



**Mutembei v Republic (Criminal Appeal E024 of 2021)
[2022] KEHC 13302 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E024 OF 2021
TW CHERERE, J
SEPTEMBER 29, 2022**

BETWEEN

MARTIN MUTEMBEI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence Nkubu Criminal
No.1132 of 2019 by Hon. E. Ayuka (SRM) on 08th February 2022)*

JUDGMENT

1. Martin Mutembei (appellant) was charged with another that was acquitted the offence of Forcible Entry contrary to section 90 of the [Penal Code](#). The particulars were that:

On November 11, 2019 at Mbeti village in Kirendene location in Imenti South Sub-County within Meru County jointly with others not before the court, in order to take possession thereof entered land parcel No Nkuene/mitunguu-kithino/331, the property of Llyod Mugo Josphat

Prosecution case

2. PW1 Llyod Mugo Josphat stated that he was the registered owner of land parcel No. Nkuene/mitunguu-kithino/331 as shown on titled deed issued in his name on April 4, 1997 PEXH 1. It was his evidence that he had by judgment in Nkubu PMCC No 57 OF 2006 obtained an order to evict appellant and others from the land but they refused to vacate. The judgment and the eviction order were tendered as PEXH. 2 and 4 (b) respectively. On November 11, 2019, Complainant received information that appellant had threatened his workers, He reported the matter to police and appellant was subsequently arrested and charged. In cross-examination, complainant stated that appellant had not occupied the land but kept trespassing thereon.



3. PW2 Robert Kiguma who was in occupation of appellant's land. He recalled that appellant and others found him on the suit land on November 11, 2019 and chased him away. PW3 Charles Ndulu who was also in occupation of complainant's land recalled how appellant and others chased them away from the land on November 11, 2019. PW4 Stephen Kaaria M'Ananua received information that appellant and others had assaulted PW2 and 3 who were occupying complainant's land. He went to the scene. He reported the matter to police and appellant was arrested. PW5 PC Achieng, the investigating on November 11, 2019 received complainant's report that appellant had chased his workers from his farm.

Defence case

4. Appellant in his sworn testimony stated that the land in question belonged to his late father and that he was not aware how complainant acquired its title.
5. After the conclusion of the trial, appellant was convicted and sentenced to 2 years' imprisonment.

The appeal

6. Dissatisfied with the conviction and sentence, Appellant lodged this appeal February 22, 2022 setting out 5 grounds of appeal in his petition of appeal dated which I have summarized into 3 grounds as follows:
 1. That the trial court failed to find and hold that the suit property belonged to the appellant's father from time immemorial
 2. That complainant did not produce sale agreement for the suit land
 3. That the trial court failed in relying on a civil judgment to convict appellant
 4. That appellant had a *bonafide* claim over the suit land

Submissions

Appellant's submissions

7. By his submissions filed on June 13, 2022, appellant reiterated the grounds of appeal. Appellant additionally submitted that complainant did not tender sale agreement for the suit land and that his ownership of the suit land is in doubt which doubt ought to have been resolved in favour of the appellant. Reliance was placed on *Philip Muiruri Ndaruga v Republic* [2016] eKLR where it was stated as follows:

“The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt...To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him...”

8. Appellant additional relied on *Veronica Nyambura Wabome v Republic* [2019] eKLR where it was held that section 8 of the *Penal Code* is clear that “a person is not criminally responsible in respect of an



offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.” This provision protects persons with honest or bona fide claims, however misguided, from criminal liability merely on account that their claim is found to have been legally unfounded.

Respondent’s submissions

9. The State submitted that prosecution case that accused was in illegal actual possession of complainant’s land was proved and in support thereof relied on [Florence Wanjiku Mwamunga & another v Republic](#) [2018] eKLR.

Analysis and determination

10. This being a first appeal, this court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial court, and give due allowance for that (See *Okeno v Republic* [1972] EA 32).
11. The issue for determination in this appeal is whether the prosecution established its case against the appellant on the charge of forcible detainer contrary to section 91 of the [Penal Code](#) which states;
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 misdemeanour termed forcible detainer.
12. The offence is clearly defined in the statute and the ingredients of the offence are clear and are defined by the statute.
13. I have reviewed the evidence and I find that the prosecution proved that the land belonged to PW 1. He had a title deed to the land. The manner in which the title deed was acquired was not an issue at the trial and cannot be raised in this criminal appeal.
14. What I gathered from the evidence on record is that appellant believes that he has a honest claim of right which he submits belonged to his father from time immemorial. The evidence by complainant confirmed that appellant is not in occupation of the suit land. Indeed, it was the evidence by PW2 and PW3 that appellant and others had trespassed onto the land and chased them away.
15. In [Albert Ouma Matiya v Republic](#) Busia HCCR Appeal No 8 of 2012 [2012]eKLR, Kimaru J., stated 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.
16. Having found that the prosecution did not prove that appellant was in actual possession of the suit; the finding by the trial magistrate that the offence of forcible detainer had been established was against the weight of evidence.



17. The evidence on record discloses an offence of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95(1)(b) of the [Penal Code](#). From the foregoing, appellant is convicted of a lesser offence of creating disturbance. The offence which is a misdemeanour attracts an imprisonment for six months.
18. Appellant has served over 5 months' imprisonment. It is ordered that the sentence be reduced to period already served. Appellant shall be therefore be set at liberty unless otherwise lawfully held.

DELIVERED AT MERU THIS 29TH DAY OF SEPTEMBER 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present

Foe Appellant - Mr. Mwiti Advocate

For the State - Ms. Mwaniki (PPC)

