REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CRIMINAL CASE NO E1028 OF 2021

REPUBLIC.....PROSECUTION

VERSUS

JOSHUA KYALO MUTISO.....1ST ACCUSED

JOSEPHINE MWELU MUNGUTI.....2ND ACCUSED

RULING

THE CHARGE

Joshua Kyalo Mutiso and Josephine Mwelu Munguti (hereinafter referred to as the 1st and 2nd accused persons respectively) were jointly charged with the offence of Forcible detainer contrary to section 91 of the Penal code, as well as a second charge of malicious damage to property contrary to section 339(1) of the Penal code. The particulars of the first count are that within the month of December, 2020 at Kanyililia village in Nzaui Sub-county within Makueni County, the accused persons being in possession of land title number Makueni/Nguu Ranch/ 1250, without 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 Florence Ndanu Kimwele, who was entitled by law to the possession of the said land.

The particulars of offence of the second count are that in the month of May, 2021 at Kanyililia village in Nzaui Sub-county within Makueni County, the accused persons wilfully and unlawfully destroyed indigenous trees and vegetation on land parcel number Makueni/Nguu Ranch/1250, valued at Ksh. 606, 742.20/=, the property of Florence Ndanu Kimwele. When the plea was taken, the accused persons pleaded not guilty, where after the matter was set down for hearing.

THE EVIDENCE

The prosecution case was heard by another Magistrate who was subsequently transferred. When the matter was placed before me, directions were taken to the effect that the matter proceeds from where it had reached. However, no further witnesses were called by the prosecution. I will thus rely entirely on the record. The prosecution called a total of two (2) witnesses in a bid to prove their case against the accused persons. PW 1 Florence Ndanu Kimwele (hereinafter referred to as the complainant) testified that he bought plot number 1250 in 2011. That the 1st accused person was in occupation of the land. The complainant filed a case in court and the 1st accused person was evicted vide a court order in 2015.

It was the testimony of the complainant that she waited until 2020 but the 1st accused person declined to vacate. He was evicted in 2021 and his house was demolished. That in 2011 the 1st accused person had leased the land to people who had cultivated it. The 1st accused person was later arrested. That the 1st accused person went to the complainant's land in 2021 and destroyed her crops. The name of PW 2 is not clear to me but the witness stated that he/she was the village elder of Nguu village. That on 13/5/2021 she was passing on the road in the morning when she saw people cutting trees on the complainant's land. That she saw two men and when the witness asked them why they were cutting down the trees, the men stated that they had been hired by one Musyoki who had leased the land. PW 2 stated that she/he met Musyoki who informed him/her that he had leased the land from Nzomo. The witness stated that Nzomo was the 1st accused person herein.

MAIN ISSUE FOR DETERMINATION

The main issue for determination at this stage is whether the prosecution has established a *prima facie* case to warrant the accused persons or any of them to be placed on their defence.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record as well as the law applicable. A *prima facie* case is defined in the ***Mozley and Whiteley's Law Dictionary 11th Edition*** as:

"A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side." Emphasis added

The *locus classicus* on what constitutes a *prima facie* case is to be found in the celebrated case of Ramanlal ***Trambaklal Bhatt v. R [1957] E.A 332*** at 334 and 335, where the court stated as follows:

"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence……. It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence." (Underlining mine)

In the authority of ***Ronald Nyaga Kiura v Republic [2018] eKLR***, the court observed that a *prima facie* case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. In my considered view, for the court to find that a *prima facie*

case has been made out against an accused person, the prosecution must have established, on the face of it, the following:

a) That the offence complained of was indeed committed; and
b) That the evidence links the accused person to the offence complained of.

It is my further opinion that in order to show that the offence complained of was indeed committed, the prosecution must establish the key ingredients of the offence. A *prima facie* case is an early screen for a court to determine whether the prosecution can go forward to try the accused person fully for the crime. As such, the standard of proof that the prosecution must satisfy at the *prima facie* case stage is lower than that for proof that the accused is guilty, that is, lower than proof beyond reasonable doubt. In order to establish a *prima facie* case, a prosecutor need only offer credible evidence in support of each element of a crime.

Section 91 of the Penal code provides in part as follows:

"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."

From the above provisions, it is my view that the ingredients of the offence of Forcible detainer, which the prosecution must establish are as follows:

a) That the accused person was in actual possession of land;
b) That the possession of the land by the accused person was without colour of right;
c) That the accused person held possession of the land against the interest of the owner or person legally entitled to possession of the land;
d) That the accused person held possession of the land in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against the person entitled in law to the possession thereof.

My view is buttressed by several authorities. I will highlight just a few. In the case of ***Charles Kiprono Biegon & 2 others v Republic [2016] eKLR***, Mumbi Ngugi J (as she then was) observed as follows:

"In Murang'a Criminal Appeal No. 430 of 2013 Richard Kiptalam Biengo vs Republic, the Court observed as follows with respect to the offence of forcible detainer:

'A literal reading of section 91 of the Penal Code shows that the prosecution will only prove an offence of forceful detainer against an accused person if it demonstrates that: -

(a) A person has actual possession of land;

(b) The person has no right over the land;

(c) The act of possession is against the interests of the legal owner or the person legally entitled to the land; and

(d) The act of possession of the land is, therefore, likely to cause a breach of the peace or a reasonable apprehension of the breach of the peace."

Similarly, in ***Albert Ouma Matiya v Republic [2012] eKLR***, Kimaru J (as he then was) held as follows:

"The ingredients required to establish the charge of forcible detainer under Section 91 of the Penal Code are as follows: 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."

It is my further opinion that before or while impugning the accused person's possession of the land, the prosecution must establish that the complainant is the legal owner or has a legally recognized interest in the land in issue. In the case of ***Ivory Chris Musovya v Republic [2014] eKLR,*** the court quashed a conviction on a charge of Forcible detainer on the ground that the prosecution had failed to show any evidence that the complainant's claim to possession was supported by law. In ***Republic v Geoffrey N. Wafula & 2 others [2015] eKLR***, J.R Karanja J observed that:

"It therefore follows that a person entitled by law to the possession of the land must prove ownership thereof for him to lodge a criminal complaint against another said to be in actual possession of the land but without colour of right. Ownership of the disputed land is thus a vital and material ingredient of a charge of forcible detainer and without its proof such a charge would be unestablished."

The particulars of the charge describe the land in issue as Makueni/Nguu Ranch/1250. The complainant stated that the land belonged to her. The record indicates that the complainant marked certain ownership documents for identification but the same were not produced in evidence. In the case of ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR,*** the Court of Appeal held as follows:

"The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record".

In ***Des Raj Sharma v Reginam [1953] 19 EACA 310***, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of ***Michael Hausa v The State [1994] 7-8 SCNJ 144,*** it was held by the Supreme Court that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence. It therefore follows that no documentary evidence was adduced to show the existence of the land and that it belonged to the complainant.

The complainant stated that the 1st accused person was already in occupation of the land when she bought it. That she filed a case in which she obtained eviction orders against the 1st accused person. According to the complainant, the orders were granted in 2015 but she waited until 2020 when the accused person was ordered to vacate the land again. That the 1st accused person was evicted in 2021. No evidence of existence of the court case and eviction orders was adduced. There is no evidence to show what the 1st accused person did in December, 2020 or any other period that would threaten a breach of the peace. There is also no evidence to show that the 1st accused person constructed a house on the land after being ordered to vacate. In essence, there is no acceptable evidence to show that the 1st accused person was in actual possession of the land in December, 2020.

The complainant did not give testimony concerning the 2nd count. The direct evidence regarding the 2nd count was given by PW 2. The witness mentioned other persons not before court as the ones who cut down the trees. There is no evidence to show that the accused persons cut down the trees or instructed anybody to cut down the trees. It was stated that the 1st accused person had leased the land to one Musyoki who had instructed the two men to cut down the trees. Musyoki was not called to testify. There is no evidence to show that the 1st accused person had leased the land in issue to Musyoki. Even if the 1st accused person had leased the land to Musyoki, there is no way he can be held criminally culpable for the actions of other persons not working under his instructions and for his benefit. Furthermore the second charge out to have been an offence of cutting down trees contrary to section 334 of the Penal code.

An offence of cutting down trees or even malicious damage to property cannot be established by mere word of mouth. Not even photographs or a damage assessment report were produced in evidence. None of the prosecution witnesses mentioned the 2nd accused person. It is not known why she was charged. In cases of forcible detainer, a Survey report is an important piece of evidence as it would portray the position on the ground. It is not enough for a witness to state that the accused person was in possession of land without establishing that fact through tangible evidence. The investigating officer was not called to testify. It is not known why the accused persons were arrested and charged. In a nutshell, there is no acceptable evidence to show that the accused persons were in possession of the

land in issue at the material time. It is therefore unsafe to state that the accused persons had no colour of right to possess the land since it is not clear which land they had possessed.

As already indicated, there is absolutely no evidence to show that the manner in which the accused persons possessed whatever land was likely to cause a breach of the peace or a reasonable apprehension of such breach. In my view, it is not enough to merely show that the accused person was in possession of land. There must be evidence to show that such possession was a threat to the peace. This implies that the accused person must have expressly or by conduct committed an overt act which is a threat to the peace. This is the ingredient that differentiates between the offences of Trespass on one hand and Forcible entry or Forcible detainer on the other hand. The upshot of the above considerations is that the prosecution has failed to establish the key ingredients of the offence against the accused persons.

The test in determining a *prima facie* case was laid down in ***Republic v Galbraith [1981] WLR 1039***, in the following words:

1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case;

2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence;

(a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

It is the duty of the prosecution to prove the charge against the accused person. To this end, the prosecution must satisfy the ingredients of the offence at a *prima facie* level before the accused person is called upon to offer an explanation. In my view, before the court places an accused person on their defence, there must be credible evidence to show that the offence complained of was committed and that the evidence links the accused person to the offence.

In the instant case, there is absolutely no acceptable evidence to show that the accused persons committed the offences. In the circumstances, I have no difficulty in stopping the case at this juncture. I agree with the observation made by the High Court of Malaysia in ***Criminal Appeal No. 41LB-202-08/2013 – Public Prosecution v Zainal Abidin B. Maidin & Another*** that the defence ought not to be called merely to clear or clarify doubts. In the case of ***Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16,*** Sharma J held:

"It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence, to rule that there is a case for the accused to answer."

I may be curious to know what the accused person has to say about the allegations but curiosity is not a reason enough to place the accused person on his defence.

DISPOSITION

In view of the foregoing and having considered the prosecution evidence on record, I find that the prosecution has failed to establish a *prima facie* case to warrant the accused persons to be placed on their defence. The accused persons have **NO CASE TO ANSWER** in respect of the offence of Forcible detainer contrary to section 91 of the Penal code and that of malicious damage to property contrary to section 339(1) of the Penal code. I proceed to **ACQUIT** them accordingly, under section 210 of the Criminal Procedure Code. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 18TH DAY OF DECEMBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.