



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NO. 14 OF 2018**

**JOSEPH KIOKO KITHIMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgement of the Senior Principal Magistrates Court at Kangundo*

*delivered on 15.12.2017 by the Resident Magistrate E. Agade*

*in Kangundo SPM Criminal Case 202 of 2016)*

**JUDGEMENT**

1. The Appellant was on 8.3.2016 charged with the offence of forcible detainer contrary to section 91 of *The Penal Code* before the Senior Principal Magistrates Court at Kangundo. It was alleged that the appellant on diverse dates between 16<sup>th</sup> February 2008 and 3<sup>rd</sup> day of February 2016 at Muisuni Location in Kangundo sub-County within Machakos County, being in possession of piece of land title number Kangundo/Muisuni/821 of Mbithe Kithimba without colour of right, held possession of the said land in a manner likely to cause a breach of the peace against Mbithe Kithimba who was entitled by law to the possession of the said land.

2. In support of the prosecution case, 6 witnesses were presented and the evidence was thus; Pw1 was Mbithe Kithimba who testified that on 16.2.2008 her mother gave inheritance out of land reference Kangundo/Muisuni/821 to her, the appellant and Benjamin Kioko. It was her testimony that the appellant entered the property that had been allocated to her and she reported that matter to the police and that the appellant and his son were instructed to leave but refused. She told the court that after the succession proceedings in respect of her deceased mother, the title deed to the suit land was issued in her names and that the appellant remained on the land hence she decided to press charges against him and was duly arrested and charged. She told the court that she wanted the appellant out of her land.

3. Pw2 was Benjamin Ngani Kithimba who testified that on 16.2.2008 his mother divided her property among her 4 children namely the appellant, Pw1, Philip together with a grandchild all in the presence of the clan members. However after the allocation everyone was told to shift to the land that they had been allocated and an agreement was signed (Pexh 1) but however the appellant refused to move out of the land that was allocated to Pw1 and even entered the land and cut mango trees. He told the court that the appellant was charged for refusing to leave Pw1's land and yet he had been given his land. On cross examination, he told the court that his mother cried before the clan elders because the appellant was disturbing her. He testified that the appellant's children farm on Pw1's land and it was wrong to do so.

4. Pw3 was Geoffrey Mutuko Wambua who testified that on 16.2.2008 he was the Chairman, divisional clan and that he received a request from the appellant and Pw1's mother who was old and sick to subdivide her land among her children. He told the court that he obliged and after the division that was reduced to an agreement that was signed by everyone and stamped by the clan stamp, the appellant was dissatisfied with the land being allocated to Pw1's child. It was his testimony that there were sketch maps on how the division was made.

5. Pw4 was Pius Musimba Muasya who told the court that on 16.2.2008 he was the clan secretary of Ethanga clan and he received a request from Pw1's mother to subdivide her land among her children. He obliged and heeded to the instructions and in addition he was instructed to give part of the land to her grandchild Kalekye who had assisted her. He testified that the appellant entered the land that was given to Kalekye and later the land that was given to Pw1 and continued staying there. He told the court that he had a map of the distribution and that the appellant was given a big portion in Kithumuoni in Kangunditi.

6. Pw5 was Shadrack Kituku Ngwili who testified that he was in the committee of those who were called on 16.2.2008 to witness the distribution of the land that belonged to Pw1's and the appellant's mother. He told the court that the appellant was not satisfied with the distribution and that he sold the portion that he had been given and began admiring the portion that was given to Pw1's daughter. He told the court that the appellant's intention was to take the portion that was given to Pw1.

7. Pw6 Pc Jared Okello Michira who told the court that he was instructed to investigate the instant matter, and that he went to the suit land and was shown the land that the appellant refused to vacate. He told the court that he was given a copy of the grant as well a title deed in the names of Pw1. It was his testimony that Pw1 wanted to use her land but was chased by the appellant hence he arrested him for forcefully remaining on Pw1's land and refusing to vacate from the same. He told the court that the appellant cultivates on Pw1's land and when she goes to her land, the appellant chases her hence she sought assistance of the court.

8. The court was satisfied that a prima facie case had been made against the appellant who was placed on his defence. In his defence, the appellant testified that his mother called relatives to divide the land and she did so.

9. Dw2 testified that he was the secretary when the subject land was being divided and a map was drawn and an agreement written that everyone signed and everyone was given a portion of land.

10. In her judgment, the trial magistrate found that the appellant was in possession of the suit land based on the unchallenged prosecution evidence and that he gave unsworn evidence that lacked probative value. The trial magistrate found that the appellant had no color of right to be on the suit land and that the occupation was a breach of the peace as well as a breach of Pw1's enjoyment of the land. She therefore convicted the appellant and sentenced him to three years' imprisonment.

11. Being dissatisfied with the decision, the appellant appealed on both conviction and sentence on nine grounds, as;

*a) The learned trial magistrate erred in law in failing to appreciate that the charge sheet before the court was fatally defective.*

*b) The learned trial magistrate erred in law and in fact in failing to find that the certificate of confirmation of grant as well as the temporary grant and the title deed in respect of the land parcel No. Kangundo/Muisuni/821 all of which were produced as exhibits in the trial court were obtained fraudulently.*

*c) The learned trial magistrate erred in law and in fact in admitting the two agreements on the subdivision of the land in evidence without having the same subjected to a document examiner given that the burden of proof is higher in criminal cases than in probate and administration matter.*

*d) The learned trial magistrate erred in law and in fact in failing to appreciate that the matter before the trial court was a land matter and that it did not have a criminal element.*

*e) The learned trial magistrate erred in law and in fact in failing to appreciate that the issues raised in this case were civil in nature and that the complainant was merely abusing the criminal justice system.*

*f) The learned trial magistrate erred in law and in fact in failing to make sure that Section 300 of the Criminal Procedure Code was complied with.*

*g) The learned trial magistrate erred in law and in fact in relying on the evidence of Pw6 that was full of hearsay and which contradicted the evidence of the other witnesses.*

*h) The learned trial magistrate erred in law and in fact in convicting the appellant herein against the weight of evidence.*

*i) The learned trial magistrate erred in law and in fact in meting a sentence against the appellant that was manifestly excessive and harsh in the circumstances given that the appellant was charged with an offence which was a misdemeanor.*

12. The appellant prayed that the appeal be allowed and the conviction quashed, sentence set aside and he be released.

13. The appeal was canvassed vide written submissions. Counsel for the appellant submitted that the prosecution did not discharge its onus of proof. It was submitted that the evidence of Pw1 alluded to a color of right by the appellant. It was submitted that the instant case belonged to the ELC court and ought to have been referred there. It was submitted that the evidence of Pw3 showed that he illegally crafted a will and that the complainant abused the criminal process and thus the appeal is merited and ought to be allowed. It was submitted that the sentence that was passed was excessive and harsh. Counsel invited the court to consider the case of **Abraham Lonyangat & Anor v R (2012) eKLR and Njeru Mutunga v R (2009) eKLR**.

14. Submitting in opposition to the appeal, the learned State counsel submitted that in line with the definition of the offence of forcible detainer in the case of **Albert Ouma Matiya v R (2012) eKLR**, the prosecution established the ingredients beyond reasonable doubt hence the appeal lacked merit and urged the court to dismiss the same.

15. This being a first appellate court, it is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact and to come to its own independent conclusion as to whether or not the decision of the trial court can be sustained. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see **Pandya v. Republic [1957] EA. 336**) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see **Shantilal M. Ruwala v. R. [1957] EA. 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own 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 **Peters v. Sunday Post [1958] E.A 424**).

16. Counsel for the appellant in his submissions assails the trial court for failure to consider that the appellant had a colour of right to the suit property. The appellant's evidence on record did not set up such a defence neither is there any other evidence from the record of the trial court so as to enable this court elicit that such a defence arose. Similarly this was not raised in the grounds of appeal hence it was not in order for counsel to raise the same in his submissions. For argument sake, Section 8 of *The Penal Code* provides that a person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

17. A defence to a claim of right under section 8 of *The Penal Code* involves: (a) a genuine, honest belief, regardless of whether it is well founded in fact or law. The fact that it is a wrongheaded claim does not matter (see **Rex v Bernard [1938] 2 KB 264 at 270** where it was held that a person has such a claim of right "if he is honestly asserting what he believes to be a lawful claim even though it may be unfounded in law or in fact;" (b) regarding a legal entitlement to property or money in the hands of another, not simply a moral entitlement (see **Harris v Harrison (1963) Crim LR 497**).

18. The defence allows for a subjective belief in a claim of right which if established negates the required mental element of property related offences. It should be noted that this defence is not limited to situations in which an accused believed he / she owned the property. Rather, it includes those situations in which the accused honestly, although not necessarily correctly, believed that he / she had either the right or the authorization to receive, take, acquire, or dispose of the property. The existence of such a claim may constitute an answer to a property related crime in which the issue as to whether the accused had a genuine belief in the legal right to the property rather than a belief in a legal right to employ the means in question to recover it, is relevant to the determination of culpability. Once the defence is successfully raised on the evidence, it is then for the prosecution to negate it (see **Astor v Hayes (1998) 38 A Crim R 219**).

19. From the evidence on record, the appellant did not indicate his belief as to his right of legal entitlement to the property that was allocated to the complainant. In-fact the evidence shows that he was averse to the allocation of the plot to Pw1's daughter and no basis for his belief was given. He did not attempt to explain the reason for such belief and in this regard, he cannot be excluded from liability for the offence charged. In any case the appellant participated in the distribution of the land by his mother in the presence of clan members and each family member was allocated his or her portion. It is clear that the appellant was out to disinherit the female members of the family. The clan members confirmed the distribution.

20. The offence of Forcible Detainer c/s 91 of *The Penal Code* is committed by any person who in actual possession of land that he has no right to have possession of occupies the same in a manner that is likely to or causes a breach of the peace. See the case of **Albert Ouma Mitiya v R (2012) eKLR**.

21. To establish that the detainer is forcible there must be proof of such force as constitutes a public breach of the peace, or such conduct as constitutes a riot or unlawful assembly or such as to be likely to deter a person minded to resist the entry (see **Archbold's Criminal Pleading, Evidence and Practice (38th ed., (1973), para. 3608)**. L. Owen Pike, *History of Crime in England*, vol. 1 p. 249 shows that at common law, offences of forcible entry and detainer were not confined to brigands and outlaws, but were committed by otherwise law-abiding persons, sometimes to recover land of which they had been dispossessed, and sometimes in the belief that they had some title to the land.

22. The offence with which the appellant was charged in the instant case is constituted by the unlawful taking of possession of real property by force or threats of force. From the prosecution evidence of Pw1 as corroborated by Pw2 and Pw3 show that his purpose in entering and or remaining on the suit land was to dispossess Pw1. The evidence of Pw1 as corroborated by Pw3 to Pw5 establish that the appellant's possession of the land was for the purpose of assuming the possession of land as was evident that he was cultivating on the land against the interests of the complainant who was entitled by law to possess and own the said land. It was immaterial that he did so in exercise of an honest belief that he was entitled to be on the land. Further if there was any such honest belief the same is ousted by the fact that the appellant was present during the distribution of the land by his mother and was fully aware that the portion in issue lawfully belonged to the complainant.

23. With regard to the element of breaches of the peace, the evidence showed that Pw1's peacefulness of actual possession of land was prevented as she was not able to access the same. In the absence of contrary evidence and in the presence of unchallenged evidence, I find that the appellant had no power to remain on the suit premises.

24. Counsel for the appellant in the grounds of appeal assailed the trial court for relying on forged documents as proof of right of Pw1 but however the element of fraud or dishonesty on the part of Pw1 was not tendered as evidence in the trial court. The appellant did not challenge the documentation when the same were tendered in court hence the court did not interrogate the issue of fraud. In this regard, at this point in time the court cannot purport to address the issue of authenticity of documents that the appellant had not taken issue with in the trial. In other words, the evidence that was adduced by the prosecution witnesses and the appellant were the test as to whether the prosecution proved the count that the appellant had been charged with and not extraneous issues that did not form part of the record. In any event the prosecution produced the relevant documents of ownership of the land by the complainant. Again the appellant confirmed in his evidence that indeed their mother had subdivided the land to each of her children. It appears that his only grouse was that he was opposed to the complainant's daughter being given a share of the land yet her mother had been allocated another share. If that was the case then he ought to have raised the issue with his mother during the sub division of the land. It was out of character for him to wait for his mother to die then proceed to harass the female members of the family.

25. Counsel for the appellant in his grounds of appeal has challenged the use of hearsay evidence. From the record, there was direct evidence of Pw1 who was reportedly allocated the land and denied entry to the same. Pw1 reported the same to Pw6 and Pw2 to Pw5 were present when the allocation was being done. I am unable to see how the evidence material to the case was hearsay. Pw6's evidence spoke about the report that was made to the police whereas Pw2 to Pw5's evidence corroborated the evidence of Pw1. I am therefore satisfied that the evidence adduced by the prosecution proved beyond reasonable doubt that the appellant entered upon and remained on the land with menaces, force and without the authority of the law. I am also satisfied that the prosecution adduced evidence which proved beyond reasonable doubt that the appellant used such force as constituted a public breach of the peace to the point that it deterred Pw1 to enter the land. The defence of claim of right was not available to the appellant as it came out quite clearly that the Appellant did not have a colour of

right over the land as he had his own land separate from that of the complainant.

26. Be that as it may, the appellant has every right to employ the legal means to recover the land after convincing the requisite court that he has such right to the land. The manner by which he chose to resist the enjoyment of Pw1 of the subject land constituted an offence and thus there was no abuse of court process in charging the appellant with the offence.

27. Counsel for the appellant has challenged the charge sheet as being defective. However no submissions were made in this regard.

28. Section 134 of the Criminal Procedure Code provides as follows:-

**“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”**

29. In this regard, this court would have to direct itself as to whether or not the charge sheet did not specify the offence that the appellant was charged with and that it did not give information as to the nature of offence charged and whether the appellant was prejudiced or the same occasioned any miscarriage of justice. A perusal of the charge sheet indicates that the charges were in my view clearly elaborated. In addition the Appellant was fully present during his trial, was aware of the charges facing him and that at no point did he raise an application regarding the charges that he faced. He also fully cross-examined the witness at length.

30. From the above analysis, I am satisfied that it was not correct that the charge sheet was defective, and in any event the appellant’s counsel’s gravamen and submissions leverage more on the proof of the case and not on the validity of the charge sheet. Further if there were any such discrepancies the same were minor and did not prejudice the appellant in any way and which were curable by section 382 of the Criminal Procedure Code.

31. The appellant challenges the proportionality of the sentence imposed by the trial court. His argument is that the offence carries a maximum sentence of 3 years and that the sentence that was passed was harsh and excessive in the circumstances of the case. From the record, the appellant was given a chance to mitigate and said nothing that was of use to enable the court make a decision. The circumstances in which an appellate court may interfere with the sentence of a trial court were specified in **Ogolla S/o Owor v. Republic (1954) 24 EACA 270** as follows;

***“The appellate Court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed being manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle.....The Court may not interfere with the sentence imposed by a trial court simply because it would have imposed a different sentence had it been the trial Court.”***

32. This court therefore may interfere with the sentence imposed by the trial court only if it comes to the conclusion either that; (i) the sentence is excessive, given the background of the appellant and the circumstances of the offence; (ii) the sentence is illegal; or (iii) there was an error in principle in the sentencing which resulted in an unreasonable sentence. If a sentence is manifestly excessive, that is an indication of a failure to apply the right principles (see **R v Ball 35 Cr App Rep16**).

33. Sentencing is governed by provisions in *the Judiciary Sentencing Policy Guidelines*, and the exercise involves balancing all the relevant factors in order to meet the objectives being pursued in sentencing. Appellate courts give wide latitude to trial courts in matters of sentencing since they have, inter alia, the advantage of having heard and seen the witnesses. The sentencing court is for that reason in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives set out in the law and the sentencing guidelines.

34. That a sentence is harsh and excessive can be determined comparatively by considering the type and length of sentences generally given previously for that type of offence in which the circumstances are similar to the instant case and the background of the accused is similar by showing that the sentence represents a substantial and marked departure from the sentences customarily imposed for similar offenders who have committed similar crimes; or by demonstrating that the trial court ignored or placed too much emphasis on one of the sentencing principles, resulting in a disproportionate sentence or one that does not fit the crime or the offender in the circumstances as to amount to a wholly disproportionate penalty; or that the court failed to individualize the sentence by its failure to consider the relevant mitigating factors while placing undue emphasis on the circumstances of the offence and the objectives of denunciation and deterrence, such that all that was done was to punish the crime; or that for some other manifest reason, the punishment is demonstrably grossly disproportionate to what would otherwise have been appropriate. The appellant should be able to show that the sentence is startlingly or disturbingly inappropriate.

35. Some of the factors to be considered by the trial court at sentencing are the character and antecedents of the convict, including any other offences admitted by him or her whether or not he or she has been convicted of such offences, denunciation (public criticism) of the unlawful conduct, deterrence to the offender and to others of a similar mind, protection of the public, rehabilitation of the offender, and reparation (make amends) for harm done to victims or to the community while promoting a sense of responsibility in offenders.

36. The appropriate length of imprisonment is in a case such as the instant one, with no unusual mitigating circumstances and the appellant having said nothing when given an opportunity to mitigate results in a finding that it is impossible to justify departing from the sentence provided for by law.

37. Counsel for the appellant has not demonstrated that the trial magistrate was labouring under any error of principle in the determination of the sentence or that there was such an error as resulted in the sentence being unreasonable. I have not been furnished with any earlier decision in which the circumstances are similar to the instant case and the background of the appellant is similar where the court imposed a

different or lighter sentence and therefore there is nothing to suggest that the sentence represents a substantial and marked departure from the sentences customarily imposed for similar offenders who have committed similar crimes. I note that section 91 of *The Penal Code Act* does not prescribe a penalty for the offence of Forcible detainer. For that reason under section 36 of *The Penal Code*, when no punishment is specially provided for any misdemeanour, it is punishable with imprisonment for a period not exceeding two years or with a fine or with both. In passing a sentence of three years the trial court appears to have erred as it should have considered the fact that the appellant was a first offender as confirmed by the prosecution and ought to have given an alternative sentence of a fine due to the advanced age of the appellant. This court did consider the appellant's age during his application for bail pending appeal. Counsel for the appellant in his submissions seemed to suggest that the maximum sentence for the offence is three years yet that is not the case. I find that a sentence of eighteen months imprisonment or an alternative of a fine of Kshs 50,000/ would have been appropriate.

38. Having found that the term of imprisonment imposed in the instant case is excessive, the same ought to be interfered with by substituting with a fine of Kshs 50,000/ or eighteen months imprisonment. On conviction I find the same was safe as the charge was duly proved beyond reasonable doubt.

39. In the result it is my finding that the appeal partly succeeds. The appeal against conviction lacks merit and is dismissed. The appeal on sentence succeeds to the extent that the sentence of three years is set aside and substituted with a fine of Kshs 50,000/ or eighteen months imprisonment from the date of conviction.

Orders accordingly.

**Dated and delivered at Machakos this 15<sup>th</sup> day of January, 2020.**

**D. K. Kemei**

**Judge**