REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 216 & 217 OF 2015.

FLORENCE WANJIKU MWAMUNGA.....1ST APPELLANT.

CHARLES THIRU NJOKA.....2ND APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 4281 of 2010 delivered by Hon. T. Okelo, SPM on 11th September, 2015).

JUDGMENT

Background.

1. Florence Wanjiku Mwamunga and Charles Thiru Njoka, hereafter the 1st and 2nd Appellants respectively were charged as the 2nd and 1st accused in two counts. The first count was for forcible detainer contrary to Section 91 of the Penal Code. The particulars of the offence were that on 9th October, 2010 at PCEA church Kayole within Nairobi County, jointly with others not before court being in possession of plot No. A3-178 of Micro Forms Limited without colour of right, held possession of the said land in a manner likely to cause a breach of the peace against Micro Forms Limited who were entitled to the possession of the said land.

2. The second count related to the offence of stealing contrary to Section 275 of the Penal Code. The particulars of the offence were that on 9th October, 2010 at PCEA Church Kayole within Nairobi County, jointly with others not before court, stole 60 tonnes of ballast and 40 tonnes of quarry dust all valued at Kshs. 100,000/- the property of Micro Forms Limited.

3. The Appellants were found guilty of both offences. They were sentenced to one year probation. They are both dissatisfied with that court's decision and they each filed separate appeals. The 1st Appelalnt filed appeal no. 216 of 2015 whilst the 2nd appellant filed appeal No. 217 of 2015. Both were consolidated for purposes of this judgment. The petitions of appeals are dated 22nd December, 2015 and are similar. They raise the following grounds of appeal.

> *(i) That the learned magistrate erred in relying on fabricated evidence. (ii) That the trial magistrate erred in failing to appreciate that a private company could not be allocated public land,*
>
> *(iii) That the honorable magistrate erred in failing to appreciate the document examiner's uncontroverted evidence,*
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> *(iv) That the learned magistrate erred when relying on a civil case that was yet to be heard substantively when arriving at his decision,*
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> *(v) That the trial magistrate erred in failing to appreciate that the Appellants were neither custodians nor owners of any property owned by the Presbyterian Foundation,*
>
> *(vi) That the honorable magistrate erred in law failing to appreciate that forcible detainer charges are no longer entertained in law,*
>
> *(vii) That the learned trial magistrate erred in failing to appreciate that none of the prosecution witnesses actually saw the Appellants steal the material forming the subject matter of count 2,*

(viii) That the trial magistrate erred in failing to consider the defence evidence that was presented,

(ix) That the honorable magistrate erred by failing to note that the prosecution did not prove the offence to the required standard.

(x) That the judgment and sentence amount to a miscarriage of justice and in the interest of justice should be set aside.

Evidence.

4. Both Appellants were elders of Kayole PCEA Church. With respect to count I, the church claimed ownership of the parcel of land adjacent to the church. On the land, the church built a nursery school which was already running. The church claimed the land through allotment of a nursery school by City Council of Nairobi. The events leading to the charges against the Appellants were that the complainant who testified as PW1 also claimed the same parcel of land plot number A3-178. He and his wife were directors of Micro Forms Limited which was allotted the land by the City Council of Nairobi. According to PW1, he applied for allocation of a plot in early 1992 and was allocated the subject plot in the number stated. Subsequently, the land was demarcated and a beacon certificate issued on 23rd April, 1996. He adduced in court the beacon certificate as well as the allotment letter. He further testified that Kayole PCEA Church grabbed the plot in 2005 and developed the nursery school which stood on it by the time the Appellants were arrested. PW1 raised a complaint with the City Council and the latter asked the church to vacate the plot but which it did not.

5. Subsequently, PW1 decided to develop the land. He ferried into the plot some construction materials namely; building stones and ballast on 9th October, 32010. Both Appellants who were at the site at the time with the help of some goons prevented PW1 from offloading the building materials. PW1 sought help from police and was able to offload the materials. As soon as the materials were offloaded, a lorry Reg. No. KBH 682R drove to the site and carried the materials at the behest of the Appellants. PW1 then reported the matter to Kayole Police station and investigations commenced.

6. **PW2 Charles Wachira Kariuki** a businessman dealing with building materials in Kayole Estate confirmed that he had sold the building materials to PW1and ferried them to the site on 9th October, 2011. He confirmed that on the same date, and in his presence, some people went to the site with motor vehicle KBH 682 R Isuzu lorry and carried away all the materials he had sold to PW1. He confirmed that on the site was a structure built by PCEA Church Kayole. Amongst the people present when the materials were carried away were both Appellants.

7. **PW3, IP Bairita Bella** of PCIO Nairobi investigated the case. He testified that he confirmed that the disputed plot was alloted to PW1 by the City Council of Nairobi as plot No. A3-178. He testified that although PCEA Kalole Church occupied the plot, it could not produce any document to ascertain that it was allotted the land by the City Council. He then formed the opinion that the church had illegally occupied the land which belonged to PW1. He further, in cross-examination, stated that the only documentation the Appellants produced for claim of the land was allocation of a nursery school but did not state the plot number on which the nursery school stood. He did confirm that the allotment of the plot to PW1 was authentic and that the City Council had even asked the church to vacate the plot.

8. After the close of the prosecution case, the court ruled that the prosecution had established a prima facie case and accordingly put the Appellants on their defence. Both testified as **DW3** and **2** respectively. They called **DW1 Assistant Commissioner of Police, Emmanuel Kenga** who was a document examiner as their witness.

9. On the part of the Appellants, they denied committing the offences. They however confirmed and reaffirmed that the disputed land was owned by PCEA Foundation which owned all the church land in the Republic of Kenya. In the respect of the disputed land, Kayole PCEA Church was only a custodian of it on behalf of the PCEA Foundation. They reaffirmed that it was PW1 who had invaded the church land. In addition, that the church had followed the proper procedure of acquiring the land through application for allotment by the Nairobi City Council. It was also their case that the City Council had made a part of the development plan in the favour of the church. Unfortunately, none of the Appellants had an allotment letter from the City Council to the church. They stated that on the 9th October, 2010 PW1 dumped building materials on the site which had occasioned disturbance and harassment to the church. It was further their case that the church had developed the plot into a nursery school. They confirmed that they were both elders at the Kayole PCEA Church.

10. DW1's evidence was to the effect that there was a possibility that the signature of Mrs. Wandera on a letter of allotment of the plot to PW1 was manipulated and planted on the documents. He had examined questioned documents being a letter from the City Council dated 14th September, 1992. Other documents bore known signatures and prints and the task he was assigned was to compare if the signature in the questioned document was made by the person who had signed against the known signatures and prints of Mrs. Wandera. He formed an opinion that the prints below and above the signature of Mrs. Wandera were made by different machines. He produced a document examination report in respect to the examination he conducted.

Submissions and Determination

11. Both the Appellants and the Respondent filed written submissions. The Appellants were represented by learned counsel, Mr. Muchoki. He filed the submissions on 2nd May, 2018. Those of the Respondent were filed by learned State Counsel, Ms. Akunja on 22nd May, 2018. I have considered them accordingly and shall make reference to them in the determination. I have also reevaluated the evidence and I have arrived at the conclusion that the following issues arise for determination;

i. Whether a charge of forcible detainer is valid in law.

ii. Whether the court could determine ownership of the property.

iii. Whether the court took into account the evidence of DW1, the document examiner.

iv. Whether the case was proved beyond a reasonable doubt.

12. I shall consider the first three issues simultaneously. With regards to the first issue the Appellants submitted that the learned trial magistrate failed to note that forcible detainer charges under Section 91 of the Penal Code were no longer entertained by courts. This point was vehemently opposed by the Respondent. The Appellants' advocate submitted that where a certificate of title was not adduced the proper forum for a dispute was the civil court. He relied on **Ivory Chris Musovya *v.* Republic[2014] eKLR** to buttress this submission. In reply Ms. Akunja submitted that a civil suit had already been filed, being CMCC No. 6390 of 2010. She submitted that in this case the court declined to issue a permanent injunction against the complainant herein because the Appellant had failed to show they owned the land. While citing the case of **Julius Edapal Ekai *v.* Republic[2018] eKLR** she submitted that ownership of land must not necessarily be demonstrated by a certificate of title. It can be shown by an allotment letter as was held in the case.

13. The Appellants highlighted the following excerpt from the case of **Ivory Chris**:

> ***"It therefore follows where a claim is made which is not supported by a Certificate of Title such a claim rightly belongs to the Civil Court which Court would determine the rightful owner of the land."***

At paragraph 11 is a crucial pointer to the *ratio decidendi* the court ought to apply where the court stated:

> ***"But I think the most important failure by the prosecution was failure to show any evidence that he complainant's claim to possession was supported by law."***

14. In the case the court recognized the need for adduction of documentary evidence as a show of claim of interest in land. However, the court did not deliver itself to the effect that a claim in ownership of land could only be demonstrated by a certificate of title. Suffice it to state, ownership to property in Kenya can be legally established through the possession of a myriad instruments that are *prima facie* evidence of ownership of the property. To limit ascertainment of ownership of land to merely a certificate of title would be a gross mistake in light of the various historical statutory schemes that have set out various modes of purveying and proving title to property. In my view a claim to land can be established by a legally recognized instrument, an allotment letter being one of them.

15. In the instant case, the complainant adduced a certificate of allotment as proof of his ownership of the property in question. The letter, whose provenance I shall discuss later, was dated 14th September, 1992 and related to the allocation of plot No. A3-178 in Kayole project. The complainant also adduced a letter dated 11th March, 1996 from the Housing Development Department of the Nairobi City Council acknowledging receipt of payments with regards to Plot No. A3-178-Kayole.

16. In reply, the Appellants testified that they applied for allocation of the plot and adduced a letter dated 11th October, 2005 to the Town Clerk, Nairobi City Council. However, there was no confirmation of allotment of the property. It is in black and white that the letter from the City Council of Nairobi dated 10th July, 2009 confirms that the plot was allotted to Micro Forms Limited and "any unlawful encroachment on the same would be unlawful". I hesitate to further delve deeper into the question of ownership of the property as that is under the jurisdiction of another court pursuant to Article 165(5) of the Constitution. I shall only rely on the documents adduced as pointer to the ownership of the property. Having found that the Appellants did not adduce documents to prove ownership to the property, I make a candid conclusion that a legitimate ownership of claim to the land lay with the complainant.

17. The Appellant's submission was that the documents of ownership adduced by the complainant were not genuine and should therefore not be relied upon as a pointer to entitlement on the part of the complainant. The assertion is hinged on the evidence of DW1, E. K. Kenga, a document examiner who in his document examination report concluded that there was a possibility that the signature of Mrs. Wandera, on the allotment letter was manipulated and planted on the documents. Although this witness was never cross-examined, I have had the benefit of looking at the report he prepared on 6th July, 2011. He stated he examined exhibits marked 'A' and B1-B3. He does not indicate what the exhibits in questions were. His first observation was with respect to the prints above and below the signature of Mrs. Wandera which he stated were made by different machines. He pointed to the letters 'L', 'E', 'K', 'C', 'M', 'Y' and 'W' as being in a different pattern or style and submitted that this pointed to a possibility of the signature of Mrs. Wandera being planted on the document.

18. I note that the validity of the signature is not question and the witness found the signature similar with the specimens in his possession. However, he arrived at the conclusion on the basis of the use of different typewriter to set out the body of the letter and the signature part of the letter. Further, there is no evidence that the author of the letter, the basis of which the examination was done, was questioned. In the circumstances, I find that the evidence of DW1 was not sufficient to rebut the fact that the letter from the City Council of Nairobi dated 10th July, 2009 was genuine and confirmed the ownership of the plot to the complainant.

19. On proof of the case, the first count relates to the offence of forcible detainer under Section 91 of the Penal Code which states:

> ***"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 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 misdemeanor termed forcible detainer."***

20. From this definition, I conclude that three ingredients must be established in proof of the the offence namely; (i) proof of *prima facie* ownership of the land in question, (ii) proof that the accused was illegally in actual possession of the land in question, and (iii) proof that the possession in question was in a manner likely to breach the owner's peace or created an impression that a breach was imminent. The court has already determined the first element that is the *prima facie* ownership of the land.

21. As regards to the actual possession of the land, the case for the Appellants was that the church was in actual possession of the land and

was in the process of constructing a nursery school after completing a part development plan. This raises the question of whether the church's possession of the property cushions the Appellants as they were not the ones in possession of the property. The Appellants submitted that all property belonging to the Presbyterian Church of East Africa is owned by the Presbyterian Foundation and they were neither owners nor custodians of the property. The letter submitted seeking allotment was from the Presbyterian Church of East Africa, Kayole Parish and not the Presbyterian Foundation. The recommendation letter from the Kayole Estate Residents Association also refers to an application for the property by PCEA Kayole Parish. A letter to the Commissioner of Lands dated 22nd July, 2011 has the subject matter **ATTEMPTED GRABBING OF PUBLIC UTILITY LAND BELONGING TO P.C.E.A KAYOLE CHURCH.** The Kayole Church being, to use the Appellants' phrase, an ecumenical organization is administered by its elders who are responsible for the day to day activities both religious and secular. The Appellants do not deny that they were elders in the church or their presence on the property on the day in question trying to stop an invasion of the land. They were acting at the behest of the church and were actually identified by PW2 who pointed to the 1st Appellant as the one trying to stop him from depositing the building materials. They were therefore rightfully charged.

22. The next ingredient is the proof that the possession threatened or created a breach of the peace. What constitutes a breach of peace was ably set out in the speech of Watkins LJ in **R *v.* Howells[1982] 1 QB 416** as approvingly quoted in **Steel & others *v.* The United Kingdom[1998] ECHR 95,** thus:

> ***"A comprehensive definition of the term 'breach of the peace' has very rarely been formulated… We are emboldened to say that there is likely to be a breach of peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance."***

23. In the instant case, the peace being disturbed is the quiet enjoyment of property. The Appellants do not contest that the property had been co-opted for the construction of a nursery school and was being actively occupied. Further, it was clear that the Appellants and their cronies were impeding PW1 and PW2 when they tried to deposit the building materials on the property thereby infringing the complainant's right to quiet enjoyment of his land. I thus find that the prosecution did prove that there was a breach of the peace on the part of the Appellants.

24. The sum total of the above observations is that I find that the offence under Section 91 of the Penal Code was proved beyond a reasonable doubt.

25. With regards to the second count of stealing there was no evidence identifying the Appellants as direct perpetrators. Further, they were not tied to the vehicle that was used to ferry the materials in question. The court would then be hard pressed to find that the offence of stealing was proved. However, under Section 179(1) of the Criminal Procedure Code the court may convict the Appellants for a lesser offence if proved by the evidence at hand.

26. It is clear that the Appellants were on the property when the theft took place. They witnessed the complainant's driver dropping the construction materials. They were resisting the dropping off of the materials but the complainant sought the help of the police to offload them. Subsequently, while the Appellants were on sight, they witnessed the building materials being ferried away without raising an alarm. Bearing in mind the background to the fact that they claimed possession of the land on behalf of the church was a pointer that they deliberately failed to prevent the commission of the theft which is a felony. No doubt, they were culpable of the offence of neglect to prevent a felony under Section 392 of the penal code. I accordingly substitute the offence of stealing with that under Section 392 of the Penal Code and convict them accordingly.

27. In sum, I find that the prosecution proved count I beyond all reasonable doubt. I dismiss the appeal in its respect and uphold the conviction. My findings in respect of count II are as above. With regards to the sentence the Appellants have already served and exhausted the sentence of probation that was passed by the trial court. I shall not disturb the same in the hope that it shall serve as a deterrence.

Dated and delivered at Nairobi This 31st July, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Miss Jakila h/b for Gichuki for the Appellants.

2. Mr. Momanyi for the Respondent.