Muthama v Republic (Criminal Appeal E029 of 2024)
[2026] KEHC 2437 (KLR) (23 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2437 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E029 OF 2024

HM NYAGA, J

FEBRUARY 23, 2026

BETWEEN

DANIEL MUTHAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. Felix Kombo – CM Maua Law Courts delivered on 12/2/2024 in Criminal Case NO. 619 of 2017 in Maua Law Courts)

JUDGMENT

Background

1. The Appellant was arraigned before Maua Chief Magistrate's court and charged with the offences of forcible entry contrary to section 90 of the Penal Code and malicious damage to property contrary to section 339(1) of the Penal Code.

2. The accused denied the charges.

3. After a full trial, he was convicted and sentenced to a fine of Kshs.50,000/= in default six (6) months imprisonment and Kshs.150,000/= in default one (1) year imprisonment respectively.

The appeal

4. Aggrieved by the said conviction and sentence, the appellant filed the petition of appeal dated 23rd February 2024 in which set he out the following grounds:

    a. That the learned magistrate erred in law and fact by determining the ownership of parties land in a criminal case contrary to provisions of Environmental and Land Court Act.

b. The learned magistrate erred in law and fact by engaging in determination of land ownership rights while there existed and still exists several suits all pointing on determination of ownership of the subject land.

c. That the learned magistrate erred in law and in fact by changing a direction made by a court of similar jurisdiction amounting to sitting on his own appeal which is a jurisdiction of the high court.

d. The learned magistrate erred in law and in fact by ignoring the defence evidence in total and failure to give the same any consideration.

e. That the trial magistrate erred in law and in fact by ignoring all defence witnesses and only believing prosecution witnesses with no reason at all.

f. The learned magistrate erred in taking evidence of land ownership of a registered land from adjudication officer.

g. The learned magistrate erred in law and in fact in arriving at his said decision.

5. Subsequently, the appellant filed an application dated 18th April 2024 seeking bond/bail pending appeal which was allowed by the court in its ruling delivered on 5th December 2024.

6. Directions were given that the appeal be canvassed through written submissions. Only the appellant filed his submissions.

Appellant's submissions

7. The appellant submitted that the trial court's judgment was largely hinged on the proceedings in Maua ELC No. 29 of 2018 which related to ownership of land and a dispute therein between the appellant and the complainant. That reliance was placed on the judgment in that case, when it was evident that the same was delivered after the appellant was already charged in court with the current offences. That the court failed to take account of the fact that the dispute over the land was the subject of Court of Appeal Case No. E095 of 2024.

8. It was further submitted that in respect to the second count, the maker of the document, did not attend court to produce the report on the alleged damage, in light of the defence evidence that no damage was caused.

Analysis and determination

9. Being a first appeal, the court's duty is as was set out in Okeno v Republic (1972) EA 32 where it was held that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion."

10. Similarly, in Kamau Njoroge v Republic [1987] eKLR, the Court of Appeal stated as follows:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from

the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."

11. With the above principles in mind, I will now examine the evidence adduced in the trial court.

12. The prosecution case was presented by the complainant, who stated that he was the owner of the land known as Kirindine A" Adjudication section – 3594 although the title deed that he produced referred to the land as being Nyambene/Kirindine 'A'/3594. He further stated that he was alerted that the appellant in company of other people had gone to his land and proceeded to destroy his crops. He confirmed the damage. He conceded that there was a pending case before the ELC over the said parcel of land but the same was determined in his favour.

13. The incident was witnessed by Francis Kobia (PW2) who had been hired by the complainant to work on the land.

14. The damage to the crops was confirmed by PW3 who prepared an assessment report prepared by his colleague.

15. The Land Adjudication Officer (PW4) told the trial court that according to their records, the parcel of land in question belonged to the complainant and that the appellant's father owned parcel No. 3448.

16. The appellant testified that the land in question was his and in 2013 the parties had a case that he won and he evicted the complainant from the land but on appeal before the minister, the complainant succeeded. That another case between the parties was determined in his favour.

17. In the course of the trial, the court (Hon. T. Gesora) was made aware of the ELC case No. 15 of 2020 and ELC case No. 49 of 2020. The court then stayed the criminal case pending the determination of the said suits.

18. When the matter was taken over by another magistrate (Hon. F. Kombo) the case proceeded with the remainder of the defence hearing, without regard to the orders of Hon. Gesora.

19. Franklin Riungu (DW2) stated that he was aware of the land dispute between the parties. He denied that any trees were destroyed but confirmed that some miraa crops were damaged.

20. DW3 was Peter Jacob Ntongai. He stated that he sold land to the complainant but the complainant went ahead and encroached on the appellant's land.

21. From the evidence adduced, it is clear that there was a land dispute between the complainant and the appellant which appeared to have lingered for quite some time. The same traversed the adjudication period to the time titles were issued. The appellant also filed ELC No. 29 of 2018 while the criminal case was going on.

22. In that case, the court found that the appellant's land bordered each other and that any dispute between the parties over the boundaries was not within its jurisdiction.

23. It is appreciated that under section 193A of the Criminal Procedure Code (CPC), concurrent criminal and civil cases may proceed over the same subject matter. However, a court that is called upon to determine a criminal case arising from the nature of the dispute between the parties herein ought to tread carefully so as not to make a finding that would be contradictory to the outcome in the civil suit.

24. This position was appreciated by the trial court when it opted to stay the criminal case and await the determination of the civil suits that were pending before it.

25. The offence of forcible entry is found under section 90 of the Penal Code. It is set out as follows:

> Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or in threats or in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter on the land or not, is guilty of the misdemeanour termed forcible entry:
>
> Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry

26. From the evidence adduced, the appellant is said to have gone to the complainant's land and cut down the trees and other plants. He then left the scene. Nowhere in his evidence did the complainant state that the appellant's entry was intended to grant him possession of the land in question.The act of momentarily entry into the land and destroying the crops without intent of actual occupation in my view, cannot be deemed to be the intention to take possession envisaged by the law to sustain the offence of forcible entry.

27. For the foregoing reasons, I find that the key element of the offence of forcible entry, that of intention to take possession, was not proven. The conviction and sentence on this court are set aside.

28. As regards the second count, there were eyewitnesses who saw the appellant with others descent on the land and proceed to fell down trees and other crops on the land. There is no doubt that the crops belonged to the complainant. Even if the particular parcel of land was disputed, the appellant could not just descend on the same and act in the manner that he did.

29. He had no right to act as he did and therefore the acts of destroying the crops was unlawful and without any right.

30. As regards the second count, I find that the same was proven to the requisite standard and I uphold the conviction.

31. On the sentence for the second count, the appellant was sentenced to a fine of Kshs.100,000/= in default one (1) year imprisonment. By the time he was released on bond pending appeal he had already served close to ten (10) months of the sentence.

32. Given the fact that he has been acquitted on the 1st count, I find that the time served was sufficient, as applying the remission process applicable, he would have served less time than he had already served.

33. Therefore, on the second count, I set aside the sentence and substitute it with the time already served.

34. In conclusion, the following orders do issue:

    a. The conviction and the sentence on the offence of forcible entry is quashed and set aside.

    b. The conviction on the second court of malicious damage to property is upheld, but the sentence is set aside and substituted with the time already served.

    c. Having served his sentence, the appellant is set at liberty unless lawfully held.

DATED, SIGNED & DELIVERED AT MERU THIS 23RD DAY OF FEBRUARY, 2026.

H. M. NYAGA

JUDGE