



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL NO. 121 OF 1999**  
**(From original conviction and sentence in Criminal Case No. 450 of**  
**1998 of the Senior Magistrate's Court at Githunguri: (M. Rungare**  
**Esq.)**

**JOHN NJOROGE GATHURA .....APPELLANT**  
**-VERSUS-**  
**REPUBLIC.....RESPONDENT**  
**CONSOLIDATED WITH**  
**PETER MBURU NJOROGE.....APPELLANT**  
**-VERSUS-**  
**REPUBLIC.....REPUBLIC**

**JUDGEMENT**

These appeals are consolidated. The two appellants were convicted of the offence of store breaking and committing a felony contrary to section 306 (a) of the Penal Code and sentenced to 6 months imprisonment.

They both appealed. At the hearing of these appeals, the learned counsel for the Republic conceded the appeals. With respect, I agree. The alleged offence was committed at about 1.00 a.m. It was a rainy night and the alleged culprits had covered their heads with sacks. With that in mind it is hardly possible to rely on light from a torch to identify anybody.

The two appellants were not arrested at the scene. The conditions for positive identification were lacking in these case. Conviction was therefore most unsafe. Accordingly, these appeals are allowed, convictions quashed and sentences set aside.

Both appellants shall be set free forthwith unless otherwise lawfully held. Order accordingly.

**Delivered and dated at Nairobi this 5th day of March, 1999.**

**A. Msagha Mbogholi**

**JUDGE**