



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CRIMINAL APPEAL NO. 8 OF 2019**

**HARRIS MZERA MWAILIKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence by Hon. M. Onkoba, Senior Resident Magistrate, delivered on 7<sup>th</sup> December, 2018 in Senior Principal Magistrate's Court Voi Criminal Case No. 526 of 2016).*

**JUDGMENT**

1. The appellant who was the 2<sup>nd</sup> accused in the lower court was jointly charged with Isabella Talu Mwanjala (the 1<sup>st</sup> accused) for the offence of forcible entry contrary to Section 90 of the Penal Code. The particulars of the charge were that on the 30<sup>th</sup> June, 2016 at Mwakighali Village in Voi within Taita Taveta County, jointly in order to take possession thereof, entered on the land grant number 51725 of Sisal Plantation Limited in a violent manner by digging a foundation for building a house and dropping building stones (sic). The 1<sup>st</sup> accused was acquitted for lack of evidence but the appellant herein was found guilty as charged and sentenced to 18 months imprisonment.

2. He was aggrieved by the said decision and on the 17<sup>th</sup> July, 2019, he filed a petition and grounds of appeal. He raised the following grounds of appeal: -

1. That the learned Trial Magistrate erred in law and fact in not realizing and appreciating that the prosecution had not proved the case against the 2<sup>nd</sup> accused to the standard required by law.

2. That the learned Trial Magistrate erred in law and fact in not realizing that the issue of ownership had not been proved in that the alleged complainant or owner is variously referred to as Sisal Plantation Limited, Voi Plantation Limited, Voi Sisal Plantation while the alleged title was in the name of the Voi Plantation Limited.

3. That the learned Trial Magistrate erred in law and fact in not realizing that the significance of a pending civil case SRMCC No. 144 of 2014 on the issue of who between the complainant and the accused owned the parcel of land was yet to be determined.

4. That the learned Trial Magistrate erred in law and fact in failing to realize and appreciate that the essential ingredient of force was not proved.

5. That the learned Trial Magistrate erred in law and fact in failing to consider and evaluate the evidence adduced against the accused person independently and instead took it upon himself to prove the case for the prosecution and disprove the accused (sic) and the entire defence case.

6. That the learned Trial Magistrate erred in law and fact in failing to appreciate and realize that there was no evidence against the accused person to found a conviction, on the charge as laid.

7. That the learned Trial Magistrate erred in law and fact in failing to realize and appreciate that the so called evidence of the County Surveyor was dishonest, distorted, untruthful and only meant to advance the complainant's untruthful case.

8. That the sentence was in the circumstances manifestly excessive.

3. PW1 was Fredrick Opondo Oduor. He stated that he was a Supervisor at the Sisal Plantation Limited. He indicated that his task as the Supervisor was to do rounds and detect any form of encroachments in the said plantation. His evidence was that sometime in the month of

August, 2016, while doing his rounds he noticed that someone had brought in stones, sand, dug a foundation and started building what seemed to be a house. He testified that he immediately reported the incident to the Estate Director Zahid Din.

4. It was PW1's testimony that the said director lodged a complaint at Voi Police Station and that they were accompanied by five (5) police officers to the scene. He stated that when they arrived at the scene, construction was ongoing and they met the owner of the building, being the 1<sup>st</sup> accused who was constructing the house. They also found the appellant herein, who claimed ownership of the plot.

5. PW1 stated that the two were arrested for encroaching and building within the boundaries of the sisal estate. He testified that the suit land belonged to the sisal estate and Zahid Din was its director. He further stated that the land was allocated to the family of Zahid Din by the Government. It was PW1's testimony that the land was well demarcated and had clear beacons. PW1 clarified that the incident happened on 30<sup>th</sup> June, 2016 and not in August 2016 as he had earlier stated in his evidence.

6. PW2 was Zahid Muhammad Din, one of the directors of the sisal estate. He stated that on 30<sup>th</sup> June, 2016 he was informed by his workers Okello and Tito that someone had forcefully entered the estate and started building. That he went to the scene and confirmed it to be true and proceeded to file a complaint at the police station.

7. It was PW2's testimony that police officers accompanied him to the sisal estate and arrested two persons, the 1<sup>st</sup> accused and the appellant herein. PW2 indicated that he only knew the appellant as he had previously started building a house on another part of the sisal estate but he was later stopped by the court.

8. PW2 stated that he was rightful owner of the land as he had inherited the same from his father. He indicated that the land was a lease hold title under Sisal Plantation Limited issued on 1<sup>st</sup> January, 1993 for a term of 99 years.

9. PW2 testified that the land was transferred to Voi Plantation Ltd on 25<sup>th</sup> March 2011, and that the title changed from LR No. 51725 to LR No. 28683. He stated that this was not the first time the appellant had attempted to sell his land and he did not know what interest the appellant had on his land.

10. PW3 was Sammy Juma, who was the County Surveyor in charge of Taita Taveta County. Part of his examination-in-chief was done at the *locus in quo* at the sisal estate on 18<sup>th</sup> January, 2017, when he attended court to identify the boundaries of the land known as Grant No. 51725, which borders Voi town. His evidence was that he could physically identify the boundaries of the sisal plantation. He had in his possession the site plan for the sisal estate. At the *locus in quo*, he went ahead to identify the beacons on the said plan. He stated that the building and foundation of the house under construction fell under LR No. 28683, which was registered under Voi Sisal Plantation. He further stated that as per the plan, the land begun from the beacon TB and moved along Voi township boundary circle up to boundary beacon TB 5 where it joined Voi town.

11. PW3 testified that the house under construction lay within the boundary of LR No. 28683. He stated that he did a report dated the 29<sup>th</sup> September, 2016 which was to be used in determining the boundaries. He further stated that the said house fell within the area under beacon TB and TB1.

12. PW4 was Inspector Peter Kyalo, Force No. 235243, who was attached to the Forensic Crime Scene Department, Voi Police Station. He stated that he was accompanied to the scene by Corporal Kamau of Voi Station Crime Section. That on the 6<sup>th</sup> July 2016 they went to Mwakingali area after a report was received of an incident of forcible entry, where one person was found dumping building materials and digging trenches for the laying of foundation for a building, on a parcel of land that belonged to PW2.

13. It was PW4's evidence that at the scene he documented and took 2 photos. The 1<sup>st</sup> one was a close up shot showing the general site with the dug trenches with building blocks dumped next to a sisal plantation. The 2<sup>nd</sup> photo was a close up view of the building blocks. He produced a certificate for the photos and the 2 photos in evidence.

14. PW5 was the Investigating Officer. He was Force No. 69298 Sergeant William Kamau, who was attached to Voi Police Station. He stated that on 30<sup>th</sup> June, 2016, he was on duty at 9.00a.m., when he received a complaint from PW2, a director of Voi Plantation Estate. That PW2 alleged that some people were building a house on his parcel of land and that the same was confirmed by PW2's guards, namely Fredrick and Tito, who had accompanied him to the Police Station.

15. He testified that PW2 provided him with the land grant title that confirmed that the company owned the land. PW5's evidence was that he requested his colleagues Chief Inspector Kilyungi and Corporal Rhoda, among other officers to accompany him for the site visit at Mwakingali. He stated that at the site, which bordered Mwakingali area, he found trenches which had been dug and that two men Albert and Salim were ready to lay the foundation for a house on site. PW5 stated that he questioned Albert and Salim, who informed him that they had been given the job to build a house by the 1<sup>st</sup> accused and the appellant.

16. It was PW5's testimony that he questioned the 1<sup>st</sup> accused, who told him that she had bought the land from the appellant at a fee of KShs. 80,000/=. He proceeded to ask for an agreement of sale, but the 1<sup>st</sup> accused had none. He further proceeded to interrogate the appellant for the production of ownership documents, but he did not have any.

17. PW5 testified that he asked PW2 to show him the boundary of the land, which he did. He stated that he requested the two workers and the two accused persons to accompany him to the police station for further investigations.

18. He testified that later in his investigations, he contacted his colleague Inspector Kyalo from the Forensic Crime Scene to document the

scene. PW5 indicated that he requested the County Surveyor (PW3) to confirm the location of the scene. That PW3 confirmed that the area was within Voi Plantation Estate and he did a report to that effect. PW5 stated that he received ownership documents from the director of the plantation and none from the accused persons. He produced certified copies of ownership documents (CR 51725) which he had been given by PW1.

19. The appellant was put on his defence. He gave sworn evidence and stated that he moved from Mombasa to Voi in November 1982 and had resided in Voi since then. He stated that he had resided at Aseko settlement scheme since 1998 and had built a four bedroomed house, which was about 20 meters from impugned plot and that it is within the town circle.

20. He stated that he knew that the plot was within the town circle from a letter he received on the 25<sup>th</sup> October, 2001 from one Mr. Munene a Surveyor from the District Survey Office, Wundanyi. He further stated that the letter informed him that the survey work was still ongoing and that titles would be issued once the exercise was complete. That the said letter indicated that he was a plot owner within Mwakingali B Scheme.

21. The appellant indicated that the survey was completed in the year 2017 and he was still waiting for titles to be issued. He stated that at the time he received the letter, Aseko settlement scheme was not in existence. He further stated that there were two schemes Aseko and Murekei and he had a title deed for the latter plot. He said that the impugned plot was his and was under Aseko Settlement Scheme. That he had no title to it and was waiting for the same. He indicated that PW2 was fully aware of it.

22. The appellant indicated that the property in issue was in Aseko Settlement Scheme and not inside the sisal estate. He stated that he also filed a complaint vide O.B 1/9/2013 against PW2 for demolishing his property and no action was taken to assist him. He stated the sisal crop was far from the site of the plot and that there was a road that divided the sisal estate from his land, but there was no barrier or fence that separated the two lands. He further stated that beacons that were shown to court were not for Voi Sisal Estate but were for Voi town boundary and the impugned plot was part of Aseko Scheme.

23. The appellant admitted having sold a piece of land measuring 50 x100 ft in the year 2015 for Kshs. 80,000/= to the 1<sup>st</sup> accused. He confirmed that he had told her that the land was his and that she assembled materials and begun building a house. He stated that the 1<sup>st</sup> accused was arrested and so was he, and that is how he found himself in court.

24. He indicated that there was a case pending before court, being Civil Case No. 144/2014 Zahid Din v himself and Cr Case No. 567 of 2017 by the same parties, pending before court. He stated that all the cases including this one were based on the same subject matter. He maintained that the land he sold to the 1<sup>st</sup> accused was his and did not belong to PW2.

25. In his written submissions, the appellant's Counsel stated that the prosecution was not able to prove the instances of violence referred to and as required under Section 90 of the Penal Code. He further submitted that the ownership of the land was in question and was yet to be resolved and a civil case was pending, namely, SRMCC No. 144 of 2014.

26. The appellant's Counsel submitted that it was unlawful and illegal for PW2, in full knowledge of the existence of SRMCC No. 144 of 2014 to use the criminal justice system as a means of obtaining or proving ownership of the land in issue. He relied on the case of **Joseph Wanyonyi Wafukho v Republic** [2014] eKLR, to support his claim that a criminal process should not be used as a substitute to settle a civil claim. He maintained that the case the subject of this appeal was one that required ownership of the land to be determined and that had not yet been done in SRMCC No. 144 of 2014.

27. The appellant's Counsel urged this court to allow this appeal as the prosecution had failed to prove its case to the required standard. He also stated that the sentence was manifestly excessive for a misdemeanor and there was no option to pay a fine.

28. The office of the Director of Public Prosecutions (ODPP) through Ms. Grace Mukangu, Prosecution Counsel, filed written submission on the 3<sup>rd</sup> November, 2020. She submitted that under Section 90 of the Penal Code, she was only required to prove that the appellant entered the land in a violent manner and that the violence was not limited to a person. She stated that the taking over, selling, excavating and bringing in building blocks was enough proof of taking possession of the land in a violent manner.

29. On whether the ownership of the land was not proved, she stated that PW2 testified as the owner and Director of Voi Plantation Limited and he explained that the initial owners of the land were Voi Sisal Estate who then transferred the land to Voi Plantation Limited on 25<sup>th</sup> March, 2011. She stated that the same was evidenced by the production of title document LR No. 28683 which was initially part of LR No. 51725.

30. She further submitted that PW3 testified that the land lay between beacon TB and TBS which were erected on 22<sup>nd</sup> July, 1929 and have never been adjusted and that only a lease extension was done in the year 1993. She submitted that PW3's report clearly identified that the house under construction lay within LR No. 28683.

31. The Prosecution Counsel submitted that SRMCC No. 144 of 2014 was explained by PW2 in his evidence to be a suit that involved a different piece of land that the appellant had tried to build a house on, and that was the second time he had attempted to do so, after he had been stopped in the year 1998.

32. She further submitted that PW2 testified that he obtained an order of injunction from SRMCC No. 144 of 2014 but in the case herein, the appellant sold land to the 1<sup>st</sup> accused in the year 2015. She stated that it was clear from PW2's evidence that the land in question was not the same one as that in SRMCC No. 144 of 2014.

33. It was submitted that PW2 had various options of the law to choose from with regard to the appellant's forcible entry and he chose the

criminal route as a matter of right and that the same is permitted under the law.

34. On whether the sentence was excessive, the Prosecution Counsel submitted that under Section 90 of the Penal Code, forcible entry is described as a misdemeanor and that Section 36 of the Penal Code prescribes that misdemeanors are punishable for a term not exceeding two years or to a fine or both. She stated that the appellant was sentenced to serve 18 months imprisonment which was not in any way excessive. She indicated that the appellant's Counsel had not submitted any legal justification as to why he thought the same was excessive within the parameters set under Section 36 of the Penal Code.

35. In conclusion, the prosecution stated that in a forcible entry charge, one was required to prove taking possession in a violent way and ownership of the land. She submitted that the prosecution proved its case beyond reasonable doubt by providing documentary evidence that showed the land belonged to Voi Plantations Limited. That the appellant had no title documents and only availed a vague letter that was never substantiated by the maker, thus the appellant was rightly charged and convicted.

36. This being a first appeal, this court is obliged to analyze and evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses testify. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Njoroge vs Republic** [1987] KLR 19 at page 22 as follows-

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya Vs Republic [1957] EA 336, Ruwalla Vs Republic [1957] EA 570.”***

**The issue for determination is if the prosecution proved its case beyond reasonable doubt.**

37. The appellant claimed that no violence was proved to have been used as would be required in a case of forcible entry. The Prosecution on the hand stated that entry and selling of the land to the 1<sup>st</sup> accused, who later excavated and begun building amounted to violence. It is thus necessary to look at the provisions of Section 90 of the Penal Code. They provide that-

***“Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or in threats or in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter on the land or not, is guilty of the misdemeanour termed forcible entry:***

***Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry.***

38. Violence under Section 90 of the Penal Code is defined as the use of ‘actual force applied to any person or in threats or breaking open any house or in collecting an unusual number of people...’. In this case all the prerequisites for an offence of forcible entry are lacking. There is no evidence that the appellant in any way used force to gain entry into PW2's land, or whether he was accompanied by an unusual number of people when so gaining entry or that he broke open any house on the said land in order to gain entry.

39. In this case, the appellant was accused of entering PW2's land without any justification and selling a portion of it to the the 1<sup>st</sup> accused who commenced the construction of a house on the said land. PW2 produced before the Trial Court a copy of the Title document which showed Voi Plantation Limited owned the land. The appellant's entry into the said land and the sale of a portion of it does not meet any of the ingredients required for an offence under Section 90 of the Penal Code.

40. This court does not condone the actions of the appellant of entering into and selling a portion of the land of Voi Plantation Limited. The entry to the said land happened in the year 2016 and it is therefore difficult for this court to see the correlation between the incident herein and the civil case filed in the year 2014 that the appellant referred to. In any event, PW2 was granted an injunction in the said case. However, this being a criminal case, the prosecution was under an obligation to prove the requisite ingredients for an offence under Section 90 of the Penal Code. It is apparent that the appellant broke the law by selling a portion of the land in issue. The land Surveyor who testified as PW3 proved from the beacons of the site plan that the portion of land which had been sold by the appellant belonged to Voi Plantation Limited.

41. This court's finding therefore is that the appellant had encroached on a piece of land for Voi Plantation Limited, where PW2 is a director, but the evidence adduced did not support the charge as force was not established to have been used when the appellant gained entry into the said portion of land.

42. The upshot is that this appeal is well merited and is hereby allowed. The respondent (DPP) has 14 days right of appeal.

**DELIVERED, DATED and SIGNED at VOI in open court on this 13<sup>th</sup> day of May, 2021.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of-**

Appellant present in person

Ms Mukangu prosecution counsel for the respondent.