



**Kariuki v Republic (Criminal Appeal E080 of 2024)
[2025] KEHC 3913 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3913 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E080 OF 2024
RM MWONGO, J
MARCH 26, 2025**

BETWEEN

MACLAUS FUNDI KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the decision of Hon. J. N. Githaiga,
Siakago MCCR E366 of 2024 delivered on 26th September 2024)*

JUDGMENT

Background and Appeal

1. The appellant was charged with the offence of forcible entry contrary to section 90 of the [Penal Code](#). Particulars of the offence are that on 07th April 2024 at Kinyaga village, Mbeere South Subcounty within Embu County, in order to take possession thereof, the appellant entered on land parcel number Mbeere/Kirima/4167 property of one Juliana Njoki Nthiga in a violent manner while armed with a panga and issuing threats.
2. After a hearing in which five (5) prosecution witnesses and the Defence were heard, the appellant was convicted. He was sentenced to pay a fine of Kshs.60,000/- or a one (1) year sentence of imprisonment in default.
3. Dissatisfied, the appellant filed this Petition of appeal dated 11th October 2024 through which he seeks orders that the judgment, conviction and sentence against him be set aside and the appellant be acquitted. The appeal is premised on the following grounds:
 1. That the learned Resident Magistrate erred in law and fact in convicting the Appellant on allegations that were not proved beyond reasonable doubt;



2. The learned Resident Magistrate erred in law and fact in failing to consider that the prosecution evidence was full of contradictions;
3. The learned Resident Magistrate erred in law and fact in basing her judgement on speculation;
4. The learned Resident magistrate erred in law and fact in denying the Accused person the opportunity to call his witness who was available during defence hearing; and
5. That the sentence thereof was also excessive in the circumstances.

The Proceedings in the trial court

4. The complainant testified as PW1. She said she was in church when she received a call from a neighbor, Mama Purity, asking her what the noise she was hearing was about. She told her neighbor that she was not at the property but she would find out. She established that the noise was coming from her property Mbeere/Kirima/4167. While leaving church, she met the appellant leaving her land and he had cut down some indigenous trees on her land.
5. The appellant, who was carrying a panga, told her that he knows what he had done is wrong but he will do it again and that his neighbor, one Bernard Mwaniki, had angered him. She reported the matter at the police station where she recorded her statement and the crime scene was processed. She produced the title deed for the property as evidence. The property is next to the appellant's home and there is no fence separating their properties.
6. PW2 was Joseph Nthiga Munyi, PW1's husband. He testified that he was in the company of PW1 when they met the appellant who had cut down trees from PW1's property and had used them to fence his property. The appellant said that he would do it again since the property belongs to him. They reported the matter at the police station and the appellant was arrested. They tried to resolve the matter outside court but the appellant insisted that he should be arraigned in court. He stated that prior to this incident, they had never disagreed with the appellant about the land. He confirmed that PW1 was the registered owner of the land. He stated that when they met the appellant, he was carrying a panga.
7. PW3 Bernard Mwaniki Ngari, was a neighbour of both the appellant and the complainant. He stated that he was working on his aunt's land which is adjacent to the complainant's land when he saw the appellant cutting down indigenous trees in the complainant's land. According to him, the appellant was in the company of his mother at the time of the incident. According to him, the land belonged to PW1 and PW2. In any event, he said, the appellant had not demonstrated that he was the owner of the property. He stated that the appellant was angry with him but he did not know why. He is the one who told PW2 about the incident.
8. PW4 was David Munene Muchira. He stated that he sold the land to PW1. He found the appellant cutting down trees from the complainant's property. When he asked why the appellant was doing that, he told him that he would continue doing it. He then informed PW1 of the incident. He stated that the appellant had no right to do what he did.
9. PW5 was PC Joseph Lemaiyan, the investigating officer in the case. He testified that at around 7pm, PW1 reported the incident at Kianjiru Police Patrol Base. He visited the scene and established that the appellant had cut down PW1's trees and had barricaded the road leading to the property. He collected evidence and recorded witness statements. The appellant was arrested and charged with the offence.
10. DW1, the appellant, stated that he spent his day in church and returned home at around 1:30pm. On his way home, he found PW3 and PW4 in the company of other people and they were fencing his property. He did not talk to them but later, PW2 asked him if the road is closed. He said he was



surprised to be implicated in any wrongdoing and he stated that it is PW2's workers who had fenced the property. He stated that the land belongs to his grandfather and 200 other people. He conceded that there is a land tussle between him and the complainant and the matter was in court. He did not report the matter to the police when he found the complainant fencing his land.

11. In its judgment, the trial court noted that the violent aspect of Section 90 of the *Penal Code* could also be psychological and it needed not only be proven physical violence. The court inferred threat from the complainant's apprehension when she said that the appellant threatened to repeat whatever actions he had done. The trial magistrate stated that the defense offered by the appellant amounts to a mere denial.

Submissions on Appeal

12. The parties filed written submissions as directed by the Court.

a. The appellant's submissions

13. The appellant submitted that the offence was not proved beyond reasonable doubt. He referred to the testimonies of the prosecution witnesses and argued that it was not established that he entered the complainant's land and issued threats to her. PW1 did not state that the appellant had fenced her land but that he had cut down trees. He argued that this is not proof of the offence since it is a contradiction, PW1 having stated that her property was destroyed, not that he entered her land forcibly.
14. He stated that the eye witnesses, Mama Purity and Pascaline Wanyaga were not called as witnesses, leaving the court with contradictory evidence. He relied on the case of *Kasili v Republic* [2024] KEHC 10608 (KLR) and emphasized that the burden of proof lay on the prosecution to prove its case. The appellant submitted that he was denied a chance to call his witness who was in court during the defense hearing.

b) The respondent's submissions

15. The state in its submissions, relied on section 90 of the *Penal Code* and the case of *Kennedy Wekulo Mulupi v Republic* [2021] KEHC 8269 (KLR). It was its argument that ownership of the land was proved through production of a title deed by the complainant. It relied on the provisions of section 26 of the *Land Registration Act* and stated that a title deed over the property was sufficient proof of ownership. That the prosecution witnesses proved that the appellant entered the complainant's land in a violent manner and he was holding a panga in his hand. He also violently destroyed the complainant's trees. All these suggest that he violently entered the land.
16. The state further relied on the cases of *Philip Nzaka Watu v Republic* [2016] KECA 696 (KLR) and *Njuki v Republic* [2002] 1 KLR 771 and argued that the minor inconsistencies in the case do not discredit the prosecution evidence. Further reliance was placed on the case of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No. 253 of 2003 where the Court of Appeal held that sufficient reason must be given by an appellate court before the sentence imposed by the trial court is overturned. This position was restated in the case of *Bernard Kimani Gacheru v Republic* [2002] KECA 94 (KLR). It urged the court to dismiss the appeal.

Issue for determination

17. The issue is whether the offence was proved beyond reasonable doubt.



Analysis and Determination

18. This Court as a first appellate Court is tasked with reexamining the evidence adduced at trial and coming up with its own finding, keeping in mind the advantage that the trial magistrate had in assessing the witnesses firsthand. In *Kiilu & Another vs. Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

“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 to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and 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.”

19. Section 90 of the *Penal Code* provides;

“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.”

20. To prove the offence under this provision, the prosecution was tasked with showing that the appellant violently and forcibly entered land that is proved to belong to the complainant with the intention of taking possession of it. In the case of *Andrew Mbaabu v Republic* [2021] eKLR, the court broke down the tenets of that provision as follows:

“From the above, the key questions in determining an accused person’s culpability for this offence are whether the suit property belonged to the complainant and whether the accused person (the Appellant) entered the suit property in a violent manner with the intention of taking possession thereof.” [Emphasis added]

21. The 9th Edition Black’s Law Dictionary defines ‘forcible entry’ as:

“The act or an instance of violently and unlawfully taking possession of lands and tenements against the will of those in lawful possession.

2. The act of entering land in another’s possession by the use of force against another or by breaking into the premises.”

22. Going back to the evidence, we find as follows: PW1 testified that a neighbor from the neighborhood where she had bought the land called to inquire about the noise coming from the land. She told the neighbor that she was away but she sent Pascaline Wanyaga, who was not called to testify, to check. She produced the title for the land as P. Exhb.1. Pascaline confirmed to PW1 that the noises were coming from her land. Later however, whilst returning home with her husband, PW2, they saw the appellant near the land holding a panga.



23. They checked on the land and saw that it had been entered into and some indigenous trees on the land had been cut down. PW1 said that he saw the appellant was holding a panga and he vowed to do what he had done again even though he knew that it was wrong. They reported the incident at the police station and PW5 investigated the matter.
24. PW3 stated that he was working on the property adjacent the subject land. He testified that the appellant came over to the said land; that he then saw the appellant cutting down trees from the complainant's land, and he used the trees to fence his property.
25. PW3 further stated that at the time of the incident, he saw the appellant in the company of some young men and his mother. He said that he did not engage them because he did not want to fight with them. PW3 is the one who told PW2 about what had transpired.
26. PW4 testified that he was coming from a church service on 07/04/2024 when he saw the appellant cutting down PW1's trees. He also stated that PW1 had bought the subject land from him.
27. On his part, the appellant stated that there is a long-standing land dispute between him and the complainant, a fact that the complainant denied. The appellant stated that to his knowledge, the land belongs to his grandfather and 200 other people. He said that he returned from church and found PW3, PW4 and other people fencing his property but he did not engage with them in any way. That he went home and was surprised to be implicated.
28. As earlier noted, PW1 produced a title deed for the subject land as proof that it belonged to her. By law, the holder of a title deed is deemed to be the lawful owner of the land. Section 26 of the [Land Registration Act](#) provides:

“26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except-

- 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

29. In the context of section 90 of the [Penal Code](#), it must be proved that the accused person (the appellant herein) intended to take possession of the property which belonged to PW1, and in doing so, he exercised actual violence or threats or breaking in, etc. This violence has not been defined under the [Penal Code](#) but the courts have interpreted the provision to include psychological threats caused by



the actions of the accused person. This position on psychological threats is the one that was taken by the trial magistrate in her determination as proving the offence.

30. Here, PW3 and PW4 were eye witnesses who saw the appellant cutting down trees from the complainant's property. This is sufficient proof that the appellant did indeed enter the complainant's land without lawful cause and with violence. The complainant reported the incident to the police. The appellant in stating in his defence that there is an existing land dispute about ownership of the property, gives credence to the fact that his entry thereon consisted of unauthorized possession. This fulfills the requirement of mens rea; a motive for him to enter into the complainant's land for the purpose of cutting trees.

Conclusions and Disposition

31. There is no doubt from the foregoing that the appellant unlawfully and forcefully entered into possession of the complainant's land and violently cut down trees therein. In so doing, he was acting on the basis that the land had a dispute since, according to him, it belonged to his grandfather and 200 others. That presumption was wrong as the complainant was able to show that the title to the land (P.Exhb 1) was in her name.
32. In my view, therefore, there was proof of unlawful forcible entry into the complainant's land and unleashing violence thereon by unlawfully cutting down trees as though he were in possession or ownership of the same.
33. Accordingly, the conviction is hereby upheld as the offence was proved beyond reasonable doubt. Similarly, the sentence is upheld as it is reasonable in the circumstances.
34. The issue raised in ground 4 of the petition of appeal cannot be ascertained. According to the trial proceedings, there is no mention of an intended defense witness who was not given audience in court.
35. Appeal is dismissed.
36. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 26TH DAY OF MARCH, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Mageto holding brief for Rose Njeru for accused.

Accused Present in Court

Ms. Nyika for the state

Francis Munyao - Court Assistant

