



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 139 OF 2019

PRISCILLA MUTINDA ANDREW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original Orders of Hon. E. Muiru (SRM) in Kilungu

Senior Principal Magistrate's Court SRMCRC No. 525 of 2018

issued on 12th February, 2019).

JUDGMENT

1. The Appellant was charged in the magistrate's court with interfering with demarcated land boundary contrary to section 33(d) of the Land Adjudication Act (Cap 384) Laws of Kenya. The particulars of offence were that on 5th April 2018 at Kima-Kiu sub-location in Mukaa Sub County in Mukaa County, interfered with demarcated land boundary by removing six beacons of Plot No. Kima-Kiu Konza No. 1639 belonging to MUTUNGI MUSYA. She pleaded not guilty to the charge.

2. However, on 12th February 2019, without hearing any witnesses, the trial court ruled that the matter had been settled and recorded as follows –

“I have read the detailed report by the area chief Daniel Munyao and sentiments therein, the findings and recommendations thereto. Upon further deliberations in open court in light of the said report in the presence of the area chief, Complainant's family (sons, daughters and grandsons), clan elders, accused and State Counsel, this court hereby directs that the accused person to move to the land allocated to the Complainant in Kibwezi land No. 602. The clan elders have given assurance before court that they will support the accused obtain title in respect to that land to enable permanency. The accused is given one year grace period to fully relocate from land in Kima known as 1639 to Kibwezi.

3. From the above determination of the trial court, the Appellant who was the accused, has now come to this court on appeal through counsel M/s Elizabeth Mulwa Isika & Mutua in the following four (4) grounds –

1) ***That the magistrate erred in law and fact by adjudicating on a land matter that she did not have jurisdiction.***

2) ***That the trial magistrate erred in considering extraneous matters which had no relevance to matters in issue.***

3) ***That the learned magistrate erred in law and fact by not considering the fact that the initial dispute touched on boundary dispute and not ownership.***

4) ***That the learned magistrate erred in law and fact by adapting a report (outcome of the deliberations) done by non-parties to the case before her in the absence of both the Complainant and the accused person.***

4. The appeal proceeded by way of filing written submissions. The Appellant's counsel as well as the Director of Public Prosecutions filed their written submissions, which I have perused and considered. A number of legal authorities were relied upon by counsel on both sides.

5. This being a first appeal, I am required to re-evaluate all the evidence on record and come to my own independent conclusion, and inferences. See **Okeno –vs- Republic (1972) E.A 32.**

6. Since in the present case, no witness testified in court, and instead the court relied on statements from potential witnesses and reports from clan meetings in making the trial court's verdict, which the magistrate was convinced was in compliance with implementing the spirit of reconciliation under Article 159 of the Constitution, I have to consider if the magistrate adopted the correct procedure.

7. Indeed, under Article 159 of the Constitution of Kenya 2010, courts are enjoined to promote settlement of court cases, including criminal cases. In particular, Article 159(2) (c) provides as follows –

159(2) In exercising judicial authority courts and tribunals shall be guided by the following principles –

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3).

8. In my view in this matter, the trial magistrate could only promote settlement or reconciliation if the contesting parties had filed a signed settlement agreement in court, for adoption. The contesting parties not having filed a settlement agreement there was nothing for the trial court to adopt. The magistrate did not have powers to make a determination other than adopting the settlement agreement in promoting settlement or reconciliation.

9. The magistrate having gone ahead to rely on statements from prospective witnesses to make a determination of the case was in error, and thus all the proceedings and the decisions or determination of the magistrate's court herein are defective. Being defective proceedings they are hereby quashed. On that account, the appeal succeeds.

10. The charge is however not quashed by the decision in this appeal. I will thus order that the matter may proceed to full trial if the Director of Public Prosecutions so wishes. In my view, such order will not prejudice the Appellant or any of the parties and will in fact be in the interests of justice to all interested parties.

11. I thus order as follows:-

1) I allow the appeal and quash all the proceedings before the trial court and all orders and determination made by the trial court. However, the charge sheet still stands.

2) The Director of Public Prosecutions is at liberty to prosecute the charge before any magistrate except E. Muiiru - Senior Resident Magistrate.

Delivered, signed & dated this 21st day of April, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE