REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Ojwang, Sitati, JJ.)

CRIMINAL APPEAL NO. 7 OF 2006

BETWEEN

MULINGE MASWILI……..…….APPELLANT

AND

REPUBLIC……..……RESPONDENT

(An appeal from the Judgement of the Senior Resident Magistrate, E.K. Makori, Esq at the Law Courts, Kitui, in Criminal Case No.1584 of 2004 dated 16th December, 2005)

JUDGMENT OF THE COURT

The charge brought against the appellant herein was in three counts. The first count was attempted robbery contrary to s.297(2) of the Penal Code; and the particulars were as follows:

> that the appellant, on 15th August, 2004 at about 1.00p.m., along Kasayani-Kitui murrarm road, Mbitini Location in Kitui District, jointly with another not before the Court, while armed with a dangerous or offensive weapon, namely a home-made gun, attempted to rob ***Shadrack Isika Makau*** of Kshs.20,000/=.

In the second count the appellant was charged with the offence of being in possession of an imitation firearm contrary to section 34 (1) and (2) of the Firearms Act (Cap.114). The particulars were that, on 15th August, 2004 at about 1.00p.m., along Kasayani-Kitui murram road, Mbitini Location in Kitui District, the appellant was found in possession of an imitation firearm, namely a home-made gun, without a firearm certificate.

In the third count the appellant was charged with being in possession of ammunition without a firearm certificate contrary to s.4(1) as read with s.4(3) of the Firearms Act (Cap.114). The particulars were that the appellant, on 15th August, 2004 at about 1.00pm., along Kasayani-Kitui murram road, Mbitini Location in Kitui District, was found in possession of two rounds of 7.62mm. calibre ammunition without a firearm certificate.

PW1, ***Shadrack Isika Makau***, PW2, ***Evans Ngusyi Syuki*** and PW4, ***John Muimi Kithuka*** were in a hired motor vehicle, Isuzu canter, registration number KAB 449Z, and were transporting charcoal from Kinakoni to Nairobi. When they reached Yongela, the three witnesses saw two people ahead; these people

just emerged from the bush, and laid log barriers on the road. The appellant then thrust out a weapon which looked like a gun, and held out a bullet. He demanded money, in the sum of Kshs.20,000; but the driver said that sum was not available though he had Kshs.10,000/=. The offer of Kshs.10,000/= was rejected by the attacker who ordered the engine to be switched off, and started conducting a search. The attacker threatened the driver with the gun when the driver made as if to run away. The driver then confronted him, and luckily, it turned out that the gun was not functioning. The witnesses herein overpowered the attacker, while his mate ran away. PW4 identified the gun in question, when it was shown to him in Court. Members of the public had then joined in, and the attacker, identified as the appellant herein, was tied up with ropes, and handed over to the Police. PW4 testified: "The person we did arrest is the accused in the dock…. The other ran away."

PW3, ***Johnstone Musyoki Mwongela***, a firearm expert attached to the CID in Nairobi, testified that the firearm involved in this case was a home-made gun that was capable of firing, and it was accompanied with two rounds of ammunition. The ammunition was that designed for a military rifle, and was of the 7.62 x 51 mm calibre; and both rounds were complete and could fire. The gun, PW3 testified, was a firearm within the definitions in the Firearms Act (Cap.114).

The appellant who elected to give sworn testimony, said that he was not involved in the robbery attack as charged, on the material day; for on that day he was on a long journey on foot, taking some seven hours from his home in Mutomo, Kitui District, to Mbitini; and as he went to cross the road at Kinakoni he heard the noise of a vehicle coming from behind. So, the appellant testified, he got off the road so the vehicle in question could pass; but suddenly the driver of that vehicle stopped, and arrested him, and this is how he ended up at the Police Station. It was his evidence that the prosecution initiated against him was a frame-up, as he had done no wrong.

The learned Senior Resident Magistrate held that the guilt of the appellant herein, had been proved beyond reasonable doubt; and he convicted the appellant as charged.

We have anxiously considered the evidence tendered by the Prosecution in the Court below. There is no reason to doubt that PW1, PW2 and PW4, as they travelled in their canter truck, registration number KAB 449Z, had come up against log barriers which were being set up on the road even as they watched. This evidence, which was not challenged, is consistent coming from the witnesses. It was daytime and there was broad daylight; and therefore PW1, PW2 and PW4 must have been seeing very clearly the person who was introducing barrier logs onto the road. These witnesses will moreover certainly remember that, the same person who created the obstruction on the road was armed with a gun and ammunition; and they will remember that the gun-wielding thugs engaged them in conversation, demanding the sum of Kshs.20,000/= and nothing less. The chain of identification was not at any stage broken; these witnesses saw the appellant as he emerged from the bush; they spoke to him as they observed him; they continued such contact by arresting the appellant, and by having members of the public help in tying him up with ropes; they kept sight of him as they conveyed him to the Police Station. It is a long and unbroken chain of visual identification. We hold that the identification achieved by such a long chain of live contact, marked by the unforgettable milestones of attack, speech, confrontation, threats, is to be taken in law to be a reliable process of isolating the perpetrator of a criminal act. We hold, in the circumstances, that the appellant herein was extremely-well identified as the extortionist who attacked the complainants for purposes of attempted robbery, as charged before the Subordinate Court. We also find that the appellant's allegation of a frame-up against him has no basis, and we accordingly reject his evidence.

There is also no doubt that at the time of attacking the complainants, the appellant and his mate were armed with firearms not lawfully in their possession, and therefore firearms held in breach of the Firearms Act (Cap.114).

We hold that the charges brought against the appellant herein, were adequately proved as required by law. Consequently, we uphold the conviction and sentence imposed by the learned Senior Resident Magistrate, in the case of count 1 of the charge, and we dismiss the appeal. We also dismiss the appellant's appeal in respect of counts 2 and 3 of the charge, which relate to offences under the Firearms Act (Cap.114), and we uphold the convictions and sentences awarded in that regard. However, we order that the sentences in

respect of the 2nd and 3rd count are, firstly, to run concurrently and, secondly, the said sentence is to remain suspended, in light of the capital punishment awarded by the trial Court for the first count of the charge.

Orders accordingly.

DATED and **DELIVERED** at Machakos this 11th day of May, 2007.

J. B. OJWANG

JUDGE

R.N. SITATI

JUDGE