REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. E029 OF 2021

GEORGE MAINGI MUSEMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein filed the instant appeal and which was instituted by way of the petition of appeal dated 13.05.2021. He challenges the judgment and sentence by the trial court in Siakago SPM's Criminal Case No. 1062 of 2017 and in so doing raises three (3) grounds of appeal. Ground one and two essentially challenges the said conviction and sentence on the basis that the learned trial magistrate erred in law and fact in convicting and sentencing the appellant based on contradictory, inconsistent and inconclusive evidence and whereas the prosecution did not prove its case beyond reasonable doubts. The third ground is to the effect that the trial court erred in law in sentencing the appellant consecutively.

2. He thus prayed that the appeal be allowed, the trial magistrate's judgment be quashed and the appellant be acquitted.

3. Directions were given that the appeal be canvassed by way of written submissions and which directions were complied with.

4. The appellant in support of the appeal submitted that the prosecution was not able to prove that the appellant herein was in actual possession of the land in question and which land he had no right to hold. This is for the reasons that the evidence (by PW1, PW2 and PW7) was to the effect that an organization known as CUCU NA UMAU was the one in occupation of the parcel of land in question. Further that the appellant herein was not among the officials of the said organization. It was further submitted that the evidence by the prosecution was not sufficient to prove that the appellant herein was in occupation of the land herein in a manner that was likely to cause reasonable apprehension that there would be breach of peace against the person entitled by law to the possession thereof. It was further submitted that the trial court erred in law and in fact by finding the appellant herein guilty of the offence under Section 91 of the Penal Code but convicting him under Section 215 of the Criminal Procedure Code.

5. On behalf of the respondent herein, it was essentially submitted that the evidence before the trial court was sufficient to warrant the conviction and that the elements of the offence the appellant had been charged with, were proven. Reliance was placed on the case of **Albert Ouma Matiya –vs- Republic Busia HCCR Appeal No. 8 of 2012 (2012) eKLR** on the ingredients of the said offence. Further that the argument that the appellant was never an official of CUCU NA UMAU organization were defeatist as the prosecution's evidence placed them at the scene. This court was thus invited to reconsider the evidence on record and indeed find that the same was sufficient to prove the offence.

6. 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 [1972] E.A. 32 and Kiilu and another vs. R (2005) 1 KLR 174**).

7. 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 standard 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. I say this having noted that the appellant challenges the trial court's decision on the ground that the evidence tendered was not sufficient to prove the said offence.

8. I will as thus proceed to reconsider the evidence which was tendered before the trial court. In a nutshell, the appellant herein was charged together with other two co-accused persons with the offence of forcible detainer contrary to section 91 as read together with section 36 of the Penal Code. The particulars of the offence as per the charge sheet were that on 1.01,2009, at Karaba market in Karaba location Mbeere South Sub-county within Embu County, jointly (with his co-accuseds) and without colour of right held possession of land parcel 1246 belonging to Lucy Ngina Mbatha in a manner likely to cause breach of peace against the said Lucy Ngina Mbatha who is entitled by law to possess the said parcel of land.

9. The prosecution called 7 witnesses in order to prove its case. PW1 testified that she was the owner of the land herein having been given by the survey upon sub-division. She produced a confirmation letter as proof of ownership. That, after being given the same, the appellant herein took the land away. He entered the land with a group known as "cucu na umau" and started doing business thereon. That she reported to the chief Karaba location.

10. PW2 testified as to having received a call from PW1 to escort her to Karaba to go and report encroachment on her plot. That they went to the ground together with the D.O and the Surveyor and wherein the surveyor showed them three plots 1243, 1245 and 1246 and 1246 had green houses built by Cucu na Umau organization. That they went back to the D.O's office and a report was made as to the findings on the ground. That the appellant promised to inform the group as to the findings of the exercise but he later declined and thus the matter was reported to the police. He further testified that the appellant was still using the said land and that he was the director of the group.

11. PW3 testified as having been present when the measurements were taken by the D.O, the surveyor and in presence of PW1 and appellant herein. That the plot in question was confirmed to belong to PW1 but was being occupied by the appellant and when PW1 was asked what she wanted, she said that she wanted the appellant to vacate the land immediately. However, the appellant requested for one week so as to inform the committee of the group. He testified that the land belonged to PW1.

12. PW4 testified that he was present when the verification exercise was being done by the D.O and the Surveyor. That after the exercise, they went to the D.O's office and wherein the appellant requested for some time so as to inform the officials of the group as to the findings. That however, he came to learn that the appellant refused to vacate the said land.

13. PW5 testified and corroborated the evidence as to the ownership of the land in question and that it belonged to PW1 having been allocated the same by the adjudicating office in 1978.

14. PW6 also testified as to the land in question belonging to PW1.

15. PW7 testified that he was the Investigating Officer in the case. That when the complaint was made, he was tasked with the investigation thereof and that he went to Karaba where the plot was. He found that the same had a green house, a house, a tank and a borehole dug. That he enquired as to who built the same and he was told that it was the appellant and that the owner had tried to resolve the matter before the DO but she was unsuccessful. He produced the minutes of the meeting in evidence (PExbt 5) and testified that when they went to the office they confirmed that the plot in issue was registered in the names of PW1. He produced the ownership card in relation to the said plot amongst other exhibits. The prosecution closed its case and the appellant was subsequently put to his defence.

16. In his defence, he testified that he knew the land in question and that he had been to that place but none the less it was on invitation by a group "Cucu na Umau" who had called him to advise them and that he was not a member of the group. He denied residing on the said land and testified that he only goes there to give advice. He denied having formed the said group but testified that indeed the group has built on the plot.

17. I have indeed analyzed the evidence that 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.

18. 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."***

19. From the above section, the ingredients required to stablish 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).**

20. It is not in dispute that PW1 is the registered owner of the land herein. The evidence by prosecution was sufficient in that respect. PW1 produced a copy of a letter confirming ownership. PW7 further produced a ballot card. The appellant herein did not controvert this evidence by producing evidence to prove that he was the owner of the said plot. As such, the issue as to PW1 being the owner of the land was proved.

21. As to the 2nd ingredient of the offence, the evidence by PW1 was to the effect that the appellant herein entered the suit property with a group known as "cucu na umau" and started doing business on the said land and that at the time of giving the evidence he had planted maize. In cross examination, she testified that the appellant herein chased away one Tabitha whom she (PW1) had leased the land to. PW2 testified that upon the verification exercise, the appellant sought for time to vacate the plot but which he did not do and in fact he was still in occupation of the land. PW3 and PW4 corroborated this evidence. PW7 testified that upon investigation he discovered that the appellant herein was in occupation of the land and that there were developments on the suit property and which had been developed by the appellant. When the appellant was put to his defense, he did not per se deny having been to the land but testified that he could visit the land as an

advisor to the group and that he was not in possession of the land. He denied being an official of the said group too.

22. I have considered the evidence in this respect and I find that the appellant herein was in possession of the plot in question. The prosecution's evidence was all clear that he was the one in possession of the land. It is my considered view that the prosecution's evidence was sufficient to prove that the appellant herein was in possession of the land. The appellant not being the registered owner of the land at the time of the offence and having not tendered any explanation as to why he was in possession of the said land, it is clear that the said possession was illegal and without any colour of right.

23. The next ingredient is the 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. 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. In the instant case, the peace being disturbed is the quiet enjoyment of property by PW1. As I have already noted, the evidence tendered by the prosecution is to the effect that the appellant herein was in occupation of the land. He did not prove that the "cucu na umau" was the one in occupation of the land. It is not contested that there are developments on the land (bore hole, and green houses) and thus actively occupied and that PW1 as such cannot use the said land. The appellant in fact refused to vacate the land even after having sought one week to do so. It is therefore clear that the PW1's right to ownership of property is being curtailed by the actions of the appellant. I thus find that the prosecution did prove that there was a breach of the peace on the part of the appellant. The sum total of the above observations is that I find that the offence under section 91 of the Penal Code was proved beyond a reasonable doubt.

25. I find that from the above, the prosecution tendered sufficient evidence to prove the elements of the offence of forcible detainer beyond any reasonable doubts. As such grounds 1 and 2 of the appeal herein fails.

26. The appellant raised a third ground to the effect that the trial court erred in law in sentencing the appellant consecutively. In his written submissions, he submitted that the trial court erred in law and in fact by finding the appellant herein guilty of the offence under section 91 of the Penal Code but convicting him under section 215 of the Criminal Procedure Code. Section 91 creates the offence of forcible detainer as a misdemeanour. The same is punishable under section 36 of the Penal Code which section gives the general punishment for misdemeanours where no punishment is specially provided for and it provides for a term not exceeding two years, or a fine, or both. Section 215 of the Criminal Procedure Code on the other hand provides for the option available to the trial court having heard both the complainant and the accused person and their witnesses and evidence. The court can either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.

27. I have perused the trial court's record and it is clear that the trial court applied the right procedure in sentencing the appellant herein. There is nowhere where he was sentenced consecutively. Further the trial court cannot be said to have erred in convicting the appellant under Section 215 of the Criminal Procedure Code as it is the section which provides for sentencing in criminal trials. The said ground as such fails.

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

29. 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