REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL 182 OF 2006

STEPHEN THIGA MAINA……..…….APPELLANT

-AND-

REPUBLIC…….…...RESPONDENT

(*An appeal from the Judgment of Chief Magistrate Mrs. U.P. Kidula dated 27th April, 2006 in Criminal Case No. 2604 of 2005 at Thika Law Courts*)

JUDGMENT OF THE COURT

Stephen Thiga Maina, the appellant, was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). It was charged that the appellant while acting jointly with others not before the Court and while armed with a dangerous weapon, namely an AK47 rifle, on 13th May, 2005 at Makongeni Estate, Thika District, in Central Province, robbed *Joseph Muthagya Muema* of two watches, two cellphones, one pair of Safari boots, one video deck, ten video tapes, and one Safari bag – all valued at Kshs.40,099/= ? and cash in the sum of Kshs.30,000/=, and immediately before the time of such robbery threatened to use actual violence against the said *Joseph Muthagya Muema*.

PW1, *Joseph Muema Muthagya*, a technician at Del Monte in Thika, testified that while he was asleep in his house at about 6.00 a.m., on 13th May, 2005 he sensed a push against his door. As he lay in bed, PW1 put on the lights, and when he turned his head he saw a person get in; that person wore a beret, and had an AK47 rifle, and for this reason PW1 at first thought the intruder was a Police officer. But the man then demanded money from PW1, and wanted it given to him fast. PW1 rose and dressed up, and at that point his wife entered the room. PW1 told his wife that the gunman and his colleague wanted money, all the money in the house. PW1's wife took out 28,000/= and gave to the intruders; but they still checked the bed-side locker and found another Kshs.2,000/= which they took, as well. These intruders were two men; one remained in the sitting room, while the one brandishing the gun was in PW1's bedroom talking to him. The robber in the lounge asked the gunman if money had already been handed in to him, and the gunman answered in the affirmative, and he went further and confirmed the amount as Kshs.30,000/=. The man in the sitting room now entered the bedroom and, after confirming that PW1 worked with Del Monte, and that the car parked outside was his, he demanded more money. PW1 answered that he had just handed into the gunman all the money he had, as well as the car keys. This particular robber refused PW1's car, and said he had his own outside the house. The gunman took a travelling bag and moved over to the lounge. He filled the bag with electronics, including ten tapes, a video equipment, and Safari boots. The doors in the house were, at the time, all open and PW1 and his wife could see what the

gunman was doing in the lounge. When PW1 objected to this emptying of his house, the gunman gestured by showing and rattling the gun's magazine, asking PW1 "*if I thought it was a toy*". As PW1 sat back resignedly on his bed, the gunman and his collaborator left the house. PW1 then checked the children's room and confirmed their safety, before he and his wife went outside and raised alarm. Neighbours came along; the Police Station was called; and a Police patrol motor vehicle came along, with Police officers. The Police officers inspected the scene, and PW1 went and recorded a statement.

Two days later, as PW1 passed by a shop, he saw one of the two men who had robbed him; he was dressed in the same mode, and had even the blue beret on. PW1 called the Police station, and three Police officers came along. Because of the fear that the suspect might shoot with the AK47 rifle, the Police called reinforcements, and then arrested the man pointed out to them by PW1. PW1 testified that the man he pointed out to the Police was the one who robbed him, and who had an AK47 rifle. This gunman's accomplice, a shorter man of light complexion, was not present at the time when the arrest was made. PW1 identified the beret which the robber had worn, on the material date. He confirmed that the man who came into his bedroom wielding on AK47 rifle, was the appellant herein. PW1 had not known this man before, but he saw him clearly during the robbery incident, and later formally identified him again at an *identification* parade which was conducted at the Police station.

On cross-examination, PW1 said his wife had just left the house to go to work, when the two robbers came into the house and she met them at the door. She had then returned into the house as the robbers entered. PW1 testified that he had observed the face of the appellant herein, and his mode of dress. He and his wife had followed the escaping robbers for a short distance, but they felt afraid, as the robbers were armed.

PW2, *Naomi Kathina Muema*, who runs a kiosk in Thika, testified that she normally prepares breakfast for the family at 5.00a.m., and leaves for work at 6.00am; and on the material date, just as she opened the door to leave her house, she saw two men, and one of them pointed a gun at her. This gunman ordered her to go back into the house and to lie down. The robbers told her, while lying down, not to look at them. The man wielding the gun asked PW2 where her husband was, and she said her husband was inside the room. The other robber then saw PW2's husband's cellphone charging; he grabbed it, and took also PW2's cellphone. The one with the gun now entered PW1's room and woke him up, and at this point, PW2 saw the light in the bedroom switched on; she stood up and went into the bedroom. In the meantime, the robber left in the sitting room was grabbing electrical appliances – television, video, and other items. The gunman ordered PW2 to sit down in the bedroom, and she did so. He wanted to know if PW1 knew him, and PW1 answered in the negative. The gunman demanded Kshs. 50,000/= from PW1; he asked; "Don't you work at Del Monte?" – and PW1 answered, "Yes". The gunmen then said: "*Basi toa pesa*" (Kiswahili for: "*Right, produce the money!*'') When PW1 said he had no money, the gunman asked if the motor vehicle parked outside wasn't his; and PW1 offered him the keys to the motor vehicle; the gunman said he wanted money, not a car, as he had his own. In the meantime the robbers were rummaging in all things capable of serving as receptacles – wallets, trousers-pockets, briefcases, mattresses. PW2 took out Kshs. 28,000/= from one bag and handed it over to the robbers; and PW1 had Kshs. 2000/=, which they also grabbed. The robber who had been pillaging electrical goods in the lounge, came into the bedroom and demanded to know how much money had been extracted from PW1 and PW2; he then took a travelling bag and two watches, and he returned to the lounge to stuff the bag with grabbed items – video CD-cassettes, safari boots and other things. During this robbery incident the lights in the house – in the bedroom and in the lounge – had been switched on and were not switched off at any stage. PW2 testified that he had seen the robbers well, and the one who had the gun was the appellant herein. The appellant herein had, at the material time, been wearing a "beret kind of hat which was either dark blue or black" she identified the beret shown to her in Court as the one the robber was wearing. After the two robbers left, PW1 and PW2 went out of the house and raised alarm, and neighbours came. PW1 and PW2 used a neighbour's cellphone to call the Police, who responded a short while after. PW2 had not been present when the appellant herein was arrested, and she was seeing the man in Court for the first time since the robbery had taken place.

On cross-examination, PW2 said she had been in the company of her husband during the robbery, and she had clearly seen the appearances of the two robbers. She had not met the appellant herein, prior to the

robbery incident. She did not have an opportunity to go to identification parade for the purpose of identifying the robbers.

PW3, Police Force No. 77110 *P.C. Martin Mushile* of Thika Police Station, was on patrol with *P.C. Makau* and *P.C. Abisiwa*, on 15th May, 2005 at 6.00p.m., when they received a communication from the control room, that a complainant had just seen a robbery suspect playing pool in a certain building. The Police officers arranged to meet the complainant (PW1) at a bus stage, and they went and saw many people at the house where the pool game was in progress. Since they were not sure the suspect was unaccompanied, the Police officers called for back-up help from the Police station. Even before back-up assistance came, PW3 and his colleagues cordoned off the area, and arrested the appellant herein ? just as the back-up team was arriving. The Police officers escorted the appellant herein to his house, about 100 meters from the building housing the pool tables. A Police search yielded nothing, except the hat the appellant had been wearing – a beret-like hat.

PW4, Police Force No. 231134 *Inspector of Police Joseph Toroitich* testified that he had received a request from one *Cpl. James Wairagu* (the investigation officer) to conduct an identification parade for a suspect in a robbery case. The name of the suspect was given as *Stephen Thiga Maina*, and the witness was *Joseph Mwema*. PW4 arranged a parade, its members being 8 persons of similar age to the suspect. He arranged these men in a line and called the suspect to view the parade; and the suspect expressed approval. The suspect, who had been kept far from the parade ground, was asked to choose where he would stand – and he elected to stand between parade members No. 6 and No.7. Prior to this, PW4 had sought to know if the appellant herein was wiling to attend an identification parade; and whether he wanted a friend of his, or an advocate to the present during the parade: the appellant was willing, and did not express a desire for the attendance of a friend or an advocate at the parade. The appellant duly signed against his responses on the parade form, and the complainant was then called to come and view the parade members. PW4 told PW1 there were 9 people in the parade, and the man who robbed him may or may not be one of them, and he should touch the suspect if the suspect happened to be on the parade. The complainant went and touched the appellant herein on the shoulder. PW4 then released the complainant, and asked the appellant if he was satisfied with the conduct of the parade. The appellant said he was not satisfied, because the complainant had been present at the time he, the appellant herein, was arrested. The appellant signed the parade form, and PW4 counter-signed.

On cross-examination, PW4 said he did not know the complainant had been present at the time of arrest of the appellant; and he had not been informed about a lady complainant (PW2) who should also have come to the parade.

PW5, Police Force No. 47310 *Cpl James Wairagu* recalled that at 6.00 pm, on 15th May, 2005 he had been duty officer at Thika Police station, and was in the company of *P.C. Wachira* and *P.C. Njoki.* He received a call from *P.C. Muchiri* that a robbery suspect had been spotted at a building housing pool tables. Back-up support was being requested, as it was not known if the suspect was accompanied by others. PW5 and his two colleagues drove to the place indicated, to find that the appellant herein was already under arrest. The Police officers went to the appellant's house and conducted a search, but recovered nothing. PW5, who was the investigating officer, asked PW4 to conduct an identification parade, and he did so. The suspect was subsequently charged in Court.

On cross-examination, PW5 testified that the complainant had not given him a description of the persons who had robbed them on the material date. The appellant herein was wearing a beret, when he was arrested.

The appellant, when put to his defence, elected to give an unsworn statement, and he said that on 15th May, 2005 he had woken up, and gone to work as a *miraa* (herbal stimulant) dealer; he closed business at 6.00pm, and he went to help his father who does pool-table business. The Police then came along and arrested the appellant, and he took them to his house where a search revealed nothing. He said he knows nothing about the robbery.

In assessing the evidence and coming to the Court's decision, the learned Chief Magistrate thus

proceeded:

"*The first issue here is whether this accused was identified by the two robbery victims PW1 and PW2 beyond reasonable doubt. The 2nd issue is whether the circumstances of identification were conducive to proper identification and, thirdly, were the two witnesses believable or could they have been mistaken?''*

The learned Chief Magistrate noted certain particular elements in the evidence: the robbers met PW2 at the doorway, and brought her back into the house; one of the robbers stayed for some time in the living room with PW2; when the robber with the gun entered the bedroom, the lights were switched on; the robbers were not masked; the robbers appeared to be in no hurry; they had a conversation with PW1 and PW2; they seemed to know where PW1 worked; the robbers also conversed between themselves.

From the foregoing details of evidence, the trial Court drew certain conclusions:

"*In my view these were conditions conducive to proper identification of the robbers. There was no time when [the] lights were put off and …..it was not [a robbery] conducted at ….lighting speed where everybody is thrown into the confusion."*

The learned Chief Magistrate went on to state:

"*The two witnesses in my view, were very truthful. They gave the evidence clearly and without any hesitation. The accused was unknown to them and they had no reason to plant this case on him.*

"*… I further find that the two witnesses were not mistaken in the identification of the accused*".

The trial Court found the prosecution case proved beyond reasonable doubt, held the appellant herein guilty, convicted him, and imposed on him the death penalty, in accordance with the statute law.

The appellant comes on appeal stating as his grounds that: conviction was wrong in law and in fact, for lack of positive identification; that the trial process did not comply with the terms of s.72(3)(b) of the Constitution which relates to delay between arrest and commencement of prosecution; that there were contradictions in the prosecution evidence, and so he should not have been convicted; that there were formal irregularities in the trial process; that the trial Court erred in law and fact, in rejecting his defence.

The appellant urged the foregoing points in writing and orally, and in particular submitted that he had not been properly identified as a suspect, because the intensity of lighting at the *locus in quo* was not described, and the complainants had not described the appearances of their attackers to the Police in advance.

Learned State Counsel, *Mrs. Obuo* contested the appeal, and urged that the prosecution testimonies had established with certainty that the appellant herein was, indeed, one of the robbers on the material day. In the full electrical lighting in the lounge and the bedroom, counsel urged, the complainants had clearly seen the robbers, and no room was left for mistaken identity. Counsel urged that the trial Magistrate, in her assessment of demeanour, had properly determined that the complainants were truthful witnesses.

On the appellant's contention that his defence had been rejected unjustifiably, learned counsel invited the Court to asses for itself the status of the appellant's unsworn statement, *vis-a-vis* the focussed testimonies of the prosecution witnesses.

We have paid careful attention to the content of the appellant's statement, and we find it to steer clear of the happenings of the material day. Since the testimonies of the prosecution witnesses, and more particularly those of the complainants, address specifically the robbery incident of the material day, it follows that the defence statement, in our view, has left entirely unshaken, the integrity of the prosecution case.

We have considered the belated contention made before this Court for the first time, that the appellant had remained in Police custody for 16 days instead of a maximum of 14 days (as provided in the general terms of s.72(3)(b) of the Constitution) before being charged in Court. The law on this point was clearly stated by the Court of Appeal in *Eliud Njeru Nyaga v. Republic*, Crim. Appeal No. 182 of 2006: whenever there is some delay in the commencement of prosecution, the detaining authority is to be accorded an opportunity to explain the circumstances in which this has taken place, and the Court would then make an appropriate ruling as necessary. We saw no evidence that such an opportunity did arise, or that a complaint had earlier been raised on this point; and therefore we find no basis for this particular gravamen in the appeal.

We have also not found any significant contradiction in the testimonies which would lower the quality of proof that led the trial Court to convict the appellant herein.

We are convinced that conviction had properly been arrived at, on the basis of truthful evidence especially on the identification of the appellant herein as one of the robbers; we find that conviction had been arrived at on the basis of proof-beyond-reasonable-doubt, as required by law.

Therefore, we dismiss the appellant's appeal, uphold his conviction, and confirm the sentence imposed by the learned Chief Magistrate.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 4th day of March, 2008.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Huka & Erick

For the Respondent: Mrs. Obuo

Appellant in person