



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 29 OF 2019

ISAAC GITATA MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement of the Senior Principal Magistrates Court at Mavoko delivered on 28.3.2019 by the Senior Principal Magistrate L.P. Kassan in Mavoko SPM Criminal Case 836 of 2014)

JUDGEMENT

1. The Appellant was on 14.7.2014 charged with the offence of Forcible Detainer Contrary to Section 91 of *The Penal Code* before the Senior Principal Magistrates Court at Mavoko. It was alleged that the appellant on the 10th day of July, 2014 at Danana Area in Athi River District within Machakos County being in possession of one acre piece of land LR 12610/17 located in Athi River belonging to one Mungai Ngaruiya without color of right, held possession of the said piece of land in a manner likely to cause a breach of peace against Mungai Ngaruya who was entitled by law to the possession of the said land.
2. In support of the prosecution case, 4 witnesses were presented and the evidence was thus; Pw1 was Mungai Ngaruiya who testified that he received a call that people had encroached on the suit land and yet he had the original certificate. He told the court that he bought the suit land from National Bank and that the appellant was building a mabati structure on the suit land. It was his testimony that he reported the matter to the police and maintained that the suit land did not belong to Mlolongo Bright Wines. On cross examination, it was his testimony that the owner of the suit land had charged the same to National Bank and after he bought the same he developed the land. He told the court that LR 12610/04 did not exist and on reexamination he told the court that he suspected that the same was a forgery.
3. **Pw2 Pc Daniel Lopua** testified that on 10.7.2014 he was assigned to a land matter whereupon he visited the land and found the fenced plot with persons undertaking construction. He testified that he found a person by the name Pastor who told him that he had bought the land but never showed any documents. On cross examination, he told the court that he was the arresting officer.
4. **Pw3 was Muema Ndivo** who testified that on 17.4.2015 she accompanied surveyors and officers from Athi River Police Station to LR 12610/17 to ascertain whether there was encroachment. It was his testimony that the LR number was indicated in the survey plan 201/20 and 191/10 and that the plan was used to ascertain the beacons that were marked RL4, RL5 Kq and Kz and that they were found to be stable. It was his testimony that the suit land is marked by beacons M3, M4, M10 and M11 and that he realized that there was a building and barbed wire that was done within the suit land and established that there was encroachment on the suit land. He presented a survey drawing and a survey report that were marked Pexh 10 and 9 respectively.
5. **Pw4 was Pc Daniel Nyariki** who testified that he was the investigating officer. It was his testimony that he received a report from Pw1 that persons had invaded his property and he proceeded to the suit land where he met a person called Pastor who alleged that the land belonged to him. He testified that he arrested the Pastor. On reexamination he told court that the complainant had not sold the land to the appellant.
6. The court was satisfied that a prima facie case was made against the appellant who was placed on his defence. In his defence, the appellant testified that he bought the land LR 12610/14 from Mr. Jefferson Njuguna through Syokimau Bright Homes and proceeded to construct a church. He testified that he was issued with certificate number 3917/12610/4 and he insisted that he bought LR 12610/4 and not LR 12610/17. On cross examination he told the court that he bought the land on 9.2.2014 from Jefferson Muchiri and was issued with a certificate that was signed by chair, director and secretary. He told the court that he did not pay stamp duty and that no transfer documents were executed.
7. **Dw2 Susan Kagwe** testified that she was the advocate who prepared the agreement after receipt of instructions from the appellant. On cross examination she told the court that she did not proceed with the conveyancing because her instructions were limited.
8. **Dw3, Jefferson Muchiri** testified that he knew the appellant and had informed him about a piece of land that was his shareholding in a

society called SBH. He told the court that he sold to the appellant one acre of land out of what he was given as a shareholder and he received money. He testified that he was not aware of Pw1.

9. Jefferson Njuguna, named as Pw2 testified that he sold the land to the appellant.

10. In his judgment, the trial magistrate found that the appellant was guilty as charged and convicted him and sentenced him to probation for one year.

11. Being dissatisfied with the decision, the appellant appealed both conviction and sentence on five grounds namely;

a) The learned trial magistrate erred in law and in fact in determining a land ownership dispute (a civil matter) through the criminal justice system as the complainant lay claim on Land No. 12610/17 while the appellant lay claim on plot 3917 in LR 12610/04 which are different plot numbers but the same physical ground and each party had title documents to support his claim on ownership.

b) The learned trial magistrate erred in law and in fact by not finding that the appellant could not be said to have occupied the land on the material date without a color of right as he produced his ownership documents of the disputed plot.

c) The learned trial magistrate erred in law and in fact in not finding that the issue of ownership would conclusively and strictly be proved under the civil law process and failed to advise the parties to resolve the dispute on ownership through the civil law.

d) The learned trial magistrate erred in law and in fact in not finding that the complainant and the prosecution wanted to use the criminal process as a shortcut to intimidate, harass and evict the appellant which was an abuse of court process.

e) The learned trial magistrate erred in law by not appreciating and upholding the provisions of Section 8 of the Penal Code to the effect that a person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

12. The appellant prayed that the conviction be quashed, sentence set aside.

13. The appeal was canvassed vide written submissions. The appellant submitted that this was a civil matter that could not be heard in a criminal trial.

14. The learned State counsel made no submissions in opposition to the appeal.

15. This being a first appellate court, it is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see **Pandya v. Republic [1957] EA. 336**) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see **Shantilal M. Ruwala v. R. [1957] EA. 570**). 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, (see **Peters v. Sunday Post [1958] E.A 424**). The issues elicited from the appeal point towards proof of the prosecution case, defectiveness of the charge sheet and severity of the sentence.

16. Counsel for the appellant in his submissions assails the trial court for of failure to consider that the appellant had a color of right to the suit property.

17. Section 8 of *The Penal Code Act* provides that a person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

18. A claim of right defence under section 8 of *The Penal Code* involves: (a) a genuine, honest belief, regardless of whether it is well founded in fact or law. The fact that it is a wrongheaded claim does not matter (see **Rex v Bernard [1938] 2 KB 264 at 270** where it was held that a person has such a claim of right "if he is honestly asserting what he believes to be a lawful claim even though it may be unfounded in law or in fact;") (b) regarding a legal entitlement to property or money in the hands of another, not simply a moral entitlement (see **Harris v Harrison (1963) Crim LR 497**).

19. The defence allows for a subjective belief in a claim of right which if established negatives the required mental element of property related offences. It should be noted that this defence is not limited to situations in which an accused believed he / she owned the property. Rather, it includes those situations in which the accused honestly, although not necessarily correctly, believed that he / she had either the right or the authorization to receive, take, acquire, or dispose of the property. The existence of such a claim may constitute an answer to a property related crime in which the issue as to whether the accused had a genuine belief in the legal right to the property rather than a belief in a legal right to employ the means in question to recover it, is relevant to the determination of culpability. Once the defence is successfully raised on the evidence, it is then for the prosecution to negative it (see **Astor v Hayes (1998) 38 A Crim R 219**).

20. From the evidence on record, the appellant did indicate his belief as to his right of legal entitlement to the property that was allocated to

the complainant. However no basis for his belief was given, he seemed to be hinged on the fact that he paid money but however had no requisite documentation that could support his claim of right; he had no title deed and had an undated certificate in the names of Syokimau Bright Homes and is partially signed. I am not convinced with his reason for such belief and in this regard, he cannot be excluded from liability for the offence charged.

21. The offence of forcible detainer c/s 91 of *The Penal Code* is committed by any person who in actual possession of land that he has no right to have possession of occupies the same in a manner that is likely to or causes a breach of the peace. See the case of **Albert Ouma Matiya v R (2012) eKLR**.

22. To establish that the detainer is forcible there must be proof of such force as constitutes a public breach of the peace, or such conduct as constitutes a riot or unlawful assembly or such as to be likely to deter a person minded to resist the entry (see **Archbold's Criminal Pleading, Evidence and Practice (38th ed., (1973), para. 3608)**). L. Owen Pike, *History of Crime in England*, vol. 1 p. 249 shows that at common law, offences of forcible entry and detainer were not confined to brigands and outlaws, but were committed by otherwise law-abiding persons, sometimes to recover land of which they had been dispossessed, and sometimes in the belief that they had some title to the land.

23. The offence with which the appellant was charged in the instant case is constituted by the unlawful taking of possession of real property by force or threats of force. From the prosecution evidence, Pw1 as corroborated by Pw2 and Pw3 show that his purpose in entering and or remaining on the suit land was to dispossess Pw1. The evidence of Pw1 as corroborated by Pw3 to Pw5 establish that the appellant's possession of the land was for the purpose of assuming the possession of land as was evident that he was building on the subject plot. It was immaterial that he did so in exercise of an honest belief that he was entitled to be on the land.

24. With regard to the element of breaches of the peace, the evidence showed that Pw1's peacefulness of actual possession of land was prevented as the actions of the appellant interfered with his peaceful enjoyment of the suit land. In the absence of contrary evidence and in the presence of unchallenged evidence, I find that the appellant had no power to remain on the suit premises.

25. The complainant tendered a title deed to the property that was in his name. The appellant did not challenge the documentation when the same were tendered in court hence the prosecution established that the appellant had no legal entitlement to the suit land. I am therefore satisfied that the evidence adduced by the prosecution proved beyond reasonable doubt that the appellant entered upon and remained on the land without the authority of the law. I am also satisfied that the prosecution adduced evidence which proved beyond reasonable doubt that the appellant used such force as constituted a public breach of the peace, that was able to deter Pw1 from enjoying full use of his land. The defence of claim of right was not available to the appellant. A defence under section 8 of the Penal Code should not be used as a blank cheque to take possession of lands belonging to legitimate owners. Such kind of a defence must be scrutinized thoroughly otherwise anybody can enter another's land and claim that he had an honest belief of ownership. It is also possible for one to manufacture documents on land and then purport to be the owner thereof. Such scenarios are common across the country.

26. Be that as it may, the appellant has every right to employ the legal means to recover the land after convincing the requisite court that he has such right to the land. The manner by which he chose to resist the enjoyment of Pw1 of the subject land constituted an offence and that the charges against him were in no way an abuse of court process.

27. The appellant sought that the sentence of the trial court be set aside. He has given no reason for the same. The circumstances in which an appellate court may interfere with the sentence of a trial court were specified in **Ogolla S/o Owor v. Republic (1954) 24 EACA 270** as follows;

“The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed being manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle.....The court may not interfere with the sentence imposed by a trial court simply because it would have imposed a different sentence had it been the trial court.”

28. This court therefore may interfere with the sentence imposed by the trial court only if it comes to the conclusion either that; (i) the sentence is excessive, given the background of the appellant and the circumstances of the offence; (ii) the sentence is illegal; or (iii) there was an error in a principle of sentencing which resulted in an unreasonable sentence. If a sentence is manifestly excessive, that is an indication of a failure to apply the right principles (see **R v Ball 35 Cr App Rep16**).

29. The appellant has not demonstrated that the trial magistrate was under any error of principle in the determination of the sentence. I note that section 91 of *The Penal Code* does not prescribe a penalty for the offence of forcible entry. For that reason under section 36 of *The Penal Code* when no punishment is specially provided for any misdemeanor, it is punishable with imprisonment for a period not exceeding two years or with a fine or with both and in passing a sentence of one year probation, the trial court was lenient. I find no good reasons to interfere with both conviction and sentence.

30. In the result the appeal lacks merit. The same is dismissed. The conviction and sentence is upheld.

It is so ordered.

Dated and delivered at Machakos this 28th day of January, 2020.

D. K. Kemei

Judge