Republic v Siema (Criminal Appeal E008 of 2022)
[2023] KEHC 20373 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20373 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E008 OF 2022

WM MUSYOKA, J

JULY 21, 2023

BETWEEN

REPUBLIC ..... APPELLANT

AND

PATRICK SIEMA ..... RESPONDENT

(Appeal from the judgment of Hon. Nduruti, Principal Magistrate, PM, in Kakamega PMCCRC No. 2698 of 2018, of 31st January 2022)

JUDGMENT

1. The appellant had been charged before the primary court, of the offence of malicious damage to property, contrary to section 339(1) of the *Penal Code*, Cap 63, Laws of Kenya. The particulars were that between 28th September and October 3, 2018, at Iratso Village, Shingodo Sub-Location, Shibuye Location, in Kakamega East Sub-County, within Kakamega County, he unlawfully destroyed posts of the land boundaries of Nicholas Libokot Oyet. He faced an alternative charge of forcible detainer, contrary to section 91 of the *Penal Code*. The particulars of the forcible detainer charge was that at the same place and at the same time, without colour of right, he held possession of a parcel of land belonging to the complainant, in a manner likely to cause reasonable apprehension of peace. A trial was conducted, where 3 witnesses testified.

2. PW1, Nicholas Libokot Oyet, was the complainant. He described how posts were planted, by surveyors, to mark the boundary between his land and that of the appellant. He later discovered that the posts had been removed. He reported to the police, and the appellant and another were arrested and charged. He did not see them remove the posts. PW2, Wilson Achesa, a Chief, said he was present when the posts were planted. PW1 later reported to him that the appellant and another had removed the posts. PW3, No 104XXX Police Constable Shella Kemboi, investigated the case..

3. The appellant was put on his defence, vide a ruling that was delivered on December 20, 2021. He made a sworn statement, as DW1. He denied the charges. He said the police arrested him, accusing him of uprooting posts.

4. In its judgment, the trial court found the appellant guilty on both counts.

5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds: the case was not proved beyond reasonable doubt, the conviction was founded on circumstantial evidence of the weakest kind, burden of proof was shifted, the case was founded on mere suspicion, the was no prove of damage to property, among others.

6. The appeal was canvassed by way of written submissions.

7. The appellant faced 2 charges, one main and the other an alternative. He was found guilty on both, and was convicted. Where an alternative charge is preferred, it should be treated as subordinate to the first charge, so that upon finding the accused person guilty on the main charge there would be no need to convict him on the alternative. An accused person cannot be convicted of both the main and the alternative charges. After finding him guilty of the main count, the trial court ought to have refrained from considering the alternative charge, and ought not to have convicted and sentenced on it.

8. On the charge of malicious damage to property, the accusation was that he had destroyed posts. The actus reus is damage or destruction of the property. The property in this case were the posts. Those posts were not recovered, and were not produced in court as evidence, for the court to assess the damage to them, to determine whether the offence had been established. No pictorial evidence of the damaged or destroyed posts was presented. Without the posts, the offence could not be established, since the damage or destruction complained of was of the posts, not the fence or boundary. Both the prosecution and the trial court handled the matter as if it related to destruction of the fence or boundary. That was not the case that the appellant faced. There was no proof that the posts were destroyed or damaged, and, therefore, there was absolutely no foundation for the charge.

9. More importantly, no one saw the appellant handle the posts. The posts were not found in his possession. There was no evidence that the appellant had anything to do with their uprooting or removal. There was mere suspicion, founded on the fact of the boundary dispute, but there was nothing concrete to link the appellant to the removal of the posts. I agree. The malicious damage to property charge was founded on the weakest of circumstantial evidence. It could not, in the remotest possibility, found basis for a conviction.

10. On the second count, of retaining property without colour of right in a manner likely to cause a breach of the peace, PW1 alleged that the property was his, and he had brought a surveyor to identify the boundary. PW2 was the local Chief, who participated in the identification of the right boundary. They stated that the appellant had built on the portion meant for PW1. The property in question is registered land, and there ought to be documentation to prove that it was owned by he who claims to own it. The record of appeal filed herein does not have copies of the documents that were placed before the trial court, but the original trial court record, indicates that such records were produced as exhibits, inclusive of a survey report on the land in dispute, and sketch maps. The survey report indicates encroachment by the appellant. The visit happened on September 13, 2018, and the report is dated September 18, 2018. The charges herein were preferred after that. By then the appellant was yet to remove his house from the land, and was still in occupation. That was proof that he had retained the property without colour of right. When placed on his defence, he had no explanation for his continued retainer of the land.

11. I find merit in the appeal, with respect to the first count, of malicious damage to property, and I do hereby quash the conviction founded on it, and set aside the sentence. As indicated above, it was wrongful to convict the appellant on both the main count and the alternative count, for upon conviction on the main count, the court ought not have convicted on the alternative. Conviction on the alternative count can only be upon acquittal on the main count, should there be evidence to support such conviction. As I have found that there was no evidence to convict on the main count, and have quashed the conviction on that main count, there would be basis for upholding the conviction on the alternative count, which I hereby do. I accordingly affirm the conviction on the alternative charge of forcible retainer, and confirm the sentence. The appeal is disposed of in those terms. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Khayumbi, instructed by JI Khayumbi & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.