



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL APPEAL NO.10 OF 2015**

**HARON KIPRONO TOO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence by Hon. B. Limo (RM)*

*in KERICHO SRM's Court Criminal Case No. 1681 of 2011*

*delivered on 16/3/2020)*

**JUDGEMENT**

1. The Appellant was convicted with the offence of **FORCIBLE DETAINER** contrary to section 91 of the Penal Code and he was sentenced to two (2) years imprisonment and the trial court ordered the complainant take possession of his land.
2. The particulars of the charge were on the 8<sup>th</sup> day of June 2011 at Kapbokyiek location in Kericho District of Rift Valley province (now Kericho County) the Appellant took possession of parcel of land title No.Kericho/Kiptugum/280 belonging to Kipleting Boiyon without colour of right and held possession of the said land in a manner likely to cause a breach of the peace against Kipleting Boiyon who was entitled by the Law to the possession of the said land.
3. The prosecution evidence in summary was that the complainant who testified as PW1 was living on the said parcel of land when the Appellant sent his sons to evict him from the land parcel No. Kericho/Kiptugumo/280 (hereafter referred to as the suit property) in November 1996.
4. The complainant produced a title deed and a search showing he was the registered owner of the suit property. The sons of the Appellant demolished his houses on or about 8<sup>th</sup> June 2011 and built a store on the land.
5. The prosecution called five witnesses PW2, PW3, PW4, PW5 and PW6 who said the suit property belonged to the complainant and that the Appellant unlawfully evicted the complainant from the suit property and took possession of the same.
6. The Appellant said in his defence that the complainant sold the land to him on 10/11/1974 and he produced sale agreement and photographs of the suit property. The Appellant admitted that the name of the complainant does not feature in the documents he produced in court. The Appellant called two witnesses who said the complainant sold the suit property to the Appellant.
7. The trial court found that the name of the complainant does not appear in the documents produced by the Appellant which the Appellant said was the sale agreement.
8. The trial court found the Appellant guilty as charged and convicted him and ordered the complainant to take possession of the suit property.
9. The Appellant has now appealed to this court on the following grounds.

**i) THAT there were material contradictions in the prosecution evidence.**

**ii) THAT the trial court relied on inadmissible evidence.**

- iii) **THAT the judgment was biased and it did not analyze the evidence nor did it take into account the Appellant's evidence.**
- iv) **THAT the burden of proof was shifted to the Appellant.**
- v) **THAT the trial court considered extraneous circumstances and relied on the complainant's evidence that was unreliable, doubtful and contained grave contradictions.**
- vi) **THAT the sentence awarded was harsh and excessive in the circumstances of the case.**

10. The parties filed written submissions which I have duly considered. The Appellant submitted in writing through his counsel as follows;

- i) **THAT the prosecution evidence was riddled with contradictions. It was submitted that the complainant said he was evicted in 1996 and his house was demolished in June 2011 then he reported the matter to the police while PW2 said the Appellant had stayed in the suit property since 1997 and the Appellant was arrested when he build a permanent house. PW3 said the Appellant had two houses one of which was built in 1972 and that he had occupied the suit property since 1974.**
- ii) **It was further submitted on behalf of the Appellant that the trial court failed to establish that it could not rely on the evidence of a single witness. Further, that the first constituent element of the offence of forcible detainer is that the Appellant was in actual possession of the land without colour of right. In this case it was submitted that the Appellant bought the suit property from the complainant.**

11. The Respondent opposed the appeal and submitted as follows;

- i) **THAT the prosecution evidence against the Appellant was overwhelming and further that the prosecution proved the guilt of the Appellant to the required standard.**
- ii) **THAT the evidence adduced by the seven prosecution witnesses was reliable, consistent and corroborative with no discrepancies. There was evidence that the Appellant evicted the Complainant unlawfully.**
- iii) **THAT the evidence adduced by the prosecution witnesses who included the chief and the Appellant's older brother was admissible and relevant and no extraneous circumstances were considered.**
- iv) **THAT the elements for forcible detainer were proved and the evidence was analyzed without bias in the judgment.**
- v) **THAT the sentence was not harsh considering that the accused person was a first offender, the two years sentence was legal and the conviction was safe.**

12. This being the first appellate court, it is the duty of the court to re-evaluate the evidence and arrive at its own conclusion (*see Okeno v R*)

13. The issues for determination are as follows;

- i) Whether the prosecution discharged the burden of prove to the required standard.*
- ii) Whether the sentence was excessive.*

14. On the issue of the burden of proof, it is the duty of the prosecution to discharge the burden of prove imposed by law. The degree of prove is beyond reasonable doubt.

15. For an accused person to be convicted with the offence of forcible detainer under section 91 of the penal code, there are certain elements that the prosecution needs to establish. Kimaru, J, in High Court Criminal Appeal no. 8 of 2012, Albert Ouma Matiya verss Republic stated that in order to establish the charge of forcible retainer under section 91 of the Penal Code;

***“...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 land in a manner that is likely to cause reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land.”***

16. Further, In **Criminal Appeal no. 430 of 2013, Richard Kiptalam Biengo versus Republic (2015) eKLR** the learned Judge stated that *A literal reading of section 91 of the Penal Code shows that the prosecution will only prove an offence of forceful detainer against an accused person if it demonstrates that: -*

- “(a) A person has actual possession of land;***
- (b) The person has no right over the land;***
- (c) The act of possession is against the interests of the legal owner or the person legally entitled to the land; and,***

***(d) The act of possession of the land is, therefore, likely to cause a breach of the peace or a reasonable apprehension of the breach of the peace”***

17. In the current case, the prosecution called seven (7) witnesses who included neighbours to both the complainant and the Appellant, an elder brother of the Appellant and the chief.

18. There is evidence that the Appellant evicted the complainant and demolished his house from the suit property.

19. There is also evidence that the title deed is in the name of the complainant. The search also showed that the complainant is the registered owner of the suit property.

20. The Appellant’s defence was that the complainant sold the suit property to him in 1974.

21. However, the court found that the sale agreement did not have the name of the complainant as the seller.

22. I also find that the Appellant had no right to evict the complainant without a court order for eviction and further, no explanation was given why the suit property was not transferred to the Appellant if indeed he had purchased it from the complainant in 1974.

23. I therefore find that the prosecution discharged the burden of proof to the required standard in criminal cases. I also find that the sentence meted upon the Appellant was lawful.

24. The appeal herein lacks merit and I accordingly dismiss it and uphold both the conviction and the sentence.

**Delivered, signed and dated at Kericho this 4<sup>th</sup> day of February 2021.**

**A. N. ONGERI**

**JUDGE**