



REPUBLIC OF KENYA



**Barisa v Republic (Criminal Appeal E021 of 2024)  
[2025] KEHC 5271 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 5271 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E021 OF 2024  
AN ONGERI, J  
MARCH 26, 2025**

**BETWEEN**

**RAPHAEL KIMBIO BARISA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence by Hon. C. K. Kithinji (PM)  
in Voi Criminal Case No. E128 of 2022 delivered on 22nd February 2024)*

**JUDGMENT**

1. The Appellant was found guilty with the offence of forcible detainer contrary to Section 91 of the [Penal Code](#) and he was fined Kshs. 50,000/= in default to serve eight (8) months imprisonment.
2. The particulars of the charge were that the Appellant on diverse dates between February 2019 and February 2022 at Kirumbi area of Kishamba B in Voi Sub County within Taita Taveta County was found in possession of two acres of land without colour of right and he held the said possession of the said land in a manner likely to cause a breach of the peace against Martha Chuma who is entitled to the possession of the said land.
3. The Appellant pleaded not guilty to the charge and the prosecution called five (5) witnesses in support of their case.
4. The prosecution evidence in summary was that the husband of the complainant died in 2015 and subsequently being a member of Kishamba B Group Ranch she was allocated land which the Appellant took over.
5. The complainant approached the Appellant to be given other land. She cleared the remaining portion of land but there was violence again and the appellant took over the land again. She made a report to the police and the matter was brought to court.



6. The Appellant in his defence said in 2015 together with Brian Kinoi and Stephen Mwanjala he had taken up the area within Kishamba B Group Ranch.
7. He gave Calvin Mwakaba work to clear his portion. Calvin engaged two casuals and they cleared the land and planted indigenous tree poles.
8. In the year 2019, his wife informed him that the complainant wanted to see him. They met and she said she wanted land. He referred her to Trevos Mwachoo to assist her.
9. In 2020, the Appellant said he established that Stephen Mwanjala his neighbor had given her a portion of land and she became his neighbour.
10. In July 2020, one Zacharia Kidunge a fundi employed by the complainant called inquiring of the arrangement as the complainant had instructed him to put up a building on his land and he denied.
11. On 17<sup>th</sup> August 2020 he got a letter from the DCI summoning him for interrogations and he was arrested on 25<sup>th</sup> February 2022 and charged.
12. The trial court found that the Appellant was guilty as charged and he was fined Kshs. 50,000/= in default to serve eight (8) months imprisonment.
13. The Appellant has appealed to this court on the following grounds:-
  - i. The conviction is completely unjustifiable in light of the fact that there is absolutely no evidence of commission of the offence.
  - ii. In particular there was no proof of existence of ownership of or entitlement to any land by the complainant.
  - iii. The court erred in relying on hearsay and other inadmissible evidence.
  - iv. The court erred in failing to recognize that the case and all the witnesses were in conspiracy to dispose the Appellant of his lawful property by the use of courts.
  - v. That the Honorable Court failed to acknowledge that there were serious inconsistencies in the prosecution's case and evidence.
  - vi. In particular the court ignored the express admission by the complainant that she had no land at all and was being assisted to acquire some by the other witnesses and that the prosecution was a culmination of or part of that process of acquiring land.
  - vii. The court failed to apply the law applicable in the circumstances.
  - viii. The Appellant shall also argue that the court ignored all the relevant provisions of the Kishamba B Group Ranch Constitution which were placed before it which confirmed the Appellant's rights in the circumstances.
  - ix. The trial court misdirected itself in shifting of the burden of proof to accused and requiring the Appellant to demonstrate his ownership of land.
  - x. That charges were not proved to the required standard.
  - xi. And the Appellant shall argue that the court severely misdirected itself in the case in whole.
  - xii. And the Appellant shall argue that the conviction was not warranted in all circumstances of the case.



14. The parties filed written submissions as follows:-
15. The appellant was convicted and fined KShs 50,000 or 8 months imprisonment by the Trial court. The appellant's submissions can be summarized as follows:
16. That the charges against him were part of a conspiracy between the complainant and her witnesses to take over his property.
17. That the complainant and her witnesses allegedly created false narrative about a land dispute, which the Trial court failed to properly evaluate.
18. That the complainant admitted in her testimony that neither she nor her late husband ever owned any land, undermining her claim to the disputed property.
19. That the prosecution's evidence was hearsay, and her key witnesses, such as Zakaria Kandonga Mwandoe (who allegedly received materials and built a house for the complainant), were not called to testify.
20. The Trial court ignored the appellant's defense, including his reliance on *the Constitution* of Kishamba B Group Ranch and Section 8 of the *Penal Code*, which provides a defense for acts done under a bona fide claim of right.
21. The appellant argued that the prosecution failed to prove the essential elements of the offence of Forcible Detainer, as outlined in the case of Julius Edapal Ekai v Republic [2018] eKLR as follows;
  - i. Actual possession of land by the appellant. That no evidence was provided to show that the appellant was in possession of the complainant's land. The complainant's testimony was based on hearsay, and no witnesses testified to seeing the appellant on the land.
  - ii. Appellant's lack of right over the land. That the appellant claimed he has a lawful right to occupy unoccupied land within his village under the Kishamba B Group Ranch Constitution. The prosecution failed to prove that the appellant had no right to the land.
  - iii. Possession against the interests of the legal owner. The prosecution failed to prove the complainant's legal ownership or entitlement to the land. The complainant admitted she had no land, and there was no documentation or evidence to support her claim.
  - iv. Likelihood of causing a breach of the peace. The appellant argued that there was no evidence of any threat or hostility between him and the complainant. The complainant herself admitted that the appellant had never threatened her.
22. The appellant submitted that the Trial court ignored his defense and relied on hearsay evidence.
23. That the court refused to allow a material witness (Zakaria Kandonga Mwandoe) to testify, which could have clarified the location of the alleged land and whether the appellant had interfered with it.
24. Further, that the court failed to consider *the Constitution* of Kishamba B Group Ranch, which grants the appellant the right to occupy unoccupied land within his village.
25. That the court ignored the defense under Section 8 of the *Penal Code*, which provides immunity for acts done under a bona fide claim of right.
26. The appellant alleged that the area chief, Michael Mwapea, played a significant role in orchestrating the case against him, including soliciting false information to secure an unfavorable pre-sentencing report.



27. The appellant further claimed that the complainant and her witnesses had a personal vendetta against him, and the case was motivated by a desire to force him to abandon his land.
28. The respondent submitted that the appellant was charged with forcibly detaining a piece of land in Kirumbi area, Voi, without legal right, which caused a breach of peace against the complainant, Martha Chuma.
29. That the trial court found the appellant guilty and sentenced him to a fine of Ksh. 50,000 or 8 months imprisonment.
30. That the appellant appealed, arguing that the court failed to apply the law correctly.
31. The prosecution had to prove three elements under Section 91 of the *Penal Code* as follows;
  - i. That the appellant was in actual possession of the land.
  - ii. That he had no legal right to the land.
  - iii. That his possession was likely to cause a breach of peace against the person entitled to the land.
32. The complainant testified that she was allocated the land by the Kishamba 'B' Group Ranch officials after her husband's death. She cleared the land in 2017 but was later informed in 2019 that the appellant had encroached on it.
33. That the appellant's possession was deemed illegal, and the complainant was unable to access the land from 2020 onwards due to threats and intimidation by the appellant.
34. That the complainant testified that the appellant's actions caused her fear and prevented her from accessing or developing the land.
35. That a letter from the group ranch officials was presented as evidence, stating that the appellant's occupation was illegal and urging him to vacate to maintain peace.
36. The respondent prays that the appeal be dismissed, as the sentence was appropriate and the conviction was safe.
37. The respondent contends that the appellant was rightly convicted for forcibly detaining land without legal right, causing a breach of peace against the rightful owner. That the prosecution proved its case beyond reasonable doubt, and the trial court's decision should be upheld.
38. This being a first appeal, the duty of the first appellate court is as stated in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 where the Court of Appeal held that:

“The first appellate court has a duty to re-evaluate the evidence presented before the trial court and arrive at its own independent conclusion. The appellate court must subject the entire evidence to a fresh scrutiny and draw its own inferences. While the appellate court should consider the trial court's findings, it is not bound by them and must form its own independent judgment”.
39. The issues for determination in this case are as follows:-
  - (i) Whether the prosecution proved the guilt of the Appellant to the required standard.
  - (ii) Whether the appeal should be allowed.



40. Having carefully considered the submissions of both the Appellant and the Respondent, as well as the evidence presented before the trial court, this court is tasked with re-evaluating the evidence and making an independent determination as required by the principles set out in *Selle v Associated Motor Boat Co.* [1968] EA 123.
41. On the issue as to whether the Prosecution Proved the Guilt of the Appellant, the offence of forcible detainer under Section 91 of the *Penal Code* requires the prosecution to prove the following elements beyond reasonable doubt:
  - i. Actual possession of the land by the Appellant. The prosecution must demonstrate that the Appellant was in actual possession of the land in question.
  - ii. Lack of legal right to the land. The prosecution must prove that the Appellant had no lawful right to occupy the land.
  - iii. Likelihood of causing a breach of the peace. The prosecution must show that the Appellant's possession of the land was likely to cause a breach of the peace against the person entitled to the land.
42. On actual Possession of the Land, the complainant, Martha Chuma, testified that she was allocated the land by the Kishamba B Group Ranch officials after her husband's death in 2015. She further stated that she cleared the land in 2017 but was later informed in 2019 that the Appellant had encroached on it. The Appellant, however, denied being in possession of the land and argued that the complainant had no evidence of ownership or entitlement to the land.
43. I find that the prosecution did not provide concrete evidence, such as title deeds or official documents, to prove that the complainant was the rightful owner of the land. The complainant's testimony was largely based on hearsay, and no independent witnesses were called to corroborate her claim that the Appellant was in possession of the land. The absence of such evidence raises doubts about the prosecution's case regarding the Appellant's actual possession of the land.
44. The Appellant argued that he had a lawful right to occupy the land under *the Constitution* of Kishamba B Group Ranch, which allows members to occupy unallocated land within the group ranch. The prosecution failed to disprove this claim. The complainant admitted that neither she nor her late husband had any formal documentation to prove ownership of the land. This admission undermines the prosecution's case, as it failed to establish that the Appellant had no legal right to the land.
45. On the issue of Likelihood of Causing a Breach of the Peace, the complainant testified that the Appellant's actions caused her fear and prevented her from accessing or developing the land. However, the Appellant argued that there was no evidence of any threat or hostility between him and the complainant. The complainant herself admitted that the Appellant had never threatened her. The prosecution did not provide sufficient evidence to prove that the Appellant's possession of the land was likely to cause a breach of the peace.
46. On the issue as to whether the appeal should be allowed, based on the re-evaluation of the evidence, this court finds that the prosecution failed to prove the essential elements of the offence of forcible detainer beyond reasonable doubt.
47. The trial court erred in relying on hearsay evidence and failed to properly consider the Appellant's defense, including his reliance on *the Constitution* of Kishamba B Group Ranch and Section 8 of the *Penal Code*, which provides a defense for acts done under a bona fide claim of right.



48. Furthermore, the trial court shifted the burden of proof to the Appellant by requiring him to demonstrate his ownership of the land, which is contrary to the principle that the burden of proof lies with the prosecution. The prosecution's case was based on insufficient and unreliable evidence, and the trial court's conviction was therefore unsafe.
49. I find that this is a civil case being processed through the criminal system. The respondent ought to have filed a civil suit for the court to determine ownership and use of the suit property. This case does not bar the respondent from filing a civil suit and therefore the respondent is at liberty to pursue her claim in the civil court.
50. In light of the above, this court finds that the appeal has merit. The conviction is accordingly quashed and the sentence imposed by the trial court is hereby set aside.
51. The Appellant is discharged, and any fines paid by the Appellant to be reimbursed.

**DATED, SIGNED AND DELIVERED THIS 26<sup>TH</sup> OF MARCH 2025 IN OPEN COURT VOI HIGH COURT.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Court Assistants: Maina/Millicent

