



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 81 OF 2015

CORAM: D. S. MAJANJA J.

BETWEEN

GEORGE OGAKE PIUS APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R.T. Ateya, RM dated 21st August 2015 at the Senior Principal Magistrates Court at Ogembo in Criminal Case No. 195 of 2014)

JUDGMENT

1. The appellant, **GEORGE OGAKE PIUS**, was convicted and sentenced to 3 years' probation 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 offence were that on 30th December 2014 at about 11.00am in Nduru Sub-location within Kisii County, the accused, being in possession of land parcel No. **SOUTH MUGIRANGO/BOGETENGA/3104** ("Plot 3104") of Dennis Ongubo Achira without colour of right, held possession of the land in a manner likely to cause breach of the peace, against Dennis Ongubo Achira who was entitled to possession of the said land.

2. Before I consider the grounds of appeal, I reiterate that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32).

3. It is not in dispute that Plot 3104 was part of a larger property, **SOUTH MUGIRANGO/BOGITENGA/3119** ("Plot 3119"), which was in the name of Esther Nyasani Makori (PW 1) who obtained her title on 5th July 2013. At about that time she had an accident and was admitted to hospital where she needed money. She requested her son, Gedion Mosoti Makori (PW 5) to look for a buyer for part of the land. Jackson Achira Omweri (PW 4), the complainant's father, approached PW 5 and informed him that the complainant, who was abroad, was interested in purchasing 25 X 200 feet of the property.

4. When put on his defence, the appellant testified that he had purchased part of Plot 3119 after he had been approached by Jason Nyamoko Makori (DW 3) who is PW 1's son and her brother in law, Zablun Murumbwa Osoti (DW 2) in 2010. He was informed that DW 3's wife was sick and that the family needed assistance. DW 3 confirmed that PW 1 sold the land to the appellant and that the appellant was occupying his own land. It was agreed that Jason would sell him part of the land for Kshs. 170,000/-. After purchasing the land, he dug a pit latrine and after he was informed that the complainant had purchased the land, he started construction. DW 2 confirmed that an initial deposit of Kshs. 15,000/- was paid to Jason who took his wife to hospital. DW 2 also recalled that the appellant paid a further Kshs. 55,000/-. The local assistant chief, Phefisi Ombui Osoo (DW 5) confirmed that he witnessed the signing of an agreement between the appellant confirming that DW 3 had received payment. George Ochoro Murwami (DW 6) testified how the appellant approached him on 20th December 2010 to assist in measuring the land he had purchased. DW 6 was also present when the agreement was signed in the presence of DW 5.

5. Counsel for the respondent conceded this appeal on the ground that the matter was essentially a civil dispute between the parties. Notwithstanding this concession, I have to satisfy myself that the concession is well founded. The issue for determination in this appeal is whether the prosecution established its case against the appellant on the charge of **forcible detainer** contrary to **section 91** of the *Penal Code* which states;

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.

6. The trial magistrate relied on the case of *Albert Ouma Matiya v Republic Busia HCCR Appeal No. 8 of 2012 [2012] eKLR* in which Kimaru J., stated 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.

7. The facts as I have set out are that appellant purchased 25 X 100 feet of Plot 3119 from PW 1's son in 2010 while the property was still in the name of DW 2. However, the complainant had the upper hand when he obtained the title from PW 1 after she had obtained her title in 2013. It is true that the complainant has a title for Plot 3104 but what the trial magistrate did not consider is whether the land claimed by the appellant, that is the 25 X 100 feet purchased from DW 3 was the same as Plot 3104. I have looked at the agreements signed between the appellant and DW 3 and the appellant and PW 1 and they refer to part of Plot 2481. What the prosecution did not establish is that the appellant was physically in possession of the land to which the complainant had a title. It is not enough for the prosecution to prove that the complainant is in possession of a title but it must prove that the accused is in actual occupation of the land comprising the title.

8. The prosecution failed to prove that land the appellant was alleged to have occupied is the same land covered by the title issued to the complainant.

9. I allow the appeal. The appellant is therefore acquitted and discharged from these proceedings.

DATED and DELIVERED at KISII this 12th day of July 2018.

D.S. MAJANJA

JUDGE

Mr Ondari instructed by Sonya J. Ondari and Company for the appellant.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.