



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 140 OF 2018

SOWEDI ATIBU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence in Mumias SPMC Criminal Case No. 392 of 2016 by T. A. Odera, SPM, dated 3/9/2018)

JUDGMENT

1. The appellant was convicted of the offence of forcible detainer contrary to Section 91 of the Penal Code and fined Ksh. 30,000/= in default to serve 5 months imprisonment. He was dissatisfied with the conviction and the sentence and filed the present appeal. The grounds of appeal are:-

(1) That the trial magistrate failed to observe the Limitation of Actions Act (Cap 22) for the appellant has lived on the land for over thirty years without any complain from anybody.

(2) That the trial magistrate erred in law by her failure to consider that there were two cases over the same issues at the same time - Cases No. 392 of 2016 and 3 of 2017.

(3) That prosecution did not use land surveyors to determine land boundaries yet the photographs used by prosecution did not show plot numbers and boundaries.

(4) That the appellant's defence that he does not live on plot South Wanga Ekeru/2802 was rejected without any cogent reason.

2. The grounds of appeal were expounded by the written submissions of the appellant. The state did not file a response to the appeal. It instead relied on the record of the lower court.

3. The particulars of the offence against the appellant were that on diverse dates between 31st March, 2016 and 4th May, 2016 in Lumino village Township sub-location in Nabongo Location of Mumias Sub-County within Kakamega County, in order to take possession thereof entered on land parcel No. South Wanga/Ekeru/2802 measuring approximately 0.07 Ha. registered in the name of Idi Mombo Shebani and ploughed it in a violent manner.

4. The case for prosecution was that the complainant and the appellant have had a protracted land dispute over the above stated piece of land. The complainant was issued with a title deed to the land on 21/6/2007. Both parties were involved in a Civil Case No. 126 of 2007 at Mumias Law Courts in which an eviction order was issued against the appellant. That on the 19/8/2016 the complainant went to the land and found the appellant ploughing it. When he asked him why he was ploughing the land, the appellant chased him with a panga. The complainant reported at Mumias Police Station. Cpl. Maurice Agoro PW2 investigated the case. The complainant led him and a colleague to the scene. They found the land having been ploughed. There was maize growing on part of the land. A scene of crime officer went to the land and took photographs. The complainant produced a title deed to the land and an eviction order against the appellant. Later Cpl. Agoro arrested the appellant and charged him with the offence. During the hearing the complainant produced the title deed and search certificate to the land as exhibits, P.Ex 1 and 2 respectively. Cpl. Agoro produced the photographs of the scene as exhibits, P.Ex. 4 (a) and (b).

5. In his defence the appellant stated that the land in issue belonged to his late grandfather, Osman Opar Mombo who had bought it from one Augustine Amos Okumaruti. That his grandfather did not have documents to the land. He died childless and left the land to him. That he has lived there for over 30 years. That the complainant wants to disinherit him of the land. That the complainant had served him with an eviction order. He produced the eviction order as exhibit, D.Ex 1.

6. Further that on 13/11/2008 the complainant's wife burnt down his house and she was jailed for 4 years. He lost everything that was in the house including sale documents over the land. That the complainant is bitter with him over the jailing of his wife and has fabricated this case. That the case was similar to another one that was before court, Criminal Case No. 3 of 2017.

7. The appellant called two witnesses – Nicholas Mukhwana Dw2 and Hassan Shaban DW3. It was the evidence of DW2 that the subject land was bought by his late brother Opar from Amos Kumaruti. That Opar and his wife lived there for many years. They were buried on the land. That the appellant used to live with Opar. That no one claimed the land after the death of Opar. That he has no relation with the complainant. In cross-examination the witness said that Opar had no papers to the land. That Amos Kumaruti is alive. That the appellant lives on the land.

8. Shaban Hassan testified that the appellant is his nephew. That the complainant was an uncle to the appellant. That the complainant has his own plot that is separate from the subject land herein. That there is a boundary and a road between the two parcels of land. That the plot of the appellant has no number. That the complainant wants to take away the appellant's land.

9. The complainant on his part stated that he had bought the land from the referred to Omar. He said that Omar was childless. He denied that the appellant took over Omar's property.

10. In convicting the appellant of the offence the trial magistrate held that the title deed and the search certificate indicate that the subject land parcel No. South Wanga/Ekero/2802 is a sub-division of South Wanga/Ekero/2742. That a title deed is *prima facie* evidence of ownership of land. That the complainant had proved that he was the owner of subject land. That whereas the appellant claimed that he occupies land parcel No. 2742, he did not produce any documents to show that the said land exists. That the appellant had no colour of right over the subject land parcel. That he admitted being served with eviction orders. That there was no evidence that he had challenged the said orders in court. That the land belonged to the complainant. The magistrate accordingly found him guilty of the offence of forcible detainer.

11. This being a first appeal the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Okeno –Vs- Republic (1972) EA 32.**

12. The appellant was charged with forcible detainer contrary to Section 91 of the Penal Code. The Section 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.”

13. In **Albert Ouma Matiya –Vs- Republic, Busia Criminal Appeal No. 8 of 2012**, Kimaru J considered the ingredients of the offence of forcible detainer and held as follows:-

“The ingredients required to establish the charge of forcible detainer under Section 91 of the Penal Code are as follows: 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.”

14. The complainant herein did produce a title deed to prove that he is the registered owner of the land in issue. Section 26 of the Land Registration Act provides that a certificate of title is *prima facie* evidence of absolute ownership of land than can only be challenged by proof that it was acquired through fraud or misrepresentation. There was no evidence that the appellant has challenged the acquisition of the title deed in a court of law. Though the appellant said that his grandfather did not have documents to the land, he claimed that the documents were burnt in his house. How could the land documents have been burnt in his house when he admitted that his grandfather did not have documents in relationship to the land? In face of the title deed the claim by the appellant over ownership of the land is untenable in law. The defence of adverse possession was open to the appellant in the civil case but not in the criminal case which case was heard after the determination of the civil case.

15. The complainant stated that an eviction order was issued against the appellant in Civil Suit No. 126 of 2007. The appellant admitted to being issued with an eviction order. It is clear that the appellant did not move out of the land even after being issued with an eviction order. There is no evidence that the appellant challenged the eviction order in a court of law.

16. The investigating officer visited the land in dispute. He found the land ploughed. Photographs of the subject land were taken where maize was growing on part of the land. The land in dispute was therefore identified with certainty. The title deed identified the land. The appellant did not have any documents in respect to the land. It was therefore proved that the subject land is South Wanga/Ekero/2802. The appellant admitted to be in occupation of the land. The prosecution did prove that the appellant was in unlawful occupation of the said parcel of land. If the appellant was charged with two criminal cases over the same charges, he should have filed an application for revision over the two files. He did not produce the proceedings of Criminal file No. 3 of 2017 during the hearing. The appeal to that end has no substance.

17. The appellant was in occupation of the complainant's parcel of land No. South Wanga/Ekero/2802 without any colour of right. He went ahead to plant maize on the land and to plough the land even after being served with eviction notice. He chased away the complainant from the land with a panga. This was clear indication that he was occupying the land by force in a manner likely to cause a breach of the peace. On my evaluation of the evidence I find that the charge against the appellant was proved beyond all reasonable doubt.

18. The upshot is that there is no merit in the appeal. The conviction is therefore affirmed. The appeal is dismissed in its entirety.

Delivered, dated and signed in open court at Kakamega this 5th day of March, 2020.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi for State

Appellant - present

Court Assistant - Polycap

14 days right of appeal.