REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.28 & 29 OF 2009

(An Appeal arising out of the conviction and sentence of Hon. T. Mwangi - SRM delivered on 11th October 2012 in Makadara CM. CR. Case No.2985 of 2009)

CAROLINE AWINJA OCHIENG……..……..1ST APPELLANT

DAVID ZACHEAS OYORO.……2ND APPELLANT

VERSUS

REPUBLIC…….…….....RESPONDENT

JUDGMENT

The Appellants, Caroline Awinja Ochieng and David Zacheas Oyolo are husband and wife. They were charged with the offence of **forcible detainer** contrary to **Section 91** of the **Penal Code**. The particulars of the offence were that on 27th November 2008 at Kayole Estate in Nairobi County while in possession of Plot No.C255 (herein after referred to as the suit parcel of land) and without any colour of right held possession of the said plot against the wishes of Jane Anne Mbithe (the complainant) who was entitled by law to possession of the said plot. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted as charged. They were sentenced to serve 18 months' probation. The Appellants were aggrieved by their conviction and sentence. They have appealed to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal challenging their respective convictions and sentence. They were aggrieved that the trial court had failed to take into consideration the evidence that was adduced by the prosecution witnesses, specifically that the suit parcel of land had been allocated twice and that the Appellants were victims of circumstances. They took issue with the fact that the trial court failed to appreciate the fact that the evidence that was adduced pointed to the fact that the Appellants undertook due diligence before they purchased the suit parcel of land and therefore could not be said to have taken possession of the suit parcel of land without the consent of the **"owner".** They were aggrieved that the trial court had failed to properly evaluate the evidence which clearly pointed to the fact that at the time the Appellants took possession of the suit parcel of land the same was vacant and therefore they could not be accused of having unlawfully taken possession of the same from the complainant. The Appellants faulted the trial court for failing to take into consideration the totality of the evidence that was adduced including the defence that was put forward by the Appellants before reaching the erroneous determination finding them guilty as charged. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentences that were meted on them.

During the hearing of the appeal, Ms. Aluda for the State conceded to the appeal. She submitted that the evidence that was adduced by the prosecution witnesses, particularly the Chairlady of the land buying company pointed to the fact that the Appellants were victims in that they were shown a parcel of land that had previously been allocated to the complainant. The Appellants had purchased the said parcel of land and had undertaken due diligence. They could not therefore be blamed for the mistake that was occasioned by the officials of the land buying company. She submitted that the evidence adduced clearly showed that the Appellants were innocent purchasers. They were shown the requisite documentation

which established that the person selling them the parcel of land was the actual owner of the suit parcel of land. The fact that the land buying company offered to give a different parcel of land was proof that the Appellants did not commit any offence. Mr. Etole for the Appellants welcomed the concession of appeal by the State. He however urged the court to find that the Appellants were entitled to the suit parcel of land because they had developed it and were residing in it. He requested that the land buying company allocates the complainant another parcel of land.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. In doing so, this court is required to take into consideration the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any comment regarding the demeanour of the witnesses. (See **Njoroge –Vs- Republic [1987] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution established to the required standard of proof the charge that was brought against the Appellants of **forcible detainer** contrary to **Section 91** of the **Penal Code**.

It was clear from the evidence adduced by the prosecution witnesses that the basis upon which the charge was brought against the Appellants was their refusal to give vacant possession of the suit parcel of land. The undisputed facts of the case were that the Appellants purchased the suit parcel of land for valuable consideration from one Martin Katabi. The suit parcel of land is situate in Matopeni Settlement Scheme in Kayole. The suit parcel of land is not yet registered. It is part of the parcels of land that were allocated to members by a land buying company chaired by PW3 Petronila Njeri Ngara. According to PW3, when the said Martin Katabi sold the suit parcel of land to the Appellants in 2008, she regularized the transaction by issuing the Appellants with the requisite documentation. The parcel of land was vacant at the time. PW3 saw no anomaly in the transaction. It was only when the complainant later lodged a complaint that she realized that the Appellants had been shown a parcel of land that had originally been allocated to the complainant. She offered the Appellants an alternative parcel of land but they demurred. This was because the Appellants had extensively developed the plot. In fact, they were living in a house constructed on the plot. The Appellants suggested that the complainant should be shown an alternative parcel of land. There was a stalemate which resulted in the complainant lodging a complaint with the police. This resulted in the arrest of the Appellants. They were subsequently charged in court with the present offence.

For the offence of forcible retainer to be established, the prosecution must establish the following: that the person charged is in actual possession of a parcel of land; that such person has no right to hold possession of it *i.e*. that the person has no title or right, either equitable or legal to occupy the said parcel of land; that such person is holding possession of the suit parcel of land against the wish of the person who is entitled by law to possession and finally that such possession is likely to cause breach of peace. In the present appeal, it was evident that the prosecution failed to clear the first hurdle *i.e*. to establish that the Appellants had no right to be in possession of the suit parcel of land. From the evidence adduced, it was clear that the Appellants purchased the suit parcel of land from apparently a *bona fide* owner; they undertook due diligence and had documentation regularized by the land buying company; that they took vacant possession of the suit parcel of land; that they developed it with the knowledge of the managers of the settlement scheme.

It was only later that the complainant came to the subject parcel of land and informed that the particular parcel of land belonged to her. The officials of the land buying company acknowledged that a mistake had been made. They offered the Appellant an alternative parcel of land. This offer did not however take into account the fact that Appellants had already developed the subject parcel of land. It was clear to this court that, to that extent, the prosecution failed to establish to the required standard of proof that the Appellants were in possession of the suit parcel of land without any colour of right. In fact it was clearly established that the Appellants were victims of misallocation of land by the officials of the land buying company. What clearly emerged from the evidence is that there is dispute regarding the ownership of the subject parcel of land which can only be resolved in the appropriate forum *i.e.* a civil court, and not in criminal proceedings such as the present one. The prosecution, correctly in the view of this court, conceded to the appeals.

The upshot of the above reasons is that the appeals lodged by the Appellants therefore has merit and are hereby allowed. Their respective convictions are hereby quashed. The sentence imposed upon them is set aside. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2017

L. KIMARU

JUDGE