



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 65 of 2005

GODFREY KARIUKI GATHURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Godfrey Kariuki Gathura, was charged with two offences under the **Penal Code**. He was charged with the offence of **forcible detainer contrary to Section 91**. The particulars of the charge were that between the 1st of October 2003 and 4th of December 2003 the appellant without any colour of right entered into and erected a building in parcel number *Bahati/Bahati Block 1/97*, the property of Ann Wangari Njogu. The appellant was also charged with the offence of **malicious injury to property contrary to Section 339(1)**. The particulars of the offence were that between the 1st of October and the 30th of October 2003 at Karunga farm, Bahati, the appellant willfully and unlawfully destroyed or damaged trees belonging to Ann Wangari Njogu valued at Kshs 3,500/=. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged and ordered to pay a fine of Kshs 8,000/= or in default to serve one year imprisonment on the first count and Kshs 3,500/= or in default to serve six months imprisonment on the second count. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his "*memorandum of appeal*" (*it ought to have been titled petition of appeal*) the appellant raises three grounds of appeal faulting the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had erred in law by considering irrelevant matters in making her decision convicting him. He faulted the trial magistrate for failing to consider his defence before arriving at the decision convicting him. He was further aggrieved that the trial magistrate had failed to consider the relevant aspects of the evidence adduced and thereby arrived at the erroneous decision convicting him. At the hearing of the appeal, the appellant who was acting in person, made submissions urging this court to allow his appeal, quash his conviction and make an order of refund of the fine that he paid. Mr Koech, Learned State Counsel did not make any submission. He however urged the court to consider and re-evaluate the evidence on record and reach its own decision. Before giving reasons for my judgment, I will set out the facts of this case, albeit briefly.

Parcel number Bahati/Bahati Block 1/97 (hereinafter referred to as the suit land) was previously owned by one Peter Njogu Muchami. According to the complainant, (PW3) Ann Wangari Njogu, the said Peter Njogu Muchami was her husband. She testified that her husband had attempted to sell the said parcel of land, but she blocked the sale by putting a caution on the title. PW3, with the assistance of her children, then filed a case before the Land Disputes Tribunal at Bahati. The Tribunal ordered the said parcel of land to be transferred to the complainant and her children, in view of the irresponsible behaviour of PW3's husband. The award made by the tribunal was adopted as the order of the court and the said parcel

of land was duly transferred to the complainant and her four children on the 29th of December 2000 (*title deed produced as Prosecution Exhibit in the trial*).

Meanwhile from the evidence adduced before the trial magistrate, it emerged that the complainant's husband had actually sold the said parcel of land to the father of the appellant for a purchase consideration of Kshs 450,000/=. The appellant's father did not however obtain the requisite consent of the Land Control Board to enable the said parcel of land to be transferred to him. The appellants father, one Antony Gathura Kariuki, filed suit against the complainant in the High Court Nakuru i.e. **Nakuru HCCC No. 365 of 1999** seeking various orders, including a declaration that he was the owner of the suit land. The suit was heard by Ondeyo J. who on the 8th of July 2003 dismissed the plaintiff's suit. The Learned Judge however noted that the said Antony Gathura Kariuki would be entitled to a refund of the purchase consideration from the husband of the complainant, if he had joined him in the suit.

Perhaps pursuant to the advise of the said Court, the said Antony Gatura filed **Nakuru CMCCC No. 2386 of 2003** against the husband of the complainant, Peter Njogu Muchami. At the time of filing the suit he sought and obtained an injunction to restrain the husband of the complainant and the complainant herself from evicting or interfering with his possession of the suit land. It is on the strength of this court order that it is apparent that the appellant and his brothers purported to take possession of the suit land. In his attempt, the appellant erected a kiosk on the said suit land.

Evidence was tendered how the appellant cut the trees which had been planted on the suit land. Evidence tendered by PW1 Julius Mulusa, a Surveyor with the Ministry of Lands and Settlement, PW4, Alex Muthengi Muiru and PW5 Joseph Mulinge Munguti established that the suit land was owned by the complainant. It also confirmed the fact that the appellant had erected a kiosk in the suit land and also cut down the trees on the said parcel of land. PW6 James Isaboke Momanyi, a forester, went to the suit land and was able to assess the value of the trees which had been cut down to be Kshs 3,500/=. He wrote a report which was produced as an exhibit by the prosecution. PW2 Police Constable Livingstone Lihanda, an officer attached to the crime scenes support services, took photographs of the structure alleged to have been erected by the appellant and the trees he is said to have cut down. The photographs were produced in evidence by the prosecution.

After the close of the prosecution's case, the appellant was put on his defence. The thrust of his defence was that the suit land had been purchased by his father from the complainant's husband and that he had been occupying the land as of right. He further testified that he had occupied the said parcel of land pursuant to an order issued by the court in NAKURU CMCCC No. 2386 OF 2003. The appellant and his witnesses denied that he has entered the suit land without any colour of right. He further denied that he had cut down the trees as alleged by the prosecution witnesses. It was the defence evidence that the trees in question were cut down by the complainant.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced by the witnesses before the trial magistrate's court and reach its own independent determination whether or not to uphold the decision of the trial magistrate in convicting the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified (*See **Okeno –vs- Republic 1972 EA 32***). The issue for determination by this court is whether the prosecution adduced sufficient evidence to prove the charge against the appellant to the required standard of proof beyond reasonable doubt. In the instant case the appellant was charged with **forcible detainer contrary to Section 91 of the Penal Code**. The said section provides that:

“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 peace or reasonable apprehension of peace, against a person entitled by law to the possession of the land is guilty of a misdemeanour termed forcible detainer.”

To prove a case against an accused person facing a charge of forcible detainer, the prosecution must establish that such an accused person entered into a parcel of land belonging another without any colour of right and remained therein against the wishes of the person. The offence of forcible detainer is a common law offence which was codified into our penal code. According to **Archbold Criminal**

Pleadings Evidence and Practice 39th Edition Sweet & Maxwell (1976) forcible detainer is defined at paragraph 3595 (*page 1510*) as being “*when a man who has entered peaceably maintains his position by force*”. The Common Law position in England ceased to be of effect when the **Criminal Law Act, 1977** was enacted. The said Act basically gave a more detailed definition and expands the circumstances under which a person would be said to have forcefully entered and remained in another person’s parcel of land without a colour of right.

In the present case, the appellant entered into the complainant’s parcel of land and remained therein without any colour of right. The appellant’s father filed a suit against the complainant in **Nakuru HCCC NO 365 OF 1999** seeking to be declared the owner of the suit land. The appellant’s father however lost the case. Ondeyo J. dismissed his suit. The Learned Judge observed that the appellant’s father would be entitled to be refunded the purchase consideration by the husband of the complainant because the land sale transaction between the appellant’s father and the complainant’s husband did not get the blessing of the requisite Land Control Board. The appellant’s father did not appeal against the said decision. However he later filed suit against the complainant’s husband which suit is still pending before the lower court (*i.e. NAKURU CMCC NO. 2386 OF 2003*).

Now the appellant has occupied and continued to occupy the suit land inspite of the fact that the court has declared that his father under whose title he is claiming the land is not the owner of the suit land. The witnesses who testified in the trial before the magistrate’s court were able to prove that the appellant forcefully and without any colour of right entered into the suit land and erected structures thereon. After carefully re-evaluating the said evidence as adduced by the prosecution witnesses and also the defence offered by the accused it is clear that the prosecution proved its case against the appellant to the required standard of proof beyond reasonable doubt. The complainant produced a copy of a title which showed that she was the registered owner of the suit land.

The appellant is basing his claim on the suit in the Chief Magistrate’s court which is yet to be determined. I am not persuaded that the Chief Magistrate’s court in the pending suit would reach a decision that overturn the decision of the High Court which ruled that the appellant’s father was not entitled to the said parcel of land. I have also considered the arguments which were made by the appellant during the hearing of this appeal. I find the same devoid of merit. Consequently I dismiss the appeal. The appellant is warned not to interfere with the complainant’s peaceful occupation of the suit land or else he shall be in contempt of the court orders issued by Ondeyo J.

I therefore confirm the conviction of the appellant and the sentence imposed by the trial magistrate.

It is so ordered.

DATED at NAKURU this 3rd day of February 2006.

L. KIMARU

JUDGE