



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL APPEAL NO. 108 OF 2019**

**GAIKIA KIMANI KIARIE.....APPELLANT**

**VS.**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction in the Chief Magistrate's Court at Gatundu,*

*L.M. Wachira, CM, dated 19<sup>th</sup> March, 2019 in Criminal Case No. 27 of 2016)*

**JUDGMENT**

1. **GAIKIA KIMANI KIARIE (Kimani)** was charged before the Principal Magistrate's Court at Gatundu with the offence of forcible detainer contrary to **Section 91** of the Penal Code. The particulars of the offence were that:-

*“Gaikia Kimani Kiarie on the 27<sup>th</sup> day of December, 2015 mutati sub-location in Gatundu South Sub-County within county being in possession of land No. Kiganjo/Nembu 2072 of Susan Kabura Kirambu without colour of right held the possession of the said land in a manner likely to cause a breach of the peace against Susan Kabura Kiramba”*

2. Although Kimani has raised 24 grounds of appeal in submissions before me, he narrowed them into two issues; that is, whether the trial court failed to consider that Kimani had proved his innocence of the offence and whether the conviction should be set aside.

3. What I construe from the above issues, in Kimani's written submission, is that Kimani faults his conviction of that offence.

4. The appeal was opposed by the respondent.

5. This Court, as held in the case **OKENO V. REPUBLIC (1972) E.A. 32**, has a duty as the first appellate court to re-consider and re-evaluate the evidence adduced before the trial court and to reach its own independent determination whether or not to uphold the conviction of Kimani. In making my determination, I shall bear in mind that I neither saw nor heard witnesses as they testified and therefore cannot make a determination of the witnesses' demeanour.

6. In summary, the prosecution's case is that Kimani sold the parcel of land, the subject of his criminal charge to George Kiramba deceased, and surrendered possession of that land to the buyer. The sale agreement witnessing that purchase is dated 20<sup>th</sup> July, 1988.

7. George Kiramba deceased died in 1991. Kimani forcibly re-entered the property he sold on 27<sup>th</sup> December, 2015 and built thereon a house. A complaint was brought by the widow of the Kiramba deceased, Susan Kabura Kiramba which resulted with Kimani being charged with offence of forcible detainer.

8. Kimani's defence was that he leased the subject property to the Late Kiramba from the year 1985 for eight years. That he was leasing to the Late Kiramba his coffee bushes. Kimani stated when he leased the coffee bushes to the late Kiramba the property was registered in his father's name but his father had shown his children (which includes Kimani) the portion they would inherit from him and it was the portion of land that his father showed Kimani and he leased to the Late Kiramba. He produced the agreement of that leasing of coffee bushes dated 1<sup>st</sup> June, 1987.

**ANALYSIS**

9. Kimani submitted that prosecution failed to produce any evidence showing that the complainant had possession or ownership of the

property. He argued that the criminal standard of proof had not been met. Kimani cited the case *H.L.(E) WOOLMINGON VS. DPP (1935) A.C. 462 PP 481*, which case has often been cited with approval by Kenyan courts where it was stated:-

***“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”***

10. Kimani further submitted that the trial court erred in not finding that he could not pass title to the Late Kiramba because the title of the subject land, in 1988, was still in the name of his father. He cited the provisions of **Section 27(a)** of the Registered Land Act (now repealed).

11. I have considered those submissions as well as the respondent’s submissions that the prosecution proved the complainant was in actual possession and had a right to hold that possession of the subject land. I will begin by dissuading Kimani on his reliance of the Registered Land Act. That Act was repealed by the Land Registration Act which commenced on 2<sup>nd</sup> May, 2012. That Land Registration Act recognizes rights of proprietor under **Section 25**, which Section provides:-

***“25(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”***

12. Ownership or right to property which is subject of a charge Kimani faces under **Section 91** of the Penal code, forcible detainer, must meet the ingredients which were discussed in the case *ALBERT OUMA MATIYA V. REPUBLIC (2021) eKLR* where the court stated thus:-

***“91. 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.***

13. It will be noted that one of the ingredients prosecution was required to meet was to establish that the complainant was the legal owner of the subject property. Section 25 of the Land Registration Act recognizes that proprietorship of land can either be through first registration, or subsequently for valuable consideration or by order of court. Prosecution’s case was that the complainant was proprietor by virtue of having provided valuable consideration and by court order.

14. As stated before when Kimani allegedly entered into the sale agreement with Kiramba deceased, Kimani’s father was then alive and was registered owner of the property but had shown his beneficiaries the portion of land he wished them to inherit. The trial court in its consideration of this evidence made the following determination in its well-considered judgment:

***“There is no dispute that the accused person (Kimani) is the registered owner of Kiganjo/ Nembu/2072 having been registered as such by way of transmission. However, the evidence on record by the prosecution is that the accused person sold his portion measuring 0.71 of an acre to the Late Kiramba... There are agreements to that effect. In the said agreements, the accused person has signed and acknowledged receipt of the purchase amount...”***

***I have considered the defence raised by the accused person and my finding is that the said defence does not convince me that the transaction was a lease as opposed to a sale for several reasons.”***

15. The trial court went on to set out the reasons for its holding amongst which was that Kimani produced an agreement to lease which had not been put to the prosecution’s witnesses when they testified. The trial court therefore termed Kimani’s defence as an afterthought.

16. I uphold the trial court’s finding which is supported by earlier determinations on the ownership of the property. The Gatundu South Land Dispute Tribunal made an award in Tribunal Case No. 18 of 1990 on 25<sup>th</sup> October, 2006 which followed a complaint by the widows of the Late Kiramba. Those widows sought that Kimani be ordered to issue them with title of the subject property. They complained that Kimani was asking them to vacate the property. The Tribunal awarded those widows the subject property. Although Kimani stated at his trial that he was unaware of that Tribunal hearing, his assertion is not supported by the Tribunal proceedings because they reflect the defence he offered. In that defence, Kimani acknowledge the sale agreement between him and the Late Kiramba and confirmed that he sold the land to him. He requested that he be permitted to refund the purchase price to the family of the Late Kiramba.

17. The Tribunal awarded the widows of the Late Kiramba 0.71 acres of the subject property. That award was adopted and as a decree issued by the Resident Magistrate Court at Gatundu in Land Dispute Tribunal No. 25 of 2006.

18. Kimani did not appeal the Tribunal decision nor its adoption by the Resident Magistrate’s Court at Gatundu. It follows that prosecution proved that the complainant, the widow, was a proprietor of the subject property by virtue of that unchallenged court order as required by **Section 25** of the Land Registration Act.

19. Kimani submission that the Tribunal was not empowered under **Section 3(1)** of the Land Dispute Tribunals act to determine ownership of property cannot be entertained by this Court sitting in an appeal from a criminal conviction and sentence of the subordinate court. Kimani did not appeal the Tribunal’s decision nor the adoption of that decisions by Gatundu Resident Magistrate’s Court. That decision contrary to Kimani’s submission is valid and unchallenged.

20. The trial court was correct to reject Kimani defence that he had leased the property to the Late Kiramba. Indeed, as found by the trial court, Kimani failed to explain the delay in repossessing the property on expiry of the alleged lease period. Kimani did not dispute the evidence that he reposed the property in the year 2015 and that was when he was arrested and charged with the offence of forcible detainer.

21. Kimani erred to rely on the case of **RICHARD KIPTALAM VS. RPUBLIC (2015) eKLR** because the facts of that case are different to his, in that case the property was in two names. This is what the court stated in that case:-

*“Considering the evidence proffered at the trial I would agree with the learned counsel for the state that the main ingredient in the offence of forcible detainer contrary to Section 91 of the Penal Code, which is legal ownership of the land, was not proved beyond reasonable doubt.*

*The Land Registrar, Pamela Muthoni Mutegi (PW4), who was in charge of the Thika registration district where the land parcel Mitubiri Wempa Block 1/6496 was registered, testified that according to the extract of the records in respect of this particular parcel, there were two owners claiming the same parcel of land; one of these people registered as the owner was the appellant while the other claimant was Kandara Investment Company Limited. With these competing claims, the registrar testified that it was not possible to say with certainty who the legal owner of the land was...*

*Without proof of legal ownership or entitlement of land parcel Mitubiri Wempa Block 1/6496, other issues such as whether the appellant was in possession of the land or whether such possession was likely to cause a breach of peace or a reasonable apprehension of the breach of the peace are of no consequence as far as the determination of this appeal is concerned.”*

22. On my exhaustive consideration of the evidence adduced at the trial I have reached my own conclusion that the prosecution proved the case against Kimani on the required standard of proof. The appeal against conviction and sentence lacks merit.

## **CONCLUSION**

23. The appeal against conviction and sentence is dismissed.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 7TH DAY OF OCTOBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Ndege

For Appellant : Kimani

DPP for Respondent : Mr. Kasyoka

## **COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**