



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**CORAM: OMOLO, GITHINJI & DEVERELL, J.J.A.**

**Criminal Appeal 236 of 2004**

**BETWEEN**

- 1. ATHMAN GALGALO BAJILA )**
- 2. KATANA FUNDO )**
- 3. HARRY THOMAS NGUMBAO ) .....APPELLANTS**
- 4. JOSHUA MICHAEL BARISA )**
- 5. JOHN BARISA )**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at  
Mombasa (Mr. Justice Mwera) dated 23  
rd  
March, 2004**

**in**

**H.C.C.R.A. NO. 87, 84, 82, 90, 89 OF 2002)**  
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**JUDGMENT OF THE COURT**

The five appellants were among twelve persons who were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code before the Senior Resident Magistrate, Kilifi. The first appellant Athman Galgalo Bajila was the 10th accused at the trial while Katana Fondo (2nd appellant), Harry Thomas Ngumbao (3rd appellant), Joshua Michael Barisa (4th appellant) and John Barisa (5th appellant) were the 12th, 7th, 9th and 11th accused respectively.

They were charged with robbing Rose Kombe on 4th July, 2001 at 2 a.m. of pocket radio,

calculator, torch and cash of Kshs. 3,000 while armed with offensive weapons, namely, pangas, and rungs. The 1st, 2nd, 4th and 5th appellants together with one Obed Komora Obed (3rd accused) and Stephen Mwambire (6th accused) were for unexplained reason convicted of the lesser offence of robbery contrary to section 296(1) of the Penal Code and each sentenced to 14 years imprisonment with hard labour together with 5 strokes. The third accused was committed to a Borstal Institution.

The present appellants appealed to the superior court. The State gave notice for enhancement of sentences to one of death under **section 296(2)** of the Penal Code but the superior court while dismissing the appeals rejected the plea for enhancement of the sentences.

The evidence of Rose Kombe (PW1) was briefly as follows:-

She was asleep when her house was broken into at 2 a.m. Her two daughters Margaret Kombe aged 15 (PW2) and Beatrice Rehema aged 13 (PW3) were asleep in another room in the same building. Apparently there were other rooms in the building let to tenants. The lamp was on and six people entered into the house including the five appellants. They demanded money. The 2nd appellant Katana Fondo was armed with a pistol. She gave Shs. 1,000 to the second appellant who struck her with a fist saying the money was not enough. The 2nd appellant and the 4th appellant then removed Shs. 3,000 from a box. The second appellant threw the lamp on the floor and it broke into pieces. The second appellant was slapping Rose Kombe in the course of the robbery.

The robbers left after 15 minutes. She used to see the first appellant, third appellant and fourth appellant before at Kibarani. Rose Kombe identified Obed Komora Obed (3rd accused) and Stephen Mwambire (6th accused) at identification parades conducted by Inspector Jacob Wafula on 10th July, 2001.

Each of the five appellants gave evidence on oath and raised a defence of alibi. The 1st, 2nd, 4th and 5th appellants claimed to be neighbours of Rose Kombe and stated that no identification parades were held. The third appellant however, claimed that he was identified at an identification parade by Rose Kombe and her two daughters. There is one common ground of appeal which is the main one, that the superior court erred in law in relying on the evidence of identification by Rose Kombe. The convictions of each appellant was solely based on the evidence of Rose Kombe, a single identifying witness at night in difficult circumstances. It is the law that such evidence should be tested with the greatest care and must also be completely watertight before a court can convict on it (see for instance, ***Kamau v Republic*** [1975] EA, 159; ***R v Eria Sebwato*** [1960] EA 174, ***Kiarie v Republic*** [1984] KLR 739). In testing the reliability of the evidence of identification at night in difficult circumstances, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc – see ***Maitanyi v Republic*** [1986] KLR 198.

The learned trial magistrate did not evaluate the evidence of identification. All he said was:-

***“When all the evidence in the entire case is taken, together, I find that PW1 was able to identify accused. 6 accused, 11 accused 7 accused, 9 accused, 10 accused, 11 and accused 12 as some of the persons who broke into her house while armed with knives, sticks, pangas and a pistol and stole from her. I find the lamp light in her room provided sufficient lighting for such identification in so far as count 3 is concerned.”***

The superior court criticised the judgment of the trial magistrate severely for failing to comply with the law but concluded:-

***“The learned trial magistrate found as a fact that identification was positive and this court does not interfere. This court is satisfied from PW1’s evidence that she identified her attackers some of whom were her neighbours”.***

With respect the superior court committed the selfsame error which the trial magistrate had committed for it did not reconsider the evidence and re-evaluate it before reaching its decision as it was required to do.

Indeed the superior court did not test the reliability of the evidence of identification by Rose Kombe using the guidelines in *Maitanyi v. Republic* (supra).

The evidence of Rose Kombe that she identified the robbers was generalised and not entirely convincing. She was awakened from sleep at a late hour of the night. The door of her room was broken into and several people entered into the room. One of the robbers beat her and slapped her occasionally during the robbery. She did not say when she lit the lamp or for how long the lamp was on before it was thrown away. She did not describe the size of the room or how and when she saw each appellant.

We agree with the appellants that this case was poorly investigated. There is no explanation why 12 people were charged when only six people robbed Rose Kombe. The gun which Rose Kombe saw is not mentioned in the particulars of the charge. All the appellants were arrested on various dates about 3 months after the robbery. There is no clear evidence of the circumstances of their arrest. Rose Kombe did not say that she knew all the appellants before and that she recognised them during the robbery. All she said was that she used to see 1st, 3rd and 4th appellants at Kibarani.

The visual identification of appellants by Rose Kombe is not reinforced by identification of appellants at identification parades. She only identified Obed Komora Obed (3rd accused) and Stephen Mwambire (6th accused) in the identification parade held on 10th July, 2001 before the appellants were arrested. Although she said that there were subsequent parades in which she identified the appellants such evidence was not produced at the trial.

The evidence of Rose Kombe was no more than the evidence of dock identification of the appellants which, as we have attempted to show above, was unreliable.

For those reasons, we allow the appeal of each appellant, quash the conviction and set aside the sentence. Each appellant to be released forthwith unless lawfully held for other lawful reason.

**Dated and delivered at Mombasa this 29th day of July, 2005.**

**R. S. C. OMOLO**

.....

**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**W. S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**