

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL CASE NO. 91 OF 2002

LORNA NASONGO TOILI APPELLANT

VS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was tried on a charge containing two counts. The first count relate to the charge of obtaining money by false pretences contrary to Section 313 of the Penal Code. The particulars of this charge are that on diverse dates between 1998 and 1999 at Lwanda village in Bungoma District within Western Province, with intent to defraud obtained from Florence Wanjala Murefu Ksh.67,000/= pretending that she was to sell her a piece of land parcel No. EAST BUKUSU/NORTH NALONDO/848, the property of Dismas Sikuku Wanyonyi.

The second count is in respect of a charge of Forcible detainer contrary to section 91 of the Penal Code. The particulars of this charge are that On diverse dates between 1998 and 1999 at Lwanda in Bungoma District within the Western province being in possession of the said land of Dismas Sikuku Wanyonyi without any colour of right, held possession of the said land in a manner likely to cause a breach of the peace against the said Dismas Sikuku Wanyonyi who was entitled by law to the possession of the said land parcel No. EAST BUKUSU/NORTH NALONDO/848.

The appellant was acquitted in respect of count I. She was however convicted and sentenced in count II and was placed on 24 months probation period. Being aggrieved she now appeals to this court on the following grounds of appeal:-

First, that the trial magistrate erred in convicting the appellant for forcible detainer in the absence of proof of her guilt beyond reasonable doubt.

Secondly, that the trial magistrate erred in making an order of eviction which is not provided for under criminal law.

Thirdly, that the probation slapped against the appellant was excessive and unwarranted.

The learned Senior state counsel who appeared for the state as the Respondent in this appeal conceded to this appeal.

The facts of the case before the learned Senior Resident Magistrate were that the appellant's deceased husband the late Samson Nasongo Toili bought part of L.R. No. EAST BUKUSU.NALONDO/848 from Cleophas Nelwesilia and Wanyonyi Sichangi sometimes in 1972. It is said that the appellant and her deceased husband occupied and cultivated the land until the appellant passed on in 1991. The deceased however died before being issued with a title deed to the suit premises. By an agreement dated 24.12.99 the appellant sold 1 ½ acres to one Florence Nanjala who testified as P.W. I. The appellant was paid a sum of Ksh.67,000/= leaving a balance of Ksh.10,000/=. It is said that the area chief confirmed the genuinity of the sale.

P.W.1. Florence Nanjala attempted to put up a house and commenced acts of occupation. Her attempt to settle on her new acquired property was resisted by one James Nyongesa who testified as P.W.2. L.R. No. EAST BUKUSU/NALONDO/848 was registered in the joint names of P.W. 2 and P.W. 3, Dismas Sikuku Wanyonyi. A title deed was issued to them on 18th January 2000. It is not in dispute that the appellant had been in occupation and had been tilling or leasing the land long before the complainant,

James Nyongesa Walwelisie and his co-owner Dismas Sikuku Wanyonyi obtained title to the land in dispute.

At the end of the trial the learned Senior Resident magistrate came to the conclusion that the appellant had no colour of right in the above mentioned property because she had no title. On this score, the trial magistrate failed to address his mind to the fact that a party can still claim title to property by adverse possession. He also failed to appreciate the fact that a party may enter into land as a licensee or a leasee without possession of title to land. In this case the evidence presented before the trial court indicate that the appellant was in occupation of the land in dispute as from 1972 until 1998. It is obvious that the offence of forcible detainer cannot be established in such circumstances. Trespass was not proved. I think the learned Senior state counsel correctly conceded to this appeal.

The learned Senior Resident Magistrate had no jurisdiction to issue an order of eviction in the case before him. There was no prayer for the same. Even if there was such a prayer, such an order is not available in criminal cases. It can only be granted in the civil process when ownership to the land in dispute is strictly proved under the civil law process. It is also evident from the evidence on record that the appellant was not in occupation at the time when the complainant was lodged by the complainants. The trial magistrate therefore misapprehended the point when he concluded that the charge was proved.

The upshot therefore is that this appeal is allowed. The conviction is quashed and the sentence is set aside.

DATED AND DELIVERED THIS 26TH DAY OF MAY 2004

J.K. SERGON

JUDGE