



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MARSABIT**  
**CRIMINAL APPEAL NO.10 OF 2016**

**MURUKORI NGITIENE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.249 of 2013 of the Principal Magistrate's Court at Marsabit by Boaz M. Ombewa – Ag. Principal Magistrate)*

**JUDGMENT**

The appellant, **MURUKORI NGITIENE**, was charged with two offences. In count one he was charged with an offence of being in possession of a firearm without a certificate contrary to section 4 (2) (a) as read with section 4 (3) (a) of the Firearms Act cap 114 laws of Kenya. In count two the charge was being in possession of ammunition without firearm certificate contrary to section 4 (2) (a) as read with section 4(3) (a) of the Firearms Act ,Cap 114 laws of Kenya.

The particulars of the offence were that on the 17<sup>th</sup> April 2013 at Nakuron village in Loiyangalani District of Marsabit County, he was found in possession of an AK 47 rifle and seventeen rounds of ammunition without a certificate.

The appellant was found guilty of the offences and sentenced to serve seven years imprisonment on each count. The sentence was ordered to run concurrently.

He now appeals against both conviction and sentence.

The appellant was in person and raised four grounds as follows:

1. That the learned magistrate erred in law and in fact in failing to note that the production of exhibits failed to meet the required standards.
2. That the learned magistrate erred in law and in fact by failing to make a finding that the prosecution failed to call some material witnesses.
3. That the learned magistrate erred in law and in fact by failing to establish that the witnesses gave contradictory evidence.
4. That the trial suffered some procedural irregularities.

The state opposed the appeal through Mr. Kibet, the learned counsel.

When fisheries officials went on routine inspection at the beach, they were accompanied by police officers. On arrival they found the appellant using a sack as a pillow and inside it was the AK 47 rifle with seventeen rounds of ammunitions. He did not have a firearm certificate. He was arrested and charged.

The appellant contended that he was framed up in this offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

**“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”**

The contention by the appellant that the production of the exhibits did not meet the standards is not supported by the evidence on record. I am satisfied that no procedure was breached in the production of the exhibits.

When it comes to calling witnesses the prosecution has a discretion as to how many and which witnesses to call. This can only be faulted if a material witness is left out without any explanation given. In the instant case , I do not see any material witness who was left out.

The evidence of **Martha Akai Dabaleba (PW1)** was very scanty. However it was not contradictory to the evidence of the other witnesses. My finding is that there was no contradiction in the evidence by the prosecution witnesses.

My perusal of the record by the trial court does not disclose any procedural irregularity as complained by the appellant.

The evidence on record was water tight and I have no reason to disturb the conviction.

Section 4 (2)(a) and (3) (a) of the Firearms Act provides as follows:

**(2) If any person—**

**(a) purchases, acquires or has in his possession any firearm or**

**ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized; or**

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.....

**he shall, subject to this Act, be guilty of an offence.**

**(3) Any person who is convicted of an offence under subsection (2) shall—**

**(a) if the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years; or**

The appellant was sentenced to the minimum penalty prescribed by the law. The sentence is therefore lawful.

From the foregoing analysis I find that the appeal has no merit and the same is dismissed.

**DATED at Marsabit this 8th day of September 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**