REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 18 OF 2019

SAMSON OMAMO KODANDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence of the Hon. M. Obiero

in Bondo PMCC No. 739 of 2014 delivered on 14/6/2018)

JUDGMENT

1. The delay in determining this appeal on merit was occasioned by the fact that the appeal was filed on 14/3/2019 and on 2/7/2019 this court summarily struck out the appeal on account that it was filed on 14/3/2019 which was close to one year after judgment was delivered on 14/6/2018 without leave of court. The appellant then took another one year before filing his application for reinstatement of the appeal attaching copy of the order granting leave to appeal out of time made on 21st February 2019 in HC Cr Misc Application No. 8 of 2019. The appeal was then reinstated 19/1/2021 and the trial court record which had been returned to the lower court resubmitted to the High Court for consideration of the appeal won merit.

2. The background to this appeal is that the appellant herein Samson Omamo Kodande was charged with the offence of forcible detainer contrary to section 91 of the Penal Code. The particulars of the offence were that on diverse dates between January 2014 and 10th May 2014 at Ragengni sub-location, Rarieda sub-county within Siaya County, without colour of right held possession of land parcel No. Uyoma/Ragengni /2462 of John Okuku in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of peace against John Okuku who was entitled by law to possession of the said land.

3. After full trial, the appellant was convicted as charged. He was fined Kshs. 20,000 or in default he was to serve twelve (12) months imprisonment. The appellant was aggrieved by his conviction and sentence and duly this appeal on 14th March 2019 out of time upon leave to appeal out of time being granted.

4. In his petition of appeal, the appellant raised thirteen grounds as below:

a) The learned magistrate misdirected himself in law and in fact in finding the appellant guilty.

b) The learned magistrate misdirected himself in law and fact in imposing deterrent sentence on the appellant.

c) The learned magistrate misdirected himself in law and fact in holding that the appellant altered the documents.

d) The learned magistrate misdirected himself in law and in fact in finding that the appellant was without colour of right notwithstanding having paid for the parcel.

e) The learned magistrate misdirected himself in law and in fact in finding that the land was held by the appellant in a manner likely to cause a breach of peace or apprehension thereof as no evidence rendered in the regard.

f) The learned magistrate misdirected himself in law and in fact in concluding that the appellant did not enter the land in 1976 by ignoring all evidence to support this.

g) The learned magistrate misdirected himself in law and fact in wrongly framing issues for determination.

h) The learned magistrate misdirected himself in law and fact in holding that the appellant did not buy the land from Deborah Oluoch.

i) The learned magistrate erred in law and in fact in that he disregarded evidence of the appellant and defense witnesses.

j) The learned magistrate erred in law and fact by not taking into account the evidence of the appellant and defence witnesses.

k) The learned magistrate erred in law and fact by not accepting evidence DW2 as to the rectification of Defence exhibit 2.

l) The learned magistrate erred in law and fact in not taking explanation of the appellant as to why he did not challenge registration of ownership of the land parcel as did not know the same.

m) The learned magistrate erred in law and fact in shifting burden of proof to the appellant.

5. The appeal was canvassed by way of written submissions.

Submissions

6. On whether the prosecution proved its case beyond reasonable doubt, it was submitted on behalf of the appellant that the appellant took full possession of the parcel of land believing that it belonged to him despite the fact that PW1 produced the title deed showing that the parcel was registered in favour of her late husband as she may not have been aware of issues pertaining to that land as she was not the owner.

7. It was further submitted that the trial magistrate misdirected himself in law and fact in finding that the appellant held the land in a manner likely to cause breach of peace as no evidence of the same was tendered but that information produced by PW4 showed lack of proper investigations and reliance on information given by neighbours.

8. It was submitted by the appellant that the charge of forcible detainer was not proved as the prosecution was supposed to prove that the appellant was in possession of land and that he had no right to do so, which burden lay on the prosecution.

9. It was further submitted that the trial magistrate misdirected himself by ignoring the fact that the main issue pertaining the parcel of land was civil in nature and not criminal.

10. The appellant further submitted that the learned magistrate misdirected himself by holding that the appellant did not enter the suit land in 1976 contrary to all evidence adduced. Reliance was placed on the case of **Richard Kiptalam Biengo v Republic [2015] eKLR** where it was held interalia that in such cases where legal ownership or entitlement of the land cannot be established beyond reasonable doubt at the accused's trial then a conviction cannot be sustained.

11. The appellant further submitted that he had sufficient reasons to believe that he had color of right in possessing the suit parcel as he bought the same from one Deborah Oluoch vide a sale agreement dated 3rd May 1976 and despite not processing the title, he learnt that the parcel was registered in the name of John Okuku much later after he was in possession of the land.

12. The prosecution did not file any submissions.

Analysis

13. I have considered the grounds of appeal, the submissions and the evidence adduced before the trial court. This being the first appellate court, my duty is to reconsider and re-evaluate the evidence on record, bearing in mind that I did not see or hear the witnesses, and reach my own conclusion -See **Okeno v R [1972] EA. 32** and **Mohamed Rama Alfani & 2 Others v Republic, Criminal Appeal No. 223 of 2002**.

14. The evidence before the trial court was that dPW1 Jenifer Otombo testified that John Okuku was her husband who died on in 1996 after which she petitioned for and was issued with a grant of letters of administration intestate in 1998. It was her testimony that the deceased, her late husband was the registered proprietor of land parcel Uyoma/Ragengni/2462, having bought the same from one Debora on 25.2.1986 and issued with a title deed on the same.

15. It was her testimony that since the deceased was not living at home, he allowed some people to use the land for cultivation but in the year 2013, one Omollo informed her that the appellant had stopped him from ploughing the land, took possession of the land and ploughed it himself.

16. PW1 testified that she then went and reported the matter to the Assistant Chief who summoned both herself and the appellant herein to his office but the appellant declined to go and on the 1.4.2013, she reported the matter to Aram Police Station where the appellant was once again summoned but he refused to go.

17. PW1 testified that police officers accompanied her to the land and confirmed that it had been cultivated by the appellant and that a surveyor also went to the land and prepared a report that confirmed that the land belonged to the late John Okuku. It was her testimony that at the time of the trial, the appellant was still cultivating the land.

18. In cross-examination, PW1 reiterated her averments and further stated that prior to her husband's death in 1996, there was no issue with the suit parcel. She further stated that she did not know how the appellant entered the land. In re-examination, PW1 denied having any land

dispute with Deborah's family.

19. PW2, Antonina Anyango a government surveyor testified that on the 28.5.2015, she accompanied her colleague, Thomas Opondo to the suit parcel measuring 0.34Ha which was equivalent to 0.84acres where they found the boundary still intact. She testified that there was an ownership wrangle over the suit property whereas the title deed showed that it was registered in the name of John Okuku. It was her testimony that they prepared a report which she produced as Exhibit 6.

20. In cross-examination, she stated that PW1 wanted to confirm the position of the land. She further stated that the land had been ploughed but that she did not see the appellant on the land.

21. PW3, Mourice Oluoch testified that he participated in the transaction where the deceased, John Okuku bought the suit parcel from Debora Oluoch. He stated that the land was being cultivated by one Omollo who had since passed on and that in 2013, the appellant took possession of the land and started ploughing it and was currently doing so. He further testified that he accompanied PW1 to Aram Police Station and reported the incident leading to the appellant being summoned but ignoring the summons.

22. In cross-examination, PW3 reiterated his testimony and further stated that the deceased was issued with the title deed to the suit parcel and that he completed payment for the same in 1987. He stated that Deborah sold the suit parcel to the deceased alone. It was his testimony that he could not tell whether the appellant started ploughing the land in 1987 but that he removed him from the land in 2013.

23. PW4 Wilberforce O. Ochar, the Assistant Chief of Ragengni sub-location testified that sometime in 2013, the complainant reported that the appellant was cultivating land which belonged to her late husband. He testified that he summoned the appellant but he ignored the summons. He stated that he confirmed that the appellant was actually using the suit parcel.

24. In cross-examination, PW4 stated that he became Assistant Chief in 1998 though he could not tell who was using the suit parcel at that time. In re-examination, he stated that he was not instructed to investigate Julius Oluoch and Evans Oluoch.

25. PW5 No. 100202, PC Pius Mulwa testified that he took over the investigations in this matter from CIP Ngugi who had since retired from the service. He stated that by the time he was coming on board, the investigations had been completed and most witnesses had testified.

26. It was his testimony that CIP Ngugi handed over to him exhibits that included certificate of official search, grant of letters of administration, certificate of death and photographs which he produced as exhibits. In cross-examination he reiterated that he did not investigate the matter but took over after the investigations were done.

27. Placed on his defence, the appellant gave sworn testimony and called two witnesses in support of his defence.

28. The appellant testified as DW1 and stated that he was in occupation of the suit parcel having bought the same in May 1976 from Debora Oluoch. He refuted the claim that he entered the land in 2014 by force and produced a document in the form of an agreement dated 3.5.1976, an acknowledgement dated 31.5.1976 and another acknowledgement dated 2.9.1976 in support of his assertion that he bought the suit parcel.

29. In cross-examination, the appellant admitted that the documents which he was relying on to show that he bought the land had been altered at the point where it showed the number of the parcel purported to have been bought. He further admitted to never having challenged the issuance of the title deed to the deceased John Okuku. The appellant further denied being summoned by anyone to solve the dispute and further denied that he took advantage of Okuku not living on the land.

30. DW2 Wilson Odade testified that the appellant bought the land from Debora and that DW2 is the one who prepared the agreement for the transaction. He stated that he did not know that John Okuku had bought the land and that at that time that the appellant bought the land, there was nobody on it.

31. He admitted that at the time he was writing the agreement, Debora gave him a piece of paper that showed that the land was number 246 but that during adjudication he found it to be 2462.

32. In cross-examination, DW2 admitted that he prepared the agreement in respect of land parcel number 2460 and that he made one agreement only. He further admitted to making the alterations on the agreement but denied making the said alterations when the appellant was charged.

33. DW3, Tobias Ohanga Oluoch testified that Debora was his mother and that he gave the appellant a parcel of land though he did not know the number of the land. He stated that he knew the complainant, PW1, when they were summoned by the OCS of Aram Police Station. He further testified that at no time did PW1's husband cultivate the land.

34. In cross-examination, DW3 stated that he was born in 1962 and that he did not participate in the transaction. He denied knowing the parcel of land that was sold to the appellant.

Determination

35. Having considered all the above, I find the main issue for determination is whether the prosecution proved the case against the appellant beyond reasonable doubt to warrant conviction and sentencing of the appellant on the charge of forcible detainer contrary to Section 91 of the Penal Code.

36. The ingredients required to establish the charge of forcible detainer under Section 91 of the Penal Code are that the prosecution must establish that the accused is in actual possession of the parcel of land which he has no right to hold possession of. The prosecution will establish this if it adduces evidence which proves that the accused has no title or legal right to occupy the land. Secondly, the accused must be in occupation of the parcel of land in a manner that is likely or causes reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land.

37. In light of these ingredients, the question is what evidence did the prosecution adduce to support the charge? There is no doubt that the appellant was in possession and actual occupation of the suit land. This was admitted by the appellant himself and his witnesses.

38. On the fact that the appellant had no right to occupy the suit land, It was the prosecution's case that the suit parcel belonged to one John Okuku, who had since died and survived by PW1 as was evidenced by the title deed produced as PEx 2 and Certificate of Official Search produced as PEx 5. The letters of Administration Intestate issued to PW1 and produced as PEx 4 were evidence that she was a survivor of the deceased John Okuku.

39. Juxtaposed against this was the sale agreement produced by the appellant as DEx 2 which clearly showed alterations to the land parcel number purported to be sold from 2460 to 2462. The explanations for these alterations by DW2 did not in my mind make sense. Furthermore, at no point did the appellant after allegedly buying the land make any efforts to have the same registered in his name. The evidence on record also reveals that issues over the suit parcel began after the registered owner John Okuku had passed on. The question is, why did the appellant wait until the demise of John Okuku before moving into the land and starting to cultivate it and claiming that he bought it from Debora?

40. It is trite law that a *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 thereof.* This is provided for in section 22 of the Land Registration Act.

41. I have considered the defence proffered by the appellant and the testimony tendered by his witnesses. That evidence did not in any way challenge the strong and watertight evidence adduced by the prosecution witnesses.

42. Accordingly, I find and hold that the prosecution proved its case on the charge of forcible detainer contrary to Section 91 of the Penal Code to the required standard of proof beyond any reasonable doubt. The prosecution established all the ingredients of the charge of forcible detainer in that it established that the complainant was the legal owner of the suit parcel of land, that the appellant was in unlawful possession and occupation of the same, that the appellant had resisted the complainant's attempt to take possession of the suit parcel of land in a manner that was likely to cause breach of peace when he resisted the summons to appear before the Assistant Chief and the OCS to resolve the matter as reported by the complainant. I find the conviction of the appellant was sound. The appeal against conviction is therefore found to be devoid of merit and the same is hereby dismissed.

43. The appellant also claimed in his petition of appeal that the learned magistrate misdirected himself in law and fact in imposing deterrent sentence on the appellant.

44. The appellant was charged with the offence of forcible detainer contrary to section 91 which provides that the offence is a misdemeanour. The section provides that:

> ***"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."***

45. Section 36 of the Penal Code is titled *"General punishment for misdemeanours"* provides that:

> ***"When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both."***

46. The trial magistrate sentenced the appellant to pay a fine of Kshs. 20,000 or in default he was to serve twelve (12) months imprisonment. This is well within the provisions of section 36 of the Penal Code. I therefore find the sentence imposed to be lawful and lenient. I find no reason to interfere with the same.

47. In the end, I find the appeal herein against conviction and sentence imposed on the appellant to be devoid of merit. The same is hereby dismissed.

File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 24TH DAY OF JANUARY, 2022

R. E. ABURILI

JUDGE