



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL CASE NO. 95 OF 2018**

**MOSES MUTIGA NABEA**

**NAAMAN NABEA.....APPELLANTS**

**VS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This appeal arises out of Judgement delivered on 13.6.2018 in Tigania SRM's court Criminal C. No. 1792 of 2013 by Hon. Sogomo SRM wherein the 2 appellants were convicted and sentenced on 18.6.2018 to pay a fine of Kshs 100,000/= each in default to serve 2 years imprisonment. The appellants were found guilty and convicted for the offence of forcible detainer contrary to section 91 of the penal code.

The particulars of the charge were that on 29<sup>th</sup> November 2013 at Githu Location the appellants jointly being in possession of land parcel no. 238 Githu adjudication section of James Kobia Nabeba without colour of right held possession of the said land in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace against James Kobia Nabeba who is entitled in law to the possession of the said land.

The 2 appellants filed joint petition of Appeal on the grounds:-

- a) The learned trial magistrate erred in law and fact by finding that there was evidence to support the charge.
- b) That the learned trial erred in law and fact by finding that the charge was proved beyond reasonable doubt.
- c) That the learned trial magistrate erred in law and fact by accepting the prosecution case as proved. Without taking into consideration the defence case.
- d) That the learned trial magistrate erred in law and fact by ignoring the legal principles governing such cases on the basis of evidence given.
- e) That the conviction was against weight of evidence adduced reasons wherefore the appellants prayed that the conviction be set aside and that they be acquitted.

The complainant said that on 29.9.2013 at 6.30 pm he was in his canteen when he got a report from John Maringo that appellants were planting trees on his land. When he visited the next day at 6.00 am he found they had planted gravelia & blue gum. He said the land was sold to his father by the appellant's father. He said they used to have a dispute over the land which is his and he produced a letter to that effect from Land Adjudication office. Complainant said he had reported severally about appellants trespassing over the land. He said plot No. 238 Githu Adjudication section is in his name.

PW2 testified that he saw appellants on complainants land on 29.11.2013 at 6.00 pm and he went to report to him. He said they were planting trees.

He said the complainant had a case with the appellants at Githu Adjudication section which Committee complainant was a member and that he testified on his behalf and the complainant. He said the trees in the area are in his land and not in Kobia's land. He said the complainants' father and appellant's father had a case before lands office and complainants father.

He admitted the 1<sup>st</sup> appellant doesn't live on disputed parcel. He denied knowing if the decision of lands office was appealed to Maua Land Board. He said 2<sup>nd</sup> Appellant doesn't live on disputed land but that 1<sup>st</sup> Appellant built a shack on the disputed land subsequent to date of

offence.

Pw3 produced a letter dated 28.6.2016 on behalf of Kepha Ouru Obingo the Sub county land Adjudication and Settlement officer confirming land is registered in the name of James Kobia Nabea. It was confirmed the section is under demarcation stage under Cap 284 Laws of Kenya. He said he didn't know who was in actual possession of the disputed land between appellants and the complainant.

PW4 investigated the complaint of forcible detainer against the appellants. He said P.C Owando visited the scene and confirmed the planting of tree seedlings and drew sketch map and also wrote a letter. He re-visited the scene on 18.6.2017 and found almost half of the land was planted with gravellia and robusta trees whereas the other half was planted by appellants. The Investigating officer said appellants were still working on the land as at 18.6.2017. He said he was not aware appellant's father was buried on disputed land. He said he didn't know if 1<sup>st</sup> appellant introduced piped water in the land in dispute. He said he was not aware complainant fraudulently transferred the land after appellant's father's death.

He denied that complainant was a member of the local Land Adjudication Committee. He said that there was a dispute before the District Land Adjudication and survey officer over the disputed land which ruled in favour of the complainant. He said witnesses to the sale transaction had already testified. He said 2<sup>nd</sup> Appellant doesn't reside on land in dispute. He said he doesn't know if the appellant's father left them any other land. He said he was not aware of sub division of Land No. 238. The appellants in defence said that their father sold land to complainant's father in 1973 when they were children for consideration of 800/=, a blanket, suit and he – goat but only 800/= was paid.

Later when complainant's father was acting he demanded for refund of 800/= and the appellants father refunded 600/= as he had spent 200/=. The appellants said they had lived on disputed land since 1978. He said that when land was being adjudicated the land officials ignored his version because the complainant was a member of the land committee. They said their father didn't sell the entire land to the complainant's father and he wanted to be compensated if he is to surrender the land to complainant.

From the re-evaluation of the evidence in the trial court. It is apparent that this is a land dispute that cannot be conclusively resolved in a criminal matter because detention of any of the parties will merely compound the enmity that already exists.

PW2 claimed he saw the appellants planting trees on the disputed land but also admits that the appellants were not in occupation and or possession of the disputed land on the day he claims they were planting trees. As observed by Justice Kimaru in the case of Albert Ouma Matiya vs Republic 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.

- It must be established that the accused has no title or legal right to occupy the land in dispute.
- It must be proved that the accused is in occupation of parcel of land in a manner likely or causes reasonable apprehension that there will be breach of peace against the persons entitled by law to the possession of land.
- PW2 said the appellants were not in possession or occupation of the land in dispute. He said it is later that 2<sup>nd</sup> appellant put up a structure on land in dispute. The Investigating officer – PW4 said that when he visited the disputed land appellants were not in occupation. The Investigating officer visited disputed land in June 2017.

The 1<sup>st</sup> ingredient fails. It has not been proved. The complainant said the appellants had severally trespassed into the disputed land. Trespass and forcible detainer are 2 separate and distinct offences and cannot be proved by elements meant to prove the other.

The exhibit used to prove that the complainant was entitled to the disputed land was date 28<sup>th</sup> June 2016, whereas the offence according to the charge sheet in the trial court shows offence was committed on 29<sup>th</sup> November 2013.

PW3 didn't lead evidence explaining circumstances under which the letter was written by the sub county Land Adjudication and settlement officer to show land belonged to the complainant several years after charge against appellant was lodged in court.

PW4 P.C. Kipchumba revisited scene on 18.6.2017 and found gravellia and robusta trees. The complainant and PW2 said that the appellants planted gravellia and blue gum trees. He said there were also beans on the disputed land which were planted by appellants. The Investigating officer doesn't tie his visit on 18.6.2017 to the offence allegedly committed on 29<sup>th</sup> November 2013.

Whether the prosecution proved the appellants had no title or legal right to occupy the land, the evidence was that the appellant's father sold some portion of the land to the complainant's father in 1973 but only 800/- was paid out of the consideration agreed upon. Later the complainant's father demanded for the money he had paid and it is alleged the appellants father refunded 600/=-.

The appellants claim their father was buried on land in dispute. The appellants claim the complainant whom PW2 confirmed was a member of Githu Land Adjudication Committee fraudulently transferred land to himself after the death of their father. The document showing ownership is dated 2016 when offence is alleged to have been committed on 29.11.2013.

It would have been important to verify proceedings that determined that complainant was entitled to the land when it is alleged it is his father who bought it from the appellant's father over 46 years ago. If it is true that complainant was a member of LAC that determined the dispute in his favour then the rules of natural justice will obviously have been mooted.

It is the view of this court that going through the trial courts proceedings, the justice of the day will not be served by upholding the convictions and sentence passed in the trial court. The dispute herein ought to go through exhaustive process to establish the rights of the parties herein rather than banging some of them behind bars. The conviction is quashed and sentence set aside. The appellants are forthwith set at Liberty unless otherwise lawfully detained. The appellants are advised to pursue their rights with Maua Land Adjudication and

settlement officer so that the matter can settled conclusively once and for all. This judgment should be served on Maua L.A.S.O.

Orders accordingly.

**HON A.ONG'INJO**

**JUDGE**

**JUDGMENT SIGNED, DELIVERED AND DATED THIS 24<sup>TH</sup> DAY OF JANUARY 2019.**

**In the Presence of:**

CA: Kinoti

Appellants:-Ms Kiome Advocate holding brief for Mwiti for Appellant

Respondent:- Ms Mwaniki for state

**HON. A.ONG'INJO**

**JUDGE**