REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 27 OF 2015

SIMON CHOPER …….
APPELLANT

VERSUS

REPUBLIC ……
RESPONDENT

(An appeal from conviction and sentence in original Lodwar PMCR 544/2015 DELIVERED ON 2ND December, 2014 by I O ODHIAMBO Resident Magistrate)

JUDGMENT

The appellant **Simon Chopper** was charged in the Principal Magistrate's court with the offence of forcible detainer contrary to section 91 of the penal code. The particulars were that on the 9th day of October, 2014 at Lodwar Town in Turkana Central sub-county within Turkana County was in possession of Plot No.11 (**ERC/341/85/1 of Abdizirak Abdullahi Alin** the owner in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace against the said **Abdirizak Abdullahi Akia** who was the entitled by law to be in possession of the said land.

The prosecution called 4 witnesses and on 25/11/2014 the appellant was put on his defence and asked to make his defence. The appellant elected not to say anything in his defence and left the matter to court. He was therefore convicted and sentenced to serve two (2) years imprisonment.

The appellant was dissatisfied with the conviction and sentence and preferred this appeal filed by Disi Obanda Advocate on 5th June, 2015 citing of grounds which can be paraphrased into the following grounds.

1. **That the named trial magistrate erred in law and fact in invoking criminal jurisdiction in a civil dispute over ownership of land.**
2. **That the trial magistrate failed to analyse the evidence and give reasons for his decision in the judgment**
3. **That the trial magistrate was biased against the appellant for electing not to say anything in his defence**
4. **The trial magistrate erred in not finding that the prosecution had not proved the offence and shifted the burden of proving innocence to the appellant.**
5. **The sentence of two (2) years imprisonment was excessive in the circumstances,**

Counsel for the appellant filed written submissions in support of the appeal. Counsel submitted that though couched in criminal terms, this was a civil dispute involving ownership of land and that the

complainant in this case had acknowledged this by filing a civil suit at the High Court in Kitale over the same property.

Secondly learned counsel for the appellant submits that the charge was not proved as the prosecution was supposed to prove that the appellant was in possession of the land and that he had no right to do so. The burden of proving that he had no right lay on the prosecution which did not discharge the duty and instead the court shifted the burden to the appellant which was contrary to law.

Third the appellant elected not to say anything in his defence should not be considered as the court did then in prosecution's evidence was not challenged.

Thirdly counsel submitted that the learned trial magistrate failed to analyse the evidence in his judgment and also failed to give reasons for his decision.

Kimanthi prosecuting counsel for respondent opposed the appeal. He filed written submissions. He supported the decision of the trial court and submitted that the prosecution proved that the appellant was in actual possession of the land; and therefore an offence of forcible detainer was established. He submitted that the sentence was not excessive as the maximum sentence provided under section 91 is two years to which the appellant was sentenced. Finally he submits that the submission by counsel for appellant is an attempt to adduce evidence in the appeal stage.

Briefly the evidence in the lower court was that **PW1 John Kisaka Makekula** bought land parcel **No.11 Lodwar from John Lomino**. It was a plot measuring **50ft by 100ft** and paid him Kshs.**7000.** He developed the plot and built residential rooms which were occupied by tenants who paid rent to him. The appellant was one of the tenants. The appellant approached Kisaka to introduce a friend who wanted to buy the land at Shs.**200,000/=.** Kisaka declined. Later Kisaka sold the parcel of land to the complainant Abdirizak Abdulai Alin at Shs.**2,400,000/=.** He produced the sale agreement and allotment letter which he had given to the complainant as exhibits. Later he was informed that the appellant had refused to move out. PW2 the complainant after buying the plot decided to develop it but the appellant refused to vacate. He reported the matter to Lands office who asked the appellant to move out but refused. He reported to police and appellant was arrested and charged with present offence.

The appellant was charged with the offence of forcible detainer contrary to section 91 of the penal code which provides

91 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 of the peace or reasonable apprehension of a breach of the peace against a person entitled y law to the possession of that land is guilty of misdemeanor termed forcible detainer.

The basic …….of the offence under section 91 of the penal code is 1) that the accused must be in possession or occupation of the land 2) that he is doing so without colour of right 3) that occupation is likely to cause a breach of the peace or apprehension of the breach of the peace when the rightful owner assets his rights. Those are the ingredients the prosecution must prove.

In the present appeal, from the records the appellant was in occupation or possession of plot No.11. The plot did not belong to him as brought out by the evidence of PW1 and Kisaka who had owned the plot since 1985 when he bought it. He produced the allotment letter dated 7/8/1985. He also produced sale agreement dated 25th February, 2014 whereby he sold the land to the complainant. By this evidence the prosecution established that the land belonged to the complainant as the rightful owners. The prosecution by this evidence demonstrated that the appellant who was in occupation did not have any right to do so.

The appellant in view of the above was asked to vacate the plot which he did not do.

In the light of this evidence by the prosecution, the trial magistrate rightly in my view found that a prima facie case had been made against the appellant. A prima facie case is one in which a reasonable tribunal

properly directing its mind to the law would convict if no explanation is offered by the defence.

Counsel for appellant submitted that the appellant exercised his right to remain silent under the provision of section 21 of C.P.C and that the trial magistrate assigned adverse inference against the appellant that since he did not defend himself he was guilty. It is true that a judge or magistrate should not draw or attract adverse comments or intervene when accused elects to keep quiet when put on his defence. (**Chenyo Nickson Katama** – VS – **Republic Malindi C.APP CR. APP 33 of 2013**). I find no inference or advance conviction by the trial magistrate as relating to the appellants option to keep silent and nor to offer any evidence, in the judgment of the trial magistrate.

Counsel for the appellant submitted that though the appellant was put on his defence, the fact that he elected not to offer any defence did not shift the burden of proof from the prosecution, which burden at all times rests on the prosecution. Counsel submits that the appellant bore no burden of explaining or proving anything in relation to the offence. This statement may be correct but has exception in certain circumstances. Sec. 111 of the evidence Act places burden on ……..on accused in certain cases. It provides

111 (1) where a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any exception or exemption from or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact specially within the knowledge of such person is upon him"

This provision in my view verifies the burden of proving circumstances that bring the accussed into exception of the law to the appellant. In charge facing the appellant the duty of bringing out that he had colour of right to occupy and be in possession of plot No.11 was a fact specially within his knowledge. Nowhere is the proceeding whether in cross-examination or otherwise did he state had he occupied the land by right either by having bought, inherited or by adverse possession. No document of domestic or how he acquired the land was tendered. In my view therefore in the absence of such explanations the trial magistrate was correct in arriving at the finding he did and found him guilty. Consequently I find that the conviction was proper and supported by evidence on record.

Lastly counsel for the appellant submitted that the imposition of the maximum sentence of two years without the option of a fine was excessive and draconian and was used as a means of evicting the appellant from the property. The offence the appellant was charged with is a misdemeanor. The general punishment for misdemeanor is provided for in section 36 of the penal code which provides

36 where in this code no punishment is specially provided for any misdemeanor, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both"

I note that the sentence of two years imprisonment is the maximum provided for the offence appellant was charged. He was a first offender and I do not find any aggravating circumstances to warrant him being sentenced to the maximum sentence. I note the appellant was sentenced on 2/12/2014 and by now has served a substantial part of the sentence. I therefore reduce the sentence of two years to the period served by the appellant and order that he be released forthwith.

Dated and signed at Lodwar this 15th day of March, 2016.

S RIECHI

JUDGE

17/3/2016

Before – S N RIECHI J

Gikunda for state – present

Appellant – present

Lotiir – C/clerk

Court – the judgment read over and delivered in open court in presence of the appellant and Mr. Gikunda for state this 17th day of March, 2016.

S RIECHI

JUDGE