REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO.66 OF 2019

PARMELITA PARANGA .....1ST APPELLANT

NTINANOI OLE SAMERI KAMUUGU .....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from original conviction and sentence (Hon. M. Kasera, SPM), delivered on 3rd October,2019 in

Criminal Case No.1774 of 2015, at the Chief Magistrate's Court, Kajiado)

JUDGMENT

1. The appellants were charged with forcible detainer contrary to section 91 of the Penal Code. Particulars were that on diverse dates between 2000 and 2015 at Emboloi Group Ranch in Isinya Sub County within Kajiado County, jointly being in possession of Kajiado/Kaputei-North/966 of Gladys Nkiua Saunet without colour of right, held possession of the said land in a manner likely to cause a breach of the peace against the said Gladys Nkiya Saunet, who was entitled by law to the possession of the said land.

2. The appellants denied the charge, and after a trial in which the prosecution called 7 witnesses and the appellants' sworn defence and who called three defence witnesses, the trial court convicted the appellant and sentenced them to a fine of Kshs. 50,000, and in default, 12 months imprisonment.

3. The appellants were aggrieved with both the conviction and sentence and lodged this appeal, raising the following grounds:

> ***1. The learned trial magistrate erred in law and in fact by failing to appreciate that none of the cardinal ingredients of the offence of forcible detainer were proved beyond any reasonable doubt by the prosecution evidence so as to sustain conviction of the Appellants.***
>
> ***2. The learned trial magistrate erred in law in making an order of eviction which is not provided for under criminal law.***
>
> ***3. The learned trial magistrate erred in law in failing to acknowledge that the Appellants were exercising an honest claim of right as per the express provisions of Sections 8 of the Penal Code (CAP 63) Laws of Kenya.***
>
> ***4. The learned trial magistrate erred in law and in fact by rejecting the entire evidence of the Appellants and not taking into consideration the fact that the Appellants have lived on the parcels of land since early 1990s.***
>
> ***5. The learned trial magistrate erred in fact by not taking into consideration the evidence by the Appellants that there is inconsistence between the Registered Index Map and the ground and therefore it was not proved beyond doubt that the Appellants were residing on the complainant's parcel of land.***
>
> ***6. The learned trial magistrate erred in law and in fact by convicting the Appellants on the basis of contradictory, unsatisfactory and inconsistent evidence.***

4. This appeal was disposed of through written submissions. The appellants submitted through their written submissions dated 6th April, 2021, that the 1st appellant was the owner of **Kajiado/Kaputei/North 939** which was allocated to him by the group ranch and was shown the boundaries by the chairperson of the group ranch Samuel Parmulot (DW4) during the demarcation exercise. The 1st appellant subdivided parcel No. 939 and sold parcel 4304 to the 2nd appellants in the 1990s and the 2nd appellant has been residing on that portion for over 20 years.

5. The appellants argued that the prosecution did not prove the ingredients of the offence of forcible detainer beyond reasonable doubt. They relied ***Albert Ouma Matiya v Republic*** [2012] eKLR, for the submission that the prosecution did not conclusively prove that parcel No. 966 whose boundary dispute is yet to be settled, belonged to the complainant.

6. They also submitted that the prosecution did not prove that harm was likely to be done on the complainant or her property as she never testified that she feared being harmed through assault, affray, unlawful assembly or other disturbance. They relied on ***R V Howell*** **[1982] 1 QB 416** and ***Florence Wanjiku Mwamunga & Another v Republic*** [2018] eKLR.

7. The appellants further submitted that the trial magistrate had no jurisdiction to issue eviction orders in criminal proceedings. They relied on section 6 of Magistrate Courts Act 2015 and section 7 of the Criminal Procedure Code to argue that the trial court cannot issue eviction orders.

8. The appellants argued that they were exercising an honest claim, and relied on section 8 of the Penal Code for the proposition that they carried out developments on their respective parcels by digging up a dam after acquisition of proprietorship rights through allocation of the land and title from the group ranch first to the 1st appellant who subsequently sub divided and sold a portion to the 2nd appellant. They contended that they could not have committed fraud.

9. The appellants faulted the trial court for not considering their evidence, arguing that they produced title deeds for parcel Nos. 936 and 4304 which was confirmed by DW3, DW4 and DW5 who testified that the boundary dispute on Parcel No. 966 was due to difference on ground and the registered index map (R.I.M).

10. The prosecution relied on their written submission dated 30th October 2020 and filed on 24th February 2020 to argue that they proved the charge and its ingredients beyond reasonable doubt. According the prosecution counsel, the compliant was the legal owner while the appellants were in unlawful possession and they resisted the complainant's attempts to take possession.

11. The prosecution counsel PW1 testified and produced supporting documents that the title to the land was transferred into her name on being issued with a certificate of confirmation of grant following her late husband's death. Further, the complainant filed a land dispute at land registry following which the land registrar and the land surveyor visited the land and established that Parcel 966 which was being occupied by the appellants belonged to the complaint. The trial magistrate, therefore, had jurisdiction to issue eviction orders in order to enforce the complainant's right to property guaranteed under Article 40 of the Constitution.

12. The prosecution counsel maintained that the appellants resisted the complainant's attempts to take possession; the land registrar's report clearly indicated that Parcel 966 was legally owned by complainant and that the appellants remained adamant and continued to construct on the land leading to their arrest and prosecution.

13. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial court's record and considered the impugned judgment. This being a first appeal, it is the duty of this court, as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that the trial court had the advantage of seeing the witnesses as they testified and give due consideration for that.

14. In ***Okeno v Republic*** [1972] EA 32, it was held that:

> ***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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion... 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 finding and conclusion; it must make its own findings and draw its own 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.***

15. In ***Kiilu & Another vs. Republic*** [2005]1 KLR 174, the Court also held that:

> ***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.***

16. PW1, the complainant, testified that her late husband who died in 2000 was the owner of Parcel No. 966 and that her mother-in-law died on 2001 due to pressure caused by the appellants who were claiming ownership of parcel 966. She told the court that she was granted letters of administration in succession cause No. **2291 of 2004** and thereafter, title for parcel 966 was registered into her name. She surrendered the original title to the Agricultural Finance Corporation as security for a loan. She stated that the appellants built and grazed on the land and refused to leave despite several meetings to have them evicted. She stated that 1st appellant sold part of Parcel No. 966 to the 2nd appellant and had it subdivided.

17. According to the complainant, on 21st September 2015 at 8.00pm while on duty at Subukia Police Station, she was informed by her workers that the 2nd appellant was digging a dam on her land. She reported the matter at Isinya Police Station and police visited the land where they found a dam already dug and police asked each of them to present their ownership documents for the land. She stated that the 1st appellant's land was parcel No. 939 which he sold to the 2nd appellant and that both appellants live on her land, parcel No. 966.

18. **PW2 Murumo Lenalupo**, the complainant's worker, testified that on 21st September 2015 while at work, the 2nd appellant brought an excavator to dig a dam on the complainant's land Parcel No. 966 where the appellants also lived.

19. **PW3, John Yangaso Ole Kuyasi**, testified that on 21st September 2015 at 8.00am, the 2nd appellant started digging a dam on the complainant's land where the appellants also lived, and did not stop despite being ordered by the complainant through a phone call to do so. In cross examination the witness stated that ownership of Parcel No. 966 was under dispute between the complainant and the appellants.

20. **PW4.Mwangi Njeri Gitau**, a scenes of crime police testified that on 23rd September 2015 at 12.00hrs, he received a call from Isinya Police Station requesting him to join CPL Irene Kimuyu for photographic documentation for a forcible detainer scene of crime. He produced photographs showing that the appellants homestead(s) had been constructed within the complainant's land and a 400 metres dam had just been dug. In cross examination, he stated that he did not know if the land belonged to the complainant.

21. **PW5-Paul Tanui**, Land Registrar Kajiado, testified that Parcel No. Kajiado/Kaputie-North/966 which initially belonged to Embolio Group Ranch was given to Joshua Kipamp Ole Sisika as a gift on 20th January 1987. It was later transmitted to Gladys Nkina Sautet, I.D No.11680920 on 13th September 2006 through a grant of representation intestate and produced a green card for that parcel. He also stated that Parcel No. 939 belonged to the 1st appellant although he did not produce its green card and that it was different from Parcel No. 966. In cross examination, the witness stated that he had never seen 939 and that the green card corresponded with the map. He stated that where the map differs from what is on the ground, the land parcel would be identified by the survey department.

22. **PW6, James Methini Wambua,** a retired land registrar, testified that he arbitrated a boundary dispute where 1st appellant, owner of 939 laid claim over Parcel No. 966. He stated that upon visiting the ground with a Mr. Ndugu, also a retired land surveyor, they found that Parcel No. 939 which belonged to the 1st appellant did not share a boundary with Parcel No. 966 which belonged to the complainant and that the appellants were not living on their land. He stated if there was a difference between what was on the map and the ground, then the position on the ground prevails. He stated in cross examination that the boundary dispute was between 966 and 956. He admitted that the report of the District Surveyor was not in court.

23. **PW7, No. 89140 Salim Bibo**, the investigating officer previously attached to Isinya police station, testified that he received a complainant on land dispute for Parcel No. 966 from the complaint against the appellants. He asked them to present ownership documents in support of their claims. After conducting investigations together with PC Waweru, they established that Parcel No. 966 where a dam had been dug and a small house built, belonged to the complainant. This was according to records from Kajiado Land registry. In cross-examination, he stated that during the site visit on 2nd September 2015, the 2nd appellant never produced any documents to show that Parcel No. 966 belonged to him. The appellants were arrested and charged.

24. In his defence, the 1st appellant testified that he had been living on parcel No. 939 since 1997 and that it was given to him by the group ranch and he was shown the boundaries by the surveyor who did the demarcation in the presence of the complainant's mother in law. He stated that they are neighbours with the complainant who owns 966. He further stated that he subdivided parcel 939 and sold a portion to the 2nd appellant. He denied that he was living on the complainant's land.

25. The 2nd appellant testified that the 1st appellant sold to him parcel No. 4304 which borders the complainant's land No. 966. He had constructed a dam on his parcel of land and that his title deed got burnt in 2018 and they have never had problems. In cross examination, he stated that he moved to Parcel No. 939 in 1997 which was shown to him by the 1st appellant and the Committee and he found the complainant's mother-in-law. He further stated that 25 people had problems with the map and the ground.

26. **DW3, Samuel Pertapipi Parmulot**, testified that he was the chairperson of the group ranch which had 299 registered members who were given land following sub division in 1982. The map was drawn by a private surveyor, Francis Munene, and that Parcel No. 966 belonged to the complanaint. He stated that 25 members who were issued with new title deeds had issues with the land and a committee was formed to solve the problems. In cross-examination, he stated that the map drawn by the private surveyor was rejected by the land control board. He stated that he never had any documents to prove that he was the chairperson of the group ranch.

27. **DW4, Topuika Ole Simel,** testified that he was a member of the ranch and the demarcation committee. He was present when the complainant's mother-in-law was shown the land. He stated that he knew the complainant and the appellants and that they live on their respective parcels of lands.

28. **DW5, Moses Rapai Ole Taiko**, chairman of village elders, testified that he was a member of the group ranch and secretary to the Committee that was formed to resolve the land dispute between the complaint and the appellants since the map and the ground were not tallying. They notified Isinya District officer, surveyor and Registrar and ministry of lands, Housing and Development in writing of the problem.

29. The trial court then considered the evidence and was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted and sentenced the appellants, prompting this appeal. The appellants faulted the trial court on various grounds. The issues that arise for determination in this appeal are, first; whether the prosecution proved it case to the required standard and, second; whether the trial court had justification in convicting the appellants.

30. In criminal cases, the prosecution bears the burden to prove its case against the accused beyond reasonable doubt. As the court stated in ***Philip Nzaka Watu v Republic*** [2006] eKLR, to find conviction in a criminal case, the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt.

31. In ***Bakare v State (***1987) 1 NWLR (PT 52) 579), the Supreme Court of Nigeria (**OPUTA, JSC.)** stated:

Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability. (Emphasis).

32. It is also because of the high degree of proof required in criminal trials, that the Court of Appeal stated in ***Pius Arap Maina v Republic*** [2013] eKLR, that, the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution case raising material doubts, must be resolved in favour of the accused.

33. Similarly, in ***Stephen Nguli Mulili v Republic*** [2014] eKLR, the Court of Appeal again stated:

[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR.

34. The prosecution case was mainly based on the evidence of PW1, PW2, PW3 and PW4. PW1 testified that parcel No. 966 belonged to her deceased husband and was later transmitted to her through a grant of representation. PW2 and PW3 were workers of PW1 and told the court that the appellants entered the land and started constructing a dam thereon. They informed PW1 who asked the appellants to stop but they continued. The matter was reported to the police. PW4, a scenes of crime officer, was sent to document the scene. He took photographs which showed that the appellants' homestead was on PW1's land. A dam about 400m had also been constructed on the land.

35. PW5, the land registrar, testified that parcel 966 belonged to the complainant's deceased husband and was later transmitted to the complainant. According to him, the 1st appellant's land was parcel No. 939. PW6 a retired Land Registrar, testified that he arbitrated a boundary dispute where the 1st appellant, whose land was 939 had laid claim over Parcel No. 966. He visited the ground with a land surveyor (now retired) and they found that the 1st appellant's land (Parcel No. 939) did not share a boundary with Parcel No. 966 which belonged to the complainant. The appellants were also not living on their land.

36. On the other hand, it was the 1st appellant's case that he was shown boundaries to his land by the group ranch and settled and lives on the parcel of land which he believes is Parcel 939. He then subdivided it and sold a portion to the 2nd appellant. The two denied occupying the complainant's land.

37. DW3 stated that survey was done by a private surveyor but problems occurred and the map produced by the private surveyor was rejected. A committee was formed to solve the problems. DW4 a member of the demarcation committee in the group ranch stated that he was present when the complainant's mother-in-law was shown the land. He stated that he knew the complainant and the appellants and that they lived on their respective parcels of land.

38. DW5 was a member of the group ranch and secretary to the committee that was formed to resolve the land dispute between the complainant and the appellants since the map and the ground were not tallying. They notified Isinya District officer, surveyor, Land Registrar and ministry of lands, housing and development in writing of the problem. He however stated that he did not know who lives on parcel No. 936 which does not tally with the map. He stated that the complainant did not attend the meetings for resolving the problem.

39. The appellants were charged with forcible detainer contrary to section 91 of the Penal Code. Section 91 provides:

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.

40. To constitute an offence of forcible detainer, the accused must be in actual possession; must have no claim of right over the land and the possession must be in a manner that is likely to cause a breach of the peace. (See ***Albert Ouma Matiya vs Republic*** [2012] eKLR).

41. In this appeal, the 1st appellant maintained that he was shown his land parcel No. 939 and its boundaries and settled on that land. He later subdivided the land and sold a portion to the 2nd appellant who took possession and started developing his portion. DW3, DW4 and DW5, testified to the effect that members were shown their respective parcels of land but problems emerged later as the land on the map differed with what was on the ground, forcing the group ranch to set up a committee to resolve the matter.

42. As it is, from the evidence of the 1st appellant and his witnesses, there seems to be a problem on the ground. The 1st appellant maintains that he resides on parcel No. 939 which is supported by DW3, DW4 and DW5. DW5 stated that both the appellants and complainant live on separate parcels of land. In other words, the appellants believe that they are on their parcels of land and not on the complainant's land.

43. The complainant inherited the land and was not there when the land was distributed. PW5 and PW6, land registrar and retired land registrar respectively, stated that the appellants reside on the complainant's land. Although PW5 produced a copy of the green card for parcel 966, he did not produce one for parcel 939. PW6 stated that he visited the land with a surveyor and but did not state who resides on parcel 939. His evidence was not clear whether they showed the 1st appellant his land and its boundaries.

44. From the evidence of both sides, it is clear to this court that this was not a case of forcible detainer, but one of confusion over boundary and actual parcels of the feuding parties on the ground. The trial court ignored the appellants' evidence and their witnesses that they lived on

their parcel of land and that there was a possibility that what is on the map is different from what is on the ground. The 1st appellant also stated that he subdivided the land and sold a portion to the 2nd appellant. The 2nd appellant was, therefore, a victim of the same confusion. He was developing what he believed to be his parcel of land lawfully purchased from the 1st appellant. If the appellants are on the complainant's land, who is on their parcel of land? The prosecution witnesses and, in particular PW5 and PW6 who were supposed to assist the parties did not seem to have done their work well. I am therefore unable to agree with the trial court that the prosecution proved the ingredient of forcible detainer beyond reasonable doubt.

45. The next issue would be whether the possession was a threat to a breach of the peace. Having determined that forcible detainer was not conclusively proved, this issue would not be necessary save for completeness of this appeal.

46. The definition of what would constitute a breach of peace was well stated by **Watkins LJ**: in ***R v Howell*** [1982] 1 QB 416; [1981] 3 All ER 383, thus:

> ***A comprehensive definition of the term 'breach of the peace' has very rarely been formulated so far as we have been able, with considerable help from counsel, to discover from cases which go as far back as the eighteenth century.... [W]e cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks on a person's body or property.***

(See also ***Steel & others v The United Kingdom*** [1998] ECHR 95).

47. The appellants stated that they did not act in a manner that threatened breach of the peace. The complainant did not also testify that the appellants threatened her in any manner. The parties had lived on the land, whoever the owner might be, for a reasonably long time and there was no evidence that there was a threat to peace in the area. In fact, DW5 stated that each of the parties were living on their parcels of land. In the circumstances, I do not think the prosecution proved this ingredient too.

48. I must observe here, that the issue in the case before the trial court (and in this appeal), appears more civil than criminal. The appellants claim ownership of the land they occupy which, according to them, is different from that of the complainant, while the complainant claims that land too. The complainant's case is that the land belonged her husband before it was transmitted to her after his demise. There is evidence that there could be a problem regarding identification of the parcels of land both on paper and on the ground, an issue that cannot be resolved through criminal proceedings. The trial court was therefore wrong to convict the appellants when the 1st appellant claimed that he and the 2nd appellant were staying on the land which he was shown and later sold to the 2nd appellant portion thereof. It requires a different mode of resolving the issue other than through criminal sanctions.

49. In the circumstance, having considered the appeal and evidence on record, I am satisfied that the trial court was in error and this appeal must succeed. Consequently, this appeal is allowed, conviction quashed and sentence set aside. Any fines paid shall be refunded to the person who paid.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 23RD DAY OF JULY 2021.

E C MWITA

JUDGE