



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**Criminal Appeal 86 of 2004**

**RICHARD MWANGIRI NDORO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Richard Mwangiri Ngoro was tried and convicted of forcible detainer contrary to Section 91 of the Penal Code. The particulars of the charge were that on diverse dates between 26th September, 2003 and 11th December, 2003 at Vyambani, Kilifi, the appellant being in possession of Plot No. 278 of Jackson Mwinga, without colour of right, held possession of the said land in a manner likely to cause a breach of the peace against Jackson Mwinga who entitled by law to the possession of the said land.

After a full trial where the prosecution called four witnesses and the defence also four witnesses, the trial court found the appellant guilty and sentenced him to a fine of Kshs. 20,000/= or in default to serve 18 months imprisonment. It is against the conviction and this sentence that the appellant appeals.

Being a first appeal this Court is bound to evaluate and analyse for itself the evidence tendered before the trial Court in order to draw its own conclusions, always bearing in mind the fact that the trial Court had the advantage of receiving direct evidence. The evidence led by the complainant was that in September, 2000 he bought the land in question from Harry Ezekiel Kazungu. Next to this land, the appellant had settled as a squatter. It was his evidence that the appellant moved to the land in question.

According to PW2 – Josphat Kazungu, his father sold the land to the complainant and the appellant had no right over the land. PW3 – Laban Mwazo, an officer from the Ministry of Lands and Settlement told the trial court that when he went to the disputed land, the appellant turned hostile and threatened to beat up those who were present. The appellant was subsequently arrested by PW4-P.C. Nzuki.

In his defence the appellant testified that the land in dispute belonged to his father from whom he inherited it. He was born on the land. This evidence was confirmed by DW 2 – Jonathan Musuko, DW3- Mwababu Tuki and DW 4 – Alex Musuko.

The appellant has listed four grounds of appeal in his petition. The grounds can be summarized that the trial magistrate failed to consider the evidence of witnesses to the effect that the appellant's father settled on the land in dispute in 1954.

I have considered the evidence adduced by both prosecution and defence before the trial Court.

The offence of forcible detainer is committed where

i) a person is in possession of land without colour of right

ii) that above person holds on to possession in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace

iii) the breach in question must be directed at the person entitled by law to the possession.

The evidence on record is to the effect that the appellant's father was settled on the land in question in 1944, or 1954/1956. It is not clear from the evidence under what conditions he settled on the disputed land. But the appellant who, at the time of trial was 31 years, was born on the land.

According to PW3 – Laban Mwanzo the land initially belonged to one Ezekiel Kazungu Haro, who sold it to the complainant.

The complainant, on the other hand told the Court that he bought the land at Kshs. 100,200/=. It is not for this Court to be decided on the issue of ownership of the disputed land.

It is the prosecution case that complainant was the owner of the land and that the appellant was a squatter without colour of right. The prosecution was required to adduce evidence to show that the appellant behaved towards the complainant in a manner that threatened a breach of the peace between 26th September, and 11th December, 2003. The complainant testified but did not state if the appellant ever threatened him. The only evidence of threat was adduced by the Ministry of Lands official, Laban Mwanzo.

Laban Mwanzo was not the person entitled by law to the disputed land. Without evidence that the threats were directed at the complainant, I find that the prosecution evidence fell short of the required standard.

The result is that the appeal is allowed, conviction quashed and sentence imposed set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

**Dated and delivered at Malindi this 6th day of September, 2005.**

**W.OUKO**

**JUDGE**

6.9.2005

Judgment delivered

Present – Mr. Odhiambo for Mr.Ogoti for the state

Appellant in person.

C.C. National Council for Law Reporting

W.OUKO

JUDGE