



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
CRIMINAL APPEAL NO. 26 OF 2023

WENJE AWINO JUNG'A APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.93 of 2023 of the Chief Magistrate's Court at Migori by Hon. J. Munguti –Principal Magistrate)

JUDGMENT

1. Wenje Awino Jung'a, the appellant herein, was convicted of forcible detainer contrary to section 91 of the Penal Code.
2. The particulars of the offence were that on diverse dates between 10th March 2000 and the 8th day of September 2020 at Sori town, Nyatike sub-county of Migori County, was in possession of land parcel number Migori/Kachieng "A"/302 of Samuel Otieno Oloo without colour of right, held possession of the said land in a manner likely to cause a breach of the peace against Samuel Otieno Oloo, who was entitled by law to possess the said land.
3. The appellant was instructed to vacate the land and demolish the structure he built. He was dissatisfied with the conviction and the order and appealed both. He was represented by Omonde Kisera & Company Advocates. The following grounds of appeal were presented:
 - a) The learned magistrate erred in law and fact in failing to find that the prosecution had failed to prove its case beyond any reasonable doubt as required by law.
 - b) The learned magistrate erred in law and fact in failing to appreciate that the failure to adduce evidence of a surveyor was fatal to the charge, as doubt remained outstanding as to which title the house in question is erected.
 - c) The learned trial magistrate erred in law and fact in making illegal orders that the appellant should demolish his home within one week before coming back for sentencing on 18th May 2023.

- d) The learned trial magistrate erred in law and fact in acting in a manner that takes away the appellant's right of appeal and, in essence, blackmails the appellant before sentence.
 - e) The learned trial magistrate erred in law and fact in giving an illegal directive that the appellant must demolish this home within one week, contrary to section 152 of the Land Act, amended, which stipulates a minimum notice of 3 months before any evidence can be undertaken.
 - f) The learned magistrate acted in a weird manner and issued illegal orders after convicting the appellant, which orders are bound to embarrass the Judiciary.
 - g) The learned trial magistrate acted without jurisdiction when he issued illegal eviction orders in a criminal case, whose orders are the preserve of the ELC as spelt out in the Constitution.
 - h) The learned trial magistrate erred in law and fact in failing to appreciate that the prosecution's case was unsafe for conviction.
 - i) The learned trial magistrate erred in law and fact in arriving at a decision which is not supported by any sufficient evidence and law.
4. The respondent did not file any grounds of appeal or any submissions.
 5. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court, and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs Republic [1972] EA 32**.
 6. Section 91 of the Penal Code provides:

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.
 7. The **Black's Law Dictionary** defines actual possession as:

Physical occupancy or control over property.
 8. This definition denotes a continuum of control or occupancy and not a one-time occurrence. For the offence of forcible detainer to be proved, the elements of the offence must be proved. These elements were explained in **Albert Ouma Matiya vs Republic Busia HCCR Appeal No. 8 of 2012 [2012] eKLR**, Kimaru J. (as he then was) stated 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.

9. The particulars of the charge indicate that the appellant occupied the land intermittently over a period of five years. This raises the question of whether this constituted trespass rather than forcible detainer. In my view, the particulars of the charge support a different offence other than the one he was charged with. It is trite law that where the particulars of the offence are at variance with the charge, the accused is entitled to an acquittal. This was held in the case of **John Brown Shilenje vs R. High Court (NBI) Criminal Appeal No 181 of 1981** (unreported).
10. The onus of proving by the complainant lay with the prosecution. The appellant contended that his house was on land parcel number 704, which he said shared a boundary with land parcel number Migori/Kachieng “A”/302. In order for the prosecution to prove their case, they were required to provide the court with a surveyor’s report to show where the house that the appellant was ordered to demolish stood. They failed to do and this was fatal to their case.
11. Apart from failing to produce a surveyor’s report, the prosecution lacked confidence in its case. PC Brian Wanjala (PW3) admitted during cross-examination that he was uncertain whether the appellant’s house was located on land parcel number Migori/Kachieng “A”/302.
12. Based on the foregoing analysis of the evidence on record, the appellant's conviction lacked sufficient evidence. The conviction is quashed, and the sentence is set aside. The appellant was released on bail while awaiting the outcome of this appeal.

Delivered and signed at Migori, this 25th day of February 2026

KIARIE WAWERU KIARIE

JUDGE