



REPUBLIC OF KENYA



**Sepepiari v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 15596 (KLR) (3 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E002 OF 2023
F GIKONYO, J
DECEMBER 3, 2024**

BETWEEN

BENJAMIN LEMASHON SEPEPIARI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. W. Kitur
(S.R.M) in Kilgoris CMCR No. 627 of 2019 on 03.02.2023)*

JUDGMENT

Forcible detainer and making document without authority

1. The trial court convicted the appellant for forcible detainer (s.91 of the Penal Code) in Count I and sentenced him to pay a fine of Kshs. 100,000/=, in default to serve one-year imprisonment.
2. The trial court also convicted the appellant for making a document without authority (s. 357(a) of the Penal Code) in Count II and sentenced him to pay a fine of Kshs. 50,000/=, in default to serve one-year imprisonment.
3. Being dissatisfied with the said conviction and sentence the prosecution preferred an appeal vide petition of appeal dated 17/02/2023 citing the following grounds of appeal: -
 - i. The learned trial magistrate erred in law and in fact when he failed to take cognizance of the fact that the appellant held a valid title deed No. Transmara/Shartuka/1722.
 - ii. The learned trial magistrate erred in law and in fact by not taking cognizance of the fact that the complainant never produced any court order which specifically canceled the appellant's title deed No. Transmara/Shartuka/1722.



- iii. The learned trial magistrate erred in law and in fact when he failed to take cognizance of the fact that all ingredients of the offences the appellant faced were never proved by the prosecution beyond reasonable doubt.
- iv. The fine of Kshs. 150,000/= imposed by the learned trial magistrate is harsh and excessive in the circumstances.
- v. The learned trial magistrate erred in law and fact by relying on insufficient and contradictory evidence of the prosecution witnesses.
- vi. The learned trial magistrate erred in law and in fact when he found and held that the appellant was guilty of the offences charged when the prosecution had not proved its case beyond reasonable doubt.
- vii. The learned trial magistrate erred in law and in fact when he failed to take cognizance of the fact that no machine or apparatus were found in possession of the appellant herein in order to find him (appellant) guilty of the offence of count II.
- viii. In the above circumstances, the conviction by the learned trial magistrate is unsafe, harsh, and legally untenable.

Brief facts

- 4. The appellant was charged with two counts.
- 5. In count I. The appellant was charged with forcible detainer contrary to section 91 of the Penal Code.
- 6. The particulars were that from the year 2010 to date at Kilena village in Transmara West district of Narok County being in possession of land number Transmara/Shartuka/205 of Daniel Leshan Seitai without any colour of right, held possession of the said land in a manner likely to cause a breach of the peace against Daniel Leshan Seitai who was entitled in law to the possession of the land.
- 7. In count II. The appellant was charged with making a document without authority contrary to section 357(a) of the Penal Code.
- 8. The particulars were that on 22/09/2009 within the republic of Kenya with intent to defraud without lawful authority or excuse made a title deed number Transmara/Shartuka /1722 purporting it to be a title deed issued by Transmara land registry.
- 9. The appellant was tried and convicted on the two counts.
- 10. The appellant was sentenced to pay a fine of Kshs. 100,000/= or in default to serve one-year imprisonment in count I and in count II, to pay a fine of Kshs. 50,000/= or in default to serve one-year imprisonment. The sentences were to be served concurrently.

Directions of the court.

- 11. The appeal was canvassed by way of written submissions.

The Appellant's submissions.

- 12. The appellant submitted that the prosecution did not prove beyond reasonable doubt that the appellant did not have a colour of right over the parcel of land noting that he too has a title deed that has not been declared fake by a court of law. The appellant relied on section 8 of the Penal Code and the case of *Veronica Nyambura Wabome Vs Republic Criminal Appeal No. 2 of 2017*.



13. The appellant submitted that the prosecution did not produce minutes of the demarcating committee which allocated the complaint the suit parcel of land.
14. The appellant submitted that the only breach of peace that was brought out during trial was the allegation of arson that arose out of post-election violence which did not involve the complainant and the appellant. Therefore, the prosecution did not prove that there was a threat of peace as a result of the appellant's occupation of the parcel of land subject of this proceedings. The appellant relied on R V Howell [1982] 1QB 416; [1981] 3 LL ER 383.
15. The appellant submitted that he was charged under the wrong section of the penal code. The offence alleged to have been committed ought to be specifically created by a specific section of the penal code that criminalizes the same. The section thereof alleged to have been breached did not create the offence charged. Therefore, the charge sheet dated 19.08.2019 was defective for creating an imaginary offence' making a document without authority contrary to section 357(a) of the Penal Code, and the convictions cannot stand.
16. The appellant submitted that the sentences meted against him were unlawful and offends the principles of sentencing that give guidelines to be followed by courts of law. The appellant urged this court to find that the sentence was irregular, harsh, and excessive, allow the appeal and order that the fines of Kshs. 150,000/= paid by the appellant be refunded to him.

The respondent's submissions.

17. The respondent submitted that the appellant has no colour of right to be in the land.
18. The respondent submitted that the appellant's occupation of the complainant's land is against the legal interests of the complainant.
19. The respondent submitted that the possession is likely to cause a breach of peace or a reasonable apprehension of a breach of peace.
20. The respondent submitted that the prosecution proved that the title deed for parcel number Transmara/Shartuka/ 1722 did not emanate from the land registry and was confirmed as a forgery. Therefore, the appellant made the document without authority.
21. The respondent submitted that the defense did not shake the prosecution's case.
22. The respondent submitted that the sentence imposed upon the appellant is within the legal bracket. The respondent further submitted that the sentences were very lenient under the circumstances considering the appellant's protracted detainer of the complaint's land and his dubiousness in forging a title for himself in a bid to fraudulently grab the complaint's land. The respondent relied on the MM1 Vs Republic [2022] eKLR

Analysis And Determination.

Court's duty

23. As first appellate court, will re-evaluate the evidence and make own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. Okeno vs. Republic [1972] E.A 32
24. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions.



25. The broad issues for determination are;
- i. Whether the prosecution proved its case beyond a reasonable doubt.
 - ii. Whether the sentence was manifestly harsh and excessive.

Forcible detainer

26. The offence of forcible detainer is established in Section 91 of the Penal Code as follows;

91. Forcible detainer

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.”

27. In *Julius Edapal Ekai v Republic [2018] eKLR, HCCRA NO. 31 OF 2017*, Riechi J., stated set out the elements of the offence of forcible detainer as follows: -

“A literal reading of Section 91 of the penal code shows that the prosecution will only prove an offence of forcible detainer against an accused person if it demonstrates that:-

- (a) A person has actual possession of land
- (b) The person has no right over the land
- (c) The act of possession is against the interests of the legal owner or the person legally entitled to the land; and
- (d) The act of possession of the land is, therefore, likely to cause a breach of the peace or a reasonable apprehension of the breach of the peace.”

Being in actual possession without any colour of right

28. All the prosecution witnesses told the court that the appellant was in occupation of the said land. The appellant also admitted this fact except he stated that he owns the said parcel by producing a title deed Transmara/Shartuka/1722 as a title deed for his land.
29. The appellant was, therefore, in actual occupation of the suit land.
30. The appellant raised a defence of being a rightful owner of the suit parcel of land, citing Section 8 of the Penal Code which provides a full defence for a person asserting a bona fide claim of right. It states; A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.
31. PW2, a former chairman of Shartuka Group Ranch testified that the parcel of land the appellant claims to own under title number Transmara/Shartuka/1722 does not exist among pieces of land in the Shartuka Group Ranch.
32. PW4, the Transmara Sub-County Deputy Land Registrar testified that the title deed for Transmara/Shartuka/206 was issued to Daniel Leshan Seitai, the complainant on 12/06/2013. He produced the said title deed as P Exh 1 and its green card as P Exh 2. He confirmed that the appellant’s title deed for Transmara/Shartuka/1722 did not emanate from their office.



33. The title deed produced by the appellant has no relationship with the suit land at Shartuka Group Ranch. Therefore, on the basis of the evidence adduced, the prosecution proved that the appellant was in possession of the suit land without any colour of right.

Actual possession was against the interest of the person entitled by law.

34. The law was careful not to use “registered owner” in section 91 of the Penal Code as there are other different types of interests in land that are recognized in law and which may entitle a person to possession of land.
35. PW1 testified that he was allocated the 35 acres of land in 1998 and he lived on the land until the year 2006 when he was evicted after political violence broke out.
36. In 2012, he found out that the appellant had moved into his land. He asked him to move out in vain. Later the appellant claimed he was the owner of the same parcel of land.
37. PW2, a former chairman of the Shartuka Group ranch testified that PW1 was one of their members and after adjudication and survey was undertaken, the complainant was issued with a title deed for Transmara/Shartuka/ 206. According to PW2, Transmara/Shartuka/1722 the appellant claims to own does not exist among pieces of land in Shartuka group ranch.
38. PW3, the complainant’s brother testified that the complainant owns Transmara/Shartuka/206 and that he was rearing cows in it between 1998 and 2006.
39. PW4, the Transmara Sub-County Deputy Land Registrar testified that the title deed for Transmara/Shartuka/206 was issued to Daniel Leshan Seitai, the complainant on 12/06/2013. He produced the said title deed as P Exh 1 and its green card as P Exh 2. He confirmed that the appellant’s title deed for Transmara/Shartuka/1722 did not emanate from their office.
40. DW1, the appellant denied illegally taking possession of the complaint’s land that is Transmara/Shartuka/206. He produced a photocopy of the title deed for Transmara/Shartuka/1722 as D Exh 1.
41. The evidence by the officials of the Lands Office was that the title deed the appellant claims to give him an interest in the suit land did not emanate from their office. Evidence from PW2, former chairman of the Shartuka Group Ranch confirmed that the land indicated in the title produced by the appellant did not exist in the land covered by the ranch.
42. It bears repeating that, the relationship between the title produced by the appellant and the suit land was not established. Thus, the defense by the appellant does not show that his occupation of the land in issue was ‘in the exercise of an honest claim of right and without intention to defraud.’
43. The defense by the appellant did not create any doubt in the prosecution’s case.

The possession was a threat to a breach of the peace.

44. The definition of what would constitute a breach of peace was well stated by Watkins LJ: in R v Howell [1982] 1 QB 416; [1981] 3 All ER 383, thus:

A comprehensive definition of the term ‘breach of the peace’ has very rarely been formulated so far as we have been able, with considerable help from counsel, to discover from cases which go as far back as the eighteenth century.... [W]e cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse



resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks on a person's body or property.

45. Elders and even police had tried to intervene in vain. The act of possession of the land and the circumstances in which possession was obtained by the appellant, are likely to cause a breach of peace or reasonable apprehension of a breach of the peace. In the circumstances of this case, this court finds that the prosecution proved this ingredient.
46. The offense of forcible retainer was proved beyond reasonable doubt.

Making a document without authority

47. Contrary to the submission by the appellant, the offence of making a document without authority is established in Section 357 of the Penal Code and the sentence prescribed thereto in accordance with the principle of legality as follows:

“ Any person who, with intent to defraud or to deceive:

- a. without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing or
 - b. knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years.
48. The appellant seems to claim that there was specific evidence to show that he made, signed or executed the document he produced as evidence of certificate of title. But, he produced the document without any evidence to support the source of the document or that it was official or his ownership claims. Leaving an inference that the Appellant was either involved in the making of the title deed or he procured the making of the title deed.
 49. Besides, the appellant claimed to be the registered owner of land parcel number Transmara/Shartuka/1722. He submitted the said document to the court as proof of ownership. The evidence by PW4, the Transmara Sub-County Deputy Land Registrar was categorical that the appellant's 'title deed' for Transmara/Shartuka/1722 did not emanate from their office.
 50. The overall impression arising from the evidence is that, the document was not from the land office, was false and a forgery. It was a certificate of title of ownership which he used to claim ownership of the property in issue. These facts disclosed that he knowingly and fraudulently obtained and uttered the document to claim ownership, and could as well be taken to have forged the document himself in law. His intent was to defraud the complainant of the suit property or deceive that he was the owner of the property.
 51. Accordingly, this court finds that the offence under Section 357(a) of the Penal Code was proved beyond reasonable doubt.
 52. In the upshot, the appeal on conviction fails.

On sentence.

53. The penalty prescribed in Section 91 of the Penal Code for forcible detainer is that of a misdemeanor.



54. Section 36 provides for the general sentence for misdemeanours as follows:

When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

55. Whilst a person convicted for the offence of making a document without authority in Section 357(a) and (b) of the Penal Code is liable to imprisonment of seven years.

56. In this case, the trial court fined the appellant herein; a) Count I- Kshs. 100,000/= and in default, to serve one-year imprisonment; and b) Count II- Kshs. 50,000/= and in default, to serve one-year imprisonment. The sentences were to run concurrently.

57. The sentences passed by the trial court were lawful and appropriate. The sentences were not harsh and/or excessive. The trial court did not overlook some material factor, or considered, some wrong material or acted on a wrong principle. As such, the challenge on the sentences, therefore, fails.

Conclusion and orders

58. This court finds that the prosecution proved the charges against the appellant beyond reasonable doubt. Further, the sentences meted out on the appellant were lawful and appropriate to the charges and circumstances of the case.

59. In the upshot, the appeal has no merit and is dismissed. Both the conviction and the sentence by the trial court are upheld.

60. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 3RD DAY OF DECEMBER, 2024.**

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F. GIKONYO M

JUDGE

In the presence of: -

1. Bogogo for the appellant
2. Okeyo for DPP-Respondent
3. Nyangaresi C/A

