



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Odhiambo & another (Criminal Appeal E007 of 2022)
[2023] KEHC 2230 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E007 OF 2022
KW KIARIE, J
MARCH 20, 2023**

BETWEEN

REPUBLIC APPELLANT

AND

BENARD ODERO ODHIAMBO 1ST RESPONDENT

MAURICE OTIENO OSUNGU 2ND RESPONDENT

(From the original conviction and sentence in Criminal case No.163 of 2019 of the Principal Magistrate's Court at Ndhiwa by Hon. E.M. Onzere –Principal Magistrate)

JUDGMENT

1. Benard Odero Odhiambo and Maurice Otieno Osungu, the respondents herein, were acquitted in two counts of forcible detainer contrary to section 91 of the Penal Code and destruction of crop of cultivated produce contrary to section 334 (a) of the *Penal Code*.
2. The particulars of the offence in count one were that on the 28th day of May 2019 at Konyango sub location, Ndhiwa sub county of Homa Bay County, without colour of right held possession of land parcel number Kawere/Konyango/Karadeng/2436 of Joseph Obuya Muga in a manner likely to cause a breach of the peace against Joseph Obuya Muga who was entitled by law to possess the said land.
3. In count two the particulars were that on the same day and place, they destroyed sugar cane valued at Kshs. 182,400.00 the property of Joseph Obuya Muga.
4. The appellant was aggrieved and appealed against the acquittal. The following grounds of appeal were raised:
 - a) The offence of forcible detainer therein was proved beyond any reasonable doubt.



- b) The magistrate failed to appreciate the fact that the complainant in the case is the bona fide owner of the land, has been in actual possession of the said land and has a valid title deed for the land.
 - c) The magistrate erred in law and fact by admitting into evidence and referring to documents produced by the defence that did not meet the minimum evidentiary threshold in this case.
 - d) The magistrate erred in law by delving into civil attributes of this case yet it is a criminal case.
 - e) The magistrate erred in finding that the accused persons did not commit the offence despite the two giving every contradictory statements in their defence.
 - f) The magistrate erred in law by not clearly and objectively looking at all the evidence adduced by all witnesses in the case and analysing it in her judgment.
5. The appeal was opposed by the respondents, through the firm of Quinter Adoyo on the following grounds:
- a) That there is a dispute over ownership of the said parcel of land in court.
 - b) That there was no evidence to prove the charge.
6. 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 v Republic* [1972] EA 32.
7. 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 or reasonable apprehension of 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.
8. Black's Law Dictionary defines actual possession as:
- Physical occupancy or control over property.
- This definition denotes a continuum of control or occupancy and not a one-time occurrence. This explains why we have trespass to land as a one-time offence in existence. At the onset the wrong charge was preferred against the respondents. In *Albert Ouma Matiya v Republic* Busia HCCR Appeal No. 8 of 2012 [2012] eKLR, Kimaru J. (as he then was) stated as follows:
- The ingredients required to establish the charge of forcible detainer under Section 91 of the Penal Code are 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.
9. In their defence, the respondents contended that the land in question belong to Onsongo Muga who gave them the work of ploughing. The sugarcane that was standing therein had been planted by them on instructions of Onsongo Muga.
10. At the time of hearing of this case, it emerged that there is a pending land dispute relating to the ownership of land parcel number Kawere/Konyango/Karadeng/2436. This is ELC case number 30



of 2019. It is only after the conclusion of this case that the issue of ownership will be resolved. Parties cannot attempt to do so through criminal process.

11. If we momentarily assume that the complainant is the rightful owner, the respondents who were mere employees of Osongo Muga could only be prosecuted with criminal offences if it was proved that they had knowledge that the land belonged to another party other than the person instructing them. This was not the case. If the circumstances were otherwise, Osongo Muga was the one to be charged with the offence of forcible detainer.
12. The upshot of the foregoing analysis of the evidence on record is that the trial magistrate properly addressed her mind correctly to the facts and the law. The appeal lacks merit and the same is dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

