



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 85 OF 2018

(From original conviction and sentence in Butali PMCCRC No. 1125 of 2016, by Hon. EW Muleka, Senior Resident Magistrate (SRM), of 12th June, 2018)

KENNEDY WEKULO MULUPI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The appellant herein was charged with forcible entry contrary to section 90 of the Penal Code, Cap 63, Laws of Kenya, in Butali SRMCCR No.1125 of 2016. He pleaded not guilty to the charge. The prosecution conducted a trial, where seven witnesses testified. He was convicted and sentenced to pay a fine of Kshs. 20,000.00 in default of which he was to serve three (3) months imprisonment. The particulars of the charge were that on the 14th day of September 2016, at Matioli Village, Butali Sub-Location in Kakamega North Sub-County within Kakamega County, in order to take possession thereof, entered on the land parcel number Kakamega/Malava/2927 belonging to Chebuyoi Kongoni, in a violent manner by ploughing the said land using a tractor.

2. The appellant was dissatisfied with the conviction and sentence, and he appealed to this court. He seeks the quashing of the said conviction, the setting aside of the sentence and refund of the Kshs. 20,000.00 paid as fine. The grounds of appeal as set out in the petition of appeal are that the ingredients of the offence had not been established beyond reasonable doubt; the holding that the entered in Kakamega/Malava/2927 forcibly could not hold as he had been using the land since 2008; the land in dispute was the subject matter of Kakamega HCSC No. 375 of 2011, which was still pending, hence the ownership of the said land was in question since 2008; the matter before trial court was purely civil and had no criminal element; the investigating officer was not called and no reason given by the prosecutor; the trial court relied on photographs taken by ungazetted scenes of crime personnel; and the trial court held that there was no evidence of pendency of succession proceedings yet the appellant had produced a copy of the petition and the relevant *Kenya Gazette*.

3. It is the duty of the first appellate court is to reconsider the evidence, evaluate it, and draw its own conclusion. See *Okeno vs. Republic* (1972) EA 32 and *Njoroge vs. Republic* (1987) KLR 99.

4. The prosecution called seven witnesses. PW1, was Chebuye Kongoni Mulupi, a brother and neighbour of the appellant and the complainant. He testified that in April 2004, their father, Peter Kongoni, together with their mother, Susan Wayera Kongoni, and himself, proceeded to the Malava Land Control Board to transfer registration of Kakamega/Malava/2927 to his name, and he produced documents in court to support that. He stated that on 14th September 2016, he went home to find the said parcel of land having being ploughed. He adduced photographic evidence of the ploughed land. He stated that there was a pending succession cause, being Kakamega HCSC No. 375 of 2011.

5. PW2 was Henry Shitanda, a village elder and a brother of both the appellant and PW1. He testified that PW1 called him on 14th September 2016, complaining that the appellant had ploughed his land without informing him. When he went to view the land, he found a tractor still ploughing the land, despite the police urging that the exercise be stopped. PW3 was Japheth Juma Kwova, a neighbour and an administrator, who testified that he was at the home of PW1 on 16th September 2016, where he found the appellant and PW1 arguing. He said that he saw a tractor parked on the side. He stated that he did not know the owner of the land that was ploughed.

6. PW4 was Benji Isaac Matsaha, the driver of the offending tractor. He stated that he had been at the land of the appellant on 14th September 2016 ploughing. He said that he also ploughed the land again on 16th September 2016. He testified that he had been ploughing the land since 2008. PW5 was Reuben Chuma Keyoni, who testified that he was at home on 14th September 2016, when he saw a tractor ploughing the land. He saw the driver, PW4, and Silas, who confirmed that they had been sent by the appellant. PW6 was Jonathan Kiplagat, a police detective, attached to Kakungu North Sub-County. He produced photographs of the scene of crime, on behalf of the officer who had taken the photographs. PW7 was Police Constable Philomena Chebii, the arresting officer who apprehended the appellant. She testified that PW1 informed her that the land belonged to him, and produced title documents to support his assertion, while the appellant did not produce any.

7. At the close of the prosecution case, the appellant was placed on his defence. He gave sworn testimony and called one witness. He stated that he was a teacher, and was in school when he received a message from his brother, Mumia, to the effect that he was needed at home. He went home, where he found his brother, PW1, working against his instructions, and he went to the police station to explain that there was a succession cause. When he arrived at the police station, he was arrested and charged with ploughing the parcel of land. His witness, DW1, Francis Mumia Peter stated that the appellant and PW1 were his brothers, and that there was a succession cause, and the subject land was used by the appellant ever since their father was alive, and he was not aware that PW1 had a title deed to the land.

8. After reviewing the evidence, the trial court found the appellant guilty of forcible entry into the subject land despite him knowing that there was a succession cause, and PW1 had a title deed to the land. The court found that the prosecution had proved its case beyond reasonable doubt.

9. The appeal was canvassed by way of written submissions, The appellant submitted that: he had possession of Kakamega/Malava 2927 at the time of commission of the alleged offence and that he had been ploughing it since 2008; there was a succession dispute, being Kakamega HCSC No. 375 of 2011 on the subject property; PW1 had title to the land but not occupancy or use of the said land; the matter was purely civil and was before the High court and the police should not have been involved; the decision in *Dedan Mugo Njeru vs. Republic* applied where it was held that where there was a civil claim over ownership of property, the police did not have to intervene for the police do not decide ownership of property; there was insufficient proof of ownership of the property by PW1; and the photographic evidence adduced by PW1 was not in conformity with section 78 of the Evidence Act.

10. On the issue of ownership, PW1 produced a title deed, consent from the Land Control Board, as well as transfer of land form from the land's registry for the parcel of land in dispute, as evidence that the land was his. The appellant did not produce any document to prove otherwise. Once PW1 produced documents that showed him as the registered proprietor of the subject property, the burden shifted to the appellant to produce documents to counter that evidence.

11. The appellant has argued that the lower court did not prove the ownership of the subject land and did prove forcible entry beyond reasonable doubt. The principal element of the offence forcible entry and retainer is the taking of possession of land in a violent or forcible manner, and the offence would not be committed where the land belonged to the accused. PW1 produced a title deed, which showed that the subject property was registered in his name. He was the one entitled to it since registration in 2008. There was no evidence that the appellant had been allowed to utilise it by PW1. By procuring PW4 to go and plough a piece of land belonging to another without the consent of that other, the appellant was, no doubt, entering land belonging to another by force. Ploughing it suggested that the owner would not have access to it so long as crops were planted on it by another, which brought out the element of detainer.

12. The appellant raised the issue of the pending succession cause, to suggest that ownership of the said property was not settled, since the estate of their parents was still in court. I do not see the relevance of the succession proceedings. PW1 produced a title deed for the subject property, which showed him as proprietor. The land did not belong to their deceased parents as at the date the forcible entry and detainer happened. It belonged to PW1, giving the documents that he prosecution presented at the trial.

13. On the ground that the appellant had been using the property since 2008, PW5, a brother of both the appellant and PW1, testified that he knew that PW1 had title to the land, and that he had never seen the land been cultivated by the appellant from 2008, as alleged by him.

14. On the matter being purely a civil dispute, without any criminal element, since there was a pending succession cause, section 193 of the Criminal Procedure Code would be relevant. The same states as follows:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceeding is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

15. On the ground that the prosecution did not call the investigating officer and no reason was given, I believe the decision in *Jeremiah Gathiku vs. Republic* (Criminal Appeal No.73 of 2008) (unreported) answers the same, where it was held:

“... the effect of failure to call police officers in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate.”

16. Overall, it is my finding that the trial court arrived the correct finding, that the appellant forcibly entered land belonging to PW1, and properly convicted and sentenced him in accordance with the law. He was given a sentence which fitted the offence. Consequently, the appeal herein is disallowed, the conviction is upheld and the sentence confirmed.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF MARCH, 2021

W MUSYOKA

JUDGE