



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 31 OF 2017**

**JULIUS EDAPAL EKAI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**(An appeal from conviction and sentence in original Lodwa PMCR C 116 of 2016 delivered on 14/6/2017 by M K Mwangi Principal Magistrate)**

**J U D G M E N T**

The appellant **Julius Edapal** was charged with the offence of forcible detainer contrary to section 91 of the penal code. The particulars of the offence are that on the 25<sup>th</sup> day of December, 2015 at Lodwar township within Turkana County being in possession of plot No.290 of Kenya Armed forces Comrades Association (KAFOCA) without colour of right held possession of the said land in a manner likely to cause breach of the peace against members of KAFOCA who were entitled by law to be in possession of the said land.

In count 2 the appellant was charged with the offence of malicious damage to property contrary to section 339 (1) of the penal code. The particulars of the offence are that on the 25<sup>th</sup> day of December, 2015 at Lodwar Township in Turkana Central District within Turkana County willfully and intentionally destroyed the sign post of Kenya Armed Forces Comrades Association (**KAFOCA**) valued at Sh.20,000/= the property of **KAFOCA**.

During the trial the prosecution called 3witnesses and the appellant called one witness Leonard Kasike the land Administrator Turkana. After considering the evidence the trial magistrate found the appellant guilty on both counts and fined her on count 1 **shs.50,000/=** in default 6 months imprisonment, and on count 2 fined **shs.20,000/=** in default 2 months imprisonment. Aggrieved by the conviction and sentence the appellant filed this appeal challenging the conviction and sentence on the following grounds;

- 1. That the learned magistrate erred in law and fact in holding that the prosecution had proved its case beyond reasonable doubt yet evidence on record did not support such a finding.**
- 2. That the learned magistrate erred in law and fact in failing to consider the appellants defence in its entirety**
- 3. That the trial magistrate erred in law and fact in considering extraneous issues in convicting the appellant**
- 4. That the learned magistrate erred in his application of the law applicable and the evidence adduced against the appellant in the circumstances of the case.**
- 5. That the learned magistrate dealt with the matter as if it was a determination of property rights and it failed to consider that the appellant had reasonable grounds to remain on the land.**

The evidence before the trial court was that Kenya Armed Forces Comrades Association hereinafter referred to as **KAFOCA** is an organization of members of the Kenya Defence Forces. Benidet Loapia Molo is the chairman of the Association in Turkana County. On 21/4/2010 the Association was allocated plot No.290 by the County Government, in Lodwar town. They were issued with allotment letter Exhibit 1. They then developed a part development plan (PDP) and plot surveyed and were issued with a Survey map exhibit.2. They fenced the parcel of land and erected a sign post of the association. On 14/7/2015, they received information that the appellant had invaded the yard destroyed the sign post and deposited ballast materials on site. They requested him to remove the ballast but he refused. The matter was reported to police and appellant was arrested and charged with the present offence.

The appellant gave sworn evidence. He testified that the complaint's plot 15 No 219 and that the plot where he deposited the materials belongs to him and he wanted to construct a hospital and he blames the complaint for destroying his property. The appellant called DW2 Leonard Kisike the lands Administrator Turkana who testified that from their records the appellant has 2 plots No.290 Kalokol and No.93

Lodwar town. He confirms that plot No.290 California Market in Lodwar belongs to KAFOCA Lodwar Branch.

Mr. Pukah counsel for the appellant submitted on 2 main grounds. First that the prosecution did not prove its case beyond reasonable doubt. He submitted that the prosecution did not prove all the ingredients of the offence. He submitted that no evidence was lead to show that appellant ever threatened the complainant and that without that evidence the charge is not proved. He invited the court to the decision in **Richard Mwangiri Nduro – VS – Republic (2005) EKLR.**

Further, counsel submitted that in count 2 the value of the property destroyed was not proved and the value assigned to it is exaggerated.

Secondly counsel submits that the learned trial magistrate failed to consider the appellants defence, which was a claim of ownership. He submits that the appellant produced document showing he was entitled to the land but the trial court did not consider them if not for anything that they created an issue of ownership which then would attract the defence of sec.8 of the penal code which provides.

**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.**

Mr. Gikunda for the state opposed the appeal. He submitted that there were exhibits produced to show the land belonged to the complainant and that even the witness called by the appellant confirmed this. That the land which the appellant has documents of is at Kalokol market and not Lodwar in Turkana Central.

The appellant in court is charged with the offence of forcible detainer contrary to section 91 of the penal code. Section 91 provides

**91. 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.**

A literal reading of Section 91 of the penal code shows that the prosecution will only prove an offence of forceful detainer against an accused person if it demonstrates that:-

**(a) A person has actual possession of land**

**(b) The person has no right over the land**

**(c) The act of possession is against the interests of the legal owner or the person legally entitled to the land; and**

**(d) The act of possession of the land is, therefore, likely to cause a breach of the peace or a reasonable apprehension of the breach of the peace.**

To secure a conviction on a charge under section 91 of the penal code, the prosecution must therefore prove that the accused is in actual possession of the land; he has no right to do so either because they have no title to same or the title to the land belongs to another person and the occupation or possession of the land is likely to cause a breach of the peace against the person entitled to it.

In the present appeal, the complainant produced in evidence as exhibit, the plot allotment letter dated 21/5/2010 allocating plot No.290 Lodwar market to KAFOCA, they produced a survey map exhibit 2 showing the location of the plot on the grounds. DW2 Leonard Kisike the lands administrator Turkana County who was a defence witness called by the appellant stated

**My name is Leonard Kisike. I live in Kanamkemer. I am the lands administrator Turkana. I am here on behalf of the chief officer. I have a photocopy of the land register – it shows that accused has 2 plots to wit plot No.290 in Kalokol, and in Lodwar town plot No.93.**

**Plot No.290 California market however, belongs to Kafoca Turkana branch.**

**The land plot No.290 belongs to KAFOCA. It is along the road. It is registered. There is also a cemetery. Plot No.290 is not community land. One plot has a caution order. The one in Kalokol and California are very distant. No public land is in issue. I am not aware of the lease. I have no copy of the lease. No public land is involved. It is private land.**

The appellant in his evidence alluded to several letters from the National Land Commission – **DMFI 1, 2, DMFI 2 and DMFI 3** and a receipt **DMFI 4** it is not clear whether these are documents which were marked for identification were ever produced as exhibit. The appellant however in cross-examination about the Lodwar plot stated.

**“I am charged with forceful detainer and malicious damage to property. I know plot No.290 in Kalokol. I have another document for that property. I am telling the truth. I have not produced document for property No.290 Lodwar in court. The complainants are jealousy. They wanted to extort money from me. The government has more money. Complainant worked with my family in the army. I have not invaded private owners land. I have come from the land. I am the owner now.**

He admits that he has no documents of title to the plot No.290 Lodwar this is the plot the complainants produced the letter of allotment to. It therefore follows that the complainant are the legal owners of plot No.290 Lodwar; which is the subject of this charges. In my view

therefore the prosecution proved the ingredient of ownership.

The second ingredient of the offence the prosecution was to establish is that the appellant was in occupation or possession of the land. Possession is defined in the penal code as;

**“Possession”**

**(a) “ be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person:**

However in relation to land. Black Law Dictionary defines possession as **control, tenure, use occupation therefore same as actual possession. The word occupation when applied to real property is ordinarily equivalent to possession.**

The appellant in his defence admits depositing materials on the land. This is fortified by his assertion that he was building an orthopedic facility on the site. The photographs produced show materials deposited on the site. All these acts were evidence that he was in occupation or possession of the plot No.290 Lodwar which land belonged to the complainants. It is his contention that he had been allocated the land by the National Land Commission. As stated above no document was produced to support his assertion to elevate this from an offence of forcible detainer to a land dispute, as the counsel for the appellant wants this court to find.

The last issue is whether the act of possession was likely to cause a breach of peace or reasonable apprehension of the breach of peace. Black’s Law Dictionary defines breach of the peace as

**“A violation of the public tranquility and order. A constructive breach of peace is an unlawful act which though wanting in the elements of actual violence or injury to any person is yet inconsistent with the peaceful and orderly conduct of society. An apprehended breach of peace is caused by the conduct of a man who threatens another with violence or physical injury.”**

The element the prosecution has to prove is will the act complained of in this case possession of the land a violation of the public tranquility or order or is likely to lead to the disruption of the peace where the offended party is likely to assert his right. In this case the evidence in count 2 shows that there was acts committed by the appellant which would lead to a breach of or reasonable apprehension of a breach of the peace.

The last ground of appeal raised by counsel for the appellant was that the trial magistrate did not consider the appellants defence. As stated above the defence of the appellant was that the land belonged to him. He called DW2 Leonard Kisike as the County had Administrator as his witness. The learned trial magistrate in his judgment stated;

**“The defence advanced by the accused person does not develop from cross-examination and in itself, does not exonerate the accused from criminal liability. His actions clearly demonstrate disrespect of the sanctity to private property and dishonesty in purporting that plot No. 290 – Kalokol was the property in issue. I therefore dismiss the defence, uphold the prosecution’s evidence and find that the prosecution has met the standards set in criminal law”.**

From the above statement in the Judgment it is evident that the learned trial magistrate considered the appellant defence and found it, rightly in my view wanting. This ground of appeal does not in my view have any merit.

In the result upon evaluating the evidence before the trial magistrate, I am satisfied that the conviction was founded on evidence adduced and was proper. The sentence meted out was in my view legal and cannot be disturbed.

In the result, I find no merit in this appeal, and same is dismissed.

**Dated at Lodwar this 12<sup>th</sup> day of February, 2018.**

**S N RIECHI**

**JUDGE**