



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRA NO.14 OF 2015

(Appeal originating from original the judgment of Hon. J. Macharia ag. Pm in Garsen Cr. No. 117 of 2013)

CHRISTOPHER JOHN KATANA APPELLANT

VRS

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant was charged with offence of forcible detainer contrary to section 91 of the Penal code. Particulars of the offence were that the appellant on 28/8/2006 up to 27/05/2013 at Matangeni sub-location, Tana river County within Coast Province being in possession of land title deed number Witu/Tana/215 of Swaleh Said Chalalu without color of right held possession of the said land in a manner likely to cause breach of the peace against Swaleh Said Chalalu who is entitled by law to the possession of the said land.

The appellant was convicted and sentenced to serve 8 months imprisonment. The grounds of appeal are that the prosecution did not prove its case beyond reasonable doubt, the trial court erred in law by holding that the land in dispute belong to the complainant yet the appellant has been in occupation since 1985, that the trial court failed to consider that there was a land dispute, that the appellant's defence was not considered and that the sentence is harsh and excessive.

Mr. Obaga, Counsel for the appellant, submitted that the ingredients of the offence of forcible detainer were not proved. The dispute was before the local administration and parties recorded an agreement. There was no proof of likelihood of violence or breach of peace. Section 91 of the Penal Code was used to bypass the filing of a civil suit. The dispute was purely civil and the court failed to consider section 8 of the Penal Code. The sentence is also unfair since the appellant is a 1st offender. He has already served 4 months.

Mr. Nyongesa, State Counsel, opposed the appeal. Counsel maintains that the prosecution proved its case as required. The complainant asked the appellant to vacate the land but he refused. This was likely to cause a breach of the peace. The appellant had no honest claim on the land. Counsel cited the Case of Samuel Abuya Mbija v. Republic. Homabay CRA No.87 of 2014. The record of the trial court shows that five witnesses testified for the prosecution. PW1 Swaleh Saidi Chalatu was the complainant. He testified that he occupied the suit land before it was surveyed. The land was later adjudicated and allocated Plot No.Witu/Tana/215. He was a given allotment letter in 2002. He later obtained his beacon certificate. The appellant went to occupy his land and he tried to stop him. The appellant is his neighbour. On 7/6/2009, they signed an agreement whereby the appellant agreed to vacate but he did not comply. He reported the matter to the police. PW2 Ramadhan Maro is a neighbour to PW1. He testified

that he occupied this land no.194 since 1994. The appellant went to occupy PW1's land in 2006. The complainant is the lawful owner of the land in dispute. An agreement was signed in the presence of police officers.

PW3, Erastus Kenga is the assistant chief of Matangeni sub-location, Kipini location. He advised the appellant to vacate the suit land but he refused. PW4 Ben Mwangi is a land settlement officer, Tana River County. He testified that the settlement was done in 2002 and 27 squatters including PW1 were successful. PW1 was allocated Plot No.215. Title deeds were issued after a Presidential directive. The complainant has built on his land. He went to the scene and pointed out the big house. PW5 PC Kimtai Lang'at was attached to the Kipini Police Station. A report was made on 23/3/2013 by PW1 that the appellant was residing on his land. He investigated the matter and the appellant informed him that he was occupying the land since 1992. He caused the appellant to be charged.

In his sworn defence, the appellant testified that the land is his as the complainant was wrongly allocated the land. The map shows that the land is his but he has no title deed. He has stayed on the land since 1982.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. Section 91 of the Penal Code states as follows:

“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 by law to the possession of the land is guilty of the misdemeanour termed forcible detainer.”

The evidence on record shows that PW1 was the lawfully registered owner of the suit land. It is established that PW1 occupied the land before it was surveyed. When adjudication was done, the appellant was not on the ground. There is no evidence that the appellant objected to the settlement officers when PW1 was identified to be the owner of the suit land. PW3 who is the area assistant chief advised the appellant to vacate the land but he refused. Under section 91 of the Penal Code the offences committed when the person who is in actual possession has no colour of right on the property and when there is likelihood of a breach of peace or reasonable apprehension. The evidence shows that the appellant was the registered owner of the land. Although he claims that he has been residing on the land since 1982, it is in evidence of PW1 and PW2 that the appellant occupied the land in 2006. According to PW5, the appellant told him that he has been in occupation since 1992. The appellant did not have any title document.

Although counsel for the appellant is of the view that there was no breach of peace, the appellant's act of occupying the land and refusing to vacate raised reasonable apprehension of breach of peace. The ingredients of the offence were proved. Section 8 of the Penal code provides for a bona fide claim of right to property. The evidence shows that the appellant had entered into an agreement to vacate the land in 2009. He therefore had no bona fide claim on the land. The conviction was therefore proper.

With regard to sentence, Mr. Nyongesa admitted that taking into account the appellant's age, he ought to have been given a non-custodial sentence. The appellant appears to be aged and the offence is a mis-demeanor. He has already served 4 months imprisonment. That is enough punishment. The 8 months sentence is hereby set aside and replaced with the period already served.

In the end, the appeal on conviction is disallowed. The sentence is set aside and replaced with the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 25th day of June, 2015.

SAID CHITEMBWE

JUDGE

