REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 8 OF 2019

EMILIO NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was convicted for the offence of forcible detainer contrary to section 91 of the Penal Code Cap 63 Laws of Kenya in Embu Chief Magistrate's Criminal Case No. 879 of 2017. The particulars of the offence were that on unknown dates between 14.07.2012 and 19.09.2017 at Gachara area of Mavuria Location of Mbeere South sub-county within Embu County, being in possession of parcel of land number Embu/ Mavuria/167 measuring 7.6 Hectares of Boniface Njuki Rinji, without colour of right, held possession of the said land in a manner likely to cause breach of peace or reasonable apprehension of a breach of peace, against Boniface Njuki Rinji who was entitled by law to the possession of the said land.

2. The appellant was subsequently sentenced to pay a fine of Kshs. 20,000/- and in default to serve a sentence of two years imprisonment. It is this conviction and sentence which necessitated the appeal herein and which was instituted vide the petition of appeal dated 13.03.2019. The appellant raised twelve (12) grounds of appeal. However, a critical analysis of the said grounds reveals that the appellant challenges the said conviction and sentence on the basis that the trial magistrate erred in fact and law in convicting the appellant whereas the prosecution had not tendered sufficient evidence to prove its case to the required standard. He thus prayed that the conviction by the trial court be quashed and the subsequent sentence be set aside.

3. The appeal was canvassed by way of written submissions. The appellant in support of his case submitted that the evidence tendered by the prosecution was not sufficient to sustain the charge before the trial court. Further that PW1 despite him stating that he bought the suit land (LR. Embu/ Mavuria/ 167) from PW2, did not tender evidence to the effect that PW2 was the rightful owner thereof and nor was there evidence that PW2 inherited the same from his grandfather as there was no evidence of succession proceedings having been undertaken. That the green card produced as PEx.II had no entry of succession proceedings. The appellant further submitted that the title by PW2 was obtained through an illegal process and that even though the appellant had no title documents, he had lived on the said land ever since he was born and was given the said land by his father in 1987. That the prosecution did not establish why PW2 has never lived on the suit land since 1972 or 1998 when he obtained the title but only sold it in 2012. It was further submitted that the trial court erred in sentencing the appellant herein under section 91 of the Penal Code whereas no evidence was tendered to prove the elements of the said offence (being in actual possession; without any colour of right; and circumstances present likely to cause breach of peace or reasonable apprehension).

4. It was submitted on behalf of the respondent that the prosecution proved the case against the appellant herein beyond reasonable doubt. The respondent's submissions were to the effect that the elements of the offence were proved more so, the fact that the appellant was in occupation of the land yet he was not the registered owner. Reliance was made on the case of **Albert Ouma Matiya –vs- Republic Busia HCCR Appeal No, 8 of 2012 (2012) eKLR**. Further that, the sentence meted out was not harsh as the offence of forcible detainer is a misdemeanour whose punishment is provided under section 36 of the Penal Code to be imprisonment for a term of two years or fine or both and thus the sentence meted out on the appellant was fair and just in the circumstances. Further that the appellant's defence was considered by the trial court but the trial court found the same to be weak in the face of the strong and credible evidence by the prosecution.

5. This being a first appellate court, the duty bestowed upon it (as was stated in **Okeno –vs- Republic [1972] EA 32)** is to re-examine the evidence presented before the trial court and evaluate the same in order to determine whether the trial court erred in law and fact. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. Further it is the function of a first appellate Court to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. (See**Kiilu & Another –vs- Republic [2005]1 KLR 174)**

6. In his evidence, PW1 testified that he bought the suit land from one Adriano Nyaga who had approached him on 14.07.2012 and upon payment of the purchase price, a title deed was processed in his name.

7. PW2 (Adriano Nyaga Kigondu) on his part testified that the suit land belonged to him having inherited the same from his grandfather in 1972 and was using the same until 14.07.2012 when he sold it to PW1. That he conducted a search before selling the said land and there was no one in occupation thereof. In cross examination, he reiterated that at the time of selling the land to PW1, there was no one who was living on the suit land.

8. PW3 (Michael M. Njeru) testified that he was the chief of Mavuria Location and that in March 2016, PW1 reported that people had encroached on his land and wherein he summoned the encroachers but they failed to honour the summons. One of them was the appellant herein. That he then referred the complaint to the police.

9. PW4 (John Njuki Njiru) testified to the effect that he was a land broker and he witnessed the sale of the suit land between PW1 and PW2.

10. PW5 (Cpl Jatani Tolosa) testified that he investigated the case before the trial court and when he conducted a search at Siakago Land registry, he discovered that the said title was clean. He produced the copy of the title deed to the suit land, sale agreement, current copy of the title, a copy of the green card and survey sheet as PExbt 1,2,3, 5(a) and 5(b) respectively. In cross examination, he testified that he found the accused living on the land after the complainant (PW1) had bought the same. In re-examination, he testified that the accused had no title document to the suit land.

11. The appellant on being put on his defence testified that the suit land belonged to him having been given to him by his father in 1987 and that he had been using the same ever since. Further that he has no title document as the land belonged to Mugwe clan and thus clan land. In cross examination, he testified that he did not have any title document and that he did not know that the land was adjudicated, demarcated and given title numbers.

12. DW2 (John Muthie Mburia) testified that he was a village elder and the appellant herein has never been evicted from the land. In cross examination, he stated that he did not know whether PW2 was the registered owner of the land or whether the same was sold to PW1.

13. DW3 (Musungu Njagi) testified that he knew the appellant herein and that he has never been evicted from the suit land. In cross examination, he testified that the appellant lived in Gachara but that he did not know the suit land in question. In re-examination, he testified that the accused has been living on the suit land and has never been evicted.

14. DW4 (Severino Nyaga) testified that he was the chairman of Mugwe clan and an uncle to the appellant. It was his evidence that the land where the appellant lived was occupied by his brother (father to the appellant) since 1937 and that the appellant inherited the same from his father. That the land had been transferred fraudulently to PW2.

15. I have definitely considered the evidence tendered in the trial court as is required of this court.

16. Section 91 of the Penal Code being the section under which the appellant herein was charged provides 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."***

17. From the above definition, it is clear that the prosecution had the burden of proving three (3) main ingredients of the offence being; -

> (***i) proof of prima facie ownership of the land in question,***
>
> ***(ii) proof that the accused was illegally in actual possession of the land in question, and***
>
> ***(iii) proof that the possession in question was in a manner likely to breach the owner's peace or create an impression that a breach was imminent.***

18. In **Albert Ouma Matiya V Republic [2012]eKLR** the court held:-

> **"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. "**

19. As for the proof of ownership, PW1 in his testimony testified that he purchased the suit land from PW2 for Kshs. 30, 000/- per acre and that he was given the title to the suit land upon completing the payment thereof. A copy of the title deed to the suit land and the green card were produced by PW5.The appellant testified that the suit land was given to him by his father but that he did not have title documents. As such, PW1 is the registered owner of the suit land and this was proved by evidence. Despite the appellant having testified as to the land being a clan land, there was no evidence tendered before the trial court to outweigh the concrete evidence of ownership of the suit land which was tendered by the prosecution. Further, despite the appellant having testified to the effect that the title by PW2 was obtained fraudulently, there was no evidence which was tendered to prove the alleged fraud. The Appellant did not avail before the trial court or even this court any

evidence to show that he had any legal right to occupy the land in question.

20. As such, the trial court did not err in finding that the prosecution had proved ownership on the part of PW1. In **Richard Kiptalam Biengo –vs- Republic [2015] eKLR** the court held that;

> ***"…where the ownership of the land in an offence of forceful detainer is in controversy or to put it more appropriately, if the legal ownership or entitlement of the land cannot be established beyond reasonable doubt at the accused person's trial, then a conviction cannot be sustained."***

In this case, the said ownership was sufficiently proved.

21. As for the proof that the accused was illegally in actual possession of the land in question, it is not in dispute and indeed was admitted by the appellant in the trial court that he was in actual possession of the suit land. This was further corroborated by the defence witnesses who testified that the appellant herein had been living on the suit land and had never been evicted. Having found that the evidence before the trial court was sufficient to prove ownership, it therefore follows that the occupation by the appellant can only be said to be illegal as it is against the ownership rights of PW1.

22. As to whether the possession was in a manner likely to breach the owner's peace or create an impression that a breach was imminent, Judge G.W. Ngenye-Macharia in **Florence Wanjiku Mwamunga & another –vs- Republic [2018] eKLR,** in defining the breach of peace held that;-

> ***"22. The next ingredient is the proof that the possession threatened or created a breach of the peace. What constitutes a breach of peace was ably set out in the speech of Watkins LJ in* R *v.* Howells[1982] 1 QB 416 *as approvingly quoted in* Steel & others *v.* The United Kingdom[1998] ECHR 95*, thus:***
>
> ***"A comprehensive definition of the term 'breach of the peace' has very rarely been formulated… We are emboldened to say that there is likely to be a breach of peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance....."***

23. PW1 testified that he found some houses built on his farm and he reported the matter to the area chief and also to the police. Further that, the accused was violent and trespassed on his land. As such, it is clear that the quiet enjoyment of the PW1's property was disturbed by the appellant. In fact, he admitted being in occupation of the land. As such, it is clear that PW1's peace was breached.

24. It is my considered view, therefore, that the evidence before the trial court was sufficient to establish the elements of the offence facing the appellant before the trial court. The appeal having been premised basically on the failure by the trial court to analyze the evidence and thus erred in its decision, I find that the appeal has no merits.

25. The appellant was sentenced to pay a fine of Kshs. 20,000/- and in default serve two (2) years' imprisonment. It is trite that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances.

26. It is now settled law, following several authorities by the Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist. (See **Ahamad Abolfathi Mohammed & another –vs- Republic [2018] eKLR** and **Bernard Kimani Gacheru –vs- Republic, Cr App No. 188 of 2000).**

27. In the end I find that the prosecution was able to prove the charge against the appellant to the required standards. Further, the sentence imposed upon the appellant was within the confines of the law. As such, the appeal is hereby dismissed.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF JULY, 2021.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent