Njoka & another v Director of Public Prosecutions (Criminal Appeal 35 of 2022) [2025] KECA 1358 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KECA 1358 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 35 OF 2022

PO KIAGE, J MOHAMMED & WK KORIR, JJA

JULY 25, 2025

BETWEEN

CHARLES THIRU NJOKA ..... 1ST APPELLANT

FLORENCE MWAMUNGA ..... 2ND APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ngenye-Macharia, J.) dated 31st July, 2018 in CR.A Nos. 216 & 217 of 2015)

JUDGMENT

1. By this appeal the appellants seek to reverse the decision of the High Court at Nairobi (Ngenye-Macharia, J., as she then was) which affirmed the decision of the Magistrate's Court that had found them guilty of the offence of forcible detainer contrary to section 91 of the *Penal Code*. The particulars of that offence were that the appellants;

> On the 9th day of October 2010 at P.C.E.A Church in Kayole within Nairobi County, jointly with others not before court being in possession of plot No. A3-178 of Micro Forms Limited without colour of right, held possession of the said land in a manner likely to cause a breach of the peace against Micro Forms Limited who were entitled to the possession of the said land."

2. The appellants had also been charged with a second count of stealing contrary to section 275 of the *Penal Code*. The trial court however, found the offence of stealing not proven, instead, pursuant to section 179(1) of the *Criminal Procedure Code* (CPC), the appellants were found guilty of the lesser

offence of neglect to prevent a felony under section 392 of the *Penal Code* and accordingly convicted. The particulars of the offence of stealing as framed were that the appellants;

> On the 9th of October 2010 at P.C.E.A Church Kayole within Nairobi County jointly with others not before court stole 60 tones of ballast and 40 tones of quarry dust all valued at Ksh. 100,000 the property of Micro Forms Limited."

3. The evidence that was led on the charges, which was believed by both the trial magistrate and the learned judge was that, James Onesmus Gitonga Weru (PW1) and his wife were co-directors of a company known as Micro forms Limited. At the beginning of the year 1992, through the company, they purchased a plot in Eastlands area of Nairobi, namely, plot No. A3-178 (the suit land) located in Kayole One. They were subsequently issued with an allotment letter and a beacon certificate in that respect. PW1 and his co-director wanted to build a nursery school on the land but they decided to wait until the area was inhabited before proceeding with the construction. In February 2005, they constructed a site office on the suit land and commenced construction of the nursery school. However, when they ferried some construction material on the site, they were confronted by a group known as Estate Watch, which demanded payments for every lorry of materials ferried to the site. In June 2005, they were informed that the P.C.E.A church had put up signage indicating that they wanted to establish a nursery school at the same site. In October 2005, PW1 learnt that it was the P.C.E.A Church, Kayole Parish (the church) that had put up the signage. He decided to visit the Parish to talk to the Reverend in charge. The Reverend told him that the project belonged to the elders of the church and requested him to return after two weeks when he would have consulted the elders. He went back and met the same reverend and one of the elders, who informed him that his plot was not the same as that of the church. PW1 showed them evidence of having purchased the suit land upon which they asked him to go and return in January 2006. However, PW1 never saw the Reverend again.

4. In August 2006, he wrote a letter to the then City Council of Nairobi calling for the eviction of the church from the plot. Upon making several visits to the City Council Office, in 2008 he was informed that the plot had been allocated to the church. Following his further follow up visits, the City Council later issued an eviction notice to the Church but it refused to leave. Subsequently, PW1 wrote to the Church and held meetings with its officials in a bid to reach an amicable resolution of the dispute but with no success. On 9th October 2010, PW1 ferried construction materials to the suit land but was arrested by Police Officers and taken to Kayole Police Station. When he presented documents showing ownership of the land, he was released. Shortly thereafter, he was informed that the building materials that he had taken to the site, being ballast and quarry dust, costing Kshs.100,000, had been stolen. They had been carried away in a lorry registration number KBH 682R Isuzu. He made a report to the police and recorded a statement. I.P Bairita Bella (PW3) testified that on 9th October 2010, he was in office when he was informed of a commotion on the suit land. He learnt that PW1 was trying to develop the land but he met resistance from members of the P.C.E.A Church. PW3 was assigned to investigate the case and in the course of the investigations, he established that the suit land belonged to PW1. He proceeded to arrest the appellants, who were elders of the Church, and charged them.

5. That, in summary, was the prosecution case as presented against the appellants who were arrested and charged with the two (2) counts as aforementioned. At the close of the prosecution case the trial Magistrate (T. Okelo, SPM) found that the prosecution had established a prima facie case against both appellants and placed them on their defence. The appellants elected to give sworn evidence and called two (2) witnesses.

6. ACP Emmanuel Kenga (DW1), a forensic document examiner was the first to take the stand for the defence. He testified that he was tasked with examining two questioned documents including the

allotment letter dated 14th September 1992 from the City Council, as against other documents bearing known signatures. He was to compare whether the signature in the documents in question was similar to the known signatures. From his analysis, he formed the opinion that the signature of Mr. Wandera as shown on the two documents, could have been manipulated and planted on the documents. The appellants, (DW2) and DW3, while confirming that they were elders of the P.C.E.A Church, Kayole Parish, denied stealing anything or occupying the suit land. They claimed that the land that the Church occupied and on which they had built a nursery school, was a public utility land and did not have a plot number like the suit land.

7. Upon evaluating the evidence that was tendered before him, the learned magistrate found the appellants guilty as charged in both counts. He convicted them accordingly and placed them on probation for one year.

8. Aggrieved by that decision, the appellants lodged a petition of appeal at the High Court in Nairobi where Ngenye-Macharia, J. (as she then was) held as aforestated.

9. Still dissatisfied, the appellants have preferred the instant appeal, based on 9 grounds, which can be summarized that the learned Judge erred by;

    a. Failing to discharge the first appellate court's mandate judiciously.

    b. Failing to accord the appellant's defence the weight it deserved.

    c. Failing to appreciate that the charge of forcible detainer cannot be entertained in criminal courts.

    d. Failing to appreciate that forged documents cannot confer good title.

    e. Convicting the appellants with the lesser offence of failing to prevent a felony whereas the ingredients of the same were not proved.

    f. Failing to appreciate that the prosecution did not prove its case to the required standard.

    g. Flouting Article 62 of *the Constitution*.

10. During the hearing of the appeal, learned counsel Mr. Gichuki appeared for the appellants while the respondent was represented by Mr. O. J. Omondi the learned Senior Assistant Director of Public Prosecutions. Mr. Gichuki had filed written submissions which he briefly highlighted while Mr. O. J. Omondi requested and was allowed to make oral submissions on points of law, citing an inadvertent omission to filing submissions.

11. Submitting on the charge of forcible detainer, Mr. Gichuki contended that the appellants were merely elders of the PCEA Church. They were not in the managing council or even the Board of Trustees of the Presbyterian Foundation, which owns or manages all property under the Church. Counsel argued that, MicroForms Limited, the company through which the complainants allegedly acquired the suit land, was a private company which does not have the capacity to purchase public land. Citing the Environment and Land Court decision in Law Society Of Kenya vs. Kinyua, The Head of Public Service & 5 Others; Migot-adholla & Another (Interested Parties) [2022] KEELC 3962 (KLR), it was submitted that there was no evidence showing that the complainant followed the laid-down procedures for acquiring public land, and thus the impugned judgment violated Article 62(4) of the Constitution, which provides that public land shall not be disposed of except in terms of an Act of Parliament specifying the terms of that disposal. Moreover, there was no evidence that the suit land had a certificate of title. What was produced in court by the complainant was a copy of the allotment letter and a beacon certificate.

12. Mr. Gichuki faulted the learned Judge for failing to discharge the first appellate court's duty of re-evaluating the evidence before the trial court and arriving at her own independent conclusions. He contended that had the learned Judge discharged that duty, she would have found that DW1, a document examiner, whose evidence was uncontroverted, found the copies of the allotment letter and the beacon certificate to be fake. Further, the learned Judge would have noted that the appellants presented evidence in a chronological manner, showing how the church acquired the plot in question. She would have also borne in mind PW2's evidence to the effect that he did not see the appellants loading any materials on motor vehicle registration number KBH 682R.

13. Citing section 91 of the *Penal Code*, which prescribes the offence of forcible detainer, Mr. Gichuki identified one of the elements of the offence as, proof that the accused person was illegally in actual possession of the land in question. He reiterated that the appellants provided in a chronological manner and by way of documents how the church applied to be allocated the land that they occupied, which was public land. Referring us to the letters at pages 48 and 49 of the record, letters by which the church applied to the Nairobi City Council, seeking to develop a Nursery School on the suit land, counsel asserted that the appellants had demonstrated that their possession of the suit land was not illegal. Relying on the High Court decision in Ivory Chris Musovya vs. Republic [2014] KEHC 1082 (KLR), it was argued that the dispute on ownership of the suit land should have been satisfactorily determined in civil proceedings. In that decision, the court held that where a claim is made which is not supported by a certificate of title, such a claim rightly belongs to the civil court which in turn ought to determine the rightful owner of the land.

14. Counsel contended that even if the suit land had a certificate of title, such title would not be tantamount to sufficient proof of ownership of land.

15. Next, Mr. Gichuki urged that the prosecution failed to prove its case to the required standard. He submitted that the appellants not only tendered evidence showing that they were in actual possession of the land, but they also proved in their respective sworn statements that the church had legally and procedurally applied for allocation of the suit land through Kayole Residents Association. Counsel contended that the complainant could not give an account of how he acquired the suit land. He asserted that the fact that the civil court had determined that the Presbyterian Foundation owns the suit land, abviates a judicial absurdity where one court held that the complainant owns the land yet another held that the Presbyterian Foundation owns the said land.

16. On the appellants being convicted of the lesser offence of failing to prevent the commission of a felony, under section 392 of the *Penal Code*, instead of the offence of stealing, counsel faulted the learned Judge for failing to appreciate that the appellants did not have any illicit plan or prior knowledge of a plan to commit some crime on the suit land, but were merely on the land to prevent it from being grabbed. Mr. Gichuki cited John Irungu vs. Republic [2020] eKLR and Joseph Muriithi Nyaga & 2 Others Vs. Republic [2013] eKLR for the argument that in order to sustain a conviction under section 392 of the *Penal Code*, the prosecution must show that the accused person knew that the felony was going to occur, or witnessed it in progress.

17. Counsel referred us to page 32 of the record where the appellants explained how they acquired the land. He also drew our attention to a judgment in the supplementary record of appeal being Chief Magistrates Court at Milimani, Civil Suit No. 6390 of 2010, where the court determined that the land in issue belongs to the Presbyterian Foundation. We pointed out to counsel that the learned Judge could not be faulted for making findings contrary to a judgment that was delivered long after her decision. Moreover, there was no proof that the appellants had sought leave to adduce further evidence, considering that the said judgment from the Chief Magistrates Court was not before the trial court and

neither was it before the first appellate court. In conclusion, counsel urged us to set aside the impugned judgment and the sentence imposed.

18. In a brief response in opposition to the appeal, Mr. O. J. Omondi submitted that since there are concurrent findings by the trial court and the first appellate court, the Court should not interfere with those concurrent findings unless it is shown that they are not based on any evidence or that wrong principles were considered in arriving at the concurrent findings. He asserted that the first appellate court discharged its duty. It evaluated the evidence in totality and made its own independent findings. Counsel contended that during trial, the evidence which was available was that the appellants were trespassers and were occupying the subject property without any color of right. He urged that the learned Judge rightfully substituted the charge of stealing with that of failing to prevent a felony, and accordingly convicted the appellants of that offence. Mr. O. J. Omondi argued that there was evidence that the appellants were on the disputed land and they prevented the complainant from depositing building material on the land. He contended that the appellants did nothing reasonable to prevent the theft of the material from the suit land. They just watched as the property was ferried away. In the end counsel urged us to uphold the conviction and dismiss the appeal in its entirety.

19. In a brief reply to submissions made by the respondent's counsel, in respect to the substituted offence of failure to prevent the commission of a felony, Mr. Gichuki insisted that there was no way the appellants, who were just elders of the church, could have prevented the loading of the building materials in a lorry that belonged to PW2.

20. We sought Mr. O. J. Omondi's opinion on the argument by the appellants that, absent a certificate of title, the charges against them could not properly have been established. Counsel's reply was that the learned Judge considered that issue and reached a verdict that even a letter of allotment can suffice in proving who had ownership of the land at the time. Counsel, however, added that there seemed to have been a double allotment of the suit land, with one claimed to be a forgery. On the learned Judge's substitution of the offence of stealing, we inquired whether the offence of failure to prevent a felony, was a lesser cognate offence to stealing. Mr. O. J. Omondi conceded that failure to prevent a felony is not a lesser cognate offence of the offence of stealing. Concerning the offence of forcible detainer as defined under section 91 of the *Penal Code*, we probed whether the church had any color of right to possess the suit land, in view of their explanation on how they came to be in occupation of the land. Counsel insisted that the church had no color of right to possess the land. We queried whether the appellants, who were elders of the church, were in actual possession of the land. Mr. O. J. Omondi's view was that being elders of the church, the two were in constructive possession of the suit land. We probed how then it was possible that they were convicted under section 91 of the *Penal Code* when they were not in actual possession. Counsel's curious answer was that it was because they were in occupation of the land and were preventing the complainant from depositing building material on site.

21. We have given due consideration to the memorandum of appeal, the entire record and the rival submissions made before us cognizant that our jurisdiction on a second appeal is restricted to matters of law only. See section 361(1) of the *Criminal Procedure Code*;

> A party to an appeal from a subordinate court may, subject to subsection (8), appeal against decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-
>
> a. on a matter of fact, and severity of sentence is a matter of fact; or

b. against sentence except where a sentence has been enhanced by the High Court, unless subordinate court had no power under section 7 to pass that sentence."

22. Following the concession by counsel for the respondent on substitution of the offence of stealing with that of failure to prevent the commission of a felony, the central question that remains for our determination is whether from the record, and given the defence mounted by the appellants, the offence of forcible detainer was proved beyond reasonable doubt. The offence as stipulated under section 91 of the *Penal Code* states;

> 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."

23. The appellants contend that the charge of forcible detainer was not proven by the prosecution beyond reasonable doubt for the reason that they tendered evidence showing that they were in actual possession of the suit land, and they had legally and procedurally applied for allocation of the land. Further, the appellants argue that a charge of forcible detainer cannot lie where there is no certificate of title as in the instant case where, DW1, the document examiner, opined the allotment letter and the beacon certificate that the complainant relied on, to be a forgery. Counsel for the respondent, however, countered the appellants' submissions by maintaining that the church had no color of right to possess the land. He affirmed the learned Judge's finding that a letter of allotment can suffice in proving who has ownership of the land. Counsel, to his credit, was quick to add that there seemed to have been a double allotment of the suit land, with one claimed to be a forgery.

24. A perusal of the record shows that DW2 explained the procedure that they followed in acquiring the land and the documentation that they obtained as follows;

> We are still on the plot, we are building a nursery school. There is also a church in the place. We have been there since 2005 to date. We have a problem with the complainant. We followed due process to acquire the land. We made an application to Nairobi City Council for a plot that we had identified and which has commenced to a primary school – D exhibit 3. This is the entire map for the area. It did not have a number and was not number A3-178. The one I am showing is marked as a public utility-marked as a nursery school. All the other private lands have plot numbers. The public land does not have numbers. This is the map – D exhibit 4. The area residence association supported us. That we be allocated the plot. They are Kayole residents association. They wrote a letter to the director housing department on 8/12/05 – D exhibit 5. City Council has made a part development plan in our favour to put up a nursery school for the plots. This is the one – D exhibit 6. They then put a public notice for 60 days asking anybody to lodge any issues if they were opposed to that. It was a regularisation site plot to be developed by the P.C.E.A. The notice was in Daily Nation and Taifa Leo and Kenya Gazette. This is the notice – D exhibit 7(a). Daily Nation advert D-exhibit 7(b), Taifa Leo – D exhibit 7(c). Kenya Gazette issue no. 7283 for 6 of 1996."

25. We also note the uncontroverted evidence of DW1, the document examiner, that the signature of one Mrs. Wandera, who was the signatory of the allotment letter and the beacon certificate which the complainant relied on to demonstrate his ownership of the suit land, may have been manipulated and planted on the documents. Having meticulously perused the record, our considered view is that ownership of the suit land stood disputed as at the time of the trial and the appeal at the High Court.

Moreover, it is evident that the appellants were in occupation of the land. We are accordingly not convinced by the assertion that, the appellants had no colour of right to the suit land. In coming to that conclusion, we are persuaded by the reasoning of the High Court in David K. Sitienei & Another vs. Republic [2017] KEHC 1997 (KLR);

> 12. In the circumstance, I find that the ownership of these parcels of land are in dispute. I further find that the 2 appellants have been in occupation of the parcels of land in dispute for a number of years. They have done farming on it. They have livestock on it and also planted trees on it. It therefore follows that they cannot be said that they have no colour of right in respect of the disputed parcels of land. I find there is merit in ground 1, which I hereby uphold."

26. Similarly, in Richard Kiptalam Biengo vs. Republic [2015] KEHC 5099 (KLR), the court held;

> When this appeal came up for hearing, counsel for the state Ms Keya conceded the appeal and submitted that the offence under section 91 of the *Penal Code* had not been proved beyond reasonable doubt; according to the learned counsel for the state, ownership of the land in question had not been proved and although the conviction of the appellant appears to have been based on fraud, it was not established that the appellant was fraudulent in acquisition of the title to the land in question. As the main issue appears to have been about a dispute over ownership of land, counsel submitted that the proper forum for resolution of this dispute was in the civil court.
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> Considering the evidence proffered at the trial I would agree with the learned counsel for the state that the main ingredient in the offence of forcible detainer contrary to section 91 of the *Penal Code*, which is legal ownership of the land, was not proved beyond reasonable doubt."

27. The totality of our consideration of this matter is that, we do not think that, from the record, the prosecution met the threshold of proving beyond reasonable doubt the charge of forcible detainer, as against the appellants. The conviction of the appellants on that charge was therefore not safe.

28. In the result, we quash the appellants' conviction, set aside the sentence, although it was already served, thereby clearing the good names of these church elders.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL JAMILA MOHAMMED

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR