



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 80 OF 2009

JOHN ORIARO OKUMU1st APPELLANT
GEORGE ABIERO ORIARO2nd APPELLANT
SILVANUS OCHIENG ORIARO.....3rd APPELLANT

VERSUS

REPUBLICRESPONDENT
(From original conviction and sentence in Criminal Case number 1028 of 2006 of the Resident Magistrate's Court at Siaya)

JUDGMENT

This appeal arises from the decision and judgment of the Resident Magistrate at Siaya in Criminal Case number 1028 of 2006 in which the appellants, **John Oriaro Okumu**, **George Abiero Oriaro** and **Sylvanus Ochieng Oriaro** were charged with the offence of forcible detainer contrary to Section 91 of the Penal Code.

The particulars were that on the 12th August 2006 at Obambo sub – location Siaya District, without colour of right held in possession Land Parcel Number **Siaya /Obambo /136** in a manner likely to cause a breach of peace against James Onyango Obondi who was entitled by law to the possession of the said parcel of land.

Upon their respective plea of not guilty, the appellants were tried and convicted. The first appellant (**John**) was sentenced to two years imprisonment. The sentence was however suspended. The second appellant (**George**) and the third appellant (**Sylvanus**) were each fined a sum of Kshs. 5,000/= in default six months imprisonment.

Being dissatisfied with the conviction and sentence, the appellants filed separate appeals which were later combined and allocated a single file number i.e. High Court Criminal Appeal No. 80 of 2009.

The grounds of appeal are contained in the petition of appeal dated 21st May 2009 filed herein by the firm of **Nyawiri Osero Carilus & Co Advocates**.

The grounds are as follows:-

- (i) **The Learned Resident Magistrate grossly erred in law and fact by failing to consider that the prosecution failed to prove the case against the accused beyond any reasonable doubt as required by law.**
- (ii) **The learned Resident Magistrate grossly erred in law and fact by shifting the burden of prove on the appellants.**
- (iii) **The learned Resident Magistrate erred in law and fact by failing to appreciate that the evidence of PW1, PW2, PW3, PW4 and PW5 was not credible to sustain any conviction and sentence of the appellants.**
- (iv) **The learned Resident Magistrate erred in law and facts by ignoring to appreciate and/or consider the appellants' defence.**
- (v) **The learned Resident Magistrate erred in law and fact in failing to appreciate and consider that the weight of evidence given by the prosecution could not sustain any conviction and sentence against the appellants.**

Learned counsel, Mr. Nyawiri, appeared for the appellants at the hearing of the appeal while the respondent was represented by the Learned Principal State Counsel, **Miss Oundo**.

Mr. Nyawiri, reported that the first appellant is now deceased and was granted leave to withdraw the appeal respecting the deceased first appellant.

In his submissions, the learned counsel combined and argued all the grounds together. He said that two parcels of land i.e. Parcels number 136 and Parcel number 2238 were brought to the attention of the trial court and since the appellants' defence was that they were in occupation of Parcel number 2238 and not parcel number 136, it would have been prudent for the trial court to ensure that a report from the land surveyor was availed in court for purposes of proper determination of the case. Learned counsel noted that in its judgment, the trial court pointed out that a demarcation of the plot could be carried out. Therefore, the trial court doubted the prosecution evidence yet went ahead to convict the appellants. Learned counsel contended that the conviction was not proper under the circumstances and urged this court to allow the appeal.

The learned Principal State did not oppose the appeal, she submitted that the complainant alleged that the appellants resided on parcel number 136 yet the defence showed that they occupied parcel number 2238. The learned Principal State counsel further submitted that there ought to have been a survey to pinpoint the boundaries and that there was doubt as to whether the appellants were in occupation of the complainant's parcel of land.

Consideration being given to the foregoing submissions, it is nonetheless the duty of this court to re-examine the evidence and draw its conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Briefly, the prosecution case was that the complainant **James Onyango Obondi (PW1)** was at the material time the registered owner of Land Parcel number Siaya / Obambo / 136 which he inherited from his father. The appellants were his neighbours. They built their home on the said parcel of land. This created a dispute between the deceased first appellant and the complainant's father. The dispute was determined by a land Tribunal in favour of the complainant's father. However, the complainant's family was chased away from the land by the appellants. The complainant worked in Nairobi. He learnt that the appellants were setting up another home on the parcel of land. He reported the matter to the police at Siaya and obtained the necessary title deed from the lands office. Consequently, the appellants were arrested and charged with the material offence.

The complainant's mother **Bertha Aluoch Milomba (PW2)** and uncle **Cleophas Osino Opondo (PW3)** agreed with and supported the complainant by saying that the material parcel of land belonged to the complainant that the appellants had encroached into it.

P. C. Wasike (PW4) of Siaya Police Station said that the complainant reported a case of trespass in which the appellants were the offenders. He (PW4) acted on instructions from his superior (OCS) and arrested the appellants at their home. They did not show him any title deed for the material parcel of land. They were charged after the complainant produced his title deed.

The District Land Registrar Siaya (PW5) availed documents from the Land Registry showing that the complainant was the registered proprietor of the material land parcel number Siaya/obambo/136.

The evidence by the Land Registrar ended the prosecution case against the appellants.

In his defence, the second appellant contended that the material parcel number 136 was different from the parcel which they occupied. He said that parcel number 136 is a large parcel of land which was bushy and had remained uncleared for the last twenty (20) years. He maintained that their home was not on the said land.

The third appellant contended that they lived on Parcel number 2238 and not the disputed parcel which is unknown to him.

The learned trial magistrate considered the evidence by both the prosecution and the defence and concluded that the prosecution case had been proved against the appellants beyond any reasonable doubt. Consequently, the appellants were convicted and sentenced accordingly. In her judgment, the learned trial magistrate remarked:-

"PW5 is a crucial witness the land Registrar Bondo / Siaya District. He testified and adduced a green card to the court at (sic) exhibit and that PW1 was now the legal owner of the disputed land. May be there could be a demarcation boundary (sic). If that be the case then the disputing parties ought to bring in a government surveyor to show them their boundaries. However, since the case is that of forcible detainer I will restrict the same on it. However the court finds that prosecution have proved their case and court finds that accused persons are guilty of the offence and herein

convict them accordingly”.

This remark clearly indicated that the learned trial magistrate was not in doubt that the material parcel of land number 136 belonged to the complainant but she was in doubt as to whether the appellants were in occupation of the parcel.

The implication was that the appellant could have been in occupation of a separate parcel of land being mistaken for parcel number 136 or a portion thereof. This explains the suggestion by the learned trial magistrate that the complainant and the appellants should have engaged lands surveyors to determine the boundaries of their respective portions of land.

The appellants denied that they were in occupation of the material parcel of land and contended that they were in occupation of parcel number 2238. It is surprising that they were convicted yet there was already a reasonable doubt regarding their alleged occupation of land belonging to the complainant.

With respect, having found that a surveyor was required to determine boundaries, the learned trial magistrate should simply have advised the parties to seek solution in the office of the District Surveyor or in a Civil court.

It was not proved beyond reasonable doubt that the appellants were at the material time in actual occupation and / or possession of the complainant's parcel of land. In the circumstances, the offence of forcible detainer under Section 91 of the Penal Code was not established against the appellants.

The conviction of the appellants by the learned trial magistrate was therefore improper.

Consequently, this appeal is allowed. The conviction is hereby quashed and the sentence set aside.

The trial court's record shows that the second and third appellants paid the fine which was imposed. The same be refunded to them in accordance with the applicable rules of account.

Dated, signed and delivered at Kisumu this 29th day of October 2010.

**J. R. KARANJA
JUDGE**

JRK/aao