



**Kalipa v Republic (Criminal Appeal E019 of 2024)
[2025] KEHC 5122 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E019 OF 2024
RPV WENDOH, J
APRIL 30, 2025**

BETWEEN

JOHN KAKUKO KALIPA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. JOHN KAKURO KALIPA, the appellant herein, was convicted by Senior Resident Magistrate Kapenguria for the following offences; Count I,- being in possession of a firearm without a firearm certificate contrary to section 4(2) (a) as read with section 4(3) of the *Firearms Act* no. 25 of 2025.
2. The particulars of the charge are that on 14/4/2024, at Mawingu Road, Makutano Township, West Pokot County, jointly with others not before the court, was found in possession of an AK47 rifle serial no. 01777 without a firearm certificate.
3. Count II,- Being in possession of ammunition without a firearm certificate contrary to section 4(2) (a) as read with Section 4(3) (a) of the Firearm Act.
4. It was alleged that on the same night, he was found jointly with others not before the court, in possession of nineteen (19) rounds of ammunition of calibre 7.62 by 39 mm without a firearm certificate.
5. Count III,- Being unlawfully present in Kenya contrary to section 53 (1) (f) as read with section 53 (2) of the Citizen and immigration Act Cap 12 of 2011. It was alleged that on the same night of 14/4/2024, being a Ugandan National, was found unlawfully present in Kenya without a valid entry Visa or permit.
6. The appellant was sentenced to imprisonment as below;

Count 1 -Twelve (12) years imprisonment.



County II – twelve (12) years imprisonment

County III – Accused to serve one (1) year imprisonment and after completion of sentence, to be deported to his country of origin. Prison sentences were ordered to run concurrently.

7. The Grounds of appeal are as follows; -
 1. That the offence was not proved to the required standard;
 2. That the evidence was full of inconsistencies;
 3. That the prosecution failed to call crucial witnesses;
 4. That the sentence is harsh and disproportionate to the offence.
8. The prosecution called a total of six (6) witnesses and when called upon to defend himself, the appellant gave unsworn evidence.
9. This being a first appeal, this court has a duty to re-examine all the evidence tendered before the court, analyze and evaluate it and draw its own conclusions. This court is guided by the decision of Okeno - V- Republic (1972) EA 32, where the court said, "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 findings 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...

The Prosecution Case;

10. PW1 CPL Ali Mohammed Adan of Makutano police post and PW2 PC Bare Aden recalled the 14/4/2024; that they were on patrol with other officers at about 11.00p.m. He was recalled to go back to the police station. PW1 said that at the police station, they were joined by Cpl. Ahmed Bashir from Kapenguria police station. They found three (3) members of public who informed them they knew of a person who had an AK47 gun and was looking for a buyer. They went together to Makutano and at the junction, the appellant who was going to Panama Bar was pointed out to them. They stopped him, conducted a search on him and recovered an AK 47 gun in his right hand which he had wrapped in a green/white black cloth (sheet).
11. They found one bullet in the chamber and eighteen (18) bullets in the magazine chamber. PW1 said they made an inventory of the recovered items.
PW2's evidence was similar to that of PW1.
12. PW3 Chief Inspector Mbalani Kahi, from DCI a Ballistic expert, testified that on 24/4/2024, he received the following exhibits.
 1. AK 47-gun Serial No. 01777 – A1
 2. Magazine – A2
 3. Nineteen (19) Ammunition B1-19.
13. He was asked to ascertain whether Exhibit A1 was a firearm, whether Exhibit B1-19 were ammunition, whether Exhibit A2 could be used in Exhibit A1; whether Exhibit B1-19 could be used in Exhibit



A1 and whether Exhibit A1 had been associated to any crime in Kenya. After the examination, he found that Exhibit A1 was manufactured in China, could fire ammunition of calibre 7.62 X 39mm, that Exhibit A1 was capable of firing and he used two ammunitions of Exhibit B1-19 to test fire and renamed them TCI-3; that Exhibit A2 was a detachable box magazine and can carry 30 rounds of ammunition 7.62 X 30mm and could be used in firearms AK47 like Exhibit A1. He also found that Exhibit A1 and Exhibit B1-19 were capable of being fired and are a firearm and ammunition respectively; that further microscopic test and examination of TCI-3 did not reveal any match to any reported offence in Kenya.

14. The report was marked as PExh.6a while the accompanying exhibit memo form was P.Exh. 6 (b).
15. PW4 Cpl. Ahmed Bishar Abdile was with PW1 and PW2 when they arrested the appellant and he testified to that fact.
16. PW5 Cpl. George Wamae of DCI West Pokot was the Investigation Officer. After the case was assigned to him by the DCIO, he found a suspect, John Kalipa at the police station and had been arrested on 14/4/2024. After carrying out investigations, he prepared an exhibit memo form and forwarded the exhibits, AK47 gun, magazine, 18 rounds of ammunition to the Ballistics expert. He also established that the appellant was from Uganda and lacked any identification. He charged the appellant.

Defence Case:

17. When called upon to enter his defence, the appellant opted to give unsworn evidence in which he stated that he is Kenyan from Kacheliba and had lost his identification; that on 23/4/2024 about 9.00p.m. while at Panama bar, walking to the stage, he met officers who called out “ni huyu” meaning “it is this one” and he was arrested. He had a sheet round his neck. He was taken to Makutano Police Station where it was alleged, he had a firearm and was charged.

Submissions:

18. In his submissions, the appellant argued that no photographs were taken at the scene where the gun was allegedly recovered; that the gun was not dusted for finger prints; that the informers were not called as witnesses hence crucial witnesses to the case were not called; that the witnesses failed to visit the scene and record the witness statements; that the case was a fabrication because the appellant was a repeat offender; that the officers had known him from the earlier case and that the court should have taken into account that fact. The appellant also argued that possession was not proved.
19. He therefore prays that conviction be quashed, sentence be set side and he be set at liberty forthwith.
20. The Respondent opposed the appeal and also filed submissions in which it was argued that the three offences were satisfactorily proved; that it is upon conviction that it was found out that he was not a first offender. The court was urged to uphold the conviction and sentence.
21. I have now considered all the evidence tendered before the trial court by both sides, grounds of appeal and their submissions.

Failure to photograph the scene:

22. The appellant complained that the scene was not photographed with him carrying the gun hence the evidence against him is not true. In my considered view there is no requirement that an accused be photographed at the scene to prove possession. In fact, once arrested in possession, it was safer for him to be whisked away from the scene to avoid attracting the public or would be other offenders. The



circumstances under which the appellant was arrested did not necessarily require the processing of the scene.

23. The appellant also complains that the evidence of the informers was very crucial to the case and failure to call them is prejudicial to his case.

On Police Informers:

24. The issue of police informers has been discussed by the courts in various decisions. Ordinarily the police will not disclose the identity of the informers nor are they called as witnesses. The common excuse given is for the protection of the informers and the source of informers. In many cases police cannot ably perform their duties of detection and prevention of crime if it was not for informers.
25. In *Kigecha Njinga -V- Republic* (1965) EA 773 the Court of Appeal said. “Informers play a useful part, no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desires the court to hear the details of the information, an informer has given to the police, clearly the informer must be called as a witness”.
26. Again, the Court of Appeal in *Joseph Otieno Juma -V- Republic* (2011) e KLR stated thus, “Concerning the failure to ask the informers to testify in this case, our view is that in the circumstances of this case, their evidence was not necessary to determine the innocence or otherwise of the appellant because the prosecution’s evidence served the purpose. However, we think that if the evidence of the informers is necessary to prove the guilt of the appellant, it would have been necessary for them to have testified perhaps outside the glare of the public”
27. It means that where the prosecution case is weak for lack of sufficient evidence and the evidence of the informer would make a difference in strengthening that case, it would be prudent to call the informer to testify and for the informer’s safety, the evidence would need to be taken in camera.
28. In the instant case, PW1,2 and 4 all told the court how they acted on the evidence of an informer which led to the arrest of the appellant. On being searched, he was found with an AK 47 and further search unveiled eighteen (18) rounds of ammunition. Their evidence was cogent and consistent in all material particulars and this court has no doubt they told the court the truth. At no time during the trial, did the appellant allege that any of the officers knew him because of the offence he had earlier committed. The issue of his previous conviction only showed up at the time of sentence. I find no gap in the prosecution evidence that would have required the evidence of the informer to fill, and failure to call the informer does not weaken the prosecution case at all.

Whether the offence was proved:

29. The appellant was charged under section 4(2) as read with Section 4(3)(a) of the *Firearms Act*. Section 4(2) (a) provides as follows
30. 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 he shall, subject to this Act, be guilty of an offence.”
31. The appellant was found in possession of both the firearm and ammunition without holding a certificate as required by the *Firearms Act*.



32. PW2's testimony confirmed that the AK47 Exh.A1 was a firearm under the *Firearms Act*, manufactured in China and was capable of firing ammunition of Calibre 7.62. 39.
33. The ammunition Exh.1-3 were live, capable of being fired in Exh.A1. P.Exh.A1 was also confirmed to be a box magazine which could carry thirty (30) rounds of ammunition, 7.62 X 30mm and could be used in Exh.A1 AK47. The court is satisfied that the prosecution proved that the appellant was found in possession of a firearm and ammunition as charged.
34. As regards Count III. Although the appellant claimed to be a Kenyan in his defence, he admits in his submissions that he had been in Kenya since 2010. His defence was vague, hollow and unbelievable and was rightfully dismissed by the trial court.
35. Having reviewed all the evidence on record and considered the grounds of appeal and submissions, I find that the conviction is sound and I affirm it. Under section 4(3) (a) of the *Firearms Act*, upon conviction, an accused is liable to imprisonment for a term of not less than seven years, and not more than fifteen (15) years. The Appellant was not a first offender. He had been convicted of a similar offence in Criminal case no. 466 of 2010 and was released in 2015 upon completion of the sentence. It is obvious that he was not rehabilitated and the trial court preferred a deterrent sentence of twelve (12) years imprisonment on count 1 and 2 and one (1) year imprisonment on Count 3 and they were ordered to run concurrently. Upon completion of sentences, he is due for repatriation to his country of origin. The sentences are fair in the circumstances and the court finds no reason to interfere. The Appeal lacks merit and is hereby dismissed in its entirety.

DATED SIGNED AND DELIVERED ON THIS 30TH DAY OF APRIL, 2025

HON. R. WENDOH.

JUDGE.

Judgement read in open Court in the presence of

Mr. Majale for State /Prosecution Counsel

Appellant - present

Juma/Regina - Court Assistants

