REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 1028 OF 1987

BETWEEN

KIMANI..... APPELLANT

V

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from original conviction and sentence in Criminal Case No 19680 of 1986 of the Second Class District Magistrate's Court at Makadara)

July 19, 1989, **Porter J** delivered the following Judgment.

The appellant was convicted in the court below of wilfully subjecting a tenant to annoyance with intent to compel the tenant to vacate the premises contrary to section 30 (which should have read section 29 if the particulars are to be followed) of the Rent Restriction Act Cap 296, and sentenced to 2 months imprisonment and a fine of Shs 2000 in default of payment of which a further 2 months imprisonment.

The complainant in this case was the alleged tenant and most of this appeal although not all turns on the question of whether there was a landlord/ tenant relationship between the complainant and the appellant at the time of the offence.

The complainant was a tenant of one Mrs Munah from January 1980 up to 31st March 1986. The property was bought from Mrs Munah by the appellant round about then, and it was said that their agreement was that the property was bought with vacant possession. Mrs Munah wrote to the complainant on 26.2.86 "requiring vacant possession" on or before 30.3.86 and indicating that the complainant could negotiate a new tenancy with the appellant. It seems clear that the original tenancy came under the Rent Restriction Act cap 296 as even the renegotiated rent to which I shall turn in a moment was Shs 1800, less than the amount referred to in section 2 (1) of the Act and indeed if the property did not come under the Act that would be a complete defence to the charge which was never put forward, even in this court.

In fact the requirement of vacant possession was in the nature of a notice under the Act: possession may not be recovered unless the notice given is given for one of the reasons set out in one of the subsections of section 14(1). The notice in question does not as it does not specify the ground upon which possession was required, nor can it be said that Mrs Munah required possession on any of the grounds set out in section 14 as she had already sold the property according to the notice.

Mrs Munah therefore could not have recovered possession under this notice, nor was the appellant entitled to rely on it.

Notice however was given under the tenancy, a notice which was valid for the purpose of terminating the tenancy itself, and so the complainant was in possession of the premises on a statutory tenancy which continued in force when the appellant bought the property as an agreement between Mrs Munah and the appellant did not affect the existing tenancy.

A letter was written to the complainant by the advocates for the appellant on 3.10.86. It said that a notice of which I do not have a copy was served on the complainant to vacate the premises on 16.6.86.

Once again such a notice would not entitle the appellant to an order for possession unless and until it was drawn under section 14, and the Tribunal made an order.

The appellant says that the letter of 3.10.86 was a notice of 3 months and the case was taken to the Rent Tribunal and was to be heard in January 1987. It was heard on 18.3.87 and the case was lost by the appellant as 12 months had not passed after the date of notice.

As the appellant gave no evidence in this matter, as he was entitled to do, this is all the evidence there was on this point and so it seems clear that the application for possession was made under section 14 (1) (e). The notice given was therefore not valid and a nullity. There was no evidence that the notice given in June 1986 was any more efficacious.

The complainant says that he agreed to quit as per the notice of 3.10.86. That may be so but the point is that in order to obtain an order for possession, the appellant had to bring a case under section 14 and succeed which was not the case. Meanwhile the statutory tenancy continues.

There was also a time at which the appellant approached the complainant to arrange that they share the house from 1st January 1987: this approach was made in December 1986, but the complainant said that he did not agree.

Pausing there, there clearly was a statutory tenancy, recognised by the appellant pending the Tribunal hearing, recognised as the appellant quite rightly did go, in the end, to the Tribunal to obtain possession. According to the complainant he paid rent until December 1986, although at one time it was in arrears as the appellant refused to accept it.

Therefore there was not the slightest doubt that the appellant had no right to attempt to obtain possession in the way so graphically described in the evidence of the complainant and the witnesses for the prosecution: there was clearly a landlord/tenant relationship.

There are 2 limbs to section 29, eviction without the authority of the Tribunal, which might have been charged in this case, although it was not, and wilfully subjecting a tenant to annoyance with the intention of inducing him or compelling him to vacate the premises. In most cases the one charge will include the other and it seems to me that it is not right to say that to remove furniture and possessions of a tenant is

not annoyance with the requisite intention.

I do not think that the learned trial Magistrate can be criticised for reciting the fact that the appellant gave no evidence: I think the learned trial Magistrate ought to have noticed that the charge was laid under the wrong section, but I do not think that any injustice arose from that, and I would cure that defect in the charge under section 382 of Criminal Procedure Code.

The learned trial Magistrate had the opportunity of seeing the witnesses give evidence which I have not had. This resolved to a question of credibility, and remembering that the learned trial Magistrate was in a position to assess the witnesses in the witness box, on my own assessment of the record I would agree with the conclusion reached and come to the same conclusion myself.

The appellant was rightly convicted, and I do not think that the sentence was in breach of principle, or manifestly excessive.

Appeal against conviction and sentence is dismissed.

Dated and Delivered at Nairobi this 19th day of July , 1989

PORTER

JUDGE