



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.CR.A 105 OF 2015

JOHN MUTUA KYENGOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and Sentence of the Senior Resident Magistrate’s Court at Kilungu by Hon. Patrick Wambugu (SRM) in Criminal Case No. 1 of 2014 dated 22nd April 2015)

(Before E. Ogola J)

JUDGMENT OF THE COURT

1. This is the judgment on appeal against the conviction and sentence of the Appellant by **Patrick Wambugu, SRM Kilungu Court** on **22nd April 2015**. In that court, the Appellant was charged, convicted and sentenced to serve **18 months’ imprisonment** for the offence of **forcible detainer** contrary to **Section 91** of the **Penal Code**. The Appellant appeals against that conviction and sentencing. The charge in the lower court alleged that on **5th day of November 2013** at **Kivaku village, Kyamuoso Location** in **Kilungu Sub County** within **Makueni County** being in actual possession of **Plot No. 1611 in Kyamuoso Adjudication Section** without colour of right the Appellant held possession of the same in breach of peace against **Ezekiel Mwaka Musau** being the person entitled by law to the said plot.

2. The Appellant has put forth 8 grounds of appeal as follows:-

i. “THAT, the purported land transaction was not incontrovertibly established as vital/crucial witnesses neither participated nor were they called to corroborate the complainant’s allegations of purchase and the subsequent offence of forcible detainer contrary to Section 91 of the Penal Code.

ii. THAT, foregoing notwithstanding, no evidence was adduced by the prosecution witnesses as proof that any particular boundaries were agreed on by the parties in respect of the land parcel under dispute.

iii. THAT, the trial court erred in fact by failing to visit the alleged site of dispute relying instead on photographic evidence that was both insufficient and unreliable.

iv. THAT, the purported sale agreement was not endorsed by any independent witness (es) including PW2 who claimed to have been present at the time.

v. THAT, the learned magistrate erred in law and substance by evaluating the prosecution case in isolation only to later consider the defence evidence in rebuttal, hence shifting the burden of proof to the accused person.

vi. THAT, the plausible evidences of the defence witnesses were unduly rejected and no sufficient explanation tendered in respect.

vii. THAT, the case was of subtle but complex legal profundity beyond Appellant's intellectual scope and as such he should have been accorded legal representation and/or counsel pursuant to Article 50 (2) (h) of the Constitution of Kenya 2010.

viii. THAT, the learned magistrate misapprehended the facts of the case and subsequently applied inappropriate legal principles that culminated in a gross miscarriage of justice against the Appellant.”

3. Under grounds 1, 2, 3 and 4 of the appeal, the Appellant submitted that land transactions in **Kenya** are very sensitive issues and that any such transaction should be witnessed by the local chief and sub chief to give it a force of legality. The Appellant submitted that the land purported to have been purchased by the complainant was not authenticated by any official document at the time of purchase, and that given that the land in question was a family land it was prudent for other family members or clan members to have been consulted. The Appellant further submitted that there was no proof of any boundaries between the half acre he sold and the remaining part and that the whole issue was a case of misunderstanding since both the Appellant and the Complainant claimed the same piece of land. Despite the fact that the said parcel **No. 1611 Kyamuoso Adjudication Section** was surveyed and title issued, the Appellants submitted that no evidence was adduced to show that the Appellant and or other family members participated or were witnesses to the demarcation. The Appellant submitted that the trial court ought to have visited the site to verify the boundaries instead of relying on photographs and that the prosecution ought to have provided corroborative evidence or witnesses such as local administrators, the adjudication officers and other documents such as maps and survey charts to establish the demarcation.

4. Under grounds 5, 6 and 7 of the appeal the Appellant submitted that the defence had a strong case and that the trial court acknowledged the fact but nonetheless proceeded to convict the Appellant and that this was a case of miscarriage of justice. The Appellant noted that the trial magistrate had observed that the defence witnesses were truthful though they seemed not well versed with the nature of the offence before the court and the facts therein and that having made that observation the trial magistrate ought to have helped the defence out of their ignorance.

5. Under ground 8 of the appeal, the Applicant submitted that the nature of the dispute fell within the preamble of a civil case rather than a criminal case and that this was a matter which was best resolved with the chief and clan elders.

6. The prosecution opposed the appeal. The prosecution's case was that in proving their case in the trial court they called a total of six witnesses where PW1 testified that he is the owner of the property in question after he bought it from the Appellant in the year 1997 and a letter from the Land Adjudication Officer was produced as exhibit to support his claim. In the year 2013 the Appellant encroached into the Complainant's land and build a house thereon. His evidence was corroborated by PW3 who was PW1's caretaker who testified that he was present when the Appellant encroached into PW1's land and built a house, he further testified that the Appellant chased him away from the land. PW3's evidence was corroborated by PW4 who confirmed that he saw the Appellant building his house in the Complainant's land. PW6 the Investigating Officer investigated the case and produced a letter from the **Ministry of Land** to prove that the land belonged to the Complainant. The complainant also produced photos of the house that the Appellant had built on the Complainant's land.

7. I have carefully considered the appeal. This being the first appeal I have considered and reiterated the evidence upon which the Appellant was convicted. I have also considered the grounds of appeal and the prosecution's objection to the appeal. In my view the following are the issues for determination by this

court.

- i. Whether the ingredients of the offence were proved.
- ii. Whether the sentence meted was reasonable.

8. In regard to the first issue the Appellant in grounds 1, 2, 3 and 4 of the appeal submitted that the disputed land was not demarcated, and that the trial court ought to have visited the site to confirm the position. He further submitted that both him and the complainant claims the said piece of land. However, the Appellant ought to have known that the disputed land being **parcel 1611 Kyamuoso Adjudication Section** was surveyed and title issued to the Complainant. The court had no duty to go behind the title and purport to establish the true owner when the documents, which were not disputed, showed clearly who the true owner of the plot was. The trial court did not have to visit the site.

9. As for grounds number 5, 6 and 7 of the Appeal, this court notes that the learned trial magistrate observed that the defence witnesses were truthful though they seemed not well versed with the nature of the offence before the court and of the facts therein. This observation cannot be faulted. It is important for the witnesses to understand the nature of the case and the section of the law relied on so that the evidence they give may be relevant. The Appellant should be aware that a plea of ignorance is no defence in criminal proceedings. Indeed all the prosecution needed to do, and which they did, was to establish the ingredients of the offence of forcible detainer under Section 91 of the Penal code 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. This was proved by the evidence of PW1, PW3 and PW4. Secondly, the accused must be in occupation of the parcel of land in a manner that is likely to cause, or causes reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land. This was proved by the evidence of PW3 who confirmed that the Appellant chased him away from the land where he was the caretaker employed by the Complainant.

10. It is the finding of this court that the prosecution established all the ingredients of the charge of forcible detainer. It established that the Complainant was the legal owner of the suit parcel of land; that the Appellant was in unlawful possession and occupation of the same and that the Appellant had resisted the Complainant's attempt to take possession of the suit parcel of land in a manner that was likely to cause breach of peace.

11. As for ground 8 of the grounds of appeal that this matter should have been dealt with by the elders, the view of this court is that the criminal court has jurisdiction to try any offence which is provided for in law, like in the instant case. Since there was the criminal jurisdiction to try the offence, the submissions by the Appellant that the matter be referred to village elders is not sustainable and I dismiss it.

12. On the second issue as to whether the sentence meted was reasonable, I have noted that non of the parties submitted on the issue. However, I have looked at the law and have found that a sentence period of 18 months falls within the law and is in my view reasonable and requires no interference with by this court.

13. In the upshot, the Appellant's appeal herein is dismissed and conviction and sentencing upheld.

That is the judgment of the court.

Dated and delivered at Machakos this 7th day of September 2016.

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E. OGOLA

JUDGE