



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.195 OF 2001**

**(From original conviction and sentence in Criminal Case  
No.604/2000 of the Senior Resident Magistrate's  
Court at MOLO –G. ONGONDO (D.M.II ) PRO**

**MARY CHELANGAT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The Appellant MARY CHELANGAT has appealed against conviction and sentence in Molo SRM'S Court Criminal Case No.604/2000. She had been charged with one count of "FORCIBLE DETAINER contrary to Section 91 of the Penal Code.

That between September, 1998 and 12th March, 2000, at Kirobon Farm Keringet in Nakuru District of Rift Valley Province, being in actual possession of land Plot No.42 of BENJAMIN KIBIWOT CHESELUT without colour of right held possession of it in a manner likely to cause a breach of peace to the said BENJAMIN KIBIWOT CHESELUT who is entitled by law to the possession of the said plot No.42.

Four (4) grounds were raised in this appeal but the Counsel for the Appellant argued only two. First that the court erred in finding the Appellant guilty of the offence since she was a wife of the Complainant and the land on which she lived then and todate was family land. That the Complainant had not established ownership of the land in exclusion of all others. Two that the Appellant's defence was completely ignored by the court.

The State through Mr. Onderi opposed the appeal. His key contention is that the Complainant's evidence that the land in question was his was corroborated by PW2 and secondly that appellant's claim was through a marriage. She was unable to prove. In response, Mr. Kiplenge submitted that even if Appellant may not have proved marriage, there was no evidence to disprove marriage and therefore a doubt was created on that issue.

I did consider the submissions by both counsels together with the grounds of appeal as filed. I have also scanned through the lower court's record.

Section 91 of the Penal Code provides:-

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

There are several facts which the prosecution had to prove beyond any reasonable doubt.

- 1) That the appellant was in actual possession of land.**
- 2) That she had no colour of right.**
- 3) That she held possession of it in a manner likely to cause a breach of the peace**
- 4) That she held it against the Complainant who was entitled to the land by law.**

In support of its case, the prosecution called the Complainant, PW1, his neighbour PW2 and the arresting officer PW3. PW1 and PW2 did not give consistent evidence as to the possession of the land by the Appellant. The Complainant told court that he came to know that the Appellant had constructed a hut on his land on 10.3.2000 through his servant one GEOFFREY. He went to the land and confirmed the story. He said he found a hut which was one week old.

PW2 on the other hand said he saw the Appellant constructing a house on the complainant's land in 1998, and that he immediately went and alerted the complainant about it. PW2 went further to state the identity of the one he saw constructing the said hut as the Appellant.

The evidence of PW1 and PW2 is inconsistent and the inconsistency goes to the very substance of the charge. The inconsistency becomes critical in light of the appellant's defence which was that she was the Complainant's wife. She brought her father and a neighbour to testify to the fact that not only were they husband and wife but also lived together, got five children all of whom were adults. Not only did she testify to their long standing relationship but the Complainant himself admitted in cross-examination that his name was in the Appellant's Identity Card. If the prosecution case was inconsistent as to whether the appellant took possession of complainant's land in 1998 or 2000, a disparity of 2 years, the court should have taken a serious view of that contradiction in light of the defence evidence. Instead the court entered into an exercise of determining whether or not the Appellant was married to the Complainant. The case before the court was criminal in nature and the burden of proof fell squarely on the prosecution to prove its case beyond any reasonable doubt. The Appellant's duty rested on creating a doubt in the court's mind as to her guilt and not to prove any assertions she made in her defence.

Even if the court were to consider whether there was a marriage or not, in my view, the Appellant was able to show there was some relationship between her and the Complainant to the extent she bore him five children and also identified herself with his name proved by her identity card.

I do agree with the Appellant that the learned trial Magistrate failed to take into account her defence and in consequently not finding that there was a doubt created by the Appellant in the prosecution case.

As far as the charge is concerned, the prosecution failed to prove that the Appellant had no colour of right over the Complainant's land and neither did it prove that the appellant held possession of the land in a manner likely to cause a breach of the peace. The prosecution failed to show that the Appellant held the land against the Complainant who was entitled to the land by law. The complainant did not have any title to the land. He merely had receipts showing he bought some land from Kirobon Farmers Company. If he had receipts, he did not show the court how he was able to identify which portion of Kirobon Farm belongs to him. Even the issue of ownership of the land was not proved to the required standard.

I do find ground to fault the trial court's finding that the Appellant was proved guilty of the offence. There was no evidence upon which the court could arrive at a conviction. Accordingly I do allow

the Appellant's appeal, quash the conviction and set aside the sentence. I further order that if the Appellant paid any part of the fine imposed in the lower court, the same be refunded to her.

Orders accordingly.

**JESSIE LESIIT**

**JUDGE**

Read, signed and delivered this 9th day of July, 2003.

In presence of

Mr. Kiplenge for Appellant.

Mr. Mutuku for State.

**JESSIE LESIIT**

**JUDGE**