REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 80 OF 2016

JOSEPH MWANIA NGOLIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal arising from the conviction and sentence by Hon. I. M. Kahuya (SRM) in Machakos*

Chief Magistrates' Court Criminal Case No. 1233 of 2008 on 13th October, 2016)

JUDGEMENT

1. The appellant was charged and convicted of the offence of forcible detainer contrary to section 91 of the Penal Code and malicious damage to property contrary to section 339 (1) of the Penal Code and sentenced to 12 months on each count which sentences were to run concurrently. The appellant has in this regard served sentence and appeals against the conviction.

2. The prosecution case was that an allottee to the subject property, Land Parcel No. Machakos/Mua hills/167 having defaulted in paying up for 13.6 acres, Ezekiel Mule Musembi (PW1) entered into a transfer agreement and paid off the sum that had accrued for ten years. The allottee then died before the land was transferred to him. That the appellant together with his brother then invaded the land despite him getting directions from court that the said land be transferred to the complainant. That the appellant and his neighbours ganged up and damaged his property. As a consequence thereof he vacated the said land. That in the year, 2003, the appellant invaded the land and cut down his trees between the year 2006 to October, 2007. That the appellant went ahead and constructed on the land. The complainant later obtained a court order and the said structure was demolished and forest officers assessed damage to trees at KShs. 130,953/-. He produced a court order dated 14th October, 1998 (P. Exhibit 1), certified copy of title deed for the subject land (P. Exhibit 2) and receipts for court bailiff costs (P. Exhibit 3). Jacob Musembi (PW2) stated that the appellant and his family were evicted from the subject land in the year 1999 and later turned against PW1 forcing him and his family to relocate in the year 2003. That the appellant thereafter took possession of the land. Edward Wambua Nyamai (PW3) who is a forest officer visited the subject land on 23rd March, 2007 at the instance of the OCS Machakos. Upon his assessment, he found that twenty trees of assorted species whose value totaled to KShs. 130,953/- had been damaged. He produced a report to that effect as P. Exhibit 4. Corporal Wycliff Ashiundu (PW4) together with three other officers went to the subject land on 9th June, 2008 upon receiving a report on malicious damage to trees. That they found the appellant who lived in the structure constructed thereon whom they arrested.

3. Placed on his defence, the appellant stated that he had lived on the land since childhood and that his parents had been buried on the land. He contended that PW1 had fraudulently obtained title to the land. That no succession cause had been filed in respect of the land. That his late father made complaints against PW1 with regard to the subject land and produced letters dated 10th January, 1989 and 29th November, 1994 as D. Exhibit 2 and 3. The appellant on cross examination admitted to being in possession of the land and acknowledged that he was aware of Land Case No. 498 of 1995 but denied having knowledge of P. Exhibit 1. He further denied damaging trees as alleged.

4. Aggrieved by the trial court's conviction, the appellant filed this appeal on grounds that:

a) The trial court erred in law and fact in failing to comply with section 200 (3) of the Criminal Procedure Code.

b) That the prosecution did not prove the charges to the required standards.

5. The appellant's submissions were essentially a repetition of his case. The respondent on the other hand submitted that where ownership of the land in an offence of forceful detainer is in controversy and when ownership is established, then a conviction stands. In support thereof, the respondent cited the cases of **Albert Ouma Matiya v. Republic [2012] eKLR** and **Murang'a Criminal Appeal No. 430 of 2013., Richard Kiptalam Biengo v. Republic**. That PW1 testified that he is the registered owner and produced a court order allowing him to be

registered as such which evidence was corroborated by PW2. That further PW3 confirmed the evidence of PW1 on malicious damage thereby the case was proved against the appellant.

6. This is a first appeal and this court is thereby under duty to re-consider and re-evaluate the evidence afresh with a view to arriving at its own independent conclusion bearing in mind that it did not have the benefit of seeing the witnesses demeanor. The issues that are for determination are:

a) Whether or not the trial court failed to comply with section 200 (3) of the Criminal Procedure Code.

b) Whether or not the prosecution proved the charges to the required standards.

7. I am alive to the provisions of section 200 of the Criminal Procedure Code thus:

"200. (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right."

8. Other than the said section not being in mandatory terms, it is to be noted that for the appellant to ride on section 200 (3) in this appeal, he must establish that he was prejudiced which he has not done and that ground fails. Section 200 (4) of the said Act provides that:

"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

The Appellant suffered no prejudice since he proceeded**.**

9. It is clear to me from the evidence on record that the appellant merely stated that he was entitled to ownership of the subject land and denied that he did not destroy the trees. On the other hand, PW1's evidence that he was entitled to ownership of the land and that the trees were damaged by the appellant was corroborated by PW2, PW3 and PW4's evidence. PW1 further produced evidence to that effect. It emerged that the appellant forcefully entered the land and cut trees yet he had no legal ownership documents and against the interests of the legal owner which act was likely to cause a breach of the peace.

10. **Section 91** of the **Penal Code** under which the appellant was charged reads as follows:

"91. 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."

The evidence of the four prosecution witnesses left no doubt that indeed the appellant was actually found in actual possession of land without colour of right and held it in a manner likely to cause a breach of the peace. He had earlier on been evicted from the land and his structure demolished but he came back and further disobeyed a court order issued vide **Land Case Number 498 of 1995.** The damage of trees on the said land was confirmed by the four prosecution witnesses. The damage assessment report was produced as *exhibit No.4.*

11. The Appellant's defence did not shake that of the Respondent which was proved against him beyond any reasonable doubt. The Appellant's claim if he had any should have been addressed in the land case. Having abandoned that route he was thus nothing more than a land grabber. I find the trial court properly convicted him on both counts and hence I am unable to interfere with the said conviction. On sentence it is noted that the Appellant's mitigation was duly considered by the trial court and that the sentence meted out against him was reasonable and not excessive. As the sentence was the exercise of discretion by the trial court, there is no reasons to interfere with the same.

12. In the result, I find the appeal is devoid of merit. The same is dismissed. The conviction and sentence by the trial court is upheld.

Orders accordingly.

Dated and delivered at Machakos this 10th day of December, 2018.

D.K. KEMEI

JUDGE