



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. E021 OF 2021

ANGELO NDWIGAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appeal herein was instituted by the appellant vide a petition of appeal dated 22.02.2021 and wherein he challenges the conviction and sentence of the trial court (Hon. W. Ngumi- PM) in Siakago PM's Criminal Case No. 993 of 2017. The grounds of appeal as per the said petition are that the trial court erred in law and fact by finding that PW1 had an absolute and indefeasible title to LR Mbeere/Kirima/ 2993; that the trial court erred in law and fact by disregarding the customary law trust in relation to the said land parcel and that the appellant was entitled to LR Mbeere/Kirima/ 2993 by virtue of the said customary law and which customary rights prevented the prosecution from meeting its burden of proof; that the trial court erred in law and fact in failing to find that PW1 had acquiesced with the appellant's possession of Mbeere/ Kirima/2993; and in convicting and sentencing the appellant without proof of *mens rea*; and that the sentence in the circumstances of the case was such that a manifest travesty of justice occurred therein.

2. He thus prayed that the appeal be allowed, conviction be quashed, sentence be set aside and the appellant be acquitted.

3. The appeal was disposed off by way of written submissions.

4. The appellant in support of the appeal submitted that the trial court erred in fact and in law by failing to find that the prosecution did not prove beyond reasonable doubts that the appellant held the suit land on 3.03.2017. That the suit land was a sub-division of LR Mbeere/Kirima/2244 which was a community land belonging to seventeen clans and at the time PW1 was allocated the suit land (on 16.07.2008) and when he was registered with the same (3.10.2008), the appellant was living on the land and despite the evidence by DW1, DW2 and DW3 to the effect that the appellant was born on the said land and thus the possession of the land by the appellant antedated 3.10.2008. The appellant further submitted that he took possession of the land as a result of customary law trust and that the possession was not without any colour of right and/ or created false impressions. Reliance was made on the case of Joseph Ogola -vs- The Queen (1956) KLR Vol. XXIX 174 as to the meaning of "colour of right." That he took possession of the suit land with a colour of right of customary trust and intergenerational and intragenerational equity.

5. Reliance was made on the case of Gladys Njeri Muhura -vs- Lispa Wagaturi Muthiguro (2019) eKLR as to what is customary law trust. It was further submitted that the appellant did not hold possession of the suit land in breach of peace as the weapons which the prosecution alleged the appellant to have gone with (arrows, a bow and a panga) thus making people to flee, were never produced in court. Further that his actions were in honest protection of self and property as he had interest under customary trust. As such, the trial court erred in having not found that the appellant acted in defence of self and property as provided for under Section 8 of the Penal Code. Reliance was made on the case of Palmer -vs- Republic and Republic -vs- David Kinyua (2014) eKLR to support the point that the appellant was acting in self-defence and defence to property.

6. On behalf of the respondent, Ms. Mary Gakuo filed written submissions and wherein it was submitted that the prosecution was able to prove all the elements of the offence facing the appellant beyond any reasonable doubts. Further that it was proved that the complainant was the legal owner as he had a title deed and which is protected under Section 21 and 26(1) of the Land Registration Act. That the appellant did not have an honest claim of right and thus the defence under Section 8 of the Penal Code was not available in the circumstances of the case. Reliance was made on the case of Isaac Gitata Maina -vs- Republic (2020) eKLR and that issues of customary law trust can only be handled by the Environment and Land Court. As such grounds 1,2,3,4 and 5 ought to fail. It was further submitted that the sentence meted out on the appellant was within the law and the same was not excessive and this court cannot and/ or ought not to interfere with the same.

7. This being a first appeal, the duty of this court is well settled. This court has a duty to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.(See Okeno v. Republic

8. In re-evaluating the said evidence, this court ought to bear in mind that the burden of prove rests on the state as was held in *locus classicus* in **Woolmington –vs- DPP (1935) AC** and to the standards of beyond any reasonable doubts as was held in **Miller Versus Minister of Pensions [1942] AC**. Any doubt ought to work in favour of the appellant.

9. I will as thus proceed to reconsider the evidence which was tendered before the trial court. In a nutshell, the appellant herein was charged with two counts but convicted of forcible detainer and which is the subject of this appeal. The particulars of the offence as per the charge sheet were that on 3.10.2017 at Kamutianjiru village, Kombo Munyiri Sub-location, Mbeere South Sub-county within Embu County, held a possession of land parcel Mbeere/Kirima/2993 without colour of right which belongs to James Njeru Mubothi in a manner likely to cause breach of peace against the said James Njeru Mubothi who is entitled by law to possess the said parcel of land. The accused also faced a second count of assaulting a police officer contrary to section 253(b) of the Penal Code but which charges were withdrawn vide the orders of 27.02.2019.

10. PW1 testified that he had gone to prepare the suit land herein on 1.10.2017 and in company of PW2, PW3 and others but they were unable to carry out the task as the appellant threatened them. That on 3.10.2017, they again went to prepare the land and the accused went to the land armed with arrows, bow and a panga. He was about to attack them but was restrained by one Mr. Kiarie - a police officer and whom the appellant cut his hand using a panga. That the appellant was arrested and taken to Kiritiri police station. PW1 produced a copy of the title deed to the said land as prove of ownership and which title was marked as Exhibit 1. In cross examination, he testified that the said land was a resultant land from the sub-division of LR Mbeere/Kirima/ 2244. His testimony was generally consistent as to the issue at hand. The said testimony was consistent when he was recalled for cross examination.

11. PW2 testified that on both dates (1.10.2017 and 3.10.2018), he was hired by PW1 to work at the suit land. That on 1.10.2017, they could not work as the appellant went to the shamba armed with a jembe. That on 3.10.2017, they went to the shamba once again and the appellant's wife went to the shamba and undressed and started shouting. That the appellant also went armed with a bow, arrows and a panga and cut one of the police officers on the right hand wrist before he was handcuffed and taken to Kiritiri police station. He further testified that the land belonged to PW1 and that the appellant's father had been given land after sub-division and the accused's father had moved in to the said land but the appellant had refused to move with them.

12. PW3 corroborated the evidence by PW1 and PW2 as to the incidences on the two days.

13. PW4 testified that he was attached to regional DCI Headquarters and produced photos he took when he visited the scene. The said photos were marked as Exhibits 2 and 3.

14. PW5 testified as having arrested the appellant herein after being called by PW1 to the scene.

15. PW6, the Investigating officer produced the exhibits (earlier marked) as evidence before the trial court. The prosecution closed its case and the appellant was subsequently put to his defence.

16. In his defense, he testified that he did not take possession of the said land but he was born thereon and still lived there. He denied that PW1 had ever lived on the said land or that PW1 used to till the land. He called two witnesses (DW2 and DW3) to support his case. DW2 testified that PW1 did not live on the said land but only DW1 and who was born on the said land.

17. The trial court after considering the said evidence delivered the judgment subject of this appeal.

18. I have indeed analyzed the evidence as was tendered before the trial court and further considered the trial court's judgement therefrom, the petition of appeal and the rival submissions filed herein. It is my view that the main issues which this court is invited to determine in this appeal is whether the evidence tendered before the trial court was sufficient to win a conviction and whether the sentence meted out on the accused was excessive.

19. Section 91 provides as follows:-

"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."

20. From the above section, the ingredients required to establish the charge of forcible detainer are as follows:-

1. proof of prima facie ownership of the land in question

2. proof that the accused was illegally in actual possession of the land in question

3. proof that the possession in question was in a manner likely to breach the owner's peace or created an impression that a breach was imminent.

(See **Richard Kiptalam Biengo –vs- Republic [2015] eKLR**).

21. It is not in dispute that PW1 is the registered owner of the land herein. In fact, the appellant did admit this only that he argued that he

claimed customary law trust over the same claiming that it was initially clan land. A copy of the title deed to the land was produced in court and which clearly shows that PW1 was the registered owner of the said land. As such the issue as to PW1 being the owner of the land was proved.

22. Further it is not in dispute that the appellant was in occupation of the said land. He indeed admitted as having been born on the said land parcel and further claimed customary trust interest in the same. He testified that even at the time of the registration of the suit land in the name of PW1, he was in occupation of the same. The appellant not being the registered owner of the land at the time of the offence and having not tendered any evidence as to why he was in possession of the said land, it is clear that the said possession was illegal.

23. 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 –vs- Howells [1982] 1 QB 416** as approvingly quoted in **Steel & others –vs- 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.”

24. The evidence by the prosecution witnesses was that the appellant herein came armed with a bow, arrow and threatened to shoot down the tractor driver after which the said driver left having feared for his life. That on the second day, he caused fracas and PW1 and the other persons who had gone to prepare the land for planting had to run for their lives and they went to a corner till the police came and managed to arrest him. The appellant assaulted the police officer who had come to enforce peace. It is clear therefore that the appellant as such infringed on PW1’s right to quiet enjoyment of his land.

25. The appellant in his submissions on appeal submitted that his actions were justified as he was protecting his property and himself (he raised a defense of self defence under section 8 of the Penal Code). However, I find this defense misplaced as he could not be protecting what is not his. I thus find that the prosecution did prove that there was a breach of the peace on the part of the appellant.

26. I find that from the above, the prosecution tendered sufficient evidence to prove the elements of the offence of forcible detainer beyond any reasonable doubt. As such ground 6 of the appeal herein fails.

27. Despite the appellant having relied on the defence of customary law trust over the said land, it is my view that he did not prove that he has any right to remain on the said land based on that. This is for the reasons that customary law interests on land though the same is recognized in law is subject to prove. The same can only be relied on where a court with jurisdiction has declared that it exists. In this case, the appellant did not tender evidence as to him having been declared as having customary law interest in the suit land. What is in evidence is that the land belonged to PW1. I therefore agree with the trial court to the effect that under Section 26 of the Land Registration Act 2012, PW1 was the absolute and indefeasible owner of the land. Grounds 1, 2, 3 and 5 of appeal as such fails.

28. The appellant in ground 7 of the appeal challenged the conviction and sentence by the trial court as being a manifest travesty of justice. However, as I have already held above, the trial court applied the law to the facts and applied the same properly. The appellant did not submit or rather show how the conviction was a travesty of justice. The said ground as such fails.

29. Taking into account all the above, it is my considered view that the appeal herein lacks merit. The same is hereby dismissed.

30. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF NOVEMBER, 2021

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent