REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 5 OF 2015

DEDAN MUGO NJERU.....APPELLANT

-VERSUS—

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. E N GICHANGI RESIDENT MAGISTRATE

dated 29th JULY 2011 in Nanyuki Chief Magistrate's Court Criminal Case No. 2731 of 2009)

JUDGMENT

1. DEDAN MUGO NJERU, the appellant herein was convicted before the Chief Magistrate's Court Nanyuki of the **offence of forcible entry Contrary to Section 90 of the Penal code Cap 63** and sentenced to pay a fine of Kshs, 3,000 and in default to serve imprisonment for 2 months.

2. Appellant was aggrieved by the conviction and sentence and has according Filed this appeal

3. This is the first appellant court and the duties of such court have been reiterated time and time again. In the case **DAVID NJUGUNA WAIRIMU – V- REPUBLIC (2010)eKLR** the court of appeal stated:

> "*The duty of the first appellant court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances were the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision*

4. This appeal was opposed by learned counsel Mr. Tanui Principal Prosecution counsel. In his submission Learned Counsel Mr. Tanui submitted that the prosecution proved the case against appellant. Learned Counsel submitted that Hassan Njeru Njoka, the complainant, was the owner of Land Timau Settlement Scheme No. 763 and that he did produce a copy of the Title as an exhibit. That on the material date complainant was informed by the appellant through a text message that he, the appellant, was digging holes in his said land.

5. That the complainant on going on the land indeed found appellant in the process of digging holes whereby the appellant told the complainant that he was smelling blood. The implication of the statement

being that blood was likely to spilled.

6. Learned Counsel Mr. Tanui submitted that the appellant only raised the defence of boundary dispute during his testimony in his defence. Counsel therefore surmised that, that defence was an afterthought. He concluded by stating that this appeal has no merit.

7. Appellant has four grounds of appeal but only submitted on grounds number 1, 3 and 4. It will be assumed that appellant abandoned ground number 2 of those grounds.

8. The issues for determinating that come from those remaining grounds are:

> *a.* ***was the lower court case one of boundary dispute and hence civil in nature; and***
>
> *b.* ***If the dispute was criminal in nature did the prosecution prove the case on required criminal standard.***

THE FIRST ISSUE

9. The complainant testified that he is the owner of Timau Settlement Scheme No. 763 which measures 0.5 hectares. That between his land and appellant's land there is a road.

10. The appellant in cross examination of the complainant did ask about the size of the land No. 763 and did also ask the complainant who his neighbours. It follows therefore the defence he raised later was not an afterthought. Rather it was advancing the questioned he had asked in cross examination.

11. That being so, appellants defence in relation to the first issue was to the effect the original land that belonged to his late father was No. 92 consisting of 104 acres. This was subdivided into 762 and 763 of half acre each. That however when the title was issued in respect to parcel 763 it reflected 1 ¼ acres, which appellant said was a mistake. That the complainant purchased parcel 763 form appellant's nephew called Munene Mutegi. Appellant stated that complainant had claimed ownership of parcels 763 and 762 which was incorrect because appellant, the administrator of his late father's estate, was still in possession of parcel 762. That despite that fact the complainant went onto parcel 762 and uprooted 3 fence posts. That it was those posts that he the appellant and his brother D W 2, John Samuel Ntoanyiri, were replacing when appellant was arrested and charged with the offence of forcible entry. Appellant's brother confirmed this by his evidence in defence.

12. The evidence reproduced above point to an ongoing dispute of land between complainant and appellant. The complainant alleged that appellant was putting posts on his parcel No. 763. Appellant alleged he and his brother were replacing posts on parcel 762 which posts had been wrongly removed by complainant.

13. No evidence was adduced by surveyor or land registrar to show that indeed the appellant put the posts on parcel 763 and not 762 as alleged by the appellant. The evidence adduced by the prosecution echo the finding in the case **STEPHEN NDUNGU MBURU v REPUBLIC** [2012]eKLR where the Justice R.P.V Wendoh in finding a criminal case was a civil dispute stated:

> "*This is a civil claim over who is the owner of the suit property, and it is not in the domain of the police to decide on ownership.*"

14. Similarly in this case I find there was a dispute which related to the size of the property and to the exact location of parcel 763 and parcel 762.

15. The Learned trial Magistrate considering this aspect of the evidence stated in the judgment:

> "*P W 1 produced a title deed, which shows that his piece of land is 0.5 hectares, which translates to more than ½ an acre. On the other hand the accused said that as the administrator, P W 1's*

piece of land is supposed to be ½ an acre. What the accused is saying could be true but the title is the official and final document, which reflects size and ownership of a piece of land. There could be a mistake on the size of the piece of land but the court will be guided by the title which has not been invalidated by any court. To me P W 1 owns a piece of land, which measures 0.5 hectares."

16. The statement that the court's ought to honour a title of land unless it is invalidated is the correct exposition of the law, however the magistrate did not satisfy himself whether appellant was putting posts on parcel 763 as alleged by complainant or 762 as alleged by appellant.

17. The evidence adduced however shows clearly that the dispute was one which was akin to civil dispute rather than criminal dispute.

18. In respect to the first issue I therefore find the dispute was one of boundary dispute and therefore was civil dispute in nature.

THE SECOND ISSUE

19. The prosecution's case was either poorly investigated or poorly prosecuted or both.

20. The prosecution as rightly argued by Mr. Wanjohi Learned Counsel for the appellant did not produce a surveyor who could have shown the limits of parcel 763 and 762 so that a determination could be made whether appellant had forcibly entered parcel 763. That, in my view, was vital evidence to the case and because the case lacked that evidence the prosecution did not meet its burden of proof.

21. Further, again as rightly submitted by the appellant, the trial court needed to visit the scene to ascertain that indeed holes had been dug and even posts put on parcel 763. If a visit was not possible prosecution should have availed photographs of those holes in the case. P W 2 did say that appellant was affixing the poles with cement. If that was so, a visit could have confirmed the same. Such a visit ought to have been done when receiving the evidence of the surveyor who would have confirmed to the court whether the holes were on parcel 763 or 762.

22. In my view the prosecution's evidence fell far too short of the standard of proof in criminal case. It is because of that finding that I find and hold that this appeal has merit and should be allowed.

23. **Having therefore reached the above conclusion the judgment of this court is that this appeal succeeds and the conviction against appellant is quashed, and his sentence is hereby set aside.**

24. **The appellant shall be refunded the fine paid, if any.**

Dated and Delivered at Nanyuki this 4th February, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Kiruja

For state ……

For Appellant …….

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE