



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL CASE NO. 81 OF 2010**

**LUCY NDUTA KAMAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from the original conviction and sentence by J. Kiarie Principal Magistrate in the Nyeri Chief Magistrate's Criminal Case No.3017 of 2007 delivered on 17<sup>th</sup> March 2010 at Nyeri)*

**JUDGMENT**

**LUCY NDUTA KAMAU**, the appellant herein, was tried on a charge of two counts. On the first count the Appellant faced a charge of willfully and unlawfully cutting down standing trees contrary to *Section 334 (c)* of the Penal Code. In the second charge, the Appellant faced a charge of forcible detainer contrary to *Section 91* of the Penal Code. At the end of the trial, the Appellant was convicted and sentenced to pay a fine of Ksh.30,000/= and Ksh.20,000 for counts I and II respectively, in default to serve six (6) months imprisonment in each count. The Appellant was dissatisfied hence this appeal.

On appeal, the Appellant put forward the following grounds in her Petition:

- 1. The learned magistrate misdirected himself in fact and law by not appreciating the fact that the Appellant did at no time refuse to vacate from the land by the allocating authority (The Nyeri Municipal Council) neither was she ever called upon to do so by any person and could not therefore have been in forcible detainer of the land.***
- 2. The learned magistrate misdirected himself in fact and law by not appreciating the evidence of the Prosecution witness P.W.1, Mugo Mutothori who testified and confirmed that the appellant was her neighbour with whom he had lived with in peaceful co-existence for over ten years and such circumstances were incompatible with the offence of forcible detainer of land.***
- 3. The learned magistrate erred in fact and law by not appreciating the evidence of the Prosecution's own witness PW7, Simon Kihato an officer of the Nyeri Municipal Council who clearly testified that the Appellant had settled on the land with the full knowledge, consent and approval of the Nyeri Municipal Council and the Prosecution Exhibit 14 (Minutes dated 19<sup>th</sup> April 1985 of the Town Planning works and Housing Committee from the Nyeri Municipal Council by which the allocation of the land to the appellant was made) clearly shows as much.***
- 4. The learned magistrate erred in law and fact by not appreciating the fact that the appellant was indeed allocated the plot of land as far back as 1985 and she did produce evidence which was***

*uncontroverted confirming that (Temporary Occupation License from the Nyeri Municipal Council).*

*5. The learned magistrate misdirected himself in fact and law by not appreciating that the appellant did produce evidence which was uncontroverted confirming that she was indeed allocated the plot of land and got approval of her building plan and the Defence Exhibit 2 (Letter from the Nyeri Municipal Council dated 2<sup>nd</sup> May 2002) clearly shows as much.*

*6. The learned magistrate erred in law and fact by not appreciating the fact that the Appellant did testify and produce evidence to the effect that the allocating authority – The Nyeri Municipal Council was still charging her Property Rates for the plot of land and such circumstances were incompatible with the offence of forcible detainer of land and Defence Exhibit 4(a) (b) (Rates payment receipts dated 1<sup>st</sup> July 2008 and 31<sup>st</sup> December 2009 from the Nyeri Municipal council) clearly shows as much.*

*7. The learned magistrate misdirected himself in fact and law by not attaching requisite weight on the fact that the appellant was never given any notice to move from the plot of land by the allocating Authority-Nyeri Municipal Council nor allocated an alternative plot to settle neither was she notified of acquisition of the Leasehold title of the land upon which the plot is situate by the complainant.*

*8. The learned magistrate erred in law and fact by not appreciating the fact that the appellant could rightfully claim title by adverse possession – the proprietor of the lease having acquired the Leasehold over the land on 1<sup>st</sup> October 1992 and having never taken any step to assert its ownership.*

*9. The learned magistrate misdirected himself in fact and law by not appreciating that the appellant did testify and produce evidence confirming that indeed she did write to the Nyeri Municipal Council seeking authorization to cut down the dangerous trees and the Defence Exhibit 1 (Letter dated 16<sup>th</sup> August 2006 from the appellant to the Nyeri Municipal council) clearly shows as much.*

*10. The learned magistrate erred himself in fact and law by not appreciating that the evidence of DW1, David Gathegea – The District Forestry Officer clearly confirmed and corroborated the fact that the Appellant sought and obtained permission from both the Nyeri Municipal Council and The District Forestry Officer dated 10<sup>th</sup> May 2007) clearly shows as much.*

*11. The learned magistrate misdirected himself in fact and law by refusing to admit as evidence in support of the appellant's defence letter from the Municipal council to the District Forestry Officer dated 29<sup>th</sup> August 2006 (through which The Nyeri Municipal Council sought authorization to fell dangerous trees) yet it was being produced by the addressee D.W1, David Gathegea – The district Forestry Officer.*

*12. The learned magistrate misdirected himself in fact and law by not appreciating the fact that DW2, James Kariuki Gathegea – The district Forestry Officer clearly confirmed that he did visit the site to confirm that only the trees that had been felled were indeed the only ones the District Forestry Office had authorised.*

When the appeal came up for hearing Miss Ngalyuka, learned Senior State Counsel, conceded the appeal on the ground that the evidence could not sustain a conviction.

The prosecution's case is that the Appellant was granted a licence to operate a kiosk at mortgage housing scheme, Bondeni on 17<sup>th</sup> May 1985. The aforesaid licence is said to be express that the authority to set up a kiosk did not confer any interest in land to her. The letter was also express that she would be required to vacate the site upon being given reasonable notice. In 1992 the aforesaid land was leased to Muchithi Autospare Ltd. A certificate of lease was issued. There were some indigenous trees standing on the land in dispute. The Appellant is said to have cut down those trees. Mutothori Mugo (P.W.1), a director with Muchithi Autospare Ltd. lodged a complaint. The Police swung into action whereupon the Appellant was arrested and charged.

In her defence, the Appellant told the trial court that she had been placed in occupation by the Municipal Council hence she could not be said to have committed the offence of forcible detainer. She said since the trees were hanging dangerously on her kiosk and the electric poles, she applied to the Council to authorize her to cut the trees. She got the authority which she used to cut those trees.

The learned trial Senior Principal Magistrate came to the conclusion that the evidence tendered proved the offences. I have re-evaluated the evidence. I have also taken into account the oral submissions made by Mr. Wamahiu, learned advocate for the Appellant. On the first count, it is said that the Appellant is alleged to have committed the offence of willfully and unlawfully cutting down standing trees. The Appellant countered the aforesaid allegation by producing a letter from the Nyeri Municipal Council which gave the Appellant authority to cut down those trees which were dangerously hanging on the Appellant's kiosk and a powerline. All along the Appellant knew that the plot where her kiosk stood belonged to the Municipal Council and that is why she sought for the Council's authority to cut down the trees. With respect, I think the learned Senior Principal Magistrate fell into error when he concluded that the Appellant knew the trees belonged to the Complainant. That may be so, but the trees being within the Council's jurisdiction, there is always need to apply for authority to cut such trees under the Municipal By laws, which the Appellant did. On the first count, I am not convinced that the Appellant acted unlawfully. She was authorized by the Municipal council to cut down trees.

On the second count, it is alleged that the Appellant was given notice to vacate. There is no dispute that the Appellant was given a temporary occupation licence to occupy the suit land in 1985. In 1992, the Complainant obtained a leasehold. At the time of obtaining the lease, the Appellant was in occupation. It was alleged that the Appellant had been allocated another Plot about 100 Metres away to make move her kiosk and vacate the Plot. There was no evidence to show that the Appellant was given reasonable notice by the Council to vacate **L.R. NO. NYERI/MUNICIPALITY BLOCK 1/1323** – in terms of the temporary occupation licence. With respect, the learned Senior Principal Magistrate also fell into error when she convicted the Appellant in Count II.

The overall picture I get from the evidence is that the evidence presented in support of the charge could not sustain a conviction. I think Miss Ngalyuka rightly conceded this appeal. I allow the appeal. The conviction is quashed. The sentence is set aside. I order that any fines that may have been paid should be refunded forthwith.

***Dated and delivered at Nyeri this 25<sup>th</sup> day of March 2011.***

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Mr. Wamahiu for the Appellant and Miss Ngalyuka for the State.