

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT SIAYA**  
**CRIMINAL APPEAL NO. E059 OF 2023**

**BENTA OPONDO ONYANGO.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC .....**  
**.....RESPONDENT**

***(Being an appeal from the judgment of Hon. Lester Simiyu (SPM) dated 24<sup>th</sup> November 2023 in Siaya Chief Magistrate's Court Criminal Case No. 332 of 2019)***

**JUDGMENT**

1. The appeal herein arises from the judgment of Hon. Lester Simiyu (SPM) dated 24/11/2023 in Siaya Chief Magistrate's Court No. 332 of 2019 wherein she convicted the Appellant for the offence of forcible detainer contrary to Section 91 of the Penal Code and subsequently fined her Kshs20,000/= and in default to serve six (6) months imprisonment.

2. Aggrieved by the said conviction and sentence, the Appellant filed a Memorandum of Appeal dated 8/12/2023 wherein she raised the following grounds of appeal:

- i) The trial magistrate erred in law and fact in convicting the Appellant while the prosecution had not proved its case beyond reasonable doubt.
- ii) The learned trial magistrate erred in law and fact in failing to take into account the contents of the sale agreement produced as against the evidence of the prosecution witnesses.
- iii) The trial magistrate erred in law and fact in failing to take into account the issue of adverse possession.
- iv) The learned trial magistrate erred in law and fact in making findings which were at variance with the evidence on record.
- v) The trial magistrate erred in law and fact by failing to take into account the accused person's unchallenged evidence.
- vi) The trial magistrate erred in law and fact in relying on the prosecution's evidence which was contradictory and lacked credibility.

The Appellant therefore prayed that the appeal be allowed and the Respondent's suit be dismissed and the Appellant's counter claim be allowed.

3. This being the first appellate court, its duty is to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own conclusion as to whether or not to uphold the trial court's decision. The court will have to take into consideration that it neither saw nor heard the witnesses testify and hence to make due allowance for that. See **Okeno Vs. Republic [1972] EA 32.**
4. The Appellant had been charged with an offence of forcible detainer contrary to Section 91 of the Penal Code. The particulars are that on the 26<sup>th</sup> day of March 2019 at Nyaminia Sub Location in Gem Sub County within Siaya County, being in possession of land title number EAST GEM/NYAMINIA/1348 of Rose Achieng Andiende without claim of right held possession of the said land in a manner likely to cause a breach of the peace against Rose Achieng Andiende who was entitled by law to the possession of the said land.
5. The Appellant denied the charge thereby warranting a trial which was as follows:
6. **Rose Achieng Andiende (PW1)** testified that on the material date she went to her parcel of land East Gem/Nyaminia/1348 to plough only to find that the Appellant had planted beans thereon. That she had bought the land from one Thomas. That the accused had been using the land for three years. That she had conducted a search before

purchasing the parcel of land vide sale agreement dated 11/8/2019 and that a title deed was issued in her favour. That while on the land, some young men came while armed with pangas being led by the Appellant, they prevented her from using the land. That she sought the help of the chief to no avail and which prompted her to go to the police. That as soon as the seller left the land, the Appellant moved onto the land and started using it.

On cross examination, she stated inter alia; that the Appellant blocked her from ploughing the land as she claimed it belonged to her; that she first secured the title deed before visiting the land; that she knew nothing between the Appellant and Thomas; that she bought the whole parcel of land; that she did not know the home of the Appellant; that the surveyor did not visit the land; that she found that somebody had ploughed the land when she got to the land; that the Appellant had on another occasion chased her while she (Appellant) was armed with a panga.

On re-examination, she stated that the seller took her round the parcel before she conducted the search.

7. **Margaret Awiti (PW2)** testified that she accompanied the complainant on the material date to check on the land and found that maize and beans had been planted thereon. That the Appellant was on the land as she lived there and farmed it.

On cross examination, she stated that there was nobody working on the land when they arrived on 26/3/2019. That the Appellant's home is on the same land and that it is an old structure. That Thomas who sold the land to Complainant is a biological son to the Appellant.

8. **Thomas Ochogo Nyanga (PW3)** testified that he sold parcel 1348 on 11/11/2014 to the Complainant as he then had a title deed. That a sale agreement was entered into. That he had bought the same land from one Sando Morris Obonyo. That the size of the land is 0.3 Ha but it was bigger before he did the subdivision. That due to fee problems, he sold the whole land in 2014 to the Complainant. That there was nobody on the land when he sold it. That three years later, the Complainant attempted to use the land but was prevented by his brother and step-mother who held pangas and refused the Complainant from using the land. That the family land is 184 which is 3 km away. That the Area Chief deliberated on the matter and that his step mother was told to go away and settle on parcel 184 but she refused forcing the Complainant to report to the police.

On cross examination, he stated inter alia; that the Appellant is his step mother and not biological mother; that he bought the land in 1994; that his father forcefully built a house for Appellant on the land while he was in hospital for six years; that he reported to the chief; that he did not sue his father ; that it is not true that his father bought the land

and registered it in trust for other children; that he has letters from the chief showing how his father agreed to move away; that the Complainant was aware of the Appellant's houses on the land; that the sale agreement talks of a portion of the said land; that the agreement reads a portion measuring 0.30 Ha; that the land sold was 0.3 Ha; that when he sold the land the houses of William Odongo and George Omollo were on the parcel of land; that the two later quit and are on parcel 184; that William and George are sons of the Appellant; that he is involved in a Civil case at Kisumu seeking to evict his step brothers; that he has a judgment already.

On cross examination, he stated that he sued his father in 1996 and who agreed to move out. That in 2006 he sued the Appellant's sons. That the family land is on parcel 184 where the Appellant should move to.

9. **No. 112593 PC Wekesa Wokuve (PW4)** testified that on 26/3/2019 the Complainant lodged a report to the effect that she had gone to her farm in Nyaboga and found it had been cultivated by the Appellant who together with her sons obstructed her. That the scene was visited and the Appellant arrested. That the land is registered as East Gem/Nyaminia/1348 in the name of the Complainant. That he produced the sale agreement, title deed, green card and transfer form as exhibits and which indicated that the Complainant had bought the land from one Thomas.

On cross examination, he stated that he took over the case from an officer who retired. That there was no survey report. That he did not know if there was a home on the alleged land. That he did not find out the relationship between Thomas Ochogo and Appellant. That the Appellant claimed that the land belonged to her son but he did not know who the alleged son was.

10. The trial court later ruled that the Appellant had a case to answer. She opted to tender a sworn testimony and call two witnesses.

11. **Benta Opondo Onyango (DW1)** stated that parcel 1348 was given to her by one Edward Sunday in 1994 and that she built her house thereon as well as her children. That she buried her husband on the land in 2022 and that her sons were also buried on the land. That she was arrested despite the fact that the land was hers. That Thomas Ochogo Onyango is her fifth born son. That when her husband died she took him as the eldest but he changed registration. That the Complainant has never used the land.

12. **Modesai Mwangi Nadu (DW2)** testified that the Appellant's husband used to work for him as a guard from 1968 -1996. That the parcel East Gem/Nyaminia/1348 was bought by the Appellant's husband as he had loaned him Kshs100,000/=. That the Appellant's husband erected a house on the land in 1994 as he visited him and his children.

That Thomas Ochogo was then an adult when the Appellant's husband bought the land. That there were five houses for the parents and that the family have been in occupation of the land to date.

13. The defence closed its case at that juncture.

14. The appeal was canvassed by way of written submissions. Both parties duly complied. The Appellant's submissions are dated 4/8/2025 while those of the Respondent are dated 12/2/2026.

15. The Appellant submitted that the Appellant lived on the suit land for many years, a fact well known by the complainant and her witnesses. That the land had been purchased by the Appellant's late husband way back in 1994 as confirmed by the Appellant's witness (DW2). That the Appellant's occupation of the land was without interruption since 1994 and the complainant purportedly bought the land while the Appellant was in actual possession. That the Appellant's claim to the land rested on the doctrine of adverse possession which is an overriding interest protected by the provision of section 25(1) (b) and 28(h) of the Land Registration Act No. 3 of 2012. It was further submitted that the complainant could not attempt to recover land after a period of twelve years since the Appellant who had been on the land for over 25 years was entitled not to be disturbed by the complainant whose rights had already been

extinguished. It was therefore submitted that the possession of the land by the Appellant was with colour of right. It was finally submitted that the Appellant had acquired prescriptive rights to the land and hence the conviction of the Appellant was entirely erroneous and ought to be quashed and the sentence set aside.

16. The Respondent submitted that the Appellant had been charged under section 91 of the Penal Code which defines forcible detainer as unlawfully detaining land in a manner likely to cause a breach of peace against a person entitled to its possession. It was submitted that the testimony of witnesses established that the complainant was entitled to a peaceable and actual possession of the land when the Appellant, without colour of right, retained possession and that the Appellant's conduct was likely to cause a breach of peace where she carried pangas refusing to grant the complainant a chance to use the land.
17. It was submitted that the Respondent proved its case beyond the requisite standard of proof and that reliance was placed in the case of ***Sawe v Republic [2003] eKLR***, the Court held that proof beyond reasonable doubt does not require elimination of every remote doubt but evidence must irresistibly point to guilt and thus the same has been demonstrated in our case and prosecution evidence in this case was consistent, corroborative, and met the threshold.

18. It was submitted that the doctrine of adverse possession is not a defence in criminal proceedings and that the trial court correctly rejected it. That adverse possession is governed by the Limitations of Actions Act, Cap 22, and must be determined in the Environment and Land Court, not a criminal court. That a criminal court does not determine land ownership or title disputes as was held in **Republic v Karisa Chengo & 2 Others [2017] eKLR** and therefore, the Appellant cannot rely on a civil doctrine to sanitize unlawful occupation.

19. As regards the alleged unchallenged defence as claimed by the Appellant, the Respondent submits that the burden of proof does not shift, but when an accused alleges colour of right, he must demonstrate it which case she did not. That the Appellant merely alleged that she buried her husband and children in the said land but produced no documentary evidence, no witnesses, even the area chief and clan elders were called neither did she produce sale of land agreement proving to have been bought by her deceased husband. Further, that the evidence was overwhelming and met the standard of proof. That adverse possession is irrelevant in criminal trials, no material inconsistencies existed and therefore the defence was rightly rejected and that the appeal is frivolous and lacks merit same should be dismissed.

20. I have given due consideration to the record of appeal and the rival submissions. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond reasonable doubt.

21. As this was a criminal case, the burden of proof squarely lay on the shoulders of the Respondent to discharge and which was beyond reasonable doubt. See **Woolmington Vs Dpp [1935] AC 462**. Also in **Miller Vs Minister of Pensions [1947] 2 ALL ER 372** it was held:

**“The degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to prevent the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favor which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”**

22. It is noted that the charge levelled against the Appellant was forcible detainer under section 91 of the Penal Code which provides as follows:

**“Any person who, being in actual possession of land without color of right, holds possession of it in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of peace**

**against a person entitled by law to the possession of the land is guilty of the misdemeanor termed forcible detainer.”**

23. From the foregoing provision, the essential ingredients that the Respondent was under obligation to prove include inter alia; that a person has actual possession of land; that the person has no right over the land in question; that the act of possession is against the interests of the legal owner or the person legally entitled to the land; that the act of possession of the land is likely to cause a breach of the peace or a reasonable apprehension of the breach of the peace.

24. A perusal of the lower court proceedings revealed that the complainant had already obtained a title deed to the property namely East Gem/Nyaminia/1348 having duly purchased from Thomas Ochogo Nyanga (PW2) and who had bought it from one Sande Moris Obonyo and had already secured a title deed before selling it to the complainant. It transpired from the evidence that the Appellant had created a lot of animosity as she had held onto the land by use of force to the extent that it became impossible for the complainant to access the land. Even though the Appellant brought her witness (DW2) to support her claim that her late husband had bought land from the said Sande Moris Obonyo, there was no proof presented before the trial court such as sale agreements or even a title deed. The

Appellant's feeble claim that she had buried her husband and sons on the said land did not cast any doubt upon the Respondent's evidence showing that the complainant had title to the land. . I find that the testimony of witnesses established that the complainant was entitled to a peaceable and actual possession of the land when the Appellant, without colour of right, retained possession and that the Appellant's conduct was likely to cause a breach of peace where she and her family carried pangas refusing to grant the complainant a chance to use the land.

25. It is noted that the Appellant has sought refuge in the doctrine of adverse possession on the ground that she had been in possession of the land for a long period. It is also noted that the Appellant did not present any evidence to the effect that she had moved the relevant court to seek to be declared the owner thereof against the registered owner. I find that the same is not a defence in criminal proceedings and thus the trial court correctly rejected it. Indeed, adverse possession is governed by the Limitations of Actions Act, Cap 22, and which must be determined in the Environment and Land Court, not a criminal court. It is trite that a criminal court does not determine land ownership or title disputes as was held in *Republic v Karisa Chengo & 2 Others* [2017] eKLR) which set out the clear demarcation for the courts to handle their requisite dockets and therefore, the Appellant cannot rely on a civil doctrine to sanitize an unlawful occupation.

26. As regards the alleged unchallenged defence as claimed by the Appellant, the position of the law is that the burden of proof does not shift, but when an accused alleges colour of right, he must demonstrate it. In the present case, the Appellant failed to present such evidence of ownership of the land which is superior than that of the complainant who had title to the land while the Appellant had none but only latched onto a claim that she had been on the land for a long uninterrupted period. However, the Appellant did not avail evidence to the effect that she had moved the relevant court to be declared the owner by virtue of adverse possession. The Appellant merely alleged that she buried her husband and children in the said land but produced no documentary evidence, no witnesses, even the area chief and clan elders were called neither did she produce any sale of land agreement proving to have been bought by her deceased husband. I am satisfied that the evidence of the Respondent was overwhelming and met the standard of proof. The claim of adverse possession is irrelevant in criminal trials. I find that there were no material inconsistencies in the Respondent's case and that the evidence was quite overwhelming against the Appellant. The Appellant's defence was rightly rejected by the trial court. It is instructive that the Appellant could not just sit on the land and solely rely on adverse possession without making the requisite move by approaching the relevant court to be declared as owner. At the time of the commission of the offence, the Appellant did not have any tangible evidence

sufficient to controvert the Respondent's watertight evidence. The Appellant literally sat on her laurels and expected not to be challenged by virtue of her long occupation of the land in question without approaching the relevant court to regularize her occupation.

27. As regards the sentence, it is noted that the offence was one of a misdemeanor. Under section 36 of the Penal Code, misdemeanours are punishable with a sentence not exceeding two years' imprisonment or with a fine or with both such fine and imprisonment. Indeed, the trial court had the discretion to impose the appropriate sentence upon receipt of mitigation from the offender. The trial court duly considered the same and imposed a fine of Kshs 20, 000/ and in default to serve a sentence of six months imprisonment. I find the said sentence was neither excessive nor harsh. I see no reason to interfere with the same.

28. In view of the foregoing observations, it is my finding that the Appellant's appeal is devoid of any merit. The same is dismissed.

**Dated and delivered at Siaya this 16<sup>th</sup> day of April 2026.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

**Benta Opondo Onyango.....Appellant.**

**Kowino.....for Appellant.**

**M/s Kauma .....for Respondent.**

**Maurine.....Court Assistant.**

SIAYA HCCRA NO. E059 OF 2023 - JUDGMENT