Mohamed v Republic (Criminal Appeal 1 of 2025)
[2025] KEHC 16001 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16001 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MANDERA

CRIMINAL APPEAL 1 OF 2025

JN ONYIEGO, J

NOVEMBER 7, 2025

BETWEEN

YASSIN MAALIM MOHAMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment and sentence of Hon. C. Omondi (RM) delivered on 25-02-2025 in criminal case No.346 of 2022 Mandera SPMs Court)

JUDGMENT

1. The appellant herein was charged and thereafter convicted of the offence of forcible detainer contrary to Section 91 as read with section 36 of the Penal Code.

2. The particulars of the offence were that, on diverse dates between 10.11.2022 and 13.11.2022 at Neboi Location in Mandera East Sub County within Mandera County, jointly with others not before court, being in possession of Plot No. 249 registered in the name of Neboi livestock without any colour of right, held possession of the said land in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against the members of Neboi livestock group who were entitled by law to be in the possession of the said land.

3. Having denied the offence, the case proceeded to full trial. The appellant was subsequently found guilty and sentenced to pay a fine of Kshs. 200,000/= in default to serve two years' imprisonment. It is this conviction and sentence which necessitated the appeal herein which was instituted vide the petition of appeal dated 16.10.2020.

4. The appellant having been dissatisfied with the conviction and sentence by the trial court moved this court vide a petition of appeal dated 12.03.2025 citing the following grounds:

1. The learned trial magistrate erred in law and fact by reaching a conviction not supported by evidence.

2. The learned trial magistrate erred in law and fact in disregarding the relevant evidence and instead considered extraneous matters and thereby arriving at a wrong decision.

3. The judgment by the learned trial magistrate was premeditated, skewed, hobbling and a total misdirection and misunderstanding of the applicable law.

4. That the learned trial magistrate erred in law and fact in meting out harsh sentences despite the appellant being a first time offender.

5. The learned trial magistrate erred in law and fact in convicting and sentencing the appellant notwithstanding that the evidence tendered read and analyzed together irresistibly pointed to a civil case rather than a criminal case.

6. The learned trial magistrate erred in law and fact in not giving the appellant the benefit of doubt.

7. The learned trial magistrate erred in law and fact in treating the appellants defence perfunctory.

8. The learned trial magistrate grossly misdirected himself in law and on the issue of standard of proof by shifting the burden to the appellant.

9. The learned trial magistrate erred in law and fact in convicting and sentencing the accused person while no evidence was tendered to distinguish the history and nexus between land plot number 9/Neboi and plot number 249/Neboi.

10. The learned trial magistrate erred in law and fact in convicting and sentencing the accused person by relying on the findings in ELC case No. E002 of 2021, to which thes accused person was not a party to in determining the ownership of the land.

11. The learned trial magistrate grossly erred in law and fact by not appreciating the fact that the findings of the court in ELC E002 of 2021, pointed to the fact that the land is a communal land and that the appellant is a member of the said community.

12. The learned trial magistrate erred in law and fact in convicting and sentencing the accused person despite there being uncontroverted defence that the accused was arraigned in court while investigations into ownership of the land was still ongoing.

13. The learned trial magistrate erred in law and misdirected himself on relying on a site visit report conducted after close of hearing to prove an ingredient of the offence without according the appellant a chance to defend himself.

14. The learned trial magistrate erred in law and fact by not appreciating the fact that the accused was born and raised on the land and started a family on the same land.

5. The appeal was canvassed by way of written submissions.

6. The appellant in support of his case distilled the following issues for determination:

   i. Whether the prosecution proved its case to the required standard to warrant the judgment.

   ii. Whether the appeal is merited.

7. On the first issue, the appellant submitted that, the evidence tendered by the prosecution was not sufficient to sustain the charges before the trial court. That it was upon the prosecution to prove any criminal matter beyond any reasonable doubt as was held in the case of Republic v Musau & another [2025] 698 (KLR). It was urged that the appellant had all the rights to be in the property as he testified that the property belonged to his mother who was the registered owner of plot number 9/Neboi.

8. That fire broke out in the Mandera Registry on 11.04.2014 and this led to the destruction of all the registration documents. It was contended that as the appellant was in the process of re-registering the land, the complainants raised a claim over the same land arguing that the land was part of plot number 249/Neboi which they were allocated. Learned counsel contended that in as much as the complainants testified that there was a civil case being ELC No. E002 of 2021 over the ownership of the land in question, it was not disputed that the appellant was not part of the suit land and it wasn't clear if the suit extended to the portions claimed by the appellant herein.

9. Counsel opined that the appellant honestly believe that the suit property belongs to his family since he was born and raised on that land even before the complainants were allocated the land that was adjacent to the land in dispute. To that end, reliance was placed on section 8 of the Penal Code which provides a full defence for a person asserting bona fide claim of rights and states as follows:

   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.

10. Counsel further urged that section 19(1) of the Registration of *Land Act* No.3 of 2012, provides that it is the registrar of Lands who has the mandate to hear and determine disputes regarding boundaries.

11. As such, this court was urged that the prosecution did not prove that the appellant herein was in the suit property without any colour of right. Additionally, that the trial magistrate erred in considering the case as criminal in nature while the same was civil. Further reliance was placed in the case of Caroline Cherono Kurgat v Republic [2010] KEHC (KLR) where the court stated that:

   > " ...in this case, the prosecution of the appellant for forcible detainer was uncalled for. It seems to me that where one party has obtained title to a property which title is, or may be, subject to challenge on legal or equitable grounds, by another person who claims a prior interest, or as in this case, is in occupation of the property, the proper steps to take is to initiate an action by way of a civil suit for the eviction of, and mesne profits (if any) from the occupier of the land"s.
   >
   > To gain entry into the land by way of forcible detainer prosecution is in my view an abuse of the criminal law process, and Mr. Nyakundi was quite right and proper in conceding to the appeal."

12. On whether the appellant held possession of the land in question in a manner likely to cause breach of the peace, it was submitted that the trial court offended the right to fair trial in determining this ingredient of the offence. That the trial court visited the site after both the prosecution and the defence had closed their cases thus the appellant was not given an opportunity to challenge the inference made on construction of a make shift fence. In the same breadth, that the court had not issued any injunctive order against the development of the suit property and further, the appellant continued to attend the court without fail and therefore, the prosecution did not prove this leg. Reliance to buttress the foregoing was placed on the case of Republic v Njuki [2024] KEHC 5714 (KLR) where the court quoted the case of R v Howell [1982] QB as follows:

'There could not be breach of the peace unless an act was done or threatened to be done which either actually harmed a person or, in his presence, his property or which put someone in fear of such harm being done".

13. That the appellant did not breach peace as alleged noting that the same was not proved. It was submitted that the true ownership of the land was disputed and thus required the intervention of the registrar of land to unravel the historical search and enquiry on both plot number 9/Neboi and plot number/249 Neboi. It was urged that the instant suit was instituted before the land registrar could give verdict on the true ownership and as such, there was no proof of the person entitled by law to possession. This court was therefore urged to allow the appeal as prayed.

14. The respondents did not file submissions.

15. As the first appellate court, I am aware that I am under a duty to reconsider and re-evaluate the evidence on record, bearing in mind that I did not see or hear the witnesses testify, and reach my own independent conclusion. [See Okeno v R [1972] EA. 32 and Mohamed Rama Alfani & 2 Others v Republic, Criminal Appeal No. 223 of 2002.]

16. The evidence before this court is as follows:

17. PW1, Isaac Eden Gonjobo testified that he lived at Bulla Mpya and worked at Mandera Slaughter house. It was his evidence that on 10.11.2022, he was at the said slaughterhouse when the appellant arrived at the suit land and started living there. That the suit land is registered under Mandera Butchermen Association and the same was given to the group by the County Council in the year 1996. It was his evidence that the group has an allotment letter in respect to the land and therefore, when the appellant took illegal possession of the suit land, they made a report to the police.

18. He further averred that the appellant was still in occupation of the suit land despite the ELC at Garissa declaring that the suit land belonged to the group. According to him, the group was in possession of the title deed in respect to the land and therefore, he implored this court to find the appellant guilty of the offence charged.

19. PW2, Issack Hillow Sharamo testified that he worked at the Mandera slaughter house and that on 10.11.2022 while at the said Slaughter House, he saw the appellant arrive at night and built three temporary structures on the suit land. According to him, the suit land is Plot No. 249/Neboi registered under the name of Mandera Butchermen Association. He went further to state that, the group has held the said land from the year 1999 when the government gave them the same. He accused the appellant of encroaching the land illegally as the same belonged to the group. He maintained that previously, the matter was presented before the ELC and the court made a determination that indeed the land was owned by the group.

20. On cross examination, he reiterated that the appellant was not a party to the ELC case noting that at the time the matter was filed, the appellant had not yet encroached the land. It was his evidence that he has ownership documents of the land in question and that the previous chiefs took sides with the appellant given that they came from the same tribe.

21. PW3, No.10447 PC Amos Uhuru Mago testified that the suit herein was in relation to a land dispute reported vide OB No 36/7/12/2022 by the Livestock Butchermen Association Neboi. He proceeded that the suit plot was Plot Number 249 and that from his investigations, he established that the respondents had presented ownership documents inter alia; rate payments, Vacation Order; an order from ELC dated 02.09.2022, letter from Mandera Town Council dated 05.06.2022 and handing over

documents from the ministry of public health showing that the group was the rightful owner of the land.

22. On the other hand, he confirmed that the appellant had a chief's letter and minutes from a meeting held at the chief's office. It was his testimony that the appellant had no right to be on the said land. Additionally, he stated that the appellant ought to be charged with contempt of court orders noting that there was a judgment in place entrenching the Butchermen group as rightful owners of the land. On cross examination, he stated that the appellant occupies plot 249 belonging to the Mandera Butchermen.

23. DW1, Yasin Maalim Ahmed alias Madat testified that he was born and brought up in Neboi and his neighbours included Bulle Galle family and Mama Zainab family. He proceeded that together with his siblings they used to live with his mother with whom they used to rear animals. It was his case that his mother upon being divorced, stayed on the land till her death. It was his case that he was not ready to surrender the land for the reason that from 1980's, the slaughter house was next to Boys Town Primary.

24. That due to unhygienic standards and complaints, the slaughter house was moved to Neboi and consequently, they were given the land that is fenced by the local community. He testified that he stays far from the slaughter house. It was his case that they used to pay land rent to the County Council and further produced the said receipts as evidence in support of his case. In the same breadth, he stated that the lands registry was razed by fire and all the files were burnt. That afterwards the county government was to register the land to the locals but instead the same did not happen.

25. He further told the court that upon the death of his mother, they commenced succession process but the Kadhi instead referred them to the local chiefs. They were later referred to the land registrar who at that time had retired and therefore, they were informed to return once another land registrar had been appointed.

26. That to the contrary, things went bad and he found himself being summoned to the DCI offices in regards to ownership wrangles between him and he Butchermen. He stated that he had been in possession of the suit land No.9/Neboi hence not 249/Neboi. Further, that he was not a party to the ELC case Petition ELC No. E002 of 2021 and therefore, it was his case that the land belonged to him and not the Butchermen. He thus urged the court to find in his favour.

27. DW2, Ibrahim Adan Alio testified that the disputed land belongs to the appellant. DW3, Seynab Abdullahi Mursal stated that the appellant's mother used to stay in the disputed plot together with her children for a period of 25 years. That when he used to walk around, he used to see the appellant in the said plot. On cross examination, he said that he did not know the number of the plot.

28. DW4, Abdia Nunow testified that he was a resident of Busley. That in 1980, the family of the appellant used to stay in the subject land and that they had livestock as he used to get milk from them. He stated that the said plot is where the appellant was born, grew up and eventually got married. On cross examination, he stated that in as much as he did not know the plot number in question, he still remembered that the appellant stayed on the very land from where he used to pick milk for sale.

29. DW5, Salad Osman Jelle stated that the appellant together with his mother used to stay on the disputed plot. He further stated that there was a man by the name of Ali Yare whom the DC moved from the slaughter house and thus was given a piece of land elsewhere. On cross examination, he said that the did not know the number of the plot.

30. DW6, Maryan Adan Osman testified that the plot belonged to the appellant as he has been his neighbour for a period of over 30 years. That the appellant was born on the land, grew up and even

currently married and even got his first child who died and got buried in the same piece of land. On cross examination, he said that he did not know the number of the plot.

31. DW7, Abdiqadir Omar Mohamed testified that he lived at Neboi and that the appellant was his neighbour. That the appellant continued to live on the land even after his mother passed on and that he lives on the said land till now. It was his case that the slaughter used to be next to Boys Town and that there was a man who also used to live there and that the DC gave him an alternative land where he relocated to. That the slaughter has since moved closer to where the appellant lives and therefore, he urged the court to find in favour of the appellant and further, that the court ought to visit the place.

32. DW8, Ali Sheikh Yunis stated that he used to be a teacher at Bulla Mpya from the year 1986. That he used to see the appellant come to school late as he used to live out of town. That the land in question used to be vacant and that the appellant used to live there with his mother and that they used to keep camels. It was his case that the appellant used to be his student and that he was not a foreigner as alleged.

33. DW9, Dekow Muhammad Gedi testified that the appellant lived on the land as the same was his mother's land. That the same dates back as from the year 1980 todate and that the appellant lived far from the slaughter house. On cross examination, he stated that the appellant lived on the land that he used to live together with his deceased mother. He reiterated that the appellant and her mother used to live on the land since the year 1980 and that before, the land used not to be a slaughter house.

34. I have definitely considered the evidence tendered in the trial court as is required of this court and it is my view that the main issue for determination is whether the appeal herein is merited?

35. Section 91 of the Penal Code being the section under which the appellant was charged provides 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."

36. From the above definition, prosecution had the burden of proving the following elements:

    i. Proof of prima facie ownership of the land in question,

    ii. Proof that the accused was illegally in actual possession of the land in question, and

    iii. Proof that the possession in question was in a manner likely to breach the owner's peace or created an impression that a breach was imminent.

37. In the case of Albert Ouma Matiya v Republic [2012] eKLR Kimaru J (as he was then) was of the view that: -

> "The prosecution must establish that the accused is in actual possession of the parcel of land which he has no right to hold possession of. The prosecution will establish this if it adduces evidence which proves that the accused has no title or legal right to occupy the land.

> Secondly, the accused must be in occupation of the parcel of land in a manner that is likely or causes reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land."

38. To prove ownership, pw1 and pw2 stated that they had ownership documents in regards to the suit property. That they settled on the land in the year 1999 and they have been paying land rent and further, they have an MOU with the County Council entered in the year 2000. Apart from that, the prosecution witnesses urged that in the ELC Petition E002 of 2021, the court declared them as the owners of the suit land.

39. The above mirrored against the appellant's evidence that he was in the process of re-registering the land after the documents at the registry were burnt down. That the complainants raised a claim over the same land arguing that the land was part of plot number 249/Neboi which they were allocated.

40. Besides, the trial court made a site visit and observed under para 80 of the impugned judgment as follows:

> " ...it is established that indeed the accused person had built semi-permanent structures at the edge of the slaughter house from the pictures produced by the accused as DEXB 12 there is no fence in the plot however during the site visit the court noted that the accused was actually in the process of putting up a make shift fence".

41. In my view and considering all the evidence herein together with the court's finding after the visit, it is clear that the parties herein are claiming the same land and that the appellant's alleged land - Plot No. 9/Neboi - forms part of the Butchermen land Plot No. 249 Neboi.

42. From the above, without dwelling so much into the merit of the appeal, it is my view from the outset that there exists a contest on the ownership of the same land/and or land forming part of the Butchermen land although referred to differently by the disputants.

43. It is my view therefore, the ownership dispute between the appellant and the claimants – Butchermen Association - ought to be resolved first. My holding is supported by the finding of the case of Richard Kiptalam Biengo v Republic [2015] e KLR where the court held that;

> " ...where the ownership of the land in an offence of forceful detainer is in controversy or to put it more appropriately, if the legal ownership or entitlement of the land cannot be established beyond reasonable doubt at the accused person's trial, then a conviction cannot be sustained."

44. I must however emphasize that, where there is a dispute over land ownership, prosecution by way of forcible detainer should be the last thing to do or rather sparingly applied. In the instant case, the proper remedy should have been filing a civil suit seeking eviction orders before ELC.

45. Having found that ownership of the land in question ought to be determined first, it is my honest belief that the evidence before the trial court was not sufficient to establish the elements of the offence facing the appellant. In other words, a return of a verdict of guilty was not plausible given the circumstances of the case.

46. The upshot of the judgment is that I find merit in the appeal and the same is hereby allowed. The conviction is hereby quashed and the sentence set aside. The appellant is hereby set free unless lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF NOVEMBER 2025

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J. N. ONYIEGO

JUDGE