



**REPUBLIC OF KENYA**

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

**CORAM: A.K NDUNG'U J**

**CRIMINAL APPEAL NO 96 OF 2019**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO 97 OF 2019**

**BETWEEN**

**SAMSON KIPUSI.....1<sup>ST</sup> APPELLANT**

**SUMBI MALIMALI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellants, SAMSON KIPUSI and SUMBI MALI MALI were charged, convicted and sentenced to serve 1 year and 2 years imprisonment respectively for the offence of forcible detainer contrary to **section 91** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were that on 3<sup>rd</sup> November 2016 at Moita area in Transmara West District of the Narok county being in possession of land number Transmara/Moita 201 located at Moita area of SUSAN RORINKE without colour of right held in their possession the said land in a manner likely to cause a breach of peace by construction of a dwelling house against the will of SUSAN RORINKE who was entitled by law to the possession of the said land.

2. The appellants have now appealed against the conviction and sentence based on their respective petitions of appeal.

3. This being a first appeal, I am aware of the onerous task bestowed on this court to re-evaluate the evidence on record and to make my own independent conclusions, while alive to the fact that I neither saw nor heard the witnesses. This legal principle is well enunciated in the case of **Okeno –vs- R [1972] EA 32** where the court stated;

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- R [1975]E.A 336). 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 courts finding and conclusions; 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 –vs- Sunday Post (1958)E.A 424.”*

4. In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.

5. The prosecution in support of its case marshaled 5 witnesses.

6. Susan Rorinke Nairenya (PW 1) told court that Joseph Rorinke Dikir (*‘the deceased’*) was her husband. She testified that the deceased left her parcel number Transmara/Moita 201 (*‘the suit land’*). She recalled that on 28<sup>th</sup> November 2016 the appellants brought building materials to the suit land and their *fundis* started construction. The 2<sup>nd</sup> appellant informed her that she did not own the suit land. She reported the incident to the District Officer who informed the area chief of the matter. She also reported the matter to the Kilgoris Police Station. John Sinteti Ole Pesi (PW 2) recalled that on 3<sup>rd</sup> November he saw people building on his neighbour’s land. He testified that on the following day, while in the company of the owner of the suit land and the chief, they questioned the 1<sup>st</sup> appellant why he was building on the land that had been given to the 2<sup>nd</sup> appellant. Joseph Merriayia (PW 3) told court that the 1<sup>st</sup> appellant built a structure on PW 1’s land.

7. Robert Sanduki (PW 4) was the land registrar, Transmara sub-county. He testified that the suit land is registered under the name of the deceased. Willis Ochieng (PW 5), the investigation officer, testified that he received a report from Pw1 that the appellants had constructed a house within the suit land. He visited the scene and took photographs of the structure and got a certificate of title search in which the deceased is the proprietor as the deceased.

8. When placed on their defence, the 1<sup>st</sup> and 2<sup>nd</sup> appellants gave unsworn testimony testifying as DW 1 and DW 2 respectively and further relied on the testimony of David Ole Lekipintoi (DW 3) and Salim Rongo (DW 4) to fortify their defence.

9. DW 1 told court that he was given the suit land by DW 2 and did not know that the suit land was not DW 2's land. DW 2 testified that he had been on the land since 1984. DW 3 testified that the 2<sup>nd</sup> appellant has been staying on the land for a while. He told court that the 2<sup>nd</sup> appellant was the owner of the suit land as per the 1986 demarcation. DW 4 testified that the 2<sup>nd</sup> appellant stays on the suit land.

10. At the hearing of the appeal, Mr. O.M Otieno, counsel for the appellants relied on his written submissions while Mr. Otieno, state counsel made oral submissions.

11. The appellants submitted that the trial magistrate proceeded on the wrong facts by assuming that the complainant was the registered owner of the suit land while the exhibits on record reveal that the registered owner was the deceased. There was no evidence that the deceased had gifted PW 1 the suit land. PW 1 did not avail letters of administration and was bereft of any *locus standi* to mount a complaint against the appellants over the suit land. The appellants relied on the case of **Republic v Geoffrey N Wafula & 2 Others [2015 eKLR]** where the court held that a person entitled by law to the possession of the land must prove ownership thereof for him to lodge a criminal complaint against another said to be in actual possession of the land but without colour of right. It is the appellants' case that the acts of the complainant amounted to intermeddling pursuant to **Section 45 of the Law of Succession Act**. They argued that the 2<sup>nd</sup> appellant had been in occupation and use of the suit land since 1984 and thus acquired overriding interests over the suit land and any claim by the registered owner over the suit land was time barred as per the provisions of **Section 7 of the Limitations of Actions Act**. The appellants' contend that the prosecution failed to prove all the ingredients for the offence of forcible detainer. On the issue of sentence it was submitted that the sentence meted by the subordinate court was excessive.

12. Mr. Otieno, state counsel, conceded to the appeal principally on the issue of ownership as the suit land was registered in the name of the deceased. In respect of the conviction of the 2<sup>nd</sup> appellant, he argued that there was no evidence that the 2<sup>nd</sup> appellant was in possession, he was only said to have given land to the 1<sup>st</sup> appellant.

#### **ANALYSIS AND DETERMINATION**

13. I have considered the proceedings before the trial court, the submissions made herein on behalf of the Appellants and the oral submissions by the Respondent. Although the prosecution has conceded the appeal, I have a duty to ensure that I subject the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach my own determination based on evidence. In **Odhiambo vs. Republic (2008) KLR 565**, the court said:

*“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”*

14. This appeal lies on whether the prosecution proved its case against the appellants to the required standard, and in particular, whether it proved all the essential ingredients of the charge of forcible detainer. **Section 91 of 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.”*

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 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 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.”*

14. The prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution

must discharge in relation to each and every ingredient of the particular offence charged (see **John Mutua Munyoki vs. Republic [2017] eKLR**).

15. The fact that the 1<sup>st</sup> appellant was in possession of the suit land is not in dispute. Both PW 2 and PW 3 told court testified that they saw the 1<sup>st</sup> appellant building on the suit land. It is the prosecution's case that the 2<sup>nd</sup> appellant had given the 1<sup>st</sup> appellant the suit land and the 1<sup>st</sup> appellant took possession of the land.

16. Secondly, consideration of ownership of the suit land is essential as the prosecution was required to establish that the appellants' possession was against the interests of the legal owner.

PW 4 testified that the title pertaining to the suit property was in the name of the deceased. Pw1 testified that the suit land belonged to the deceased who left her the land but did not tender evidence of a confirmed grant showing that the land had devolved to her. In **Richard Kiptalam Biengo v Republic [2015] eKLR** the court held that;

*“...where the ownership of the land in an offence of forceful detainer is in controversy or to put it more appropriately, if the legal ownership or entitlement of the land cannot be established beyond reasonable doubt at the accused person's trial, then a conviction cannot be sustained.”*

17. In this case it is clear that the land does not belong to PW 1 as she is yet to commence succession proceedings relating to the estate of the deceased. PW 1's *locus standi* to make a complaint against the appellants and prosecute a case against them is also questionable for reasons that she has not obtained grant of letters of administration in respect of the deceased's estate. I am therefore constrained to agree with the appellant's argument that the prosecution failed to prove that Pw1 was the proprietor of the suit land. In **Richard Kiptalam Biengo v Republic case (supra)** the court stated that:

*“Without proof of legal ownership or entitlement of land parcel Mitubiri Wempa Block 1/6496, other issues such as whether the appellant was in possession of the land or whether such possession was likely to cause a breach of peace or a reasonable apprehension of the breach of the peace are of no consequence as far as the determination of this appeal is concerned.”*

18. The prosecution having failed to prove that the suit land was owned by PW 1, I find that the offence of forcible detainer was not proved.

19. In conclusions, I allow the appeal, quash the conviction and sentence. The appellants are set free unless otherwise lawfully held under a separate warrant.

**DATED, SIGNED and DELIVERED at KISII this 8<sup>TH</sup> day of JULY 2020.**

**A.K NDUNG'U**

**JUDGE**