



**Odek v Republic (Criminal Appeal E039 of 2023)
[2024] KEHC 15146 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15146 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E039 OF 2023
KW KIARIE, J
NOVEMBER 28, 2024**

BETWEEN

SAMWEL ODOYO ODEK APPELLANT

AND

REPUBLIC RESPONDENT

*(From an order in Criminal Case No. E033 of 2021 of the Principal Magistrate's
Court at Oyugis by Hon. B.O. Omwansa–Senior Principal Magistrate)*

JUDGMENT

1. Samwel Odoyo Odek, the appellant herein, was charged with two counts of forcible detainer contrary to section 91 of the Penal Code.
2. The particulars of the offence in count one is that between the 15th day of January 2020 to date, at Koderia Karabach sublocation, Rachuonyo South Sub-County within Homa Bay County, being in possession of land parcel number West Kasipul/Koderia Karabach/1281 of John Ohuru Omwenga without colour of right, held possession of the said land in a manner likely to cause a breach of the peace against John Ohuru Omwenga.
3. In count two, the particulars of the offence were that between the 15th day of January 2020 to date, at Koderia Karabach sublocation, Rachuonyo South Sub-County within Homa Bay County, being in possession of land parcel number West Kasipul/Koderia Karabach/1280 of Kingi George Oongo without colour of right, held possession of the said land in a manner likely to cause a breach of the peace against Kingi George Oongo.
4. The learned trial magistrate made some orders on the 27th day of June 2023. The said orders aggrieved the appellant. He has appealed. He was represented by the firm of O.P. Ngogwe & Associates, Advocates. He raised grounds of appeal as follows:



- a. That while reiterating the grounds of Appeal already preferred by the appellant herein against the prosecution and the learned Magistrate in Homabay Criminal Appeal No.E037 of 2023, the appellant herein contends that the learned magistrate erred in law and facts in exercising civil jurisdiction in Oyugis Criminal case No.E033 of 2021 to the detriment of the appellant who was thereby denied fair hearing and access to justice both in the civil dispute which is still pending and in the criminal dispute.
 - b. That the learned magistrate erred in law and in facts in determining with finality the plaintiffs' case in Oyugis ELC NO. E041 of 2022 against the appellant herein, the defendant in Oyugis ELC no. E041 of 2022 in Oyugis Criminal Case NO. E033 of 2021 on a mention date and contravening the Rules of Natural Justice.
 - c. That the learned magistrate condemned the appellant herein with a lot of bias, contrary to Rules of Natural Justice and in contravention of Articles 10, 19, 20, 21, 25, 27, 28, 29, 48 and 50 of *the constitution* of Kenya 2010.
 - d. That the Learned Magistrate erred in Law and in facts in maliciously prosecuting and in maliciously advancing the Plaintiffs' case in Oyugis ELC No. E041 of 2022 against the Appellant herein in Oyugis Criminal Case No. E033 of 2021 as if she had an overriding vested interest in the subject matter of civil dispute as filed in Oyugis ELC. No. e041 of 2022, which dispute has not yet been heard and determined on merits between the parties.
 - e. That the Learned Magistrate erred in Law and in facts in dismissing or stigmatizing the Appellant's case and the Appellant's Statement of Defence as was filed in Oyugis ELC Case No. E041 of 2022 in Oyugis Criminal case No. E033 of 2021 contravenes the Rules of Natural Justice and is contrary to Articles 10, 25, 27, 28, 29, 48 and 50 of *the Constitution* of Kenya 2010.
 - f. That the Learned Magistrate erred in Law and in facts in failing to find that the Prosecution lacked powers and jurisdiction to Advance and prosecute the Plaintiffs [sic] case in Oyugis ELC Case No. E041 of 2022 in Oyugis Criminal No. E033 of 2021.
 - g. That the Learned Magistrate erred in Law and in facts in failing to explain how Oyugis Criminal Case No. E031 of 2021 (where the Appellant herein was originally maliciously charged and prosecuted) was transformed into Oyugis Criminal Case No. E033 of 2021.
 - h. The above-mentioned unlawful and unprofessional conduct of the Prosecution and the Learned Magistrate constitutes a grave and gross abuse of the Criminal Justice System in any democratic state governed by the Rule of Law, meriting the urgent intervention of the Honourable Court.
5. The state opposed the appeal, and it was contended that there was no cause of action.
6. On June 27, 2023, Criminal Case No. E033 of 2021 was listed for hearing. The accused informed the court that his advocate was absent and requested an adjournment. The prosecution did not oppose the application but requested that they be allowed to try to resolve the matter through alternative dispute resolution. The following was recorded:

Accused- I agree to give them 2 acres.

Court- Having put to the accused person and the complainant and having considered the request of the prosecution, I direct as hereunder:



1. That the sub-county Surveyor went to the scene on 19/7/23 to carve out the 2 acres meant for the two complainant [sic].
 2. That the area chief of Koderia South and his village elders be part and parcel of the exercise.
 3. That all leasers to appear and be informed that they are only to harvest the crops which will be found on the portion of 2 acres and therefrom exit from utilizing the portion of land.
 4. That a report be done by both the surveyor and area chief and the same be filed on or before 25/7/2023.
 5. Mention on 25/7/2023 for further direction.
7. When the appellant informed the court about his advocate's absence, and there was no objection, the most the court should have done was direct the prosecution to notify the advocate of their desire to have the matter referred to alternative dispute resolution. What the learned trial magistrate did was unfair to the appellant.
8. Article 50 (2) of *the Constitution* provides:
- Every accused person has the right to a fair trial, which includes the right—
- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
- The appellant was denied the right of representation before these orders were made.
9. When the learned trial magistrate made the order suo moto, no evidence had been adduced, and one is left wondering where the details in the impugned order came from. There is no basis for the orders.
10. I, therefore, set aside the orders of June 27, 2023. Any action pursuant to the orders is declared a nullity. The appeal is allowed to that extent.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF NOVEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

