



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL APPEAL NO. 26 OF 2016**

**HARROLD OUMA AMOLO .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.345 of 2015 by Hon. P. K. Mutai  
(RM) at Kwale Law Courts on 26<sup>th</sup> February,2016)*

**JUDGEMENT**

The Appellant, HARROLD OUMA AMOLO was charged with two counts in count 1 the appellant was charged with forcible detainer contrary to section 91 as read with section 36 of the Penal Code.

The particulars were that:

“On diverse dates between 9<sup>th</sup> September, 2011 and 24<sup>th</sup> day of September, 2014 at Mwazaro village, Shimoni sub-location in Msambweni District within Kwale County, the appellant being in possession of plot No. LR.15733 Shimoni title No. C.R. 22654 of ROSE WANJIKU KARIUKI without colour of right hold possession of the said land in a manner likely to cause a breach of the peace against ROSE WANJIKU who was entitled by law to the possession of the said land”.

In count II, the appellant was charged with trespass upon private land contrary to section 3 (1) as read with section 11 of the Trespass Act Cap 294, Laws of Kenya.

The particulars were that:

“On the diverse dates between 9<sup>th</sup> September, 2011 and 24<sup>th</sup> day of September,2014 at Mwazaro village, Shimoni sub location in Msamwbeni District within Kwale County, the appellant unlawfully trespassed upon land parcel number CR 22654 belonging to one ROSE WANJIKU KARIUKI”

The appellant pleaded NOT GUILTY and the case proceeded to full trial whereby he was found guilty and convicted in both counts, being;

(1) the offence of forcible detainer contrary to section 91 as read together with section 36 of the penal code;

(2) the offence of trespass contrary to section 3 (1) as read with section 11 of the trespass Act.

The appellant was sentenced to

- (i) fine of Ksh 15,000 or serve and alternative sentence of four (4) months imprisonment for count 1;
- (ii) a fine of 500 or serve 10 days imprisonment in default for count II

The appellant was also directed to “remove homestead from the occupation and remove any structures hereon within 14 days from the date of judgment. In the event the offender disobeys the order, police officers were authorized to implement the directive.”

Being aggrieved with the said conviction, sentence and directive, the appellant filed an appeal on the following grounds;

- (1) That the learned magistrate erred in law and in fact by unconvicting the appellant when the respondent had not proved its case beyond reasonable doubt as provided for by law.
- (2) That the learned magistrate erred in law and in fact by convicting the appellant on insufficient and untenable evidence;
- (3) That the trial process was fatally defective and occasioned injustice to the appellant;
- (4) That the learned magistrate erred in finding that prosecution witness No. 1 was the complainant in this case.
- (5) That the learned magistrate erred both in law and in fact in that he did not properly consider the evidence given by both the prosecution and the Appellant respectively
- (6) That the learned magistrate erred in law and in fact failing to find that the charge sheet was fatally defective.
- (7) That the learned Honorable magistrate erred in law and in fact in that he did not at all take into account the evidence and submissions made by the Appellant;
- (8) That the learned Honorable magistrate erred both in law and fact in that he convicted the Appellant on insufficient evidence which did not meet the threshold of proof beyond any reasonable doubt.
- (9) That the learned Honorable magistrate did not consider the contradicting evidence given by the prosecution’s witness.

This being the first appeal, it is the duty of this Honourable court to look at the evidence that was adduced before the trial court, evaluate and analyse it afresh to be able to arrive at its own conclusion while warning itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did, to be able to feel their demeanor (see the case of OKENO VRS REPUBLIC, ( 1972) E.A 32)

The prosecutions called evidence of six (6) witnesses.

Pw1, JOHN NGATA KARIUKI testified that he was a businessman from Kirinyaga county and was husband to ROSE WANJIKU KARIUKI who was the registered owner of land parcel No. 15733 and passed on after the initiation of the proceedings before the trial court. He said that as her husband he had beneficiary interest in the land and hence is the complainant in this case he testified that he used to visit the said piece of land regularly. That in August, 2011, Pw1 visited the said land and found someone had put residential property and was residing on the said land. He identified the person as Ouma, the appellant herein. He reported the matter to the police station and after consultation, the appellant agreed to move out of the land. Pw1 then fenced the land but it was pulled down. He then assumed this had been done by

the person who was keeping goats and cows on this land. He reported the matter to Shimoni police station and both, he and the appellant were asked to produce documents of ownership to confirm who the land belonged to. Pw1 said that the appellant failed to do so and was arrested. He was then charged with the offences that he was tried for before the lower court.

Pw1 identified the death certificate ( Exhibit P1 ) to confirm his wife ROSE WANJIKUKARIUKI had died, a marriage certificate ( Exhibit P2 to confirm he and Rose were husband and wife, the original title of land parcel No. 15733 measuring 6.1 hectares was registered in the name of Rose Wanjiku Kariuki having been issued on 7<sup>th</sup> October 1991( Exhibit P4) a letter from the chief confirming he was married to Rose ( Exhibit P3), a survey deed plan No 162925 (Exhibit P5), a search certificate dated 27<sup>th</sup> May 2015(Exhibit P6), a receipt ( Exhibit P7) for title No. 22564 and certificate for title No. 22564 dated 27<sup>th</sup> May 2015 (Exhibit P8) and photographs .

Pw2 DICK JAMES SAFARI, a land Registrar of titles in Mombasa told court that his duties entail conveyancing and registration of documents

- Handling land transactions.
- Transfer of registration of title.
- Discharging power of attorney
- Confirming searches from the records.

He stated that their office received an application dated 27<sup>th</sup> March, 2015 for official search for land Registration No.15733 and the land Registration is No. 22654. They issued receipt Ref No. 22654 to confirm payment and called for file to peruse to confirm ownership. He stated that he confirmed that the land belonged Rose Wanjiku Kariuki and it measures 6.0 hectares. He issued a certificate to that effect (Exhibit P2).

Pw3, PETERSON KARIUKI KANYI said that he is a businessman who deals in construction. He stated that he knew the piece of land in question as the complaint would sometimes request him to visit the land in Shimoni. He then said that on 15<sup>th</sup> August, 2015 he visited the land with the intention of fencing it and was with the surveyor who was to put beacons on the land but they found the land occupied with structures erected on it. He said that the land also had cows and goats. He met Ouma the appellant but engaged his wife. Pw3 said that he asked the appellant to move and he agreed but requested for one week in the presence of the area chief, the village elder and the appellant's son. He again said that the appellant's wife asked for time but later claimed that she does not have money to move. That she then requested for assistance to relocate and this was reduced into writing on 25th August, 2011. He said that they gave her Ksh 10,000 to relocate the house. They did not fence the land. He also said that there was a bore hole in the homestead and the appellant's wife requested to use it and they allowed her though they did not agree. That he then visited the land again in August, 2014 and found the same structure on the land. He then alerted Pw1 about it.

Pw4, ADIMI MLONGO MIGENI told the court that he was the assistant chief of Shimoni sub location and his duties included dissemination of government policies and maintaining peace and order. He testified that he knew JOHN NGATA KARIUKI and confirmed that he owns land measuring approximately 15 acres at Mwasaro village though he does not live there. He then said that nobody steps on the land but there was an agreement between the appellant, HAROLD OUMA AMOLLO that he should vacate Kariuki's land. That the appellant agreed to move out. He was allocated a parcel of land elsewhere after coming there in 2006 and he settled on it as a squatter with his wife Margaret Kombo. He also stated that Margaret Kombo was given 2 plots No. 2 at Kwale Shimoni settlement scheme which is not owned by Kariuki, Pw1. He also said that the land had structures before which include some house, goat sheds and livestock, a well and some trees on the farm. He then briefed the OCS Shimoni police station and told them that the land was owned by Rose Kariuki.

Pw5, No. 60026 Corporal EMMANUEL KOMBO testified that he was stationed at the CID headquarters. He then said that he caused the OCS to take photographs which were sent to him for enlargement. He then produced the six photographic enlargements as exhibit (a) to (d). He prepared a certificate of authority dated 18<sup>th</sup> June, 2012 vide Gazette Notice No 5853 of 2001 which he produced as exhibit.

Pw 6. No 232934 CI ABDULAHI TATU told court that one PC Waburue was the investigating officer and he had taken over the matter on September, 2011. He said that ROSE WANJIKU, the deceased was with her husband John Kariuki when they went to report a case of trespass and structure erected. He also said that the appellant also went to the police station and he asked him to produce the documents. Pw6 said that the complainant gave him a copy of title deed for land referenced No. LR 15720, registered in the name of ROSE WANJIRU KARIUKI (Exhibit P1) He was then told that the parties had settled the matter amicably and he left the same floating. And later, Pw6 told court that the complainant went to report to him that the appellant had trespassed. They visited the scene and found temporary structure (Exhibit P8 (a) to (d) he then asked the Assistance chief to brief him about the land and was informed that the land did not belong to the appellant. He alerted the office from the scene of crime and ordered for Harold Ouma's arrest. He identified himself as the one in the dock.

The prosecution closed their case and the appellant was placed on defence and he opted to give sworn evidence and called two witnesses.

The appellant in his sworn testimony testified that he has been staying on the land since 1983 but did not know Rose Wanjiku Kariuki but knew John Kariuki. He said that on 2<sup>nd</sup> August, 2012 they found him in his residence and they talked. He then stated that on 25<sup>th</sup> August, 2011 he was away when his wife called him to confirm to him of some visitors who were claiming his land belonged to them. He then informed the District officer, the chief and village elder and asked them to wait for him. He also said that the land belong to the government but it was changed to a settlement scheme and the names of the remaining people taken in 1986. He said that demarcation started in 1987 and he was not allocated land. He then lodged complaints with the land office since his name had been omitted. He said that he wrote to the Director of land in Nairobi. Minister for land and permanent secretary that the District land adjudication officer was asked to ascertain the formal position. He produced the letters as exhibits D1, D2 and D3. He also stated that L.R NO. 15733 belonged to ROSE WANJIUR KARIUKI and he was still occupying the land since he was occupying the land because of the dispute. He denied knowing that his wife was given money but knew they had visited her. He said that he had various species of trees, exotic and had sank borehole on land No. L.R 15733, had a goat shed. He finally said that his son's house was demolished and at one time the family was left homeless. He produced photographs as exhibit D4 (a) to (e)

Dw2, MWINYI AMANI KWALE told court the he came to know the appellant in 1980 as a teacher and he was the area chief then. He also said that he knew where he stays and that when he came there the area was a forest but it now has cashew nuts, coconut and cows. He also said that the appellant's house was demolished and is now staying with neighbours.

DW3, MOHAMED MWERO said that he was the area chief and knew HAROLD OUMA as his neighbor since 1983. He said that for 30 years the appellant has been living on the same farm so that there are developments which include a borehole and trees on the farm. He explained that the land was government land but was later converted to a settlement scheme. He said that did not know of people who had benefited after allocation.

In his judgment, the trial magistrate, when confronted with the issue of whether Pw1 was within his legal rights to purport to be the complainant in this case. The trial magistrate at line 18 to 20 of page 31 of the proceedings found;

“It is therefore my findings that JOHN NGATA KARIUKI was within his rights to lodge a complaint and testify in court as a complaint in order to protect the estate of the deceased. Pw1 is therefore a proper person as complainant in this case”.

At the hearing of this appeal, the appellant's counsel indicated that he had filed written submissions

which he wished to rely on. The court confirmed that the appellant's written submissions were filed on 7<sup>th</sup> November 2016.

The state on the other hand, through M/s Mutau, learned state counsel automated to court that they would file and serve their written submissions before the date of judgment. The case was then fixed for judgment and to-date no written submission have been filed.

I have considered the evidence that was adduced during trial before the lower court. The submissions of the appellant, the law and cited authorities in line with the grounds of appeal which were raised by the appellant.

The appellant was charged with two offences, being

(a) forcible detention

(b) trespass upon private land.

The two offences, as noted by the trial magistrate in his judgment at page 25 lines 7 to 10 of the proceedings, are more or less of similar ingredients whereby a complainant is required to prove ownership and citing without law put cause and or remained upon the land without any colour of right.

In the case before the trial court where the appellant was convicted and sentenced for both counts, the evidence adduced indicates that the land No L.R 15733 Shimoni title No C.R 22654 was registered in the name of ROSE WANJIRU KARIUKI, whose now deceased having died in February, 2015. The evidence also shows that this land was registered on 7.11.1995 (Exhibit) and the offences alleged to have been committed between 9.9.2011 and 24.9.2014 before the demise of the said registered owner. The complaint, according to the charge sheet was made in March, 2015 and the complainant named as ROSE WANJIKU KARIUKI, the deceased.

Pw1, JOHN NGATA KARIUKI, who is the husband to the deceased ROSE WANJIKU KARIUKI, indicated that he was the complainant since the deceased was his wife and he believed he had beneficial interest in the said land. He produced a death certificate (Exhibit P1), marriage certificate (Exhibit P2) and a letter from the chief confirming he was married to the said Rose. (Exhibit P3) to confirm these interest and right.

Section 91 of the penal code which provides for the offence of forcible detention, defines the same in the following terms

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

And section 3 (1) of the Trespass Act provides as follows;

“Any person who without reasonable excuse enters or remains upon or erects any structure on or cultivates or lites or grazes or plants structure to be private land without the consent of the occupier ...Shall be guilty of the offence”.

From the above mentioned provisions of the law, both offences require that the possession or ownership of the land be established if one is to lodge a criminal complaint against another, who is will be alleged to be actual possession of the land but without colour of right in consent of the occupier.

The land in the case that was lodged against the appellant being in the name of Rose Wanjiku Kariuki, now deceased and as submitted by the appellant's counsel, the said not having been jointly owned by the deceased and Pw1 her husband, Pw1 ought to have endeavored to obtain letter of administration to

enable him protect the estate of the deceased and have the land's ownership transferred into his name. He had not done this by the time he lodged the criminal complaint against the appellant. It is worth noting that such rights do not pass by way of death certificate, marriage certificate or a chief's letter.

Like the appellant, who is alleged to have no color of right or consent to occupy this said land, Pw1 also lacks capacity to claim ownership or deal with the said land until he files for or obtains letter of administration to the estate of the deceased.

In conclusion, the appeal is allowed on that ground alone and it would therefore, be an academic exercise to consider all the other grounds.

The conviction is quashed and the sentence set aside.

The appellant to be refunded the fine he was ordered to pay if at all he paid, or he be released forthwith if he was committed to jail.

It is so ordered.

**Judgment delivered, signed and dated this 5<sup>th</sup> day of May, 2017.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/s Ocholla for the state

Mr Obara for the Appellant

Appellant – Absent

C/clerk- Buoro S