Odhiambo & 2 others v Republic (Criminal Appeal E058 of 2023)
[2024] KEHC 16142 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16142 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E058 OF 2023

DK KEMEI, J

DECEMBER 20, 2024

BETWEEN

JOHN OKOTH ODHIAMBO ..... 1ST APPELLANT

LEONIDA OLOO ODHIAMBO ..... 2ND APPELLANT

SAMSON OKOTH ODHIAMBO ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon B. Limo (Principal Magistrate) in Siaya Chief Magistrate's Court Criminal Case No. E85 of 2023 delivered on 24th November 2023)

JUDGMENT

1. John Okoth Odhiambo, Leonida Oloo Odhiambo and Samson Okoth Odhiambo, the Appellants herein, were charged with two counts. The first count was the offence of Forcible Detainer contrary to Section 91 of the Penal Code with the particulars being that on 3r February 2023 at Ulafu Sub Location within Siaya County being in possession of East Alego/Ulafu/438 property of Gabriel Omondi Ndege without any color of right held possession of the said land in a manner likely to cause breach of peace or reasonable apprehension of a breach of the peace, against Gabriel Omondi Ndege who is entitled by law to the possession of the land.
2. The second count was the offence of threatening to kill contrary to section 223(1) of the Penal Code. The particulars are that on 3/2/2023 at Ulafu Sub Location within Siaya County without excuse uttered words threatening to kill Gabriel Omondi Ndege.

3 Dissatisfied by both the conviction and sentence, the Appellants filed a petition of appeal dated 7th December, 2023 and amended on 11th December 2023 wherein they raised grounds of appeal as hereunder:

i. That the learned trial magistrate erred in law and in fact in trying the accused persons with incomplete statements leading to a mistrial.

ii. That the learned trial magistrate erred in fact and in law by convicting the accused persons on evidence that did not support the offences on the charge sheet hence convicting the appellants on a defective charge sheet.

iii. The trial court erred in fact and law in failing to explain to the accused persons the contents of section 211 of the CPC.

iv. The learned trial magistrate erred in fact and law by denying the accused persons an opportunity to produce their evidence.

4. The appellants prayed that the appeal be allowed and that the conviction be quashed and sentence set aside.

5. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions. See Okeno vs. Republic [1972] EA 74. In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as so held in Ajode v. Republic [2004] KLR 81.

6. The Respondent called a total of six witnesses in support of its case.

7. PW1 Gabriel Omondi Ndege testified that he is the owner of land parcel No. East Alego/Ulafu/438. He identified a copy of title deed which was marked as PMFI- 1. That on 3/02/2023, he together with others went to his land that he had bought in order for the seller to show him the entire property and his boundaries. That while they were at the farm, the Appellants herein confronted them while claiming that the land is for the community. That the 1st Appellant insulted them and started a war song. The villagers came among them the 2nd Appellant who insulted the seller. The 3rd Appellant then came and joined them and that they were threatened with death by the 1st and 3rd Appellants. That the pressure mounted and they had to leave and reported the matter to the police. That witnesses likewise went to record their statements. That he wanted to till the land but did not and thus he lost two seasons as he was denied access to the land. That he engaged the services of an agricultural officer through the area chief. That he wanted compensation which was assessed at Kshs 560, 000/.

   On cross examination, he stated that he bought the land from Magdalene Achieng and that he knows the land.

8. PW2 Magdalene Achieng testified that she is from East alego Ulafu. That she knows the 1st and 3rd Appellants herein as they were relatives since they shared a grandfather. That she sold the land parcel No. East Alego/Ulafu/438 to the complainant. That it was initially in her name. That she did succession and sold the property. That she had the previous title. She identified a copy of title No. East Alego/Ulafu/438 issued on 2/9/2019 marked as PMFI-5.

   That on 3/2/2023 they went to the land with PW1 together with Eliakim Osenyo and two other people. At the site as she was showing the complainant the boundary, the 1st Appellant came and claimed that the land should not be sold. That the 2nd and 3rd Appellants came and claimed that

someone would die. They threatened them with death and asked them to leave. They complied and reported the matter to the police.

On cross-examination by the 1st Appellant, she stated that the land parcel is East Alego/Ulafu/438.

9. PW3 Eliakim Otieno, a farmer stated that he knew 1st and 3rd Appellants. That on 3/2/2023 he was with PW1at his farm together with Magdalene and two other people. That Magdalene was to hand over the land to PW1. While at it, 1st Appellant came to confront them while claiming that the land should not be sold to a stranger. That the 1st Appellant raised an alarm while claiming that someone would die and villagers came. That the 2nd Appellant also came. Then the 3rd Appellant came and raised an alarm and threatened that the buyer was going to die. They then left and went to the police to report and that he later recorded his statement.

On cross examination by the 1st Appellant, he stated that PW1 bought the land from PW2 in December 2022 and that he was a witness to the transaction.

10. PW4 Joseph Opiyo stated that he is from Ulafu sub location. That he was with PW1 at his farm when one person came and he saw that person in the dock. It was the 1st Appellant who raised alarm. That the 2nd Appellant came. Then the 3rd Appellant also joined and together with the 1st Appellant threatened them with death while claiming that there was no land to be sold.

On cross examination, he stated that he was at the farm to do some casual job.

11. PW5 PC Bowen Rono attached at Tinderet police station but initially at Siaya police station. He testified that on 3/2/2023 at 12.00 PM he was at the police station when PW1 arrived while in the company of casual laborers and Magdalene complaining that they had been chased from the farm by the Appellants who were in the dock. That he recorded their statements and asked for title documents to the land. That the complainant gave him the title deed of East Alego/Ulafu/438, a search certificate and sale agreement between the complainant (PW1) and Magdalene. That he later visited the scene and took photographs and compiled a file which he presented to the ODPP whereupon he was advised to arrest and charge the Appellants as they now appear on the charge sheet. That he later found out that the Appellants went on to plough the land against the advice of the police. That he produced a copy of title deed to East/Alego/Ulafu/438 (PEXHBT 1), original search (PEXHBT 2), letter from chief dated 16/10/2023 (PEXHBT 3), sale agreement dated 14/12/2023 (Exhibit 4), 10 photographs produced as (P Exhibit 5a-j), photograph of ploughed farm (P Exhibit 6).

On cross examination by 1stAppellant, he stated that he found the Appellants at the farm who were abusing them as well even though they knew that they were police officers. That he investigated the case and that he visited the scene but did not know any dispute regarding the land.

On cross-examination by the 2nd Appellant, he stated that he was not aware of any items having been taken by the police.

On cross-examination by the 3rd Appellant, he stated that he knew him as the 3rd accused.

12. PW6 Charles Ngige, testified that he was an Agricultural officer attached to North Alego Ward. He stated further that he got a letter from chief North Alego requesting for an officer to do crop loss in plot No. East Alego/Ulafu/438 of Gabriel Omondi Ndege. That he visited the land on 18/10/2023 and found that it measured nine (9) acres. He assessed that an acre can give 12bags of 90kg of maize, and 4 bags of beans at Kshs less than Kshs 4000/- per 5kg bag of maize and 12000/ for beans. Thus he evaluated the loss of an acre would be Kshs 96,000/- multiplied by 9 acres. He stated that the loss for two seasons will be Kshs 1,056, 000/.He produced the agriculture crop loss assessment report as P Exhibit 7.

On cross examination, he stated that the chief requested him to do the assessment. That he did not see the 2nd Appellant at the farm and that he did not know the 3rdAppellant.

13. At the close of the prosecution case, the court ruled that a prima facie case had been established against the Appellants who were subsequently placed on their defense. All Appellants opted to tender unsworn statements and di not call witnesses.

14. Dw1 John Okoth Odhiambo stated that he is a farmer. That he has not taken anyone's land. That the land has been ploughed by someone else. That he did not threaten anybody and that he has no title to East Alego/Ulafu/438.

15. DW2 Leonida Oloo stated that she is a farmer. That she did not chase anyone on the land. That she did not have energy to chase anybody as she is 78 years. That she only raised an alarm when she saw the complainant from her house.

16. DW3 Samson Okoth Owino stated that he is from Ulafu sub location and that he is a student at Nairobi but didn't have documents to show that he was indeed a student. That he was not aware of the case.

17. That all the Appellants closed their respective cases and indicated that they would not file submissions.

18. The appeal was canvassed by way of written submissions. It was the appellants' submissions that the charge sheet was defective regarding the charge of forcible detainer because the Appellants were not in actual possession of the land. Appellants further submitted that there was a mistrial as the Appellants were not supplied with complete statements. It was their further submissions that there was no sufficient evidence to warrant a conviction for the offence of threatening to kill. Finally, the appellants submitted that the charges against them were not sufficiently proved and that the Appellants should be acquitted. However, should the court be inclined to uphold the conviction, then they submit that it should reconsider the sentences imposed.

19. In a rebuttal, the Respondent submitted that the Appellant's ground of appeal to the effect that the charge of forcible detainer is defective lacks any basis since the same was quite proper. They placed reliance in the case of Sigilani Vs. Republic [2004] 2 KLR,480 where it was held "The principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused person to prepare for his defence."

    It was further submitted that the Appellants were not prejudiced in any way since the charge contained all the requisite particulars which they understood and pleaded to and also cross-examined the witnesses. It was thus submitted that there was no miscarriage of justice contrary to the assertions of the Appellants. It was also pointed out that at the time of the offence the Appellants had the physical possession of the land in question.

20. On the issue of a mistrial, the Respondent submitted that the Appellants did not raise an objection during trial that they were not supplied with complete statements, and that this ground amounted to an afterthought. Further, they submitted that written statements are not evidence as the same did not prejudice the Appellants who had a chance to actively participate in the trial and had a chance to cross examine the witnesses who tendered their evidence orally and that they cannot now turn around and cry wolf and claim that they were not supplied with statements.

21. On the ground that there was no sufficient evidence to convict the Appellants for the offence of threatening to kill, the Respondent submitted that there was sufficient and cogent evidence on record

to support the said charge. Moreover, the words someone will die is a threat directed at people who were there.

22. On sentences imposed, the Respondent submitted that the main purpose of punishment is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they commit them then they meet this punishment. (see a New Zealand decision of R vs. AEM (2000). It was submitted that the sentences imposed were not excessive or harsh as the trial court took into account the probation report, mitigation and the general guidelines regarding sentencing of offenders.

23. In conclusion the Respondent submitted that the prosecution proved all the elements of the offences beyond reasonable doubt and prayed that the appeal be dismissed.

24. I have carefully considered the record of appeal plus the submissions on appeal and find that the only issue for determination is whether the Respondent proved its case against all the appellants beyond reasonable doubt.

25. It is noted that the Appellants had been charged with two offences namely forcible detainer and threatening to kill under section 91 and 323(1) of the Penal Code respectively. It is imperative that the salient features in both offences be highlighted before embarking on the determination of this appeal.

26. Section 91 of the Penal Code provides:

> " Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanor termed forcible detainer".

27. Section 323(1) of the Penal Code provides:

> ''Any person who without lawful excuse utters, or directly or indirectly causes any person to receive a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years.''

28. Turning on the charge of forcible detainer, the term forcible detainer is defined in Black's Law Dictionary, 11th Edition as the deliberately created false impression that title to property or goods is held by someone other than the actual owner. This definition denotes a continuum of control or occupancy and not a one-time occurrence. This explains why we have trespass to land as a one-time offence in existence.

29. In ALBERT OUMA MATIYA V REPUBLIC BUSIA HCCR APPEAL NO.8 OF 2012 [2012] EKLR, Kimaru J. (as he then was) held as follows:

> " The ingredients required to establish the charge of forcible detainer under Section 91 of the Penal Code are as follows: the prosecution must establish that the accused is in actual possession of the parcel of land which he has no right to hold possession of. The prosecution will establish this if it adduces evidence which proves that the accused has no title or legal right to occupy the land. Secondly, the accused must be in occupation of the parcel of land in a manner that is likely or causes reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land.''

Flowing from the foregoing description, the Respondent was under duty to establish the ingredients of the offence of detainer namely; that the Appellants have actual possession of the land; that the

Appellants have no right to the land; that the act of possession is against the interests of the legal owner or the person legally entitled to the land; that the act of possession of the land is likely to cause a breach of the peace or a reasonable apprehension of the breach of the peace.

30. It is thus necessary to find out from the evidence tendered before the lower court whether the above conditions have been met by the Respondent in its quest to prove the said offences. In the the instant case, it was the evidence of PW1, that he is the owner of land parcel No. East Alego/Ulafu/438. Copy of title deed marked as PMFI 1 and later produced as PEXHIBIT 1. He stated that he had lawfully purchased it from the original owner thereof one Magdalene Achieng (PW2) and that on the said date, he was accompanied by the said seller to the land and to prepare to farm it only for the Appellants herein to threaten and chase them away from the land. It was the Appellants' contention at the time that the said land would not be sold and that they threatened the complainant and his team with death. It is therefore clear that there was a likelihood of a breach of peace were it not for the complainant to opt to rush to the police station and report the incident. The investigating officer (PW5) stated that upon visiting the scene, he found the Appellants had ploughed the land despite being warned by the police.

31. PW1 further testified that that when they arrived at his property that he had purchased from PW2, they were confronted by the 1st,2nd and 3rd Appellants who raised alarm and denied them access to do what they had come to do. That they threatened them with death and had to leave. This testimony was collaborated by the testimony of PW2, PW3 and PW4.

32. It was the evidence of PC Bowen Rono (PW5) the investigation officer in this matter that he went to the ground and took photos among them was P EXHIBIT 6 which was a picture showing that the Appellants had ploughed and planted maize on the property belonging to the complainant (PW1). Tied to this, is the testimony of PW1 that he had been denied access by the Appellants to use his land for two continuous reasons. This therefore proves that the Appellants were in continuous possession of the property and which prevented the complainant who is entitled by law to own it form using the said land.

33. It is instructive that in their defense, all the Appellants denied having a title to the suit land that lawfully belonged to the complainant. Hence, it is obvious that the Appellants' claim onto the land in question was baseless and that they were out to scare away the complainant so as to get an opportunity to continue using it. It transpired from the evidence that the Appellants were claiming that the land belongs to the community and thus the registered proprietor (PW2) had no right to sell to an outsider and this left no doubt that the Appellants were out to take any action or what it takes to ensure that the complainant does not gain access to the said land. The conditions obtaining in this were perfect and which supported the offence of forcible detainer on the part of the Appellants.

34. It is noted that one of the grounds of appeal raised herein is that the charge is defective. It is a requirement under section 134 of the Criminal Procedure Code that the charge or information shall contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. The rationale behind this provision stems from the need to ensure that an accused person who is the subject of criminal prosecution is given the requisite information regarding the charges facing him or her. It is trite that an accused persons should be charged with offences known in law and which should be disclosed in clear and unambiguous manner so as to enable the said accused to understand and thereafter plead to the same and to prepare for his/her defence. See the case of Sigilani V, R [2004] 2 KLR 480. A perusal of the charge sheet in count one clearly show that all the particulars were indicated and that they did plead thereto and later participated in the trial from start to finish and robustly cross-examined the witnesses and then presented their defence. This was clear that they understood what the charge was all about. Learned counsel has contended that the reason for the

defectiveness of the charge is that the Appellants were not in actual possession. However, the evidence clearly showed that the Appellants had taken charge and possession of the land in question and denied the complainant an opportunity to enter and carry out his farming activities. It has transpired from the evidence of the investigating officer that when he went to check on the land, the Appellants had already ploughed it against orders that they stay away from the land. I find that the Appellants were in actual possession of the land. It is also instructive that as soon as the complainant and the seller arrived on the land, the Appellants emerged from their homes and confronted them and them to leave or else death would occur. Iam satisfied that the Appellants had both physical and constructive possession of the land in question. As the Appellants have confirmed that they do not have the legal documents on ownership of the land, I find that their conduct in taking over possession of the land in question without any colour of right amounted to forcible detainer pursuant to the provisions of section 91 of the Penal Code. The defence by the Appellants amounted to mere denials and did not shake that of the Respondent which was overwhelming against them. The Appellants admitted in their defence evidence that they do not have any ownership documents to the land in question. That being the position, I find they had no right whatsoever to prevent the seller from selling her land and further had no right to prevent the complainant who is now the registered owner to enter possession and till the land.

35. Leaned counsel for the Appellants has further contended that the Appellants were not supplied with witness statements and thus there was a mistrial in the end. Indeed, all accused persons are entitled to be supplied with all the evidence that the prosecution intends to rely in their case. This is a constitutional provision which must be complied with. A perusal of the court record shows that on the first date for hearing, the Appellants objected to an adjournment sought by the Respondent due to lack of witnesses. This was a clear indication that the Appellants were ready to proceed with the matter and are deemed to have had the requisite witness statements. Further, during the subsequent hearing dates, the Appellants proceeded and cross-examined witnesses. They went on to participate with the matter till the end when they tendered their defence. At no time did they inform the court that they had not been supplied with the witness statements. Since, the Appellants prosecuted their case all through, I find that no prejudice was occasioned to them as they understood the charge and cross-examined the witnesses at length. Iam therefore inclined to agree with the Respondent's counsel's submissions that the said ground of appeal must be rejected as the same is an afterthought.

36. In the result, it is my finding that the offence of forcible detainer was sufficiently proved by the Respondent against the Appellants beyond any reasonable doubt.

37. As regards the offence of threatening to kill, it is sufficient that the complainant feels that his/her life is in danger following the threats whether or not they are in writing. A verbal threat is thus sufficient for the purposes of the section. In the present case, the complainant and his team were confronted by the Appellants who threatened them with death. In fact the words used was that somebody will die. Fearing for their lives, they had to lodge report to the police. It also transpired that upon lodging the report with the police, the complainant attempted together with the police to visit the land only to find that the Appellants had already ploughed it. It was thus clear that the complainant's life would be at risk if he ever set foot on the land. The incident took place during the day and that the witnesses heard the threats and also saw the Appellants. Upon making the threats by the Appellants, the villagers arrived at the scene and thus the situation could have turned tragic had the complainant and his group not left the area. Finally, it is not in dispute that land matters in this country are quite emotive in nature and that deaths have occurred in the past involving parties staking claims thereon. Iam satisfied that the Respondent did prove the second count against the Appellants beyond any reasonable doubt.

38. On the issue of sentencing, it is noted that sentencing is at the discretion of the trial court and that an appellate court ought not to interfere with the same unless it is shown that the sentence imposed is manifestly excessive or illegal or based on a misapprehension of material facts. All courts in this country are currently guided by the Judiciary Sentencing Policy Guidelines 2016, which sets out the purposes of sentencing at page 15 paragraph 4.1 as follows:

    a. Retribution: to punish the offender for his/her criminal conduct in a just manner.

    b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    c. Rehabilitation: to enable the offender to reform from his criminal disposition and become a law abiding person.

    d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damage...

    e. Community protection: to protect the community by incapacitating the offender.

    f. Denunciation: to communicate the community's condemnation of the criminal conduct.

39. Further, in the New Zealand case of R vs. AEM (2000) the court held that: "the main purposes of punishment are to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them they meet this punishment."

    It is noted that the Appellants were ordered to serve sentences ranging from two and three years imprisonment. It is noted that the trial court called for pre-sentence reports which are dated 4/12/2023. I have looked at the said reports which are quite comprehensive in nature and have captured the history of the land in question. Even though the Appellants dispute the ownership of the land by Magdalene Opiyo who has sold it to the complainant and are in favour of another relative named Olige, the ownership of the property has already changed hands and that any person who wishes to challenge the same should move to the courts and file the requisite cases but not to resort to using the law of the jungle to deny the legitimate owner access and use of the land. It is also noted that the Appellants are first offenders. It is also noted that the 2nd Appellant has already been sentenced to serve under probation. The reports in respect of the remaining Appellants is in favour of a non-custodial sentence save only that the Appellants would be required to adhere to the strict terms of probationary order. Iam inclined to find that the custodial sentences are harsh and that the Appellants should be given a non-custodial sentence in the matter. However, I need to point out that the Appellants are expected to strictly adhere to the terms of probation failing which they shall be ordered to serve the custodial sentences in full regardless of the period they will have served under probation.

40. In the result, it is my finding that the Appellants' appeal on conviction lacks merit and is dismissed. However, the appeal on sentence succeeds to the extent that the custodial sentences imposed on the 1st and 3rd Appellants are hereby set aside and substituted with an order that they each serve under probation for the remainder of the sentences. While under probation, the Appellants shall strictly adhere to the probationary terms and that in the event of any singular violation thereof, they shall be ordered to serve the full custodial sentences regardless of any period already served under probation.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 20TH DAY OF DECEMBER, 2024

D. KEMEI

JUDGE

In the presence of:

John Okoth Odhiambo.....1st Appellant

Samson Okoth.....3rd Appellant

Ooro F.....for Appellants

Mocha .....for Respondent

Ogendo.....Court Assistant