



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL APPEAL NO. 146 OF 2009**

**[Being an appeal from judgment by Hon. L. Arika (S.R.M) on the 23<sup>rd</sup> day of September, 2009 in Webuye Resident Magistrate's criminal case no. 1276 of 2007]**

**JOTHAM SIMIYU MAFUNGA ..... APPELLANT**

**VERSUS**

**REPUBLIC..... PROSECUTOR**

**JUDGEMENT**

1. The appellant **Jotham Simiyu Mafunga** was charged with two counts in criminal case no. 1276 of 2007. The first count being forcible detainer contrary to Section 91 of the Penal Code and the second being wrongfully taking possession of land recently obtained possession of by writ of court contrary to section 121 (1) (h) of the Penal Code.

2. The appellant was found guilty of both offences, convicted and fined Kshs. 10,000/= & 5,000/= respectively.

3. Being aggrieved by the sentence the appellant appealed to this court on the following grounds;

*i. The trial magistrate erred in law and facts by not observing the Provisions of section 200 of the Criminal Procedure Code.*

*ii. The trial magistrate erred in law and facts by convicting the appellant on a defective charge.*

*iii. The trial magistrate erred in law and facts by convicting the appellant on a charge which was amended and substituted and yet witnesses had testified and never recalled to testify to the amended charge.*

*iv. The trial magistrate erred in law and facts by delivering a judgment against weight of evidence by the defence.*

*v. The trial magistrate erred in law and facts to convict and sentence the appellant on a count or decree which had been time barred under the Civil Procedure Act.*

4. At the hearing the appellant's counsel appeared to have abandoned the other grounds and concentrated only on the 4<sup>th</sup>. He argued that the eviction orders were issued on 6<sup>th</sup> September, 1989 and secondly as relates to the second count no new evidence was adduced, therefore the decree was time barred issued after a period of 12 years.

5. The State opposed the appeal on the grounds that the alleged offence was committed after the eviction, secondly only 2 witnesses had testified before substitution and the evidence of **PW4** and 5 was enough to convict, further the charge sheet was not defective.

6. This is the first appellate court and it must consider the evidence on record afresh, analyze and evaluate the same in order to arrive at an independent decision **See Okeno Vs. Republic [1973] E.A.**

7. The facts of the prosecution case in brief is that the complainant bought the property subject matter from **PW2** in 1981 and acquired title but had been unable to occupy the land since 1982 due to the hostility he encountered from the appellant and his sons. The complainant obtained eviction orders in September 1989 **PW2** Ben Wanyonyi confirmed selling the land to **PW1** which land he had bought from the accused in 1966 before adjudication and at the time of adjudication he obtained title. **PW3** confirmed ownership from **PW2** to **PW1** and the fact that title was in the name of **PW1**. **PW1** in his evidence confirmed getting eviction orders and that a case for adverse possession by the accused was dismissed in the Kakamega court.

8. In his defence the appellant admitted selling land to **PW2** but stated further that he refunded back the sale price and got his 4 acres back from **PW2** who was on the land for only 8 months. His witness **PW2** & 3 gave contradictory account. **PW2** said he learnt from **PW1** that he had sold 4 acres to **PW2** whereas **PW3** talked of **PW1** leasing from the appellant.

9. The issue before court for determination the other grounds having been abandoned is whether or not the trial court erred by convicting and sentencing on a decree which had been time barred under the Civil Procedure.

The appellant was convicted of both counts forcibly retainer and wrongfully re-taking possession against writ of court.

The appellant at no point denied that he was on the suit land, that there were an eviction order that he had been evicted but went back, his issue is that the eviction order had lapsed.

In my considered view if the eviction was done and the appellant sought for a civil remedy his argument may have sold. However this is a criminal charge and there is no time limitation against grave offence. Defiance of a court order is a grave offence in law. Enforcement agencies found him on the wrong but he defied and continued in possession and he cannot use technicality and to defeat justice.

The Githunguri case referred to set parameters on the issue of time in criminal cases. This is not a case where the appellant can use time limitation and run away from prosecution. I concur with the finding of the lower court and I dismiss the appeal.

**DATED and delivered at BUNGOMA this 3rd day of November 2016**

**ALI-ARONI**

**JUDGE.**