



REPUBLIC OF KENYA



KENYA LAW
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**Yaa & another v Republic & another (Criminal Appeal E025 of 2021)
[2023] KEHC 2016 (KLR) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E025 OF 2021
SM GITHINJI, J
FEBRUARY 20, 2023**

BETWEEN

PATRICK MANGI YAA 1ST APPELLANT

PATRICK MANGI YAA 2ND APPELLANT

AND

REPUBLIC 1ST RESPONDENT

REPUBLIC 2ND RESPONDENT

*(Appeal from the Judgment in Criminal Case No E050 of 2020 of the Principal
Magistrate's Court at Kaloleni Law Court- L N Wasige, PM dated June 30, 2021)*

JUDGMENT

1. The Appellant was charged in the lower Court with the offence of forcible entry Contrary to Section 90 as read with Section 36 of the *Penal Code*. The particulars of offence being that on August 25, 2020 at Mwinjo Mlimani sub location, Kaloleni Sub County, in Kilifi County within Coastal Region in order to take possession thereof, entered on the land Kilifi/Mwinjo Mlimani/ 19 of Morris Robert Makonde in a violent manner by chasing him out and threatening him of untold consequences.
2. On count II, the appellant was charged with the offence of Forcible Entry Contrary to Section 90 as read with Section 36 of the Penal Code. The particulars of the offence being that on August 25, 2020 at Mwinjo Mlimani sub location, Kaloleni Sub County, in Kilifi County within Coast Region in order to take possession thereof, entered on the land Kilifi/Mwinjo Mlimani/21 of Isaack Kambu Karisa in a violent manner by chasing him out with his livestock threatening him of untold consequences.
3. The appellant being aggrieved by the conviction and sentence of the trial court preferred an Appeal on the following grounds;



1. That the learned trial Magistrate erred in law and in fact by convicting and sentencing the Appellant based on a defective charge sheet.
2. That the trial court erred in law and in fact by failing to consider the evidence tendered by the Appellant in the trial court proceedings.
3. That the trial court erred in law and in fact by failing to consider and take into account the fact that the subject land belonged to the Appellant and his family after a land dispute Appeal to the Minister of Lands was decided in favour of the Appellant and his family thereby making them the lawful owners of the subject land.
4. That the trial court erred in law and in fact by failing to consider and take into account the fact that the Complainant in the trial court had filed an appeal against the decision to the Minister of lands, Civil Appeal No 2 of 2017 of which was struck out with costs.
5. That the trial court erred in law and in fact by holding that the prosecution had established the ingredients of the offence beyond reasonable doubt.
6. That the trial Court erred in law and in fact by convicting the appellant without any evidence that the Appellant committed the offences, yet the Law requires the prosecution to prove all the elements of the charges against the Appellant beyond reasonable doubt.
7. That the trial court erred in law and in fact as the conviction arrived at is totally against the weight of evidence that had been presented before the court.

Evidence

4. PW1 Morris Robert Makonde stated that on August 25, 2020 he was at Mabaya Nyungo at Plot No 19 which belongs to him with a *fundi* and his son to put up a fence. He told the court that he had bought the plot in 1987 from one Daniel Masumbuo. He availed a sale agreement dated March 14, 1987 as well as an auction letter from Shikely Auction Mart. He testified that after buying the plot he was able to have the land registered in his name. That while he was about to start fencing, the accused arrived and chased them away saying that they would face the consequences. He told the court that they went to the police station to report on that same day. That he later came to learn that the accused is a son to the previous owner of the land.
5. On cross examination, he told the court that he paid the purchase price in instalments and that the land he bought is what is described in PMFI 3. That he was issued with the title deed by the Lands office in Kilifi and he confirmed that he was forced to leave his said land because he was threatened and chased away by the appellant.
6. On re-examination, he told the court that he bought the land from Daniel who showed him physically where the land was situated. That his plot is No 19 at Mlimani area which is the parcel of which he was issued with a title deed.
7. PW2 Isaac Kambu Karisa informed the court that on August 25, 2020 PW1 called him and asked him to look for a *fundi* to put beacons on his farm plot No 19. That he got a *fundi* and took materials to the plot and upon arrival, the accused arrived and demanded to know what they were doing there. That he chased them away, saying that he will not allow them to continue with any activity on the plot.
8. He told the court that on the following day, he took his cows to his father's plot no 21 and as he was inside the plot, the accused stopped him from accessing the land and chased him away. That the accused alleged that he had no right to be on the farm and asked him to leave.



9. On cross examination, he confirmed that his late father had bought plot no. 21 from Daniel Masumbuo which is within Mwijjo Mlimani area.
10. PW3 No 85465 PC Paul Njuki attached to Kaloleni Police Station told the court that on August 25, 2020 he went through the OB and saw a report filed by one Robert Morris Makonde that he had gone to his parcel of land at Kilifi/ Mwinjo with his employee, to fence it. That the accused went to where they were and told the complainant not to do anything on the plot or else he will face the music.
11. It is his testimony that the complainant had the title documents for the plot and he recorded the statements on August 26, 2020 when PW1 and PW2 went to the police station. He was informed that the accused asserted that the plot belonged to his late father and on the false allegation chased them away from their plots. The complainant availed the title deed and a sale agreement showing he bought the plot in 1987. The sale agreement and the title deed were produced as Plaintiff Exhibit No 1 and 3 respectively. He testified that Isaac had brought a title deed for plot No Kilifi/Mwijjo Mlimani /21 dated August 8, 2013 and produced it as Plaintiff Exhibit No 4. He further testified that the seller of both plots No 19 and 21 was Daniel Masumbuo who had bought the parcels of land through an auction on January 9, 1982. Finally, he testified that the said Daniel sold the plots he had bought through auction to several other people and when the accused was summoned, he said that the plots belong to their family but failed to avail any document in support of the allegation.
12. At the close of the prosecution case, the trial court found that a prima facie case had been established and placed the appellant on his defence. The appellant elected to give sworn evidence.
13. DW 1 Patrick Mangi Yaa told the court that he had not known the complainant prior to the material day. He was from his farm at Mabaya Nyundo when he saw some fencing materials along the road which were placed around his land. That the parcel of land in question Kilifi/Mwinjo/Mlimani/19 belonging to his family and that he got concerned since no one in his family was about to fence the plot. According to him, upon inquiry, PW1 said that parcel No 19 belonged to him and he had intention of fencing the land since it is his.
14. That he only stopped him from fencing the land because the land is his and does not belong to him. He told the court that the adjudication officer is the one who told them that the land belongs to them vide a ruling dated January 18, 2019 from the Environment Land court in Malindi.

Analysis and Determination

15. The duty and role of the court on a first appeal is well stated in the Court of Appeal case of [*Issac Ng'ang'a Alias Peter Ng'ang'a Kabiga V Republic*](#) Criminal Appeal No 272 Of 2005 as follows: -

“...In the same way, a court hearing a first appeal (i e a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There is now a myriad of case law on this but the well-known case of *Okeno vs Republic* (1972) EA 32 will suffice. In this case, the predecessor of this court stated: -

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala vs R* (1957) E A 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.

16. In my view, I need determine whether the prosecution proved its case beyond reasonable doubt to warrant the conviction and sentence by the lower court.
17. Section 90 of the Penal Code provides that-

“Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or in threats or in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter on the land or not, is guilty of the misdemeanor termed forcible entry:

Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry.”
18. The above section alludes to violence which under Section 90 of the Penal Code is defined as the use of ‘actual force applied to any person or in threats or breaking open any house or in collecting an unusual number of people...’. In my view, I note that the ingredients for the offence of forcible entry has been established by the prosecution beyond reasonable doubt.
19. There is vidence that the parcels of land in issue as per the Title Deed belongs to Pw-1 and Pw-2 in Count number 1 and Count 2 respectively. The Appellant though alleged the parcels belonged to their family members availed no evidence to support the same.
20. There is no dispute that he chased Pw-1 and Pw-2 away from the said parcels, using threats. He had no legal justification for the said action, which amounts to the offences he was charged with. The trial court rightly convicted him. He was consequently fined 20,000/= on each count in default to serve 6 months’ imprisonment, and in case fine is not paid sentences to run concurrently. The sentence is fair for a misdemeanor. I find no reason to interfere with the same.
21. The upshot is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF FEBRUARY, 2023

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S M GITHINJI

JUDGE

In the Presence of; -

1. The Appellant in Person
2. Mr Kirui for the State

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Kirui for the State

