



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 47 OF 2015

FRANCIS KARIUKI NGUNDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*Being an appeal from the judgment of the Principal Magistrate's Court (E. H. Keago) Criminal Case
Number 485 of 2014 dated*

3rd November, 2015 at Baricho)

JUDGMENT

1. **FRANCIS KARIUKI NGUNDA**, the appellant, herein was charged vide Principal Magistrate's Court at Baricho Criminal Case No. 485 of 2014 with 2 counts of offences:

- i. Forcible Detainer contrary to **Section 90** of the **Penal Code**.
- ii. Creating disturbance in a manner likely to cause breach of peace contrary to **Section 95(1)** of the **Penal Code**.

The particulars in Count I as per the charge sheet presented at the trial court were that on 24th March, 2015 at Kangai Village Mwea West Sub County within Kirinyaga County in order to take possession thereof entered on parcel No. **MUTIRA/KANGAI/2355** the property of ESTHER WAMARWA NJIRU; while the particulars of the 2nd count were that on the same date and place, the appellant created a disturbance in a manner likely to cause a breach of peace by chasing ESTHER WAMARWA NJIRU thereby threatening to cut and kill her with a panga.

2. The appellant did deny the charges and the case went for trial.

3. The brief summary of the case before the trial court indicate that the complainant in the case (Esther Wamarwa) is a sister to the appellant and is a registered owner of that parcel of land known as **MUTIRA/KANGAI/2355**. She told the trial court below that the land was given to her by her father, a fact that was disputed by the appellant. It was claimed that the appellant went and planted maize on the disputed parcel on 24th March, 2015 but when asked why he was doing so, he abused the complainant and chased her with a panga. The investigating officer adduced evidence before the trial court and informed the court that the appellant had been charged with a similar offence before and convicted.

4. In his defence the appellant told the trial court that the disputed parcel was his claiming that he had

been given the same by his father. He told the court that he had been in occupation of the parcel and did not know how the complainant obtained title and told the court that there were civil proceedings pending in court.

5. The learned trial magistrate evaluated the evidence tendered and defence and concluded that the prosecution had proved its case in respect to the 2 counts to the required standard and convicted him to serve 2 years imprisonment for the 1st count and 6 months for the 2nd count. The sentences were to run concurrently. In his findings, the learned trial magistrate found that though the appellant had claimed that there were civil proceedings pending in Nyeri High Court over the land dispute, there was nothing tendered by appellant to prove the claim or to prove ownership. He found that the complainant's ownership of the parcel had not been challenged or had the titled been cancelled. Nonetheless, the learned trial magistrate made the following observations:

“.....the accused had marked some proceedings of the High Court but he did not produce them in his defence. The court also did not have the benefit of knowing what was the finding of the High Court but it is apparent that the accused and complainant have a dispute over the same land.”

6. The appellant felt dissatisfied with both the conviction and the sentence and filed this appeal citing 5 grounds as follows:-

- i. ***That the learned trial magistrate erred both in law and facts by failing to consider that the disputed land was a family land belonging to their late father and was a subject of a succession appeal at Nyeri High Court between the appellant, the complainant and appellant's brother.***
- ii. ***That the learned magistrate erred both in law and fact by failing to consider that there was a high court order from Nyeri revoking the title deed and reverting the parcel to its original registered owner.***
- iii. ***That the learned magistrate erred in law and fact by relying on hearsay evidence of a stepmother and sister disregarding the fact that there was a long standing family dispute over their late father's land.***
- iv. ***That his defence was not considered.***
- v. ***The learned trial magistrate erred by failing to consider meting out a non-custodial sentence.***

8. The above grounds crystallises one pertinent issue which is the ownership of the disputed parcel of land described as **MUTIRA/KANGAI/2355**. The complainant at the trial told the court that the land belonged to her and produced a title deed as proof of ownership. However the appellant contended that ownership was disputed and referred the trial court to the proceedings in the High Court touching on the question of ownership. The appellant, of course, did not do himself any good by failing to produce the proceedings from the High Court in his defence. The proceedings however, did not escape the attention of the trial court who for good measure referred to them in its judgment.

8. It is important to note that a criminal court is not empowered and not seized with jurisdiction to settle land disputes that are clearly of civil nature. Such disputes should be left to the civil courts to resolve and where a criminal court is made aware of existence of a civil case pending over a disputed parcel the matter should be left to civil courts to deal with the dispute and determine the same. That is what the law mandates them to do. In this case the trial magistrate made correct observations in his judgment but fell into error by making a finding that the land belonged to the complainant. It is no wonder that the respondent conceded to this appeal. The trial court made an erroneous conclusion that the prosecution case had been proved beyond reasonable doubt when he had doubts lingering in its mind about the outcome in the High Court in Nyeri. This is clearly discerned from his observations in the judgment which is thus expressed:-

“The court did not have the benefit of knowing what was the findings of the High Court.”

So if the learned trial magistrate did not know what the High Court determined in regard to the question

of ownership, how then could he assume jurisdiction to determine that the land belonged to the complainant and that the appellant's occupation was illegal? This was a misdirection, and the least the learned trial magistrate could have done was to entertain doubts about the prosecution case which rested on the ownership of the said disputed land. And the benefit of such doubts by law is given to an accused person.

9. In the end I find merit in this appeal after re-evaluating the evidence tendered at the lower trial court. I find that the witnesses called save for the investigating officer were family members who could be involved in the civil dispute pending or concluded because there was no evidence of its conclusion. I also wish to add that criminal courts of law should guard themselves against being misused by parties who are intent at criminalizing what is clearly civil disputes with the aim of gaining an upper hand in the dispute by perhaps getting occupation and other advantages. This is wrong and untenable. In the premises I allow this appeal. The conviction is quashed and the sentences are reversed. The appellant shall be set free forthwith unless lawfully held. It so ordered.

Dated and delivered at Kerugoya this 30th day of June, 2016.

R. K. LIMO

JUDGE

30.6.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant present

Interpretation: English-Kikuyu

Sitati for State present

Appellant present in person.

COURT: Judgment signed, dated and delivered in the open court in presence of the appellant in person and Mr. Sitati for respondent.

R. K. LIMO

JUDGE

30.6.2016