**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.123 OF 2013**

**MATHIU M'NABEA.....APPELLANT**

**VERSUS**

**REPUBLIC ……RESPONDENT**

*( From the original conviction and sentence in criminal case No. 1087 of 2011 of the Chief Magistrate's Court at Meru by Hon. D.W Mburu – Ag. Principal Magistrate)*

**JUDGMENT**

The appellant, **MATHIU M'NABEA**, was convicted for the offence of forcible detainer contrary to section 91 of the Penal Code.

The particulars of the offence were that on divers dates between January 2011 and December 2011 at Maili Tatu village, in Buuri District of Meru County, without colour of right, unlawfully occupied private land Nos. 1079 and 5165 belonging to **Johnson Mbaabu Mburugu** and **Catherine Gakii.**

The appellant was fined Kshs 50,000/= or in default serve one year imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Carlpeters Mbaabu, learned counsel. He raised five grounds of appeal that can be summarized as follows:

1.That the learned trial magistrate erred in law and in fact by selectively relying on the evidence of some witnesses while ignoring others.

2. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.

3. That the learned trial magistrate erred in law and in fact by delivering a judgment against the weight of the evidence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

The two complainants are husband and wife. When they visited their two parcels of land at Maili Tatu, they found the appellant having sub divided the land into 1/4 an acre plots. He claimed the land belonged to his clan. The matter was reported to the police and the appellant was arrested and charged.

The appellant contended that the disputed land was his.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

The ingredients of the offence of forcible **detainer** under **Section 91** of the Penal Code were stated in the case of ***ALBERT OUMA MATIYA vs. REPUBLIC*** (**BUSIA) HCCR APPEAL NO. 8 OF 2012 [2012]eKLR**, stated 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.*** *(emphasis mine)*

In the instant case, as I analyze evidence to establish if there was sufficient evidence on which the conviction was based, I will also address my mind as to whether these two ingredients were proved.

On the issue of ownership, **Catherine Gakii Mburugu** (P.W1) and **Johnson Mbaabu Mburugu** (P.W2) testified that they were the owners of the two parcels of land in dispute. They gave a history of how they acquired the land. Their contention was supported by their mother, **Harriet Karimi** (P.W5) and **Jackson Njiru Nyaga** (P.W4) the Land Adjudication officer of the area where the two parcels of land are situate. The latter produced allotment and confirmation letters. He also testified that the court order in Nairobi High Court Miscellaneous Application 344 of 2003 was on administrative boundaries and did not address individual parcels of land.

The appellant in his defence contended that the land was his and that he had occupied it for more than 40 years. He also conceded that he had no documents to the said land.

The learned trial magistrate was right in making a finding that the disputed land belong to the complainants. This finding was supported by the evidence on record. It is erroneous to claim that the trial magistrate considered evidence selectively. The appellant had no colour of right over the two parcels.

Other than what the prosecution witnesses testified to, the appellant conceded that he was in occupation of the disputed land.

The occupation of the complainants' land by the appellant was likely to cause a breach of peace. Land ownership is a very emotive issue and the only reason there was no breach of peace is because the complainants chose to report the matter to the police. This was an issue that was likely to cause a breach of the peace.

The evidence on record was overwhelming against the appellant and the judgment of the learned trial magistrate was based on the same.

The appeal is therefore dismissed. If the appellant had not paid the fine, to immediately do so or serve the default sentence.

**DATED at MERU this 26th day of April, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**