



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kirubai v Republic (Criminal Appeal E018 of 2023)  
[2025] KEHC 8974 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 8974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E018 OF 2023  
AN ONGERI, J  
FEBRUARY 28, 2025**

**BETWEEN**

**PHILOMENA WAWUDA KIRUBAI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an appeal from the conviction and sentence of Hon. C. K. Kithinji (PM)  
in Voi Criminal Case No. E1447 of 2021 delivered on 17th January 2023))*

**JUDGMENT**

1. The Appellant was charged with the offence of forcible detainer contrary to Section 91 of the [Penal Code](#). The trial court found the Appellant guilty as charged and sentenced her to serve a probation sentence of two (2) years.
2. The particulars of the charge were that on 14<sup>th</sup> March 2020 at MaBomani, Mwangea Sub-Location in Voi Sub-County, the Appellant being in possession of the land title deed Taita Taveta/Voi Bomani Phase I/829 (hereby referred to as the suit property) belonging to Josephine Mwasaru without colour of right held possession of the said land in a manner likely to cause a breach of the peace against Josephine Mwasaru who was entitled by law to the possession of the said land.
3. The prosecution evidence summary is that the complainant was allocated the suit property pursuant to an application she made to the Ministry of Land.
4. The complainant received a letter of offer dated 8<sup>th</sup> January 2013 under reference AS/6/81(80) valid for 90 days otherwise the offer would be cancelled.
5. She made the required payments through her father on 18<sup>th</sup> March 2013 and was issued with a receipt.



6. The title deed were issued by the President in 2014 and the same was collected by the complainant's father. It is dated 8<sup>th</sup> March 2013 in the name of the complainant.
7. The complainant's father was shown the boundaries of the suit property.
8. The Appellant said in her defence that she bought the suit property from one Scholastica Make in 200 and the transaction was before the chief at Mabomani.
9. The suit property had a three bedroomed house and a road passing through the land and she got adjacent lands in 2007.
10. In 2011 the Appellant build her house and in 2019 the complainant's father went there with Ministry of Lands people and demarcated the parcels. She was told to follow up with lands office to establish where her plot was. She followed up but did not get direction and she was charged in court.
11. The trial court found the Appellant guilty as charged and convicted her and sentenced her to a Probation Sentence.
12. The Appellant has appealed to this court against conviction and sentence.
13. The parties filed written submissions as follows:- the appellant did not file any submissions.
14. The prosecution submitted that the appellant admitted that she was physically on the land since 2007. The respondent produced a title deed for the subject property which shows the Josephine Gakuru Mwasaru is the legal owner. Under Section 26 of the [Land Registration Act](#) provides that a certificate of title issued by Registrar shall be taken by all courts to be conclusive evidence of proprietorship. Nonetheless, the section provides that the title of that proprietor is subject to challenge under the following circumstances (which have not been demonstrated by the Appellant): -
  - (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
15. The respondent submitted that the Appellant availed a land agreement in proof of ownership over land registration number Taita Taveta Bomani phase 1/829. This agreement did not indicate the land number nor the measurements thereof. Also, the witnesses in the agreement were never called as witnesses for the Appellant before the trial court. Neither was the seller of the said plot called in court to testify. Further, DW2 and DW3 did not witness any sale agreement concerning the subject property.
16. The respondent argued that that the appellant was in actual possession of the suit property and this was confirmed by PW1, PW2, PW3 and PW4. The appellant had no right over the land and this was confirmed by PW1, 2, 3,4 and 5. The appellants possession of the subject land was against the interest of the complainant. As demonstrated that complainant followed due process of the law to acquire the land. The complainant demonstrated that she is the registered land owner whose title is absolute and indefeasible as per section 26 of the [Land Registration Act](#).
17. The respondent submitted that the act of possessions of the land likely caused a breach of peace or a reasonable apprehension of the breach of peace. PW1 and PW2 demonstrated that parties herein tried to solve the issue amicably but the appellant became rude towards them. The appellant further has a semi-permanent structure on the suit property which is against the wish of the complainant.
18. On sentencing the respondent submitted that the sentence that was imposed on the appellant was reasonable seeing as she was given a probation sentence. A look at the proceedings before the trial court



- indicates that the trial court considered a presentence report availed, the mitigating circumstances and the seriousness of the offence and the need for deterrence.
19. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced during the hearing at the trial court and to arrive at its own conclusion whether to support the findings of the trial court. The Court of Appeal in *Okeno vs Republic* [1972] EA 32 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 (*Pandya vs Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 570). 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 court’s finding and conclusion; 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, see *Peters vs Sunday Post* [1958] EA 424.”
20. The issues for determination in this appeal are as follows:-
- i. Whether the prosecution proved its case to the required standard.
  - ii. Whether the appeal should be allowed.
21. On the issue of standard of prove, this being a criminal case, the standard of prove is beyond reasonable doubt.
22. The trial court considered all the elements of forcible detainer. In *Julius Edapal Ekai v Republic* [2018] eKLR, High Court Criminal Appeal No. 31 of 2017, Riechi J., stated as follows;
- “A literal reading of Section 91 of the penal code shows that the prosecution will only prove an offence of forcible 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.”
23. There is evidence that the Appellant was on the suit property prior to the demarcation.
24. I find that this is a civil suit which should be determined in the ELC Court where if there is a pending dispute.
25. The Appellant’s evidence that she purchased the suit properties from one Scholastica Mkale ought not to have been ignored.
26. I find that the prosecution did not prove the guilt to the required standard in criminal cases.
27. I find that the conviction herein is not secure and I quash it and set it aside the sentence.



28. Let the parties ventilate their claim in a civil suit where the issue of ownership of the suit property ought to be established.

**DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOI.**

**ASENATH ONGERI**

**JUDGE**

