PW6 and PW7. Counsel maintained that the evidence against all other appellants was clear and not contradictory. Those submissions were made in respect of count 1.

With regard to the other counts relating to shop breaking, possession of cannabis sativa against 2nd appellant, possession of guns and ammunitions against the 4th appellant, counsel felt inclined not to support the convictions because of the manner in which they were joined with the main count. Counsel submitted that this may have led to prejudice in their defences. These offences were committed on different dates and different places from the date and place of the main count. Counsel could not see how possession of cannabis sativa and breaking into the shop could have been entertwined with the main count of robbery with violence.

With regard to 4th appellant, counsel also had problems with possession. PW9, one of the officers who went to the house at Sagana found someone in the house who was either a house keeper or a wife. How that aspect marries with exclusive possession in so far as the 4th appellant of the house is concerned does not come out clearly considering that the appellant was arrested in Murang'a town.

It is trite law that as a first appellate court we are required to reconsider the evidence, re-evaluate the same and draw our own conclusions and in doing so we should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses. See generally **Okeno V Republic (1972) EA.32, Ngui V Republic (1984) KLR 729 and Achira V. Republic (2003) KLR 707.** We shall bare the foregoing injunctions in mind as we consider this appeals.

From the evidence on record it is apparent that the two principle and or primary offences were committed on two different and distinct days. These are the offences to be found in counts one and six. Count one relates to robbery with violence contrary to *section 296 (2)* of the Penal Code. This offence is alleged to have been committed on the night of 26th and 27th June, 2003 at Makuyu town. Flowing from this offence are the offences we would call secondary offences to be found in counts 2, 3, 4 and 5. The offence of entering into a building and committing a felony therein contrary to *section 306 (a)* of the Penal Code another principal and or primary offence was however committed on the night of 24th and 25th June, 2003. The secondary offences relating to this count are to be found in the three alternative counts. It is quite clear that counts one and six were not committed in the same day and or in the same transaction to warrant the same being preferred in the same charge sheet. Even invoking the doctrine of *Res Gestae* would not come to the aid of the respondent in this case. The people who committed the offence in count 6 were not seen by any of the witnesses who were called by the prosecution. Nor was any item(s) stolen in the robbery of the night of 26th and 27th June, 2003 recovered from any of the appellants. It was thus wrong for the learned Magistrate to have entertained the charge sheet as drawn when clearly this was a case of misjoinder of charges. There was no nexus between the two main counts. Under *section 135 (1)* of the Criminal Procedure Code, joinder of counts is only permissible if the offences charged are founded on the same facts, or form or are part of the series of offences of the same

or a similar character. The evidence on record does not show that the offences preferred in the same charge sheet were founded on the same facts, or form or are part of the same transaction nor are they similar in character. Robbery with violence was committed on a different day at a different location so are the offences of being in possession of firearm and ammunition, being in possession of cannabis sativa and of course entering into a building and committing a felony therein. As correctly submitted by the learned Principal State Counsel, the manner in which these offences were joined with the main count may have occasioned prejudice to the appellants' in their respective defences. We do not see how these other offences could have been entertwined with the main count of robbery with violence. There is no doubt that this lumping together in one charge sheet of the six offences which were quite unrelated to the main count and which were not committed in the same transaction prejudiced the appellants in respect of these other counts other than count one.

What should have the learned Magistrate done? We think that he should have sought refuge in *section 135 (3)* of the Criminal Procedure Code which provides interlia:-

"**Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information."**

He should have ordered that the other counts apart from the main count be tried separately. The appellants having been prejudiced in the conduct of their defences in respect of this other counts is sufficient reason to allow the appeals in respect of their convictions in counts 3, 4, 5 and 6. Accordingly we would allow the appeal, quash the convictions and sentences imposed on the 4th appellant on count 3, 3rd appellant on count 4, 2nd appellant on count 5 and 1st, 4th and 5th appellants in respect of count 6.

Besides the foregoing, we would still have allowed the appeals on all those other counts except count one on other grounds. From the record the Government chemist report on cannabis sativa was tendered in evidence by PW8 under the pretext that **Mr. Simon Ndubi Atebe**, Government Analyst was unavailable and would have been expensive to procure his attendance. Granted that under *section 77* of the Evidence Act, in criminal proceedings any document purporting to be a report under the hand of a Government Analyst, medical practioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be tendered in evidence by another person not necessarily the maker, however it is necessary and important that in a case like this where the accused at that stage were not represented by counsel, that the accused be made aware of the consequences of such documents being produced by another person in the absence of the maker. The trial court is under duty to explain to the accused his right to insist on seeking to cross-examine the maker if he so wishes. In this case, the appellants, should have been made aware that they were entitled to seek to cross-examine the government analyst if they so wished. See **KSM Cr.App. No.26 of 2004, Lukas Okinyi Soki V Republic**. This was not done in the circumstances of this case. All that the learned Magistrate did was to ask the appellant whether they had any objections to the exhibit being tendered in evidence by PW8. The appellants raised no objection. However that was not sufficient and the correct way to go. What we have said applies with equal force to the ballistic experts report in respect of count 3.

One may say that count 3 was relevant to the main count as both PW2 and PW3 testified that the people who committed the offence of robbery with violence were armed with a gun and pistol. That gun was recovered from the 4th appellant three days after the robbery. However it should be noted that the alleged gun retrieved from the 4th appellant was found to be a toy by the ballistic expert and not a gun as envisaged by the Firearms Act. Indeed it was on that basis that the learned Magistrate acquitted the 4th appellant of the 2nd count. None of the witnesses however said that they saw the appellant with the ammunition the subject matter of the 3rd count.

Even if we are wrong on this we doubt whether the learned Magistrate properly invoked the doctrine of

recent possession in respect of counts six. There is sufficient doubt as to the occupation and ownership of the house in which the ammunition, cloth materials as well as cannabis sativa were allegedly recovered. The level of actual possession and knowledge by the appellants of the presence of the stolen cloth material is in doubt so as to render it unsafe to rely on the doctrine. See **Geoffrey Ekaru Narok** (supra). Why do we say so? PW9 was one of the police officers who went to a house purportedly belonging to the 4th appellant at Sagana and conducted a search which yielded the ammunition and cloth material. Under cross-examination by the appellant, PW9 conceded that he met the appellant's workers' at the house. He also conceded that no inventory was recorded of the items allegedly recovered. Similarly PW8 who was in the search party testified along the same times. That he found some people in the house alleged to belong to the 4th appellant at Sagana and no inventory was taken of the recovered items. It would appear therefore that the house was not in the exclusive possession of the 4th appellant who as we already know was arrested in Murang'a town and later driven to Sagana by PW8 and PW9 for the search. There was even no evidence which linked the appellant to the exclusive use of the house at Sagana. It is therefore possible that what was found in that house may not necessarily have been in the possession of the 4th appellant. They may have belonged to the workers and or house help. The police never bothered to interrogate the so called employees of the 4th appellant. They were the ones in physical possession and occupation of the premises at the material time. Why did the prosecution not invoke the doctrine of recent possession and charge these workers with handling items recovered. Afterall they were possession of the house at the time. Alternatively why the police at least make them their witnesses. They could have explained how the items got there. In the case of **Charles Lamamba V Republic, Cr. Appeal No.8 of 1984** (unreported) the court of appeal stated thus;

"…..**The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved…."**

This was not the case here. Accordingly the learned Magistrate erred in invoking the said doctrine in the circumstances of this case. What has fallen from our lips in so far as the 4th appellant is concerned on the doctrine of recent possession applies with equal force to the 1st appellant in so far as the alleged items recovered from his house are concerned. He too was arrested elsewhere and taken to his house where again they found a lady in occupation. Certain items too were recovered.

We now turn to consider the conviction of the 2nd, 3rd and 5th appellants on the first count. The conviction of the appellants on this count turned on the evidence of identification by PW2 and PW3. In the case of **Cleophas Otieno Wamunga V Republic (1989) KLR 424**, the court of appeal set out the principles that courts need to adhere to when dealing with situations where identification of an accused person is in issue. It stated:-

"…..**It is trite law that when the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction…."**

And particularly on visual identification as was the case in the matter before us, the same court went on in the same case and stated;

"…..**Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence be examined carefully to minimize this danger. Wherever the case against a defendant depends wholly or to a large extent on the correctness of one or more identification of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance of the correctness of identification…."**

Did the learned Magistrate have these legal principles in mind when convicting the appellants? We shall see shortly.

The learned Principal Magistrate considered the rival evidence on identification and analysed the same as he was duty bound to do and stated in conclusion as follows as concerns identification of the appellants.

"…….**I have also carefully considered the evidence on the first count the two watchmen stated that their shop has sufficient security light. There are also lights from a nearby petrol station. PW8 has testified that he visited the scene and observed the security lighting. His evidence is that there is sufficient security light. The further evidence of the watchman is that the 6 men approached them in peace and told them that they had received a report that there was a robbery at the shop. They met them at a lighted area and as they talked the watchmen observed that the four of them wore police clothes while two were in civilian……..they were still not in fear of them and were observing them. They noted how they were dressed and their hair style of those who had no hats, their physique and complexion. The two watchmen said that they were with robbers for about 10 minutes before they became hostile. In my view the circumstances were very good to see and make features of the robbers……From the evidence, I have no doubt that the two watchmen saw the robbers clearly and would be in a position to identity them later"**

In our view, the conclusion reached by the learned Magistrate as demonstrated above was well founded. The learned Principal Magistrate made the appropriate inquiries as he was duty bound to do in terms of **Maitanyi V Republic (1986) KLR 198**. The offence was committed at night and the only source of light was electricity light from the shop the two watchmen (PW2 & PW3) were guarding as well as from the neighbouring petrol station. The appellants did not dispute that there was electricity light at the shop. That being the case, then the next consideration would be the intensity of the said light. The two witnesses testified that the scene of crime was well light with security lights. This fact was supported by PW8 who testified that in the course of his investigations he visited the scene presumably at night and observed that there was a lot of light. The appellants did not counter this assertion. The robbers did not strike immediately they came across the watchmen. Indeed they were friendly as they engaged the watchmen in discussions regarding an alleged report of robbery at the shop that they had received. As correctly observed by the learned Principal Magistrate, the watchmen were not in a state of panic. They were with the robbers for 10 minutes before they struck. They had discussions in an area with lights. It would appear that the said watchmen were very keen and observant. They were able to observe how some of the robbers were dressed; their physique and complexion. They were also able to tell how the robbers were armed. They even observed the hair style in particular those without caps. One of them had even shaved his head "*Jordan style.*" One may say that the caps may have interfered with PW2 and PW3's identification of some of the appellants. However this is mere speculation. It all depends on how they were positioned vis avis the source of light. From the evidence of the watchmen it is quite clear that they saw the robbers very well meaning that the caps did not at all interfere with their observation of the robbers. PW2 and PW3 were so alert such that even after they had been tied with robes and taken to the telephone booth they still observed and noted that the motor vehicle used to ferry the stolen items from the shop was "**a single rear wheel canter…"**

They observed that the vehicle was yellow in colour. They also gave a description of some of the robbers in their report to the police. The appellants have pointed out that because the watchmen stated under cross-examination that they were confused, they would not have been able to identify the appellants. However the watchmen did not say that they were confused during the incident. It would appear that they became terrified and confused when they were being tied with the robes. Before then there was no reason for the watchmen to be terrified or even be confused. Afterall they had been approached by people who appeared like they were police officers out to nab criminals in the area. They engaged the watchmen in discussions under the glare of light.

In subsequent identification parades, the two watchmen were easily able to pick out the appellants as having been members of the gang that robbed the shop that they were guarding. The parades were conducted 10 days after the robbery when the images of the robbers were still fresh in their minds. The appellants have issues with the manner in which the identification parades were conducted. They claim that members of the parade were not similar to them and accordingly they were easy target of identification. They also lament that some members of the parade were retained throughout the various

identification parades. With regard to the first complaint the forces standing order 6 (iv) (d) provides;

"……**whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail –**

(a)……

(b)……..……..

(c)……

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance, and class of life as himself. Should the accused/suspected person be suffering from disfigurement, steps should be taken to ensure it is not especially apparent….."

That standing order emphasizes the phrase "***as far as possible."*** It does not say same. It must be read with the background of the place where the parade is to be held namely within the precincts of the police station. The majority of the members of the parade most likely would come from the police cells. That being the case it is well nigh impossible to get people with similar age, height, general appearance and class of life within a limited period of time pursuant to the requirements of the constitution as to the period a suspect is required to remain at a police station before he is taken to court. It cannot be gainsaid that the selection based on the above criteria is no mean feat. We do not think it would have been practicable to get 24 members of the parade with same features as the three appellants within the time the law allows for a suspect to be held in police custody for purposes of investigations. In any case, that rule is not mandatory and that is why the word "***should"*** is used. Having evaluated the evidence on identification parade and perused the parade forms in respect of the 2nd appellant, we see nothing to vitiate the said identification parade at which PW2 and PW3 identified the 2nd appellant. The appellant did not raise any complaints. We cannot however say the same of the 3rd and 5th appellants. PW8 in this regard testified as follows:

"**On the same day I conducted another parade for Githua Waruingi alias Maina I used the same members of the parade. I informed the suspect the purpose of the parade and I asked him to a position (sic) on the line. He stood between No.3 and 4. I called a witness known as Dancun Gitau Njoroge from D.C.I.O's officer….."**

The same circumstances obtained in respect of the 5th appellant. This was wrong and irregular. Each parade should have been conducted with different set of parade members. As it is it was very easy for the identifying witnesses to pick out the appellant from the parade as they had participated in previous parades and had noted former parade members. Any new member in the parade as was the case with the two appellants must have raised their suspicion and accordingly could not have failed to mark them out as new faces in the parade. As already stated, it would have been desirable that all parade members be changed for each suspect and new members selected and lined up in order to test the accuracy of identifying witnesses. It is our view however that even if the evidence of identification parade with regard to the 3rd and 5th appellants was to be disregarded as it should, we are nonetheless satisfied that the two witnesses had been positively identified the two witnesses in the cause of the robbery.

There was also the issue of the identifying witnesses having had the opportunity to see the appellants before the identification parades. This allegation forced the trial court to adjourn the proceedings to the police lines to be able to observe whether the identifying witnesses kept at the D.C.I.O's offices as the parades were being prepared could have had an opportunity to see the parade members before hand. The answer was in the negative. We can only agree with the conclusion reached by the learned Magistrate as he had the opportunity to visit the police station and make his own observations. We did not and we cannot have such an opportunity.

The appellants have also alluded to the inconsistencies and contradictions in the prosecution evidence. The contradictions they allude to has to do with who was wearing what, who was carrying the gun and pistol whether a first report was made and if so by whom, who had shears *(big scissors)*, whether the identification parades were before the robbery e.t.c. These contradictions to our mind are minor and in any event curable. They did not go to the root of the prosecution case. Indeed these contradictions were ousted by the overwhelming evidence that was before the court confirming in no uncertain terms that the appellants were at the scene of robbery that night and indeed they did take part in the robbery.

The appellants have also raised the issue of the evidence being at variance with the charge sheet. They claim that in the charge sheet the weapons described therein are a pistol, iron bars and rungus. Yet turning to the evidence of the identifying witnesses they talk of a pistol and a big gun. The other variance is the amount of cash stolen in the process. Whereas in the charge sheet the amount stated therein is Ksh.35,000/= yet in his evidence, PW1 claimed that he lost Ksh.30,000/= from the drawer. PW1 also talked of having lost some cosmetics in the process yet the same is not featured in the charge sheet. Finally they allege that whereas the charge sheet claims that the property stolen belonged to **Dancun Gitau Njoroge**, yet the evidence adduced points to **Edward Mwangi Gitau** (PW1) as the owner of the stolen items. Once again, it is our view that the variance was not fatal to the prosecution case. They were minor and did not at all prejudice the appellants in their defences. In any event they are curable under *section 382* of the Criminal Procedure Code**. Dancun Gitau Njoroge** was **Edward Mwangi Gitau**, the owner of the shop that was raided.

Were the defences advanced by the appellants given due consideration by the learned Principal Magistrate? We think that they were. The defences only dealt with the events after the robbery. They did said nothing about the events on the night of 26th and 27th days of June, 2003. Even if we were to assume therefore that they advanced Alibi defences, those defences could not displace the strong prosecution evidence tendered against them. The learned Magistrate was therefore right in dismissing those defences as not being true at all.

Finally the appellants have raised issue with the prosecutor who appeared in court on the day of the plea. They allege that since his rank is not disclosed, he may have been an unqualified police prosecutor. On the day of the plea, the prosecutor according to the typed proceedings is merely referred to as **Mr. Ndetto**. It is therefore difficult to tell whether he was a police officer and if so whether held the rank of an assistant inspector of police and above. If he held the rank below the aforesaid rank then he was not a qualified police prosecutor in accordance with *section 85* as read together with *section 88* of the Criminal Procedure Codes.

We have looked at the original record and it is true that the prosecutor therein is indicated merely as **Mr. Ndetto**. However we do not think that merely because the rank of the said police officer was not disclosed, he was thereby an unqualified prosecutor. The issue of who is a qualified prosecutor was extensively dealt with in the now celebrated case of **Elirema & Another V Republic (2003) KLR 537**. The issue of a qualified prosecutor is only relevant when it comes to formal hearing of a criminal case. In the instant case, much as the rank of the prosecutor is not indicated, no prejudice was occasioned to the appellants during the taking of the plea as in any event they all returned a plea of not guilty and their subsequent trial was conducted by a qualified prosecutor. Had they pleaded guilty, perhaps then their complaint would have had some merit.

In the end we have come to the conclusion that the appeals in respect of counts 3, 4, 5 and 6 with regard to the respective appellants succeed. Accordingly, we allow the appeals, quash the convictions and set aside sentences imposed on the appellants in respect of those counts.

The 1st and 4th appellants should therefore be set at liberty forthwith unless otherwise lawfully held.

As for the 2nd 3rd and 5th appellants their conviction on the 1st count was inevitable. Accordingly it is upheld and sentence confirmed. Their appeals in respect of that count are hereby dismissed.

Dated and delivered at Nyeri this 22nd day of May, 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE