



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI**

CRIMINAL APPEAL 427 OF 2009

BETWEEN

DANIEL MAINA NDIRANGU ALIAS MAINA MBURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a conviction and judgment of the High Court of Kenya at Nyeri (Makhandia, J) dated 13th
March 2009**

in

**H.C.CR.A. NO 116 OF 2008

JUDGMENT OF THE COURT

Upon his trial of the offence of being in possession of ammunition without a firearm certificate contrary to **section 4(1)** as read with **section 4(3)** of the Firearms Act Cap 114 the appellant Daniel Maina Ndirangu, alias Maina Mbura, was convicted for the offence and was thereafter sentenced to 10 years imprisonment.

In his first appeal to the superior court, the appellant challenged his conviction and sentence on the basis that the evidence adduced by the prosecution fell short of establishing the offence beyond any reasonable doubt. Although he put in lengthy written submissions in that regard when the appeal came up for hearing the appellant is recorded as having said:

“ I wish to abandon, my appeal on conviction but I proceed with appeal on sentence.”

He then proceeded to state as follows:-

“ Appellant – sentence imposed is harsh and excessive. I rely on my written submissions wholly.”

In his written submissions the appellant complains that he was not taken to court within 24 hours as required under **section 72(3) (b)** of the now repealed Constitution and thus his constitutional right to a fair trial was breached; that essential witnesses were not called, for instance the members of the public who witnessed his arrest, and lastly that his defence was not considered, contrary to **section 169 (2)** of the Criminal Procedure Code.

In its judgment the superior court (M.S.A. Makhandia J), only dealt with the issue of sentence. In that regard the learned Judge in pertinent part, rendered himself thus:-

“ This court can only interfere with the sentence if it is shown to be unlawful, manifestly harsh and excessive. Nothing has been brought to any attention that would remotely suggest that the sentence

imposed was illegal, unlawful, harsh or manifestly excessive. The offence charged carries maximum sentence of ten years. Much as the appellant was sentenced to the maximum sentence it was deserved going by his previous antecedents. The appeal against sentence in a nutshell is dismissed.”

The foregoing notwithstanding, the appellant still complains against his conviction. Two main grounds are raised in this second and final appeal; firstly, that the prosecution presented the appellant before the trial court after the expiry of 24 hours contrary to the provisions of **section 72 (3) (b)** of the repealed Constitution. Secondly, that an essential police witness who escorted the ammunition recovered to the ballistic examiner, was not called as a witness.

In his submissions before us the appellant invited us to review downwards the sentence which was imposed upon him on the ground that it is too harsh and excessive.

Mr Kaigai who appeared for the Republic did not think there was any basis for interfering, moreso because the appellant has two previous convictions.

We have considered this matter and to our minds although in his petition of appeal to the superior court and the memorandum of appeal to this court the appellant has raised issues which, prima facie, challenge his conviction, our understanding from his oral submissions before us and also before the superior court is that the appellant is aggrieved about the long sentence of imprisonment which was imposed on him. The sentence of ten years is the maximum provided under the Penal section. That notwithstanding this being a second appeal, by dint of the provisions of **section 361(1)** of the Criminal Procedure Code, this appeal does not lie. The section, as material, provides:

“ 361 (1) A party to an appeal from a subordinate court may, subject to sub-section (8), appeal against a decision of the High court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

(a) On a matter of fact, and severity of sentence is a matter of fact; ”

The foregoing notwithstanding, the evidence on record clearly shows that the appellant was arrested with two rounds of ammunition. The witnesses who testified on that issue were believed by both the trial and first appellate court. And on sentence, while we are of the view that the sentence is long, it is nonetheless a lawful sentence and both courts below did not err in principle.

This appeal has no merit.

Accordingly, it is ordered dismissed in its entirety.

Dated and delivered at Nyeri this 4th day of November, 2010.

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

E. M. GITHINJI
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR