



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. E002 OF 2021**

**GEORGE KIMANDIU M'IGWATHU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original conviction and sentence by Hon. P.M Wechuli SRM in Tigania Cr. No.1686 of 2017 on 16/12/2020)**

**JUDGMENT**

- 1. GEORGE KIMANDIU M'IGWATHU (“the appellant”)** was charged with the offence of Forcible Entry contrary to section 90 of the Penal Code. The particulars were that, on 30/09/2017 at Lailuba sub-location, in Tigania East Sub-County within Meru County, in order to take possession of a land portion measuring 0.72 Ha thereof, he entered on the land parcel No.3376 Athinga/Athanja Adjudication Section, the property of **Cyprian Kobia Mberia**, in a violent manner.
2. He faced a second count of creating disturbance in a manner likely to cause a breach of the peace, contrary to Section 95(1) (b) of the Penal Code by which it was alleged that on the same day and at the same place, he created disturbance in a manner likely to cause breach of the peace by threatening to hit **Jenifer Katitu** with a piece of wood. He denied both charges, trial ensued and he was ultimately convicted, convicted on both counts and sentenced to serve probation for 6 months.
3. He was dissatisfied and aggrieved with the conviction and sentence, hence lodged the current appeal setting out 4 grounds of appeal. The said grounds fault the trial court for; deciding the case against the weight of the evidence, utter disregard of the fact that, the appellant is also the owner of land parcel No. ATHINGA/ATHANJA/6605, applying the rules of civil legislation to determine a criminal matter, and disregarded the evidence by the accused hence his conviction was unsafe and thus subject to reversal.
4. In determining this appeal, the court is duty bound to re-appraise, review and re-evaluate the facts afresh with a view of drawing its own independent conclusions and findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See **Odhiambo v R (2008) KLR 565**.
5. The prosecution’s case was that on the material day, **PW1, the complainant**, after returning home from Nairobi, was informed by his mother that, the appellant had cultivated his shamba being land reference no **No. Meru North/Athinga/Athanja/3376**, using a tractor and was so seen by the said mother Peninah and one Gatitu as he ploughed. He subsequently reported to the police, who after visiting the scene, arrested the appellant.
6. During cross examination, he affirmed the title deed the appellant had was for a different parcel of land. He accused the appellant of cultivating the land in order to take it. The appellant had previously been charged for cultivating other people’s land.
7. On the same day, **PW2 Jenifer Kaitu**, the complainant’s neighbour, had gone to fetch water at the complainant’s place, when she heard the sound of a tractor on the complainant’s farm. When she went with the complainant’s mother to check what was happening, the appellant, who was holding a walking stick, chased them away. On cross examination, she reiterated that the land the appellant was cultivating belonged to the complainant and upon re-examination, she affirmed that he saw the appellant cultivating the land.
8. **PW3 Zakaria Laichena**, a security officer and the complainant’s neighbour, visited the scene, after he was informed by the complainant that, the appellant had ploughed his farm. He stated that the appellant had no farm at that place, and that he did not know the parcel number of the complainant’s land. During cross examination, he stated that the land belonged to the complainant and not the appellant.
9. **PW4 PC Kingori** of Muthara Police Station, produced copy of the complainant’s title deed, court proceedings of 1510/2009 and letter dated 27/3/2018, on behalf of the initial investigating officer, who had since proceeded on transfer.
10. In his defence, the appellant testified that the land was his. In 2008, Penina and Jeremiah came to his land, but when he reported to the

police, the investigations turned against him, and he was instead arrested and charged. He produced the appeal, title deed, charge sheet, confirmation letter, and PW3's statement.

11. The court directed that the appeal be canvassed by way of written submissions, which were respectively filed on 3/5/2021 and 21/6/2021. The appellant maintained that he was framed, because it was the complainant who had entered into his land **No. Athinga/Athanja/6605**. He faulted the trial court for not only being biased but also improperly recording his evidence, thereby arriving at a wrong decision. He further faulted the trial court for its failure to consider his evidence and the documents adduced therein. He urged the court to allow his appeal and set him at liberty.

12. For the respondent, submissions were offered to the effect that it had proved its case beyond reasonable doubt, and the evidence it had adduced was solid. The case of **Kennedy Wekulo Mulupi v R (2021) eKLR** was cited to show that, possession of land in a violent or forcible manner is the principal element of the offence of forcible entry.

13. In order to determine whether the prosecution proved its case beyond reasonable doubt, I need to establish on whose land the cultivation took place. Here, both the appellant and the complainant are quite certain that the land in dispute was theirs. Looking at the letter dated 27/3/2018 by the OCPD Muthara Police Patrol Base, the appellant was referred to as a nuisance, who had continually been harassing the complainant and three others, on the pretext that he was the rightful owner of the land. I have read the letter by the appellant to the adjudication officer dated 3/10/2011 in which he complains that his land Athinga/Athanja/6605 was fraudulently subdivided into 4 portions including Athinga/Athanja/3376. That assertion is quite strange and incredible because, the title deed for parcel No. 3376 was issued way earlier on 12/1/2015 whereas that of Parcel No. 6605 was issued on 13/2/2019. In reality and by practice of assigning numbers to parcels of land in an adjudication and registration areas, a sub-division number being subsequent to the original number must remain serially later than the mother title. I do find that the appellants claim over the land parcel No. Athinga/Athanja/3367 cannot be a result of the subdivision of Athinga/Athanja/ 6605.

14. From the evidence, the land in question, its situation and registration is clearly not in dispute. The dispute is clearly on the alleged improper registration in favour of the complainant. That is a dispute that must be determined as a claim to title to land before the Environment and land court but never by brute force. It equally cannot be determined by this appeal without the court casting itself to usurp the jurisdiction it owns not.

15. The testimonies of PW1, PW2 and PW3 were very consistent and corroborative that the land that was ploughed by the appellant registered in the name of the complainant a fact confirmed by the appellant save that he contends that his land was fraudulently registered in favour of the complainant.

16. On whether the trial court failed to consider the evidence of the appellant, and the documents he had adduced, I find that the trial court subjected the same to due analysis in its decision. The trial court rightly and correctly, on the evidence, observed that, there was no nexus between the appellant's land and that of the complainant. The statement of PW3 adduced by the appellant buttressed PW2's testimony that, the appellant had indeed threatened her with a stick.

17. I hold and find that the prosecution did prove its case beyond reasonable doubt. It follows that the conviction of the appellant was safe and warranted. The trial court considered his remorsefulness, his advanced age and handed him a non-custodial sentence of only 6 months for both counts. I consider that most lenient and calls for no disturbance and consequently, I find that the appeal lacks merit and it is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT MERU THIS 3<sup>RD</sup> DAY OF AUGUST, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**In presence of**

Mr. Maina for state/respondent

Appellant in person

**PATRICK J.O OTIENO**

**JUDGE**