

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 115 OF 2015

TEMBE MWAURAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the conviction and sentence in criminal case No. 194 of 2013 of honorable L. K .Gatheru, Resident Magistrate Mariakani on the 19th June 2015.)

JUDGEMENT

1. The appellant was charged with the offence of forcible entry contrary to section 90 of the Penal Code in the Senior Principal Magistrate's Court at Mariakani whereby he was put on trial and convicted and sentenced to serve 2 months in prison or any fine of KSHS 10,000/= on 19th June 2015. The Honourable Court also made further as follows:

“The accused is also advised to vacate the land in question forthwith, to avoid eviction within the period of the right to appeal. Alternatively, to appeal this decision and obtain a stay thereof...”

2. The offence of forcible entry upon land contrary to section 90 of the Penal Code is one that needs to be proved by documentary proof. PW1 testified and produced a Title Deed and search showing that the parcel of land in dispute; Buni/Kisimani/996 whose registered owner is Alex Khamisi Heskin. A certificate of official search showed that the above person is the owner of the land.

DW1 the appellant stated that his witnesses would prove that the land in dispute is community land. DW2 produced a lease agreement to Dr. Krapf whom he claimed owned the land and after his demise, without heirs, it passes ownership to the government and thereby it is free for allocation. DW2 gave details as the land being Plot NO. 1139 which is at the same place as the one claimed by the complainant.

3. The controversy as to whether or not the Plot in dispute as alleged to be on the ground raised doubt as to whether the appellant had forcible entry. As I have said the threshold to convict should be based on an equivocal fact.

4. I have anxiously gone through the appellant's submissions and find that they do not address the law referred to herein above. Had the Trial Magistrate did not address his mind on the issue of the existence of two Title documents, he would have arrived at a different conclusion.

5. I have come to the conclusion that there is no conclusive proof where the title is really located on the ground and therefore that doubt should benefit the appellant. I will therefore allow the appeal and quash the conviction and set aside the sentence. The appellant is hereby set at liberty unless lawfully held.

6. Orders accordingly.

Judgment delivered signed and dated this 2nd day of December 2016.

D. O .CHEPKWONY

JUDGE