



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 121 OF 2017

TALAL OMAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in the Chief Magistrate's

Court at Mombasa in criminal case no 930 of 2011 by Hon. F. Kyambia

Senior Principle Magistrate delivered on 25th July 2017

JUDGMENT

1 **Talal Omar** the Appellant herein was charged with three counts. In Count **1** he was charged with Trespass with intent to annoy contrary to section 5(1) of the Trespass Act. The particulars of the charge were that on 20th December 2010 at Juda Estate within Kisauni District of Coast Province he was found to have trespassed the plot of Khamis Said Rashid without his consent with intent to cause annoyance.

2 In Count **11** he was charged with Malicious damage to property contrary to section 339(1) of the Penal Code. The particulars were that on the 20th day of December 2010 at Tuda within Kisauni District of the Coast Province, he willfully and unlawfully damaged two trees valued at Kshs. 17,000/= the property of Khamis Said Rashid.

3 In Count **111** he was charged with Forcible Detainer Contrary to Section 91 as read with section 30 of the Penal Code. The particulars of the charge were that on diverse dates between 20th December 2010 and 16th March 2011 at Tunda estate within Kisauni District of the Coast Province being in possession of a plot on land title no. CR 7358/1 of Khamis Said Rashid without colour of right held possession of the said plot in a manner likely to cause a breach of peace or reasonable apprehension of peace of the peace against Khamis Said Rashid who was satisfied by law to be in possession of the said land.

4 His co-accused died during trial. He was found guilty and convicted of count **1** and **3**. In count **1** he was sentenced to pay a fine of Kshs. 2000 or serve a jail term of 6 months. In Count **3** he was sentenced to serve a term of 2 years. The sentences were to run consecutively.

5 The Appellant being aggrieved by the judgment filed this appeal against both the conviction and sentence citing the following grounds.

1 That the learned magistrate erred in law and in fact in failing to find that the prosecution failed to adduce evidence of trespass and forcible detainer on the complainant's property as alleged.

2 That the learned magistrate erred when it proceeded to determine the question of ownership instead of forcible detainer.

3 That the learned magistrate erred in law and facts by failing to establish beyond reasonable doubt the legal ownership of the land and hence the conviction was wrongly sustained.

4 That the learned magistrate erred in law and facts by convicting him for the offence of Trespass where no evidence of trespass was adduced or at all as against him.

5 That the learned magistrate failed in fact and in law to note that ownership was an issue in controversy and subject to Civil Proceedings in High Court Civil Case No. 75 of 2011.

6 *That the learned trial magistrate fell into error when it failed to note that the issue in controversy as civil in nature whose criminal trial had the potential to embarrass the court and the system of administration of justice.*

7 *That the trial magistrate erred in fact and law in falling to note that the Appellant had no previous records of a conviction, his conduct did not portray a guilty mind and it was therefore wrong to deny him the benefit of the least severe of punishment as prescribed for by Article 50 of the constitution of Kenya 2010.*

4 A summary of the prosecution case is that **PW1 Hamisi Said Rashid** jointly owns land title no. CR7358/1 plot no 667 with his siblings i.e Ahmed Said, Nassoi and his sister in law Rukia Mohammed Ali. That Plot no. 667 is in the name of their deceased father one Said Bin Rashid bin Khamis.

5 On 20th December 2010, at around 8:30am, PW1 was at the farm and found many young people who had cut trees and dug trenches to start a construction. He was informed that the Appellant who was present had bought the plot and was the one building a house.

6 He went back home and informed his brothers what had transpired and they all denied selling the plot. He returned to the plot with his brother Ahmed and found the workers there though the Appellant was not there.

7 They reported the matter at Dog Section Police Post and the officers at the station accompanied them back to the plot. When the Appellant heard that he had gone back to the plot with police, he came back to the plot on a motorbike and said he had bought the land from the his co-accused and led the police to him.

8 PW1 stated that despite having constructed a house in the plot, put a watch man to guard the house and obtaining an injunction in court, the Appellant had managed to build a house on the plot.

9 He stated that the Appellant and his co-accused had no authority to sell/ buy the plot. The big trees which had been cut were valued at Kshs 17,000/- by Agricultural officers.

10 PW2 **Ahmed Said Rashid** who is Pw1's brother corroborated Pw1's testimony.

11 PW3 **CPL Good Mvoya** testified that On 20th December 2010, Pw1 and Pw2 came to the police station and reported that someone had encroached on their farm in Junda area and was even constructing. He was then ordered by the OCS to accompany Pw1 and Pw2 to the site.

12 On arrival, he observed that plot no. 667 had a house foundation dug and that 2 big trees had been cut down. He interrogated the Appellant and his co accused but they did not show him any documents to prove ownership. He said both Pw1 and Pw2 were named in the plot's title deed(PEXB.1) as beneficiaries. Thus, he made a decision to charge the Appellant and co accused with trespass and malicious damage to property.

13. On 16th March 2011, Pw1 came to Nyali Police Station and informed him that the Appellant had continued constructing his house and was in fact using water from their well and had installed a generator to pump water. On visiting the scene, he found the Appellant who on seeing him ran away. He then collected the pump and left.

14 Later, the Appellant came to the police station accompanied by his lawyer. He arrested him and charged him with forcible detainer for building a house on a plot that did not belong to him. He produced photos of the plot (EXB29).

15 PW4 **Godson Kazungu** works for the Ministry of Agriculture, Livestock and Fisheries, Mombasa County. He stated that on 24th December 2010, he was sent to the plot in issue by police officers at Nyali to assess the damage. He was in the accompanied by PW1.

16 On arrival at the plot he noted that there was a foundation for a house, a baobab tree had been cut completely and an Aborea tree had its roots cut while trying to fell it down. He produced the assessment report (EXB2) which valued the mature trees at Kshs. 17,000.

17 PW5 **Suleiman Said Rashid** (Pw1's brother) recalled that on 17th March 2011, Pw1 called him and told him that the Appellant was pumping water from their bore hole. On 19th March 2011, he went to arrest the Appellant and found that he had inserted the sub marible pump into their well. On seeing the police, he ran away.

18 He further told the court that the plot belonged to their late father **Said Rashid Hamisi Elicmandry** who was registered in 1924 and died in 1961. Subsequently, they did a Succession Cause and a grant was issued and later confirmed. He stated that each of them has his portion including his sisters.

19 The plot was registered on 23rd February 2010. He produced the title and said he had done some searches to confirm that the land belonged to them as the registered owner of the plot was Ahmed Said & Others.

20 PW6 **Dick James Safari** is a Registrar of Titles at the Mombasa Registry. He confirmed to the court that LR 667/2 Mombasa is owned by SAID BIN RASHID BIN KHAMIS and through succession, the land was inherited by Sureka Saidi Rashid and Rukia Saidi Rashid. Later, on 23/210 land was transferred by Assent to:

1. Ahmed Saidi

2. Khamis Saidi
3. Nasser Saidi
4. Rukia Mohammed Ali
5. Mansour Mohammed
6. Aziza Mohammed

21 He confirmed that the Appellant was not registered as an owner of the plot according to the copy of title(PEXB.1) which shows all transactions in relation to the plot.

22 The Appellant gave a sworn statement for his defence and called no witness. He denied the charges facing him and stated that he did not know whether the plot belonged to Pw1. He further told the court that he occupied the plot before the date stated in the charge sheet on being allowed by village elders.

23 Furthermore, he told the court that before Pw1 complained, he had occupied the plot for five years, peacefully and had never created disturbance while occupying the plot.

24 When the appeal came for hearing, the Appellant filed his written submissions through the firm of Nabwana, Nabwana & Co Advocates.

25 Mr Nabwana. submitted that the Appellant was convicted for two offences i.e trespass with intent to annoy contrary to section 5(1) of the Trespass Act Cap 204 of the laws of Kenya and forcible detainer contrary to section 91 of the Penal Code Cap 63 as read together with section 30 of the Penal Code. He submitted that the Appellant was charged with offences contrary to sections of the Law that do not exist. He said the charge sheet was incurably defective and relied on the case of **Julius Thaitumu and 4 others v Republic Criminal Appeal No. 200 of 2009 [eKLR]**

26 Counsel further submitted that the charge sheet was defective as there were two persons who were charged but the 2nd accused died during trial; the charge sheet was never amended hence, the Appellant would not know which counts he faced since he was charged with 5 counts but the court only dealt with 3 counts.

27 On the evidence led by the prosecution that the Appellant was building on the land, counsel submitted that no surveyors report was produced. Counsel further submitted that there was a civil dispute pending in court which was even captured in the probation report and the trial court could not resolve a matter pending before the High court. He argued that no evidence was led to establish the offence of forcible detainer.

28 Counsel further submitted that there was no explanation for the maximum sentence as the Appellant was in custody for 6 months before his release on bail pending Appeal.

29 Mr.Isaboke for the Respondent opposed the appeal by submitting that the prosecution had produced ownership documents. He submitted that the defect in the charge sheet was not in material form. He however admitted that the sentence was harsh but legal.

30 On the issue of the civil case in the High Court, he submitted that the same was never raised in the trial court and even if it was, there was nothing preventing civil and criminal cases being heard simultaneously.

31 This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own independent conclusion. See **Okeno v Republic E.A. 32, Njoroge v R [1989]KLR 313.**

32 I have considered the evidence on record, the grounds of appeal, the submissions by counsel and the cited authorities. The Appellants have raised total of 5 grounds of appeal. Upon considering all I have stated above, I will narrow them to three issues which are:-

- 1. Whether the charge sheet was defective?**
- 2. Whether the prosecution led any evidence to establish trespass or forcible detainer?**
- 3. Whether the sentence imposed on the Appellant was harsh?**

33. On whether the charge sheet was defective, the Appellant's counsel submitted that the Appellant was convicted for two offences i.e trespass with intent to annoy contrary to section 5(1) of the Trespass Act Cap 204 of the laws of Kenya and Forcible Detainer contrary to section 91 of the Penal Code as read together with section 30 of the Penal Code. He submitted that the Appellant was charged with offences contrary to sections of the Law that do not exist.

34 The charges in the present case were clear enough that the appellant was charged with trespass and forcible detainer. The particulars of the offence were also given, the material part of which disclosed when and where the offence was alleged to have been committed. *Mr. Were*, learned counsel who represented the appellant during his trial raised no objection whatsoever on the competence of the charge before the trial court. The inescapable conclusion is that the appellant and his counsel were well aware, with sufficient particularity, of the charge

that confronted the Appellant.

35 Section 382 of the Criminal Procedure Code is also relevant to the question raised by the Appellant's counsel. That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. (See *George Njuguna Wamae V. Republic, Cr. App. No. 417 of 2009*). In *Samuel Kilonzo Musau V. Republic, Cr App. No. 153 of 2013*, the Court of Appeal declined to interfere with a conviction where the appellant was charged with "defilement contrary to section 8(1)(2) of the Sexual Offences Act" instead of "defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act", after finding that he had suffered no prejudice.

36 Similarly in *Amedi Omurunga V. Republic, Cr. App. No. 178 of 2012 [2014] eKLR*, the Court of Appeal invoked section 382 of the Criminal Procedure Code and declined to interfere with the conviction where the appellant had, like in the present case, been charged under the punishment section without any reference to the section creating the offence. The Court found that the appellant had an opportunity to raise the issue before the trial court but did not; that he was well aware of the charge against him and its particulars; that he had effectively participated in the trial; and that no miscarriage of justice had been occasioned.

37 The Court went further and stated thus:

"To our mind, we are satisfied that the irregularity in the charge-sheet did not imperil the appellant or occasioned him a failure of justice. Given the foregoing, the decisions of the High Court that the appellant sought to rely on were decided without subjecting the conclusions to the test of whether that omission occasioned a failure of justice and thereby prejudiced the appellant. To that extent they do not represent good law and ought to be discarded or disregarded."

38 It is also noteworthy that in *Joseph Mwamuye V. Republic (2012) eKLR, Meoli, J.* declined to follow her own decision in *Samuel Fondo Gona Malindi Criminal Appeal No 119/09* in respect to section 382 CPC and stated as follows:

"In the present case, the charge contains all the essential elements of the offence defined in section 8 (1). Thus it is sufficient. The era when technicalities were allowed to override substantive justice is hopefully behind us, with the enactment of section 159(2) (d) of the constitution. The appellant's right to a fair trial were upheld in as much as he was charged with a recognized offence and the proper plea taking procedure was, followed and I do not accept that the mere failure by the prosecution to insert section 8 (1) of the Sexual Offences Act in the statement of the offence ought to be fatal."

This rendered the intrusion of the Appellant to the property owned by Pw1 unlawful which of course occasioned annoyance and injury to Pw1 and other beneficiaries of the land. Failure to amend the charge sheet after the Appellant's co-accused died did not change the facts of the case. He knew and understood the case against him.

39 I am therefore satisfied that the failure to refer to the punishment section in the charge sheet or even quoting the wrong punishment section did not occasion a miscarriage of justice in this case. Still on the charges its clear the appellant faced 3 counts and not 5 as submitted. He was convicted on C1 and C3 and acquitted on C2.

40 **Whether the prosecution led any evidence to establish trespass or forcible detainer?**

On the charges of Trespass with intent to annoy contrary to section 5(1) of the Trespass Act the elements which the prosecution must establish are:-

- i) **An unlawful intrusion or invasion of a property.**
- ii) **Intent of intrusion**
- iii) **Force and**
- iv) **Consequential injury to the owner.**

41 From the above, it must be shown that the accused entered upon the land or property of another without the consent either express or implied, of the owner or occupier thereof.

42 In this case, PW6 produced in court a certificate of title showing that PW1 was among the beneficiaries of land title no. LR 7358/1. In my humble view, PW1 established that he has a legally protected interest in the said land. The prosecution led evidence that the Appellant had invaded Pw1's property and even started construction.

43 The Appellant in his defence admitted that he was on the land having been shown the place by village elders. He however, did not lead any evidence from any village elder to inform the trial court why they decided to give him the land, if at all that was the position.

44 The ingredients required to establish the charge of **forcible detainer** under **Section 91** of the **Penal Code** are as follows:

In *Albert Ouma Matiya V Republic [2012]eKLR* the court held:-

"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. The prosecution will establish this if it adduces evidence which proves that the accused has no title or legal right to occupy the land.

Secondly, the accused must be in occupation of the parcel of land in a manner that is likely or causes reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land. “

45 In the present case, evidence was led by the prosecution that the Appellant was in occupation of the land parcel No. 7358/1. Indeed in his defence, the Appellant admitted that he was shown the land by village elders and started construction of a house. Thus it is not in dispute that the Appellant was in actual occupation of the land.

46 The Appellant in his defence stated that as at the time of his being charged he had been in occupation of the land for five(5) years and was even constructing a house. Mr. Nabwana submitted that there were several matters in the High Court over ownership of this land. Unfortunately, counsel failed to mention even one single case that is in the High Court or ELC over this issue. Even the Appellant in his own defence never made mention of any such cases.

47 The Appellant did not avail before the trial court or even this court anything to show that he had any legal right to occupy the land in question. Pw1 demonstrated his legal right to occupy through Pw6(The Registrar of titles) who produced a copy of the title (EXB1) in respect to this land. It showed that PW1 among others was a beneficiary to the land.

48 I totally disagree with the Appellant’s counsel’s contention that the trial court determined the issue of ownership while there was a pending case in the High Court dealing with the same. I say so because Pw6 produced in court a certificate of title (EXB1) showing that PW1 was among the beneficiaries of land title no. LR 7358/1 and prima facie he had the locus to complain about the trespass and forcible detainer against the Appellant. As per the title documents produced the Appellant had no right to build on that land. The evidence in relation to these documents was not displaced. As stated elsewhere above, there is no evidence of any matter in the High Court over this land.

49 On whether the trial court gave a harsh sentence, it was the Appellant’s counsel’s submission the trial court gave a harsh sentence of 2 years with no option of a fine for the charge of forcible detainer.

50 Section 354(3) (b) of the Criminal Procedure Code gives the High Court power, on an appeal from a subordinate court, to reduce or increase the sentence, or alter the nature of the sentence.

51 In the circumstances of this case, I note that the Appellant was a first offender. He was convicted on 20th July 2017. He has been in prison for a period of 15 months which I find to be sufficient punishment on the 3rd count.

52 In conclusion I find that the Appeal against conviction on the 1st and 3rd counts fails. However Appeal on sentence succeeds on the 3rd count since the one on the 1st count has been served.

53 The sentence on the 1st count is confirmed. The sentence of 2 years imprisonment on the 3rd count is set aside and substituted with a sentence of the period already served.

Orders accordingly.

Dated, signed and delivered this 26th day of October 2018 in open court at Mombasa.

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HEDWIG I. ONG’UDI

JUDGE