



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 55 OF 2019**

**LABAN ATSABINA OTUNDO.....1<sup>ST</sup> APPELLANT**

**WILFRED NAMAYI OTUNDO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(from the original conviction and sentence in Butere SRMC Criminal Case No. 437 of 2017 by Hon. M. I. Shimenga, R.M, dated 9/1/2019)***

**JUDGMENT**

1. The appellants were convicted of the offence of forcible detainer contrary to Section 91 of the Penal Code and each sentenced to serve three years imprisonment. They were dissatisfied with the conviction and the sentence and filed this appeal. The grounds of appeal are that:-

- (a) The learned trial magistrate erred in law and facts to observe that no any documentary exhibit was produced before the court.*
- (b) The learned trial magistrate grossly erred in law and fact in that she based her conviction and sentences on fabricated evidence and mere allegations.*
- (c) The learned trial magistrate grossly erred in law and fact in failing to note the doubts, contradictions and hearsay testimonies of the prosecution witness.*
- (d) The learned trial magistrate erred in law and fact by relying on evidence of a single witness who testified during the hearing.*
- (e) The learned trial magistrate erred in law and fact in rejecting the defence without proper evaluation.*

2. The grounds of appeal were expounded by the written submissions of the appellants. The state did not make any submissions in the case but instead relied on the record of the lower court.

3. The particulars of the offence against the appellants were that on 31<sup>st</sup> day of August, 2017 at Emunuku Village in Butere Sub-County within Kakamega County, being in possession of one acre portion of land No. Marama/Lunza/4011 without colour of right, held possession of land in a manner likely to cause a breach of peace or reasonable apprehension of a breach of peace against Eunice Shisia Shiperi (herein referred to as the complainant).

4. The case for the prosecution was that the appellants are brothers. They were a step-brother to the father of the complainant who is now deceased. The father to the appellants had two wives. The mother to the complainant's father was the first wife while the mother to the appellants was the second wife. The father to the appellant is deceased and left behind land parcel No. Marama/Lunza/244. The appellants have been in occupation of the land. Later the appellants filed a succession cause at Kakamega High Court in respect to their father's land. The complainant joined the succession cause so as to get the share of her father from the land. The High Court distributed the land of the deceased and gave the complainant 0.4 Ha. being the share of her father. The complainant was issued with a certificate of title to her land being land parcel No. Marama/Lunza/4011. The appellants however refused to move from the complainant's land. They continued to occupy the land by force and threatening the complainant whenever she went to the shamba. The complainant reported to the police. The appellants were arrested and charged. During the hearing the complainant's certificate of title and green card to her parcel of land was produced as exhibit, PEx 1 and 5 respectively. So were confirmation of grant and injunction order issued by the High Court to the appellants.

5. When placed to his defence the 1<sup>st</sup> appellant stated that he is from the second house of his father's household. That the first house had three sons including the complainant's father. That the sons of the first house were given land elsewhere by their father. The sons of the

second house were also given their own land No. Marana West/Lunza/244. That the complainant's father was given land jointly with his brother called Simon. That Simon sold the whole parcel and bought land elsewhere. That the complainant's father was at the time living at Juja. He returned home with the complainant. He did not have a place to stay. They stayed with him on the parcel of land allocated to the second house. He died soon after. They buried him at their home because he did not have land on which to be buried.

6. The 1<sup>st</sup> appellant said that he has lived on their parcel of land since 1975. He denied that the land was distributed by the court and a portion given to the complainant. He said that they were not issued with an eviction order to vacate the land.

7. The 2<sup>nd</sup> appellant in his defence reiterated the defence given by the 1<sup>st</sup> appellant. He said that he has lived on the land since 1952. He said that they have not done succession cause to land parcel No. Marama/Lunza/244.

8. It is not clear which of the appellants filed the written submissions in this appeal. The submissions tended to challenge the succession proceedings. It was submitted that the appellants have cultivated the land since 1975 and have never been issued with any eviction order. It was further submitted that the trial court convicted the appellants without proper evaluation of their defence.

#### **Analysis and determination –**

9. This being a first appeal, the duty of the court is to analyse and re-evaluate a fresh 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 witnesses testify - See **Okeno –Vs- Republic ( 1972) EA 32.**

10. When convicting the appellants of the offence the trial magistrate cited the case of **Richard Kiptalam Biengo –Vs- Republic, Muranga HCCR. App. No. 430 of 2013** where the court considered the ingredients of the offence of forcible detainer under Section 91 of the Penal Code that held that:-

*“A literal reading of Section 91 of the Penal Code shows that the prosecution will only prove an offence of forcible 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 interest of the legal owner as the person legally entitled to the land.*

*(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.”*

11. The trial court found that the appellants were in occupation of the land. That the complainant has title to the land and that the High court restrained the appellants from dealing with the parcel of land. That the complainant has not permitted the appellants to have possession of the land.

12. The complainant in her evidence stated that it is the first appellant who filed the succession cause. That he was issued with the first grant. That when he failed to co-operate in the case she filed an objection and she was issued with another grant. She proceeded with the case.

13. In cross-examination the 1<sup>st</sup> appellant admitted that he filed a succession cause in respect to parcel of land No. 244 and that the complainant filed an objection. The implication is that the appellants are faking ignorance of the outcome of the succession cause. They must be aware of the outcome. They have not challenged the outcome of the succession cause. The trial court was right in basing the conviction on the outcome of the succession cause.

14. The appellants admit that they are in actual possession of the whole land parcel No. Marama/Lunza/244 which land no longer exists after it was sub-divided. The complainant produced a certificate of title to her parcel of land No. Marama/Lunza/4011. Section 27 of the land Registration Act gives a registered proprietor of land absolute ownership of the property. This means that the appellants have no right over the complainant's parcel of land. The possession of the land by the appellants is therefore against the interests of the complainant.

15. In the case of **Florence Wanjiku Mwamunga & Another –Vs- Republic (2018) eKLR**, Ngenye-Macharia, J. considered acts that constitutes a breach of peace and cited the English case of **R. –V- Howells (1982) 1QB 416** as quoted in **Steel & Others –Vs- United Kingdom( 1998) ECHR 95** where it was held that:-

*“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 as fear of being so harmed through an assault, an affray, a riot, unlawfully assembly or other disturbance”.*

16. The complainant testified that the appellants have been forcibly occupying the land despite her absolute ownership of the land. That they have been chasing her away whenever she goes to the land. There was no doubt that the appellants were occupying the land in a manner likely to cause a breach of the peace.

17. On my own analysis I find that there was overwhelming evidence against the appellants. The appellants were rightly convicted of the offence. The appeal on conviction has no merit.

18. The appellants were sentenced to serve 3 years imprisonment. Section 91 of the Penal Code defines the offence of forcible detainer to be a misdemeanor. There is no punishment provided under section 91 of the Penal Code. The general punishment for misdemeanor as provided under Section 36 of the Penal Code is 2 years imprisonment. The trial magistrate therefore erred in sentencing the appellants to 3 years imprisonment when the maximum sentence is 2 years imprisonment. The sentence of 3 years imprisonment is hereby set aside.

19. The appellants were first offenders. I have considered that they have forcibly been occupying the complainant's land. I reduce the sentence for each of them to one year imprisonment commencing from the date of sentence by the trial court.

**Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of May, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Mutua for State/Respondent

Appellants – present through video link to Shikusa Farm Prison

Court Assistant - Polycap

14 days right of appeal