



No. 240/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEALS NOS 1 AND 2 OF 2011
CONSOLIDATED

MUINDE MASILA.....1ST APPELLANT

DANIEL MASILA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court

Criminal Case No. 1455 of 2009 by Hon. N.N. Njagi, PM on 26/11/2010)

JUDGMENT

1. The appellants were charged with three (3) counts;-

i. Forcible detainer contrary to **Section 91** of the **Penal Code**. Particulars of the offence being that on diverse dates between **1997** and **3rd October 2009** at **Thithi sub-location, Wolwa** within **Nguu Division** of **Makueni District** within **Eastern Province**, being in possession of **Land Parcel No. Makueni/Nguu/1066** and **1067** of **Peter Nzioka Kithongo** without colour of right holds the said land in a manner likely to cause breach of peace against **Peter Nzioka Kithongo** who is entitled by law to be the legal owner of the said land.

ii. Creating disturbance in a manner likely to cause a breach of peace contrary to **Section 95(1) (b)** of the Penal Code. Particulars of the offence being that on **3rd day of October, 2009** at **Thithi sub-location, Wolwa** within **Nguu Division** of **Makueni District** within **Eastern Province**, jointly created a disturbance in a manner likely to cause a breach of the peace by threatening to shoot **Peter Nzioka Kithongo** with bows and arrows and cut him with a panga while they continued working on the said land of **Peter Nzioka Kithongo**.

iii. Contempt of court contrary to **Section 121(1)** of the **Penal Code**. Particulars thereof being that on diverse dates between **June** and **October, 2009** at **Thithi sub-location, Wolwa** within **Nguu Division** of **Makueni District** within **Eastern Province**, did contempt to court order vide **High Court Machakos Civil Suit No. 170** of **2001** by cultivating and developing

Land Parcel No. Makueni/Nguu/1066 and 1067 pending before the said court.

2. They were tried, convicted and sentenced as follows:-

Count I – Each accused was sentenced to serve **eight (8) months** imprisonment.

Count 2 – **Accused 1** was sentenced to serve **eight (8) months** imprisonment.

Count 3 – **Each accused** was sentenced to **serve (8) months** imprisonment

Sentences were to run concurrently.

3. Being dissatisfied with the conviction and sentence they now appeal on the following grounds:-

i. That the learned magistrate erred in law and fact in convicting the appellants on evidence that was not corroborated.

ii. That the learned magistrate erred in law and fact in convicting the appellants on criminal charges while the subject matter was purely a civil claim.

iii. That the learned magistrate erred in law and fact in convicting the appellants on a charge of forcible detainer contrary section 91 of the Penal Code while the appellants had been born in the land in dispute.

iv. The learned magistrate erred in law and in fact in convicting the appellants on a charge of creating disturbance by threatening to kill the complainant while there were no exhibits produced in court and the witnesses' evidence on the charge was contradictory.

v. The learned magistrate erred in law and in fact in convicting the appellants on a charge of contempt of court while the said charge could not be sustained before the said court.

vi. The learned magistrate erred in law and in fact in failing to find that the appellants have been living in the parcels of land as their own for many years.

vii. The learned magistrate failed to make a finding, that the said parcels of land were the subject matter of dispute in **Machakos High Court Case No. 170 of 2001** which is still pending determination.

viii. The learned trial magistrate erred in giving the appellants excessive sentences in the circumstances.

4. To prove the case the prosecution called **three (3)** witnesses. **PW1, Peter Nzioka Kithongo** stated that on the **3rd October, 2009** he went to his **Plot No. 1067** with the **Agricultural Officer** to take measurements of terraces. The **1st** Appellant went and claimed ownership of the land. He demanded to be told why they were there. He threatened to kill any person he would find on the land. The **1st** Appellant then returned with a bow and arrows and threatened to kill somebody. His brother the **2nd** Appellant on hearing the commotion also went to the scene with a panga. They left the scene, went and reported the matter to the police. He produced in evidence an allotment letter, a title deed, transfer document and a court order in respect of a **High Court Civil Case No. 170 of 2001**.

5. **PW2, Peter Mwangangi Mutiso** testified that he went to the land owned by PW1 on the material day at **11.00am** and found him quarrelling with the **1st** Appellant over a piece of land. The **2nd** Appellant then came out. The appellants had pangas and rungas and a weapon he could not see properly.

6. **PW3, No. 215283 I.P Mitchel Ogeng'o** received the report from PW1. Per the report the two (2)

appellants who were squatters and constructed houses on PW1's land and had refused to vacate. He visited the land. He arrested the appellants. They had been on the land since **1997**. They had been served with a court order. He charged them. He denied an allegation that he was aware the appellants were born on that parcel of land.

7. In his defence the 1st appellant stated that he was born on that parcel of land, he was therefore on it legally. The land having been taken by the Government they were to be given the same legally.

8. The 2nd appellant claimed ownership of the land. He denied having been armed with a panga, bow and arrows. He denied having been on the land at the time the offence was alleged to have been committed. According to him the District Commissioner was to resolve the dispute in respect of the land. It was within his knowledge that an order had been issued by the court (*Machakos*) but he challenged it and he was told not to work on the land.

9. It was the submission of **Mr. Muia**, Counsel for the appellants that the appellants were born and lived on the land in issue. Evidence adduced was only in respect of Plot No. 1067 but not 1066. He argued that the conviction was wrong because the appellants were alleged to have committed the offence in **October, 2009** when the complainant purchased **Plot No. 1067** in **May 2010**. The charge of forcible detainer could therefore not be sustained.

10. On the charge of creating a disturbance in a manner likely to cause a breach of peace. He argued that there was non-disclosure of the offence of creating a disturbance. Mere words alleged to have been uttered by the 1st appellant that they would kill a person were not sufficient. Without an act of actual threat it was erroneous for a verdict of conviction to be returned.

11. With regard to the charge of contempt of court, he argued that convicting the appellants on a civil order that had been issued in respect of a pending civil matter was wrong. Further, he stated that the order was directed to four (4) defendants and no evidence was tendered before the court in support of evidence in the Lower Court.

12. The learned State Counsel, **Mr. Mwangi** in response stated that there was a court order from the High Court. Pursuant to the provisions of the **Judicature Act**, the Lower Court had no power to deal with the issue of contempt. He prayed for quashing of the conviction and sentence. With regard to **count 1**, he stated that the complainant had a title deed and on the material day the 1st appellant threatened to kill him. With regard to count 2 he stated that there was a commotion on the farm between PW1 and the 1st appellant who was armed. The 2nd appellant joined in also armed with a panga. They created a disturbance. He called upon the court to uphold the evidence adduced.

13. This being the first appeal, I am duty bound to re-evaluate the evidence adduced at trial and come up with my own independent conclusions, bearing in mind that I neither saw nor heard witnesses who testified. (*see Okeno versus Republic [1972] E.A.32*) and *Kariuki Karanja versus Republic [1986] KLR 19*).

14. With regard to the offence of forcible detainer, **Section 91** of the **Penal Code** provides thus:-

“Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or in threats or in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter on the land or not, is guilty of the misdemeanour termed forcible entry:

Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry.

The particulars of the offence stipulate that the appellants were in possession of the land **Parcel No.**

Makueni/Nguo/1066 and **1067** whose legal owner was **Peter Nzioka Kithongo**. In his testimony the complainant only talked about **Plot No. 1067**. A title deed for **Makueni/Nguu Ranch/1067** was issued to the complainant on the **21st May, 2010**. The transfer of land document in that regard is also dated the **21st May, 2010**. Counsel for the appellant raised the issue of the document having been fraudulently acquired. This however was an issue that should have been raised at trial. The appellants were of course not represented but it is too late in time to bring it up, my duty being to reconsider evidence adduced at trial. What was however established was the fact that at the point of commission of the alleged offence the complainant was not the legal owner of **Plot No. 1067**.

15. The appellants do not dispute the allegation of possession of the land. Their argument is that there is a case pending in court in that regard. There is a case, **Machakos HCCC No. 170/2001** where the complainant has sued four (4) defendants; the appellants herein are some of the defendants. In their defence they claim ownership of the land having been in occupation for **40years**. The case is yet to be determined.

The question to be posed would be whether the appellants could have some “colour of right” of being on the land by virtue of adverse possession?

This is a question that will be determined in the civil case.

16. With regard to the charge of creating a disturbance in a manner likely to cause a breach of peace. It was stated that the two (2) appellants created a disturbance by threatening to shoot **Peter Nzioka Kithongo** with bows and arrows. The evidence adduced by PW1 was that he was in company of an Agricultural Officer when the incident happened. The agricultural officer was not called as a witness. The person called as PW2 was not mentioned by PW1 as having been present. There is no way PW1 could have forgotten him as PW2 alleged after the incident he went to the home of PW1. This particular witness did not see the appellants with any bow and arrows. According to him they had pangas and rungas.

17. PW1 stated thus:-

“Accused 1 came and asked me what I was doing. The accused 1 told me that this was his land. I told him that this was my land and should not use it. I showed accused 1, insisted that the land was his. The accused said that if he found anybody on this piece of land, he shall kill a person. The accused 1 came with bow and arrows and he threatened to kill somebody.”

18. The evidence adduced is not specific as to whether the accused threatened to kill PW1. To prove the charge the prosecution should have called evidence to establish that the accused threatened and acted in a manner that would make those present resort to some violence. This evidence was not adduced.

19. With regard to the charges of contempt of court, the learned State counsel readily conceded that it was erroneous for the police to charge the appellants with the offence. I would also wish to comment on the charge itself. It is contempt contrary to **Section 121(1)** of the **Penal Code**. This is in respect of offences relating to Judicial Proceedings. The sub-section has **paragraphs (a) to (i)**. It is not stated which paragraph the prosecution imagined the appellants had contravened. An order was produced granted in **HCCC No. 170** of **2001** where some 4 defendants were restrained from interfering with or alienating Land Parcel **No. 1066** and **1067** situated at **Nguu Ranch Makueni District** until the suit is heard and determined. No evidence was led in that regard. If the prosecution believed that the appellant herein had acted in contempt of the orders – due process should have been followed. This was a civil matter that the police would not have unprocedurally purported to take up.

20. Having evaluated the evidence adduced, it is apparent that the trial court made an error in convicting the appellants. Their conviction being unmerited, I hereby allow the appeal in respect of both appellants. The conviction is quashed and sentences imposed set aside.

DATED, SIGNED and DELIVERED at MACHAKOS this 3RD APRIL 2014

L.N. MUTENDE

JUDGE