Nyanchama v Republic (Criminal Appeal E021 of 2022)
[2024] KEHC 3621 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3621 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E021 OF 2022

WA OKWANY, J

APRIL 11, 2024

BETWEEN

CHARLES NYABERO NYANCHAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Original Conviction and Sentence in Nyamira CM CR Case No. 901 of 2019 in the Chief Magistrate's Court at Nyamira by Hon. M.C. Nyigei, Principal Magistrate on 18th October 2022)

JUDGMENT

1. The Appellant herein, Charles Nyabero Nyanchama, was charged with the offence of forcible detainer, contrary to Section 91 of the Penal Code. The particulars of the charge were that on diverse dates between 2nd September 2016 and 12th June 2018 at Mesobwa area, Magwagwa sub-location in Nyamira North Sub-County within Nyamira County, being in possession of parcel of land No. North Mugirango/Magwagwa 1/3193 of the Power of Jesus Around the World Mesobwa Church, without colour of right, held in possession the said land in a manner likely to cause a breach of peace against the Power of Jesus Around the World Mesobwa Church who was entitled by law to the possession of the said land.

2. He was also charged with a second count of interfering with boundary features contrary to Section 21 (1) of the *Land Registration Act* No. 3 of 2012. The particulars of the charge were that on diverse dates between the 2nd September 2016 and 12th April 2018 at Mesobwa area Magwagwa Sub-location in Nyamira County, unlawfully trespassed and interfered with the boundary features of parcel of land No. North Mugirango/Magwagwa 1/3193 (hereinafter "the Suit Land) without lawful excuse.

3. The Appellant denied the charges and the matter proceeded to a full trial in which the Prosecution called 5 witnesses.

The Respondent's (Prosecution's) Case

4. PW1, John Michira Atebe, a pastor at Power of Jesus Around the World Church in Mesobwa (hereinafter "the Church") testified that he came to the area in 2002 and found a church already built in the homestead of his uncle one Gitioma Kimaiti. He claimed his said uncle entered into a land sale agreement (P. Exh1) with the church and that the church secured a title deed (P.Exh2) to the suit land which was issued on 19th November 2016. He produced a Search Certificate to the suit land as (P.Exh3).

5. PW1 testified that on or about 2nd September 2016 he took building materials, to wit, 2,000 stones and 2 tonnes of sand to the suit land with a view to constructing a church thereon but was later informed that the Appellant had destroyed the sand while claiming that the land was his. PW1 reported the matter to the police and engaged the services of a surveyor who prepared reports dated 20th June 2018 (P.Exh5 and P.Exh6). He stated that the Appellant's land was parcels away from the church and that he did not share a boundary with the church. He added that the Appellant sold the building materials that he had taken to the land and kicked them from the said land.

6. PW2, Jackson Momanyi Sagero, testified that the suit land belonged to the church but that the Appellant also claimed that the land belonged to him.

7. PW3, Alice Kakayi Khandah, a pastor's assistant at the church testified that one Gitioma donated approximately 0.40 Ha of land to the church in 2016. She stated that he donor's family members did not object to the donation and that it was until 2nd September 2017 when they took building materials to the land that the Appellant uprooted all beacons before kicking out of the land.

8. PW4, No. 111051 P.C. Kimeme, testified that a report of forcible entry was made by the church officials. He noted that title to the suit land issued on 18th November 2016 showed that the land in question belonged to the church and that it had been donated as a gift even though the Appellant also laid claim to the said land. The police advised the parties to settle the dispute at the Lands Office. The Land Registrar wrote a letter indicating that the suit land measuring 0.14 Ha belonged to the church. He testified that even though the Land Registrar settled the dispute between the parties, the Appellant still went ahead to chase the church members from the suit land where he thereafter planted tea bushes. He claimed that the Appellant also sold off the building materials that had taken to the suit land.

9. PW5, Martin Osana, the County Land Registrar in Nyamira testified that one Gitioma Kimaiti the original owner of land parcel No. 910 subdivided his land into 4 parcels thus creating the suit land. He produced a Dispute Resolution Report dated 20th June 2018 (P.Exh6).

The Appellant's Case

10. At the close of the prosecution's case, the trial court found that a prima facie case had been established against the Appellant who was placed on his defence.

11. In his defence, the Appellant testified that he shared a boundary with Gitioma and that their respective pieces of land had clear boundaries. He stated that the church had a place where they worshiped and they had no buildings on his land. DW1 stated that he did not know how the church obtained their title and that he had an ongoing land case against the church before the Environment and Land Court being ELC 8/2019. He denied the claim that he took the church's land forcefully.

12. DW2, Eunice Moraa Nyanchama, the Appellant's mother, testified that her late husband was the brother of Gitioma and that the land belonging to the brothers was separated by trees that were planted along the fence. She denied the claim that the Appellant entered into the church's land.

13. DW3, John Dix Nyanchama, the Appellant's younger brother, stated that the case was about ancestral land and that it was not true that the Appellant had forcibly detained the church's land. He stated that the disputed area belonged to their father and that he did not know how the church got the title to the land parcel but was aware of his brother's ELC case against the church. He stated that the boundary on the ground was established by their grandfather.

14. DW4, Geoffrey Kimaiti alias Johhny, also the Appellant's brother, produced photos depicting the land in question.

15. At the end of the trial, the trial court found that the prosecution had established its case against the Appellant and convicted him on the first count. He was sentenced to pay a fine of Kshs. 50,000/= or in default to serve one-year imprisonment. The Appellant was however acquitted on the second count of interference with boundary features.

The Appeal

16. Dissatisfied with the decision of the trial court, the Appellant filed the present appeal and set out the following grounds of appeal: -

    1. That the learned trial Magistrate erred in law and in fact in finding the Appellant guilty of forceful detainer when the Appellant demonstrated beyond peradventure that he had a claim of right over the suit land.

    2. That the learned trial Magistrate erred in law and in fact in finding the Appellant guilty as charged when the charge of forceful detainer was incurably defective.

    3. That the learned trial Magistrate decided the case against the weight of evidence on record.

    4. That the sentence meted out to the Appellant, given the circumstances of this case, was harsh and excessive.

17. The Appeal was canvassed by written submissions which I have considered.

Analysis and Determination.

18. The duty of a first appellate court is to re-analyse and reconsider the evidence tendered before the trial court with a view to arriving at its own conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify. This is the position that was taken in Shantilal M. Ruwala vs. Republic [1975] EA, 57 where it was held as follows: -

> "The first appellate Court must itself weigh conflicting evidence and draw its own conclusions."

19. I have re-examined the trial record and considered the arguments made by the parties in their submissions. The main issues for determination are: -

    i. Whether the charge was defective.

    ii. Whether the conviction for the first count was safe.

    iii. Whether the sentence was proper and legal.

        i. Whether the Charge was Defective

20. Section 134 of the Criminal Procedure Code as follows; -

> 134. Offence to be specified in charge or information with necessary particulars Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

21. Section 137 stipulates as follows on the framing of charges: -

> 137. Rules for the Framing of Charges and Information:
>
> The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code -

(a) (i) Mode in which offences are to be charged - a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;....

22. The Appellant argued the charge was incurably defective as it indicated that the Appellant allegedly committed the offence at a time when complainant was yet to become the registered owner of the suit land. The Appellant maintained that he could not be held guilty of the offence of forcible detainer when PW1 and PW2 testified that the church was not on disputed land at the time the Appellant planted tea on the suit land. The Respondent, on the other hand, conceded that there was an on-going land dispute between the Appellant and the complainant (church). The Respondent further conceded that the disputed land was the subject of another case before the environment and land court.

23. I have considered the facts of the case and noted that the offence was said to have first occurred on 2nd September 2016 when PW1 allegedly brought building materials to the suit land. PW2 and PW3 testified that the Appellant removed and sold the said building materials on 2nd September 2016. I note that the complainant got registered as the owner of the suit land on 18th November 2016. I therefore find that the Appellant's assertion that the church was not the registered owner of the suit land as at the time that the offence is alleged to have been committed was well founded.

24. I however find that the mere fact that the complainant was not the registered owner of the suit land as at the date of the commission of the offence does not necessarily make the charge defective. The Charge will only be deemed to be defective where the dates on the Charge completely contrast with the testimonies of the Prosecution witnesses. The exact date that the Appellant allegedly took possession of the suit land was not clarified by the prosecution witnesses. While the charge sheet indicated the date to be diverse dates between 2nd September 2016 and 12th June 2018, some of the Prosecution witnesses testified that the conflict began on 2nd September 2017 while PW1 stated that it was in 2016. PW4,

the investigating officer on the other hand, stated that he received a complaint against the Appellant regarding the forcible entry on 29th July 2017. It is apparent that the Prosecution was not sure of the date when the offence was committed.

25. The next question that arises is whether the defect on the dates can be cured under Section 382 of the Criminal Procedure Code. The Section states as follows: -

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

26. In B N D vs Republic [2017] eKLR, it was held: -

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

27. The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective."

28. Guided by the above decision, I find that the charge was defective because it did not correspond with the evidence of any of the Prosecution witnesses. It was not clear whether the Appellant was answering to charges relating to the events of 2nd September 2016 or 2017 or both. The witnesses did not mention any significant occurrence on 12th June 2018 which was the date indicated on the charge sheet as part of the period when the Appellant is alleged to have taken possession of the suit land. I find that the ambiguity in the particulars on the charge, coupled with a charge sheet whose particulars are at variance with the evidence of the Prosecution witnesses cannot be cured under section 382. I find that the Appellant was forced to answer to charges relating to unclear dates which may have prejudiced him in making his defence in the case.

ii. Whether the Conviction for the first Count was safe.

29. The offence of forcible detainer, is premised on Section 91 of the Penal Code which stipulates as follows: -

> 91. Forcible detainer 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 the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer.

30. The ingredients of the offence of forcible detainer were outlined in the case of Albert Ouma Matiya vs. Republic [2012] eKLR where the court held thus:-

> " 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."

31. The dispute herein revolves around an ancestral land where parties are unable to agree on their respective boundaries. The Prosecution's case was that the Appellant unlawfully took over and occupied land that had been donated to the church by one Gitioma Kimaiti (deceased).

32. PW1 testified that he delivered building materials to the suit land on 2nd September 2016 and that he obtained the title to the land on 18th November 2016. I however note that the complainant church was not the registered owner of the suit land as at the time it allegedly delivered the said building materials.

33. I note that the genesis of this suit is ownership of the suit land. I am cognizant of the fact this court lacks the jurisdiction to determine matters relating to land ownership which is the preserve of the Environment and Land Court by dint of the provisions of Article 162 (2) (b) of *the Constitution*. It was not disputed that there is an ongoing case before the ELC Court being Nyamira ELC suit No. 8 of 2019 in which the issue of ownership of the disputed land is yet to be heard and determined.

34. For the above reasons, I find that this Court cannot proceed to entertain any questions of ownership of the said parcel No. 3193 and by extension, determine the first ingredient of the offence in respect to the party entitled to possess the suit land. I find that even though the complainant produced a copy of their title (P.Exh2), the first ingredient of the offence is predicated on the issue of legal ownership of the suit parcel which is yet to be determined in the ELC matter. I therefore find that the Appellant's conviction for the offence of forcible detainer was unsafe.

35. I make no finding in respect to the second count of Interference of boundary features contrary to Section 21 (1) of the *Land Registration Act* No. 3 of 2012, because the trial court acquitted the Appellant on the said charge.

36. In the end, I find that the instant appeal is merited and I therefore allow it. The appellant's conviction is hereby quashed and sentence set aside. I direct that the fine of Kshs. 50,000 be refunded to the Appellant. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

37. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 11TH DAY OF APRIL 2024

W. A. OKWANY

JUDGE