



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 35 OF 2017

REPUBLIC.....APPELLANT

VERSUS

KAZUNGU BUMBUSHU SHENI.....RESPONDENT

(An appeal against the ruling and acquittal of Hon. Wandia, R.M., delivered on 16th November, 2017 in Malindi Chief Magistrate's Court Criminal case No. 513 of 2014)

JUDGMENT

1. The appellant was acquitted under the provisions of Section 210 of the Criminal Procedure Code for the charge of forcible detainer contrary to the provisions of Section 91 of the Penal Code, due to lack of sufficient evidence. The particulars of the charge were that on the 12th day of November, 2013 at Mbaraka Chembe village, of Gede location within Kilifi County, being in possession of parcel of land number Kilifi/mbaraka chembe/394 of William Simba Dhuri 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 breach of the peace against William Simba Dhuri who is entitled by law to the possession of the said land.
2. The Office of Director of Public Prosecutions being dissatisfied with the said ruling filed a petition of appeal on 27th November, 2017 raising the following grounds of appeal:-
 - (i) That the Learned Magistrate erred in law and fact by acquitting the respondent against the weight of overwhelming evidence by the prosecution witnesses;
 - (ii) That the Learned Magistrate erred in law and fact by misdirecting herself in the matter despite the overwhelming evidence adduced by the prosecution witnesses;
 - (iii) That the Learned Magistrate erred in law by relying on extraneous matters to acquit the respondent; and
 - (iv) That the Learned Magistrate misapplied the law and arrived at a wrong decision by acquitting the respondent.
3. The appellant filed its written submissions on 6th April, 2018. The respondent's Counsel filed his written submissions on 5th April, 2018. At the time of hearing this appeal, Ms Njoki Keng'ara, Learned Counsel for the appellant relied on their written submissions and sought a date for delivery of the Judgment. The same position obtained with regard to Mr. Gekanana, Learned Counsel, who held brief for Mr. Shujaa for the respondent.
4. The appellant's submissions are to the effect that PW1 bought 1.21 hectares of land from Tinga Kalu Tinga also known as Bumbushu Tinga. PW1 had with him in court the sale agreement. The appellant's Counsel further stated that PW1's evidence was that he bought the land for Kshs. 180,000/-. He also had with him the original title deed for the said land.
5. The appellant's submissions indicate that the respondent who was in actual possession of the said land refused to hand in vacant possession as he said that he had planted trees which he wanted to be paid for. He was also tilling the land. It was further submitted that PW1's evidence was corroborated by PW2 who testified that the appellant lived on the land in issue and that he saw him when he visited the said land.
6. The appellant's submissions are to the effect that PW3, the Assistant Chief, gave evidence that he wrote an official letter to the respondent. He also said that the land belonged to William and that Mzee Bumbushu (respondent) had stopped them from putting up beacons as he had not been told about it. He therefore wrote an official letter for them to go and put up beacons. He had with him a copy of the letter dated 7th

November, 2013 that he wrote to the respondent. In the said letter he told him that the exercise would be done on 12th November, 2013 but on the said date they were denied entry by the respondent. They then reported to him.

7. The appellant's Counsel also relied on the evidence of PW5, an Assistant Surveyor and stated that the respondent called them "*land thieves*" and chased them away when they were surveying PW1's land. Although they showed him the title, he refused to listen to them and continued chasing them.

8. It was further submitted for the appellant that the respondent was in illegal possession of land that he knew belonged PW1 but demanded payment for trees that were on the land and as a result caused a breach of the peace against the actual owner.

9. The appellant prayed for the respondent to be put on his defence as they had established a prima facie case against him. The appellant relied on the case of **Ramanlal Trambakalal Bhatt vs Republic** [1957] EA 322.

10. The respondent's Counsel's submissions in respect to ground Nos. 1 and 2 of the appeal were to the effect that the evidence adduced at the trial did not establish any of the 3 ingredients of forcible detainer. These are that:-

(i) The respondent was in actual possession of the complainant's land;

(ii) That the respondent had no right to the said parcel of land; and

(iii) That the respondent held the land in a manner likely to cause a breach of the peace against the complainant.

11. It was submitted that it was not disputed that PW1 was the registered owner of Title No. Kilifi/Mbaraka Chembe/394. The fact that was disputed is the evidence that was adduced by the Prosecution that on 12th November, 2013, the respondent was in actual possession of the said parcel of land. This was for the reason that PW1, who is the complainant, was not an eyewitness to the alleged commission of the offence.

12. Submissions by the respondent's Counsel indicate that PW2's and PW3's evidence did not state that on 12th November, 2013 they saw the respondent on the parcel of land belonging to PW1. With regard to PW2, Counsel submitted that his evidence was that the respondent was living on "*the other side*" but did not say that he was living on PW1's land. It was stated that PW2 testified that they found the respondent alone at home making a mat and that his home is situate in his father's land. The respondent told them that he would not allow them to demarcate the land.

13. It was submitted that PW3 testified that they went to the respondent's home and told him that they wanted to erect beacons on PW1's land but upon the respondent's refusal to allow them to do so, they left. The said submissions further state that PW3 contradicted himself in cross-examination as in examination-in-chief he had said that the respondent chased them away, but on cross-examination he stated that the discussion took place at the respondent's home and not on PW1's piece of land.

14. Counsel for the respondent therefore asserted that there was no evidence adduced to show that the respondent was in actual possession of the PW1's piece of land on 12th November, 2013, thus the Prosecution failed to prove its case beyond reasonable doubt.

15. It was further submitted for the respondent that PW1 purchased 3 acres (1.21 HA) of land from the respondent's father who was the registered owner of Parcel No. Kilifi/Mbaraka Chembe/33, from which parcel No. Kilifi/Mbaraka Chembe/394 was hived out. According to the respondent's submissions, his father remained with 9 acres of land and that is where the respondent's home is situate.

16. The respondent's Counsel argued that although photographs of maize crops were produced, no evidence was adduced to show that the maize was planted by the respondent on PW1's land. It was contended that the Prosecution failed to produce a survey report to indicate where the respondent's family land is situate as compared to that owned by PW1. It was submitted therefore that in the absence of the said report it could not be said that the maize crops had been planted on PW1's land.

17. On the issue of sand harvesting, Counsel for the respondent submitted that none of the witnesses said that they saw sand being harvested from PW1's land as all that was said is that PW1 was informed by his relatives that the respondent was harvesting sand. It was argued that none of the said witnesses was called to testify, hence the evidence of PW1 as to the foregoing allegation remains hearsay evidence. It was contended that no evidence was adduced to show when the maize crops were planted and by whom.

18. Counsel for the respondent submitted that the photographs produced were taken on 30th March, 2014 yet the offence was committed on 12th November, 2013. The said Counsel put across a proposition that maize which had been planted on 12th November, 2013 would have been harvested by the time the photographs were taken.

19. In response to the 3rd and 4th grounds of appeal, the respondent's Counsel controverted the same by submitting that the trial court did not err in law and fact in acquitting the respondent. He further submitted that the Hon. Magistrate did not misapply the law or consider extraneous factors but directed herself on the evidence adduced by the Prosecution.

THE EVIDENCE

20. Prosecution witness No. 1 was the complainant, William Simba, a resident of Gede. It was his evidence that he bought the land the subject of this appeal (Kilifi/Mbaraka Chembe/394) in 1994 from Tinga Kalu Tinga alias Bumbushu, for the sum of Khs. 180,000/=. It was 3 acres or 1.21 HA. The sale agreement he had with him was marked as MFI-1. He had with him the original title deed for the said property

which was marked as MFI-2. It was his evidence that since he wanted to develop the piece of land, he sent his workers and a Surveyor to show them the boundaries, but some wazee (old men) in the village sent them away. He gave the names of the said men as Kazungu Bumbushu (respondent) and his brothers, who are said to be children of the old man who sold to him the land. PW1's evidence further stated that the respondent denied PW1 vacant possession of the land claiming that he had planted trees thereon which he wanted to be paid for, but the respondent was a stranger to the matter as the agreement shows that it is his father who sold the land to him. They however continued to stay on the land.

21. On cross-examination, PW1 indicated that the agreement was dated 6th June, 1994 and he was to buy 3 acres as per the agreement. He was issued with a title on 16th August, 1994. He gave evidence that the respondent's father used to live on the land but does not know if his family lived there.

22. PW2, was Benson Kibao Simba, a resident of Kizingo. He testified before the lower court that PW1 was his brother. He recounted how on 12th November, 2013 he went to the Chief's Office to wait for a Surveyor as they were supposed to go to PW1's land at Chembe Kibabamche (sic) in Gede. He was accompanied by 2 Surveyors, namely Sanga and another. They went to Simba's land and saw the respondent who lived thereon. PW2 testified that they (the said family) had sold 3 acres to PW1 and they lived on "the other side".

23. PW2 stated that he identified himself to the respondent but when he went later on with the Surveyor to put beacons, he chased them away. PW2 reported the incident to the Chief (sic) (PW3) who said he would talk to the respondent. PW2 also reported to PW1 who said that he would deal with them.

24. It was PW2's evidence that later on, Police Officers went to him and asked him to show them Simba's land. They visited the said place where they took photographs which were marked as PMF-3.

25. On being cross-examined, PW2 stated that on 12th November, 2013 they found the respondent at his home making a mat and told him what had taken them there. He also told the respondent that the title deed was with his brother and the respondent said if he was not given the title he would not allow them to demarcate the land. PW2 further said that PW1 bought the land with the trees.

26. PW3 was Stanclans Ngala Sirya, a resident of Kakadongo in Baraka Chembe where he was working as an Assistant Chief at the time he testified in court. His evidence was that he wrote an official letter dated 7th November, 2013 to the respondent to the effect that the exercise of putting beacons would be done on 12th November, 2013. A copy of the said letter was marked as MFI-4. He testified that on 12th November, 2013, they reported to him that the respondent had stopped them from carrying out the exercise. PW3 then informed the owner of the land what had transpired. He indicated that he knew the respondent as Kazungu Bumbushu and that the land in issue was family land before PW1 bought it.

27. On cross-examination, PW3 stated that PW1 asked him to talk to the respondent to leave the land and that they had asked for their father's title deed. PW3 further said that the respondent had always lived where he was found, even when his father was alive.

28. PW4, No. 85475 P.C Onesmus Mutua based at Central Police Station Nairobi informed the lower court that he was the Investigating Officer in this case. At the time the offence occurred, he was working at Watamu Police Station. It was his evidence that on 30th March, 2014 at around 10:00a.m., PW1 went to the Police Station and reported that he bought land in Baraka Chembe (sic) in 1994 and had ownership documents which he showed them. The title was for 3 acres of land reference No. Kilifi/barakachembe/394 (sic) which he bought from the late Tinga Bumbushu, for the sum of Kshs. 180,000/=. He had the original sale agreement showing that he bought the land. An Advocate who was involved in the sale transaction took PW4 to the land, where he saw that sand had been harvested by the respondent.

29. PW4 got Corporal Mugendi from CID scenes of crime who took photographs at the scene. He identified the photographs which were marked as MFI-3A-C. PW4 further testified that the Assistant Chief, Sirya, informed him that he had told the respondent through a letter dated 7th November, 2013 that the land would be surveyed. PW4 produced the letter as P. exh. 4. He found out that PW2 and a Surveyor were denied access to the land by the respondent. PW4 visited the land's office and verified that the land belonged to PW1 and that the documents were genuine. He produced a copy of the title deed No. Kilifi/barakachembe/394 (sic) as P. exh. 2. He produced the sale agreement as P. exh. 1 and an official search certificate dated 2nd April, 2014 for the said land as P. exh. 5.

30. Joseph Sanga Kaswoswo, an Assistant of the Surveyor and resident of Kwa Chocha testified as PW5. It was his evidence that on 12th November, 2013 at 11:00a.m., (the correct time was 10:00a.m., as reflected in the Hon. Magistrate's handwritten proceedings) PW2 called him and told him that they should meet at the Chief's Office at Gede at 10:00a.m. He went with the Surveyor, Luke Omondi. PW5 testified that PW2 told them that he had spoken with the family of Bumbushu and that they could go and survey Mr. Simba's land. As they started working on the said land, one Kazungu Bumbushu (respondent) went there and asked them what they were doing. On telling him that they were surveying Simba's land, he called them "land thieves" and told them to leave. PW5 stated that they showed him the title but he refused to listen and chased them away. They went back to the Chief who said he would inform the owner (PW1) who would decide on what to do.

31. PW6, No. 78361 Corporal Erick Mugendi from CID Malindi gave evidence that on 30th March, 2014, he was called by PW4 from Watamu Police Station to take pictures of a shamba (land). They went to Baraka Chembe (sic) where he took pictures. He indicated that he took the 1st picture that shows maize on the said land, from afar. He stated that photographs 2 and 3 are close up views of the said land and maize. He indicated that the 4th picture shows that sand had been dug from the land. He also testified that he processed and printed the photographs. He prepared a report dated 18th September, 2014. He produced the photographs as P. exh. 3A-D and the report of the photographs as Plf. exh. 6.

ANALYSIS AND DETERMINATION

The issue for determination is if a *prima facie* case was established in the lower court for the respondent to be put on his defence.

32. The duty of the first appellate court is to analyze and re-evaluate the evidence tendered before the lower court and come to its own conclusion taking into account that it neither saw nor heard the witnesses testify. In the case of **David Njuguna Wairimu vs. Republic [2010] eKLR** the Court of Appeal reiterated this duty as follows:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

33. The evidence adduced by PW1 was that he bought 3 acres (1.21 HA) of land from Tinga Kalu Tinga alias Bumbushu Tinga (deceased), who was the respondent's late father. He paid Kshs. 180,000/= for the said land. A copy of the sale agreement was produced as P. exh. 1. A copy of the title deed for land parcel No. Kilifi/Mbaraka Chembe/394 was produced as P. exh. 2. The said title was in PW1's name. The measurements of the said land was equivalent to that of the piece of land bought by PW1. On cross-examination, PW1 admitted that **he still had the other title for the remaining piece of land**. The sale agreement produced in court entitled PW1 to only 1.21 hectares (3 acres) of land. It is therefore unfathomable that as at the time PW1 testified before the lower court, he still held the title to the remaining 4.79 hectares of land for no justifiable reason, as no explanation was forthcoming from PW1 as to why he was holding the title deed to the latter parcel of land. In this Court's view, it was a natural reaction for the respondent herein to demand for the original title when PW1 sent PW2 to take Surveyors to the land to erect beacons on the land he bought from the deceased.

34. Although the Office of the Director of Public Prosecutions has filed this appeal, the stalemate that brought about the complaint herein was instigated by PW1 being in possession of the original title deed for land reference No. Kilifi/Mbaraka Chembe/33, to which he is not entitled as per the evidence adduced herein.

35. After considering the written submissions made by both Counsel, the authority cited by the Counsel for the appellant and the evidence on record, I have difficulties agreeing with the position taken by Counsel for the appellant that the respondent should have been put on his defence. The respondent was in actual possession of the deceased's parcel of land and from the evidence of PW2, PW1 bought 3 acres and the respondent lived on the *“other side”*. It is therefore apparent that being family land, before the beacons could be erected, it could not be said with certainty that the respondent was in actual possession of the land that PW1 bought. It was clear from the evidence of PW3, the Assistant Chief of the area that the respondent had always lived, even when the deceased was alive, on the piece of land where he was found by PW2 and the Surveyors.

36. No evidence was adduced by the Prosecution to show that the respondent knew of the location of the parcel of land that his father had sold to PW1 and that if he had such knowledge, he occupied the said parcel of land without colour of right. There was no proof that the maize crops planted on the said land and the sand harvesting therefrom was done by the respondent. As was submitted by Counsel for the respondent, PW1's evidence on the foregoing allegation was hearsay. It was not substantiated.

37. I therefore hold that that the Hon. Magistrate did not misdirect herself when she found that the Prosecution had not established a *prima facie* case that would require the respondent to be put on his defence. The evidence adduced by the Prosecution indicated that the respondent was legally in possession of the deceased's family land but the same could not be said in respect to him having been in possession of PW1's parcel of land.

38. In the Malaysian case of **PP vs Datoseri Anwar bin Ibrahim** No. 3 of 1999 2CLJ 215 at page 274-275, Augustine Paul J stated thus:-

“A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called onto answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence, must be such that, if rebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.”

39. The lower court was not informed of the date and the year when the deceased died, however, the more I read the proceedings of the lower court, the more I became convinced that PW1 should have resorted to mediation with the family of the deceased through the respondent's Advocate.

40. On whether the respondent caused a breach of the peace, the evidence shows that he chased away the Surveyors because he was demanding for the original title deed for land reference No. Kilifi/Mbaraka Chembe/33. As I have stated earlier, PW1 did not have the legal right to have in his custody the original title deed for the said land. It is therefore up to the respondent to determine the legal action to take in that regard. I am not persuaded by the appellant's Counsel that in view of the facts of this case, that the respondent caused a breach of the peace.

41. I therefore uphold the decision made by the Hon. Magistrate in acquitting the respondent under the provisions of Section 210 of the Criminal Procedure Code. The appeal is hereby dismissed.

DELIVERED, DATED and SIGNED at MALINDI on this 11th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Njoki Keng'ara for the appellant

Mr. Shujaa for the respondent

Mr. Oliver Musundi - Court Assistant