REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KILGORIS

CRIMINAL CASE NO. E010 OF 2021

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment of Hon. R.M.

Oanda (P.M) in KILGORIS PMCR No. 680 of 2016 on 20/11/ 2019)

THOMAS IGAI MASEKE.....1ST APPELLANT

JOHANES MWITA MASEKE.....2ND APPELLANT

SIMON KIBWITA JOHN.....3RD APPELLANT

SAMWEL MWITA RAGITA.....4TH APPELLANT

CHACHA GOTI RIOBA.....5TH APPELLANT

-VRS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The Appellants are challenging their conviction and sentence for the offence of forcible detainer contrary to section 91 of the penal code. They were sentenced to pay a fine of Kshs. 15,000/= (fifteen thousand only) and in default to serve one (1) year imprisonment in each count. The imprisonment term was to run consecutively.

[2] Particulars were that on 3rd day of March 2016 at Mashangwa location in Transmara west sub county within Narok county, jointly with others not before court, being in possession of parcel no. Transmara/ Moyoi/185 registered in the name of Moharangwe farmers' self-help group 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 the members of Moharangwe self-help group who were entitled by law to the possession of the said land.

[3] The appellants denied charge. The prosecution in support of its case marshaled 7 witnesses while the appellants testified and did not call any witness.

GROUNDS OF APPEAL

[4] The appellants cited the following specific grounds of appeal;

i. That the learned trial magistrate erred in law and fact by convicting the appellants when evidence was contrary.

ii. That the learned trial magistrate erred in law and fact in convicting the appellants without evidence as to ownership of the land being proved.

iii. That the learned trial magistrate erred in relying on evidence of division without that evidence of ownership.

iv. That the learned magistrate erred in giving excessive sentence.

APPELLANTS' CASE.

[5] The 1st appellant told the court that he had leased the land from one Francis Serengesei but did not establish whether the land belonged to him.

[6] The 2nd appellant too stated that the said Francis gave him land as an agent and that he was using it. He was a caretaker of the property and was using two acres of land.

[7] The 3rd accused stated that land was leased to him by the said Francis. He didn't know whether the said land belonged to him.

[8] The 4th accused prayed for mercy from the court. He said that his father had bought land there in the year 1975 and died in the year 2003.

[9] As the appellants spoke of Francis I will reproduce the testimony of Francis Olodaru Ole Nekusro. He testified and his testimony was that he is from Moyoi adjudication section, Lolgorian town. He is a chair of Angata Baragoi farmer's coop-society. He has land from the society (2561.44 ha). The society was registered on 4/5/1966. The land is parcel no. Transmara/ Moyoi/ Parcel No. 2.

[10] It was his testimony that he does not know Moharagwe Self Help Group. He just heard that some people were arrested while trying to collect money for leasing of the farm from their parcel. He insisted that parcel no. 185 is within parcel no. 2. He leased the land to the appellants and others as well.

[11] In their submissions, the appellants argued:

> i) That the prosecution failed to adduce sufficient evidence to support the charge. It is a prerequisite for this charge to stand that there should have been an order of the court requiring the appellants to vacate the said land. There was no mention of any eviction order from the court against the appellants in neither the proceedings nor the judgment of the trial court. According to the appellants, the proper procedure ought to have been followed during the eviction of the accused persons as outlined under the relevant land laws. The trial court closed its eyes on the need for a civil claim in the matter to determine who the owners of the suit land was. Whether it is the members of Moharagwe self-help group or Francis Serengesi? They cited Article 10 of the Constitution, and the case of ***Gusii Mwalimu Investment Co. Ltd & 2 Others Vs Mwalimu Hotel Kisii Ltd, Civil Appeal No. 160 Of 1995 Applied In Teresia Irungu Vs Jackton Ocharo & 2 Others [2013] eKLR.***

[12] The appellants submitted that the trial court failed to recognize the fact prosecution produced the agreement which was alluded to have taken place by PW3. There were no minutes produced by prosecution to that effect.

> i) That the investigation officer had no capacity / authority at law to produce the documents herein.
>
> ii) That that there was contradiction on the evidence of PW1 and PW3 and PW6 on the acreage of the suit land.
>
> iii) That the learned trial magistrate acted on the wrong principles in allowing for cross examination of the unsworn statement given by the accused persons. They relied on Section 155 of the CPC and Section 19 of the oaths and Statutory Declarations Act, the cases of ***Cheruiyot Vs Republic [1976- 1985]EA 27,Sula V Uganda [2001] 2 EA, Nicholas Mutual Wambua V Republic Mombasa Criminal Criminal No. 373 Of 2006 (C.A)***.

[13] Ultimately the appellants contended that the trial court did not follow the provision of the Criminal Procedure Code and in particular the manner in which the defence hearing was conducted. They therefore urged the court to find the entire trial a nullity and proceed to acquit the appellants altogether.

[14] The appellants submitted that there were mitigating circumstances in this case that the appellants were first time offenders, the trial court failed to take cognizance of the same and instead went ahead and meted a harsh sentence on the appellants.

[15] The appellants prayed that this court makes a finding and declares that the appellants were lawfully in occupation of the said property whereby the prosecution.

[16] The appellants also prayed that they be acquitted by dint that a lawful process for eviction as required under the law was not carried out but rather the prosecution justified the arrest as a way of eviction

RESPONDENT'S CASE.

[17] **PW1-** Chacha Athumani testified that he is a teacher and chair of Moharangwe self-help group. He was appointed in the year 2012.That in the year 2010, 39 members came together and raised money, bought land and did farming. They bought two pieces of land; Moyoi Parcel No. 3 and Transmara/Moyoi/185.he identified the title deed in court in respect of parcel no 18 and the current search. The purpose of the land was to do a joint farming. They bought the said land from Kirwa Women Group.

[18] On 3/3/316 after tilling the land, they prepared land to plant and encountered resistance from a group of people, appellants herein. They asked the people who used to use the land that they were ready to occupy and use the land. They planted and the appellants also planted. They resisted them from accessing the land using arrows.

[19] On reexamination, he stated that the appellants are not members of the self-help group.

[20] **PW2-**Florence Inchagwa testified that she joined the group in the year 2015 .they bought land from Kirwa Women Group. On 3/3/2016 when they went to till land in preparation for planting there was resistance from the appellants herein who never wanted them to occupy the land. They were armed with arrows and bows.

[21] PW3- Julius Muniko Mahenye testified that he is the secretary of the group. He stated how the suit property was acquired. The land was purchased at a cost of 4.7 million from Kirwa Women Group. The people who were using the land before were asked to move out after harvesting their crop. The appellants did not move out as expected. They therefore reported the matter to the police.

[22] **PW5, 6**, and **7** all members of the group testified and corroborated the testimonies of **PW1, PW2** and **PW3.**

[23] PW4 -No. 53029 Sgt John Mambo testified that he is from Angata Baragoi police station. He investigated the matter. He stated in his affidavit that when the accused were released on band they went back to the same land and started to threaten the members of Moharangwe Famer's Self-Help Group. Some of the accused persons re-entered the land and were charged for trespass in Cr No. 89/16. On 3/3/16, the complainant reported that the accused together with others had forcefully harvested building materials and that was the basis of this offence. On 23/7/16 one Samule Segere Rioba reported that the accused destroyed his one acre tobacco he referred to the OB extract. On1/8/16 one Samuel Marwa reported vide OB NO. 5/1/16 that he found Migora Mwita Maseke alias Chokard (1st appellant) planting maize on his allocated piece of land. On 8/8/16, Florence reported vide OB NO. 8/8/8/16 that Chacha Rioba, Samuel Ragita and John had threatened her against working on her land.

[24] On 2/8/16, Samuel Rioba reported vide OB NO. 14/2/8/26 that Maka Mwita Maseke had chased him away from his piece of land while armed with bows and arrows. The ownership documents i.e. title deed, green card were produced as **P Exh P1** and **P2.**

[25] The respondent submitted that the trial court came to the right conclusion when it held that the land belonged to the complainants and not the accused who admitted that they did not own land. The appellants have not placed any evidence before court to dispute the fact of ownership of the said land.

[26] The respondent submitted that the trial court came to the right conclusion when it held that the appellants continued to occupy the said land while they were not entitled.

[27] The respondent submitted that the trial court rightly held that the possession of the said land by the appellants caused reasonable apprehension that there was a breach of peace.

[28] The respondent submitted that they did not cross examine the appellants. The question that was put by court to the appellants was simply for clarification purposes and did not occasion any prejudice to them.

[29] In conclusion the respondent submitted that it discharged its burden of prove to the required standard and that the sentence passed was proper in the circumstance. The court duly considered their mitigating factors in arriving at the sentence. The respondent therefore urged this court to dismiss the appeal and enhance the sentence.

ANALYSIS AND DETERMINATION

[30] As a first appellate court, the court is obligated to re-evaluate the evidence afresh, and make its own conclusions bearing in mind that it did not have the advantage of hearing and observing the demeanor of the witnesses. See ***Okeno vs. Republic [1972] E.A 32.***

[31] Upon perusal of the lower court record, and consideration of the evidence adduced and submissions by the parties, the court should determine;

i. Whether the appellants were cross examined on their unsworn statement

ii. Whether the prosecution proved its case to the desired threshold;

iii. Whether the sentences was harsh.

Cross examination on unsworn testimony

[32] An accused person is not liable to cross-examination if he chooses to give unsworn testimony. It is clear from the record that the prosecution did not cross-examine the appellants. Except, the trial court put question to the appellant for the sake of clarification. This is not cross-examination in the sense of the law. Therefore, this ground of appeal fails.

Whether the prosecution proved its case

[33] The central issue for determination in this appeal is whether the prosecution proved their case beyond reasonable doubt and in particular, whether it proved all the essential ingredients of the charge of forcible detainer. **Section 91of the Penal Code (*Chapter 63 of the Laws of Kenya*)** 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."

Unpacking a myth

[34] One of the essential elements of the offence of forcible detainer of land is ***being in actual possession of land without colour of right,***

[35] The ***Black's Law Dictionary, 11th Ed,*** defines color of right as: -

The deliberately created false impression that title in property or goods is held by someone other than the actual owner.

[36] *Color of right* may arise in a tenancy- landlord-tenant relationship or other types of derivative possessions. The dilemma is whether in a charge for the offence of forcible detainer of land, it is material that possession of land was initially procured through a legal or contractual relationship, say, contract for sale of land or landlord tenant relationship or marriage.

[37] Unpacking a myth. Of tenancy; a tenant who wrongfully holds over the demised premises after his tenancy expires is either a tenant at sufferance or at will. The former differs from the latter because he holds over without the landlord's assent or consent. Both differ from a trespasser for their original entry into the premises was lawful. Civil remedies are available in such situations. Nevertheless, is such continued possession *being in actual possession of land without color of right* for purposes of section 91 of the Penal Code?

[38] Of sale of land; a contract for sale of land may be repudiated or frustrated by operation of law. For instance, it is criminal offence to continue with controlled transactions in land under Land Control Act if no consent has been obtained in a given period of time. Is such continued possession *being in actual possession of land without color of right?*

[39] Of marriage; occupation of matrimonial property after divorce but before division of matrimonial property between the parties is not *being in actual possession of land without color of right* even where the property is registered in the name of or is being claimed by one of the parties to the marriage, for the law has created rebuttable presumption that such spouse holds the property in trust for the other.

[40] But, of course, possession and continued possession pursuant to a legally binding and enforceable contract or relationship is an important consideration. However, it is a kind of squirm when such possessions turn into *possession without color of right* under section 91 of the Penal Code.

[41] I invite further debate on these things.

Elements of the offence

[42] Back to the main. In ***Julius EdapalEkai v Republic [2018] eKLR, HIGH COURT CRIMINAL APPEAL NO. 31 OF 2017,*** Riechi J., stated as follows;

"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."

[43] All prosecution witnesses told court that the appellants were in occupation of the said land. The appellants did not deny that fact except, they argued that Francis Serengesei had leased out the land to them, save for 2nd appellant who stated that he was the caretaker. No evidence or agreement of the alleged lease was, however, produced.

[44] Was the possession without color of right and therefore, against the interests of the legal owner or the person legally entitled to the land?

[45] Proof that the complainant holds the legal ownership of or is a person legally entitled to the suit land is pertinent in proving that the occupation of the land by the appellants is against the interest of such legal owner or person legally entitled to the land.

[46] PW 4 testified that the title pertaining to the suit property was in the name of the complainants. The ownership documents i.e. title deed, green card were produced as **P Exh P1** and **P2.**

[47] The search also showed that the complainants are the registered owners of the suit property. The complainants were members of the self-help group.

[48] The Appellants' defence was that they had leased the suit land from Francis. Despite his evidence, there was no evidence that was produce to support the alleged lease or of any other ownership of the suit land apart from the complainants'.

[49] On the basis of the evidence adduced, therefore, the appellants' possession of the suit land was against the interest of the complainants who are the legal owner or persons legally entitled to the land.

[50] The litmus test of the offence of forcible retainer is that the *possession of the land is 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.*

[51] Watkins LJ: in **R v Howell [1982] 1 QB 416; [1981] 3 All ER 383**, explained what would constitute a breach of peace, thus:

> **A comprehensive definition of the term 'breach of the peace' has very rarely been formulated so far as we have been able, with considerable help from counsel, to discover from cases which go as far back as the eighteenth century.... [W]e cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks on a person's body or property.**

[52] (See also ***Steel & others v The United Kingdom*** **[1998] ECHR 95).**

[53] All complainants testified that the appellants threatened and chased them away from their land while armed with bows and arrows. They resisted the complainants'' use of the land. Evidence show that the appellants planted in the suit land even after the complainants had planted crops on their land. The appellants even harvested the crop planted by the complainants. There was abundant and credible evidence that there was a threat to peace in the area. In the circumstances, the unlawful occupation of the suit land by the appellants, and the use of force and threats upon the complainants by using bows and arrows-dangerous weapons- proves that they held possession of *the land 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.*

[54] I find that the prosecution proved this ingredient too**.**

[55] I therefore find that the prosecution discharged the burden of proof to the required standard in criminal cases and conviction by the trial court for the offence of forcible detainer of land contrary to section 91 of the Penal Code was proper.

[56] In the upshot, the appeal on conviction fails and is dismissed.

Whether the sentences were harsh

[57] The sentence imposed on the appellants was to pay a fine of Kshs. 15,000/= or serve one year's imprisonment. The appellants argue that the sentence was manifestly harsh and excessive in the circumstances.

[58] The applicable penalty clause is Section 36, for "*General punishment for misdemeanours*" which provides as follows:

> **'When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.'**

[59] I note that the penalty provided for under section 36 of the Penal Code is a period of imprisonment for two years, or a fine, or both. From the record, and the circumstances of the commission of the offence, although it appears that the accused were first offenders, I find that the sentence meted on them was not harsh or excessive but reasonable.

[60] The appeal herein lacks merit and is accordingly dismissed. I uphold both the conviction and the sentence. Right of appeal explained.

DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 2ND DAY OF NOVEMBER, 2021

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F. GIKONYO M.

JUDGE

In the Presence of:-

1. Court Assistant – Kasaso

2. Mr Bigogo h/b for Mr Nyagwencha Counsel for the 1st, 2nd and 4th Applicants – Present

3. 1st Applicant -Present

4. 2nd, 3rd , 4th and 5th Applicants - Absent

5. Mr Ondimu Counsel for Respondent – Present