



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

Criminal Appeal 8 of 2012

ALBERT OUMA MATIYAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Arising out of the conviction and sentence of M. Munyekenye S.R.M delivered on 18th January 2012 in Busia S.P.M.C.Cr. Case No.65 of 2012)

J U D G M E N T

Albert Ouma Matiya, the appellant herein was charged with the offence of **forcible detainer** contrary to **Section 91** as read with **Section 36** of the **Penal Code**. The particulars of the offence were that on 7th November 2010, at Ujamii village, Angoromo location of Busia County, the appellant, being in possession of the parcel of land known as land reference number South Teso/Angoromo/5979 of Jackson Abelu Omeri, without any colour of right, held possession of the said land in a manner likely to cause a breach of peace against the said Jackson Abelu Omeri who was entitled by law to the possession of the said land. When the appellant was arraigned before the subordinate court, he pleaded not guilty to the charge. After full trial, the appellant was convicted as charged. He was fined kshs.20,000/= or in default he was to serve eighteen (18) months imprisonment. The appellant was also ordered to relinquish ownership of the parcel of land that was the subject of criminal case to the complainant in accordance with the eviction order which had earlier been issued by court. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the appellant raised eleven (11) grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted of the offence of **forcible detainer** after the trial magistrate had failed to appreciate the fact that he had been in actual occupation of the suit parcel of land for a period of more than twenty six (26) years. The appellant faulted the trial magistrate for failing to take into consideration the fact that the appellant had never been evicted in the first place from the suit land to warrant the finding by the court that he was guilty of forcible detainer. The appellant accused the trial magistrate of convicting him on a matter that was essentially a civil dispute and did not amount to a criminal offence. The appellant complained that the trial magistrate had erred in law when she denied

him his constitutional right to be represented by an advocate of his choice. He was aggrieved that the trial court relied on the evidence of an alleged eviction which was not established or proved by the prosecution. He faulted the trial magistrate for failing to consider the evidence that he had adduced in his defence and thereby reached the erroneous finding that he was guilty of the charge. The appellant was aggrieved that the trial magistrate had taken into consideration extraneous matters thereby arriving at the decision convicting him of the charge. He was of the view that the fine that was imposed on him was excessive in the circumstances.

At the hearing of the appeal, this court heard rival submission made by Mr. Onsongo for the appellant and by Mr. Obiri for the State. Mr. Onsongo submitted that on the basis of the evidence that was adduced before court, the prosecution had failed to prove that the appellant was guilty of forcible detainer. It was the appellant's case that he had in fact been in occupation of the parcel of land that he referred to as L.R.No.South Teso/Angoromo/47 and not the suit parcel of land. It was the appellant's case that the prosecution had failed to establish any connection between the suit parcel of land and L.R. No. South Teso/Angoromo/47 and therefore he (the appellant) could not have been found guilty of occupying his parcel of land. The appellant insisted that the parcel of land that he was occupying was not the same parcel of land as that which is claimed by the complainant. He urged the court to allow the appeal and acquit him.

On his part, Mr. Obiri submitted that the prosecution had established its case to the required standard of proof beyond any reasonable doubt. He stated that the prosecution had established that the appellant forcefully retained possession of the complainant's parcel of land despite the fact that the High Court had issued an order directing the appellant to vacate the same. It was his submission that the appellant had failed to produce any documentary evidence to establish his alleged ownership of the suit parcel of land. He urged the court to uphold the decision of the trial magistrate and reach a finding to the effect that the prosecution had established its case to the required standard of the law.

This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial court, in light of the submission made in this appeal, and thereby reach its own independent determination whether or not to uphold the conviction of the appellant. In making the determination, this court is required to always bear in mind that it neither saw nor heard witnesses as they testified and therefore cannot be expected to make any finding regarding the demeanour of the witnesses (see **Okeno vs. Republic [1972] E.A 32**). In the present appeal, the issue for determination by this court is whether the prosecution established its case against the appellant on the charge of **forcible detainer** contrary to **Section 91** of the **Penal Code**.

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

In light of these ingredients, what evidence did the prosecution adduce to support the charge? It was the prosecution's case that the complainant PW1 AP Corporal Jackson Abel Omeri, being the registered owner of the parcel of land known as South Teso/Angoromo/5979 was denied possession of the same by the appellant despite the fact that the complainant had obtained an eviction order from the court. The complainant told the court that despite the fact that the appellant was evicted from the suit parcel of land on 2nd February 2010, the appellant soon thereafter forcefully returned to the suit parcel of land. This was about ten (10) months after his eviction i.e. in November 2010. From the evidence adduced by the prosecution, it was clear that although the appellant claims that he is entitled to the land, having lived on the same continuously since 1984, the appellant did not produce any document or adduce any evidence to support his assertion to the effect that he is entitled to possession of the suit parcel of land. On the other hand, the complainant produced the title deed of the suit parcel of land during his testimony. He also told the court how he had litigated against the appellant in the High Court to the extent that the High Court found in his favour. He produced a copy of the eviction order which was issued in his favour by the High

Court. The order required the appellant to vacate the suit parcel of land. The appellant's defence did not raise any issues that challenged the uncontroverted fact that the complainant is the owner of the suit parcel of land.

This court has carefully re-evaluated the facts of this case. It was clear that the prosecution proved its case on the charge of **forcible detainer** contrary to **Section 91** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The prosecution established all the ingredients of the charge of forcible detainer: it established that the complainant was the legal owner of the suit parcel of land, that the appellant was in unlawful possession and occupation of the same, that the appellant had resisted the complainant's attempt to take possession of the suit parcel of land in a manner that was likely to cause breach of peace and finally that the appellant had acted in contempt of the orders of the court that required him to vacate the suit parcel of land. The grounds put forward by the appellant in this appeal lack merit. The evidence that the appellant adduced in his defence did not dent the otherwise strong case that was put forward by the prosecution.

The upshot of the above reasons is that the appeal filed by the appellant lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. The appellant is ordered to comply with the order issued by the trial court by vacating the suit parcel of land in default of which he is likely to face the full force of the law. It is so ordered.

DATED AT BUSIA THIS 26TH DAY OF JULY, 2012

L. KIMARU
J U D G E