REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E141 OF 2023

BENJAMIN CHAI NGUMBAO.....1ST APPELLANT

THOMAS SIRYAH MAITHAH.....2ND APPELLANT

AGNES CHARO.....3RD APPELLANT

NAHASHON CHOME MDHAMI.....4TH APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. J. Mwaniki, Chief Magistrate Magistrate, in Malindi Chief Magistrate`s Court Criminal case No. E428 of 2023 delivered on 24/6/2024)

JUDGMENT

1. The appellants were tried and convicted for the offence of forcible detainer contrary to section 91 of the Penal Code. The particulars of the offence were that on or about the year 2019 and the year 2023 at Garisha village Kamale sub-location in Magarini sub-county within Kilifi County being in possession of land parcel No. 1402 of Salat Somo Ahmed (herein in referred to as the complainant) without colour of right held possession of the said land in a manner likely to cause the breach of peace against the said complainant who was entitled by law to the possession of the said land.

2. Each of the Appellants was sentenced to pay a fine of Ksh.50,000/= in default to serve 5 months imprisonment. They were aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:

1. That the learned trial magistrate erred in law and fact by failing to give consideration to the Appellants` defence leading to an unjust conviction.
2. That the learned trial magistrate erred in law and fact by heavily relying on the prosecution’s evidence, which was insufficient and inconsistent, and failed to establish the charges against the Appellants beyond reasonable doubt.
3. That the learned trial magistrate erred in law by shifting the burden of proof to the Appellants contrary to established legal principles.
4. That the learned trial magistrate erred in failing to properly evaluate all the evidence presented thereby reaching a wrong decision in convicting the Appellant.
5. That the learned trial magistrate erred in law and fact by treating what was essentially a civil dispute over land as a criminal matter leading to a wrongful conviction.
6. That the learned trial magistrate erred in law and fact by failing to give due consideration to the Appellants` defense leading to an unjust conviction.
7. That the learned trial magistrate erred in law and fact by heavily relying on the prosecutions` evidence which was

insufficient and inconsistent and failed to establish the charges against the Appellants beyond reasonable doubt.

8. That the learned trial magistrate erred in law by shifting the burden of proof to the Appellants contrary to establish legal principles.

9. That the learned trial magistrate erred in failing to properly evaluate all the evidence presented thereby reaching a wrong decision in convicting the Appellants.

10. That the learned trial magistrate erred in law and fact by treating what was essentially a civil dispute over land as a criminal matter leading to a wrongful conviction.

Case for prosecution

3. The case for the prosecution at the trial court was that in July 2017, the complainant bought land at Kamale in Magarini sub-county land measuring 1000 acres from the families of Daniel Ndiro PW3 and Samson Marova PW4. He signed an agreement, P.Exh.1, with the representatives of the said families. The land was unoccupied when the complainant bought the land. The boundary was marked after he bought the land. He started to develop the land.

4. The complainant had quiet possession of the land until sometimes in 2018 when some people started to enter into the land and to put up houses on the land. Among the people were the Appellants. The complainant reported to the police and some people were arrested in the year 2020 but they were not taken to court due to the corona epidemic. That in 202 he reported to the

National Land Commission and he came into an agreement with them for him to cede 200 acres of the land to the squatters who were on the land. By then land adjudication was going on in the area. His land was surveyed by Victor Otunga PW5 under instructions of the county government of Kilifi. The complainant`s land was given No.1402 that changed during demarcation to 3939. The squatters were allocated 209 acres which were surveyed by PW5. PW5 wrote a report after surveying the land. The complainant then sought the intervention of the police to have the squatters move to the 209 acres. Some of the squatters complied but some of them including the Appellants declined. The complainant reported to the police. The Appellants were arrested. Photographs of their houses on complainant`s land were taken. They were charged with the offence.

5. During the hearing of the case in court the complainant produced the sale agreement as exhibit, P.Exh.1. The surveyor PW5 produced the map of the land and his report as exhibits, P. Exh. 6 and 7 respectively. The investigating officer PW6 produced resolution letter of the National Land Commission and photographs of the Appellant`s houses on the land as exhibits, P.Exh.2 and 3 (a) – (e) respectively.

Defence case

6. The 1st Appellant stated in his defence that he and other people were kicked out some salt farms land. That the Fundisha location chief and village elders showed them unoccupied land to squat on. They built houses on the land and started to farm the

land which was un surveyed at the time. The complainant found them on the land and lied to them that he would build them a road on the land but he constructed a house and a water tank on the land. They were then told that the land belonged to the complainant. They were beaten by police officers, their crops destroyed and houses burnt down. They were evicted from the land.

7. It was further evidence of the 1st Appellant that he was a squatter on land parcel 1402 that belonged to the complainant. That he occupied the land in 2017 and stayed there for 8 years. That they filed a judicial review application over the land but it was dismissed.

8. The 2nd, 3rd and 4th Appellants adopted the evidence of the 1st Appellant. The 2nd Appellant added that they self-allocated themselves the land. That he occupied the land in 2022 and built a house. That he was arrested on 6/6/2023 and his house brought down.

9. The 3rd appellant though adopting the evidence of the 1st and 2nd Appellants added that the land where he was squatting was his which land the squatters divided among themselves. That he was farming on the land. That he does not know parcel No.1402.

10. The 4th Appellant on her part added that she had occupied 24 acres of the land in which she had built a 2 bed-roomed house. She did not know its number. She was then evicted from the land. She said that the land was hers. That surveyors were to come and demarcate the land.

Appellants` Submissions

11. The Appellants submitted that going by the provisions of section 91 of the Penal Code, the prosecution was required to prove that the complainant was legally entitled to possession of land parcel No.1402. That the prosecution case stood on of sale agreement that bore no plot number and was executed before adjudication. That the complainant did not produce any document of ownership such as a title deed or adjudication register to prove ownership of the land. That without prove of legal title or possession, the complainant could not prove the charge of forcible detainer and therefore ownership of 1,000 acres was not proven.

12. Secondly, it was submitted that section 91 of the Penal Code criminalizes occupation ‘without colour of right’ which phrase is defined in Black`s Law Dictionary as a “bona fide belief in the existence of a legal right.” That the National Land Commission directed for 200 acres be excised to accommodate squatters which was a binding resolution that clothed the Appellants with lawful colour of right. That their continued presence on the land could not amount to a crime. Reliance was placed in the case of **Julius Edapai Ekai v Republic (2018) eKLR** where Riechi J emphasized that the prosecution must prove that that the accused had no right over the land.

13. Thirdly, the Appellants submitted that there was no evidence of breach of the peace. That none of the witnesses who testified to any actual or threatened violence, disturbance or intimidation.

Reliance was in this respect placed in the case od **R v Howell (1982) 1QB 416**.

14. Fourthly, it was submitted that the burden of proof was on the prosecution to prove the charge. That the trial court faulted the Appellants for not producing documents when they were not required to prove ownership but it was the duty of the prosecution to disprove their claim to lawful occupation. That the occupation was peaceful, civil and not criminal.

15. Finally, it was submitted that the insistence by the respondent that criminality arises merely because the Appellants remained on the land after adjudication is misplaced as the National Land Commission which is a government institution had recognized their occupation.

16. The Appellants cited the case of **Republic v Chief Magistrate`s Court, Nairobi 7 another Exparete John Harun Mwau (2014) eKLR** where the court warned that:

> **a criminal process should not be used to settle civil disputes, or to coerce a party to surrender property rights under contest.**

17. Further submission was that the period covering 2019 to 2023 spans the period of National Land Commission adjudication, illustrating that this was a live administrative process and not a criminal matter. That in allowing the criminal process to run

parallel to the NLC proceedings the prosecution abused the process and undermined constitutional institutions.

18. The Appellants urged the court to allow the appeal.

Respondent`s Submissions

19. The Respondent submitted that the ingredients of the offence of forcible detainer are as was set out in the case of **Julius Edapal Ekai v Republic** (supra), among them being possession of land without colour of right which term is defined in Black`s Law Dictionary, 11th Edition as:

> **The deliberately created false impression that title in property or goods is held by someone other than the actual owner.**

20. It was submitted that the Appellants were in actual occupation of the suit land and had proceeded to make developments on the land. That though they contested that they owned the land they did not tender any proof in that regard.

21. It was submitted that the complainant legitimately bought the land and an agreement was produced in proof thereof. That the surveyor PW6 testified that he carried out a survey exercise on the land which was issued with No.1402 with an acreage of 864 acres after 209 acres were excised to squatters. No evidence was tendered to controvert the prosecution`s case on proof of

ownership. That proof of ownership was proved and that it was also proved that the appellants gained possession of the same without colour of right. Reliance to this end was placed in the case of **Albert Ouma Matiya V Republic, Busia Criminal Appeal No.8 of 2012** where Kimaru J. (as he then was) observed 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.**

22. It was submitted that the litmus test for the offence of forcible detainer is that the possession of the land is in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace against the person entitled by law to the possession of the land. The Respondent in this respect cited the case of **R v Howell** (supra) where Watkins LJ explained what would constitute a breach of peace thus:

A comprehensive definition of the term 'breach of the peace' has very rarely been formulated so far as we have been able, with considerable help from counsel, to discover from cases which go as far back as the eighteenth century.... [W]e cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks on a person's body or property.

23. It was submitted that PW 1, 2 and 3 testified that the appellants invaded the complainant`s land and started making developments, as evidenced by photographs produced in the case, without any colour of right. That there was evidence of breach of the peace in the area as the complainant and his workers were unable to fully utilise their land. That the unlawful occupation of the suit land by the Appellants, the use of force upon the complainant and the refusal to vacate the land was in a manner likely to cause a breach of the peace or a reasonable apprehension of a breach of the peace. That the charge was proved beyond reasonable doubt. The Respondent urged the court to uphold the conviction and the sentence.

Analysis and determination

24. This being a first appeal, the duty of this court is to re-evaluate afresh the evidence on record and draw its own independent conclusions, while being alive to the fact that the court neither saw nor heard the witnesses. This legal principle was well enunciated in the case of **Okeno –vs- R [1972] EA 32** where the court stated;

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."**

25. The appellants were convicted for the offence of forcible detainer contrary to section 91 of the Penal Code that provides 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."

26. The ingredients of the offence as per the said section were stated by Riechi J in the case of **Julius Edapal Ekai v Republic [2018] eKLR, High Court Criminal Appeal No. 31 of 2017** to be as follows;

"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."

27. The same was observed in **Busia Criminal Appeal 8 of 2012- Albert Ouma Matiya vs Republic**, where Kimaru J observed as follows with regard to the elements of the offence of forcible detainer:

> **"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."**

28. Arising from the above it was incumbent upon the prosecution to prove that the Appellants were in actual possession of the complainant`s land without colour of right; that their possession of the land was against the interests of the complainant who was the legal owner of the land and that their possession and occupation of the land was in a manner likely to cause a breach of or reasonable apprehension of breach of peace against the complainant.

29. As to whether the Appellants were in actual possession of the land the complainant testified that the Appellants had entered into the land from the year 2018 and that they had built houses on the land. The Appellants admitted that they had indeed moved into the land and had built houses thereon and were cultivating the land. The 2nd, 3rd and 4th Appellants were arrested on the land. I therefore find that the Appellants were in actual possession of the land. That aspect was therefore proved.

30. The next question is whether the Appellants had any colour of right to occupy the land. The prosecution had in that case the obligation to prove that the complainant was the person legally entitled to the land and that the Appellants were in occupation without colour of right. Ownership of land by the complainant is at the core of a charge of forcible detainer. In **Republic v Geoffrey N. Wafula & 2 others [2015] KEHC 6295 (KLR),** 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.**

31. The complainant testified that he bought the subject land in 2017 from the families of Daniel Ndiro PW3 and Samson Marova PW4. The said witnesses confirmed the same. A sale agreement with the said people was produced as an exhibit. The two witnesses said that the land was unoccupied when they sold it to the complainant.

32. It was the evidence of the complainant that the land was surveyed and adjudicated to him in the year 2020 and allocated the number 1402. That some 200 acres were set aside during demarcation to accommodate squatters who were on the land who included the Appellants. That the Appellants refused to move to the land allocated to them.

33. The surveyor PW5 stated that the area where the complainant`s land is situate, Adu/Kamale, was declared an adjudication area in the year 2015. That the complainant`s land changed its number during demarcation from 1402 to 3839. That demarcation is still ongoing in the area.

34. The trial court in its judgment said that the land in issue belonged to the complainant.

35. The evidence that the subject land belonged to the families of PW3 and PW4 before they sold it to the complainant was not challenged. The land has been demarcated to the complainant, surveyed and given a number. The Appellants alleged that they were told to squat on the land by the area chief after they were evicted from some salt farms. There was no evidence that the

chief was the owner of the land or that he had authority to give the appellants land that belonged to private individuals. There was no evidence that the appellants made any claim over the land with the adjudication officer in the process of adjudication. I am therefore in agreement with the trial court that the land belongs to the complainant. The appellants have no claim over it. It was thus proved that the Appellants were in possession of the land without any colour of right. Their occupation of the land was unlawful.

36. The next issue is whether the occupation of the land by the appellants was in a manner that was likely to cause a breach of the peace or reasonable apprehension of breach of peace against the person entitled by law to the possession of the land. In the case of **Sepepiari v Republic [2024] KEHC 15596 (KLR),** Gikonyo J. cited the case of *R v Howell [1982] 1 QB 416; [1981] 3 All ER 383* where Watkins LJ held the following on what would constitute a breach of peace:

> **A comprehensive definition of the term 'breach of the peace' has very rarely been formulated so far as we have been able, with considerable help from counsel, to discover from cases which go as far back as the eighteenth century.... [W]e cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which**

puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks on a person's body or property.

37. In the case against the Appellants, there was no evidence that the Appellants threatened the complainant or his workers when they were in occupation of the land. There was no evidence that they resisted any eviction. The investigating officer PW6 never told the court that there was any breach of the peace by the Appellants. The mere act of refusing to move out of the land without more does not amount to breach of the peace nor does the fact that the complainant was unable to utilize his land amount to the same. The charge is forcible detainer and it had to be shown that force was used to retain the land. No such a thing was proved. Consequently, it is my finding that the charge of forcible detainer was not proved.

38. In view of the finding that the possession of the land by the respondents was not in any breach of the peace, I find the appeal to be merited. The conviction of the appellants is thereby quashed and the sentence imposed on them set aside. I order that any fine paid by the Appellants be refunded to them.

Delivered, dated and signed at GARSEN this 4th day of February 2026

J. N. NJAGI

JUDGE

In the presence of:

Miss Ochola for Respondent

N/a for Appellants

Court Assistant - Rahma