

appeal on the basis of the grounds in the petition of appeal dated 27th February, 2009.

At the hearing of the appeal, the six (6) grounds were argued together by the Learned Prosecution Counsel, M/s. Limo.

Learned Counsel, Mr. M. Wafula, opposed the appeal on behalf of the three respondents.

It was argued by the learned Prosecution Counsel that the trial court erred in discharging the respondents whereas a case had been made out against them. That, PW1 had the necessary authority of the actual owner of the land to deal with it and as such, the power of attorney was sufficient proof of ownership of the land.

4. Learned Prosecution counsel further argued that the evidence of the district surveyor (PW2) was totally ignored yet he indicated that the respondents had encroached on the complainant's land. That, the charge was established against the respondents thereby requiring the trial court to place them on their defence.

Learned Prosecution Counsel urged this court to quash the ruling of the trial court and that -are- trial of the case be ordered.

5. The respondents through their Learned Counsel contended that the ruling by the trial court was proper as ownership of the land had to be proved for the offence to be established.

That, a power of attorney was not a record establishing ownership and that prior to the charge, a land tribunal had ruled in favour of the respondents in a dispute pitting them and the complainant. That, the complainant filed an appeal in the High Court but he lost after which he instigated the criminal proceedings. That, he admitted that the power of attorney was obtained after the institution of the criminal proceedings.

6. The respondents submitted further that forcible detainer could only be established where the complainant had absolute right over the land and herein, ownership was disputed. That, where ownership is disputed, the offence of forcible detainer would not be sustainable. Therefore, the evidence by the prosecution was insufficient to place them (respondents) on their defence.

The respondents urged this court to dismiss the appeal.

7. Having considered the appeal on the basis of the supporting grounds and those in opposition thereto and also having re-visited the evidence adduced at the trial court by the prosecution against the respondents, the opinion of this court is that the prosecution was required to establish a **“prima-facie”** case to warrant that the respondents be placed on their defence. Such a case is one in which a reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence.
8. The prosecution was thus required to provide evidence which was not only sufficient but also credible enough to establish the material ingredients of the charge of forcible detainer which is defined under section 91 of the penal code in the following terms:-

“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 break of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer”.

It therefore follows that a person entitled by law to the possession of the land must prove ownership thereof for him to lodge a criminal complaint against another said to be in actual possession of the land but without colour of right.

9. Ownership of the disputed land is thus a vital and material ingredient of a charge of forcible detainer and without its proof such a charge would be unestablished.

Herein, the evidence by the complainant (PW1) did not establish his alleged ownership of the land through his father as there was no title document to show that indeed the father was the actual legal proprietor of the land.

The power of attorney relied on by the complainant to prove ownership could not suffice and was irrelevant for that purpose.

10. Consequently, the finding by the trial court that the ingredients of the charge were not established due to “*inter-alia*” failure by the prosecution to prove ownership of the land was proper. In the circumstances, the respondents could not be placed on their defence as doing so would have been tantamount to asking them to fill the gaps left wide open by the prosecution.

Indeed, they had no case to answer and their acquittal by the Learned trial magistrate in accordance with section 210 CPC was proper and lawful.

In sum, this appeal lacks merit and is hereby dismissed.

[Delivered and signed this 25th day of February, 2015.]

J.R. KARANJA.

JUDGE.