



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO.26 OF 2016

CHARLES KIPRONO BIEGON

JAPHETH KPTOO BIEGON

PETER KIPKOECH BIEGON.....APPELLANTS

VS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in Kericho Principal Magistrate's Court Criminal Case No.201 of 2013 (Hon. B. Limo) dated 30th September 2016)

JUDGMENT

1. This judgment relates to Criminal Appeal Nos. 24, 25 and 26 of 2016 which were consolidated on 11th October 2016. The appellants, Peter Kipkoech Biegion, Japheth Kiptoo Biegion and Charles Kiprono Biegion were charged with the offence of forcible detainer contrary to section 91 of the Penal Code. The facts of the case were that on diverse dates between 10th October and 31st October 2012, at Kaborok Village in Kericho West District within Kericho County, jointly were in possession of land known as Kericho/Kabianga 3026 and 3024 belonging to Paul Kiprono Ngeno and without colour of right held possession of the said land in a manner likely to cause a breach of peace against Paul Kiprono Ngeno who was entitled by law to the possession of the said land.

2. They all pleaded not guilty, were tried and convicted of the offence, and were sentenced to 12 months' imprisonment on 30th September 2016. They therefore filed Criminal Appeals Nos. 24, 25 and 26 of 2016 respectively in which they challenged both their conviction and sentence. They also filed an application for bail pending appeal, but abandoned the application on the 11th of October 2016 and elected to proceed with the appeal.

3. In similar grounds of appeal dated 3rd October 2016, the appellants challenge their conviction and sentence on the following grounds:

1. That the learned trial magistrate erred in law and fact in convicting the appellants against the weight of evidence.

2. That the learned trial magistrate erred in law and fact in considering extraneous issues in convicting the appellant.

3. That the learned trial magistrate erred in law and fact in awarding a sentence that was

manifestly harsh and excessive in the circumstances.

4. That the learned trial magistrate erred in law and fact in failing to consider the appellant's defence in its entirety.

5. That the learned trial magistrate erred in law and fact in convicting the appellant without first analyzing the evidence.

4. The appeals were consolidated on 10th November 2016, with Charles Kiprono Biegon as the first appellant, Japheth Kiptoo Biegon as the second appellant, and Peter Kipkoech Biegon as the third appellant. The appellants were represented by Mr. Kiprono, while Ms. Mwangi appeared for the State. Both Counsel for the State and for the appellants made oral submissions on the appellants' five grounds of appeal.

5. Mr. Kiprono submitted with respect to the first ground of appeal that the trial magistrate erred in law in convicting the appellants against the weight of evidence, and that the record showed that the evidence relied on was mere allegations. While the prosecution had called 3 witnesses and produced documents which proved ownership of the property, Kericho/Kabianga/3024, exhibit No. and Kericho Kabianga/3026, there was no evidence of destruction of property. As the complaint was that the accused persons had destroyed a fence between land parcel number 3024 and 3026, the prosecution should have produced a photo of the destroyed fence as it is the evidence by PW1 that the appellants cut a fence.

6. Counsel submitted further that while the accused were charged, as stated in the charge sheet, with the offence of forcible detainer, PW1 did not tell the court how the three appellants forcibly detained that parcel of land, and was not clear which parcel was detained, whether Kericho /Kabianga/3024 or 3026. He observed that from prosecution exhibit no.3, which is a map, there is no fence between 3024 and 3026 to be destroyed, and what is between the two parcels, 3024 and 3026, is a road of access to Kericho Kabianga /3025. According to the appellants, this property, as DW4, the father of the three appellants testified, belongs to him.

7. The appellants further complained that the trial court failed to consider the evidence of PW1 and the contradictions therein. Mr. Kiprono submitted that PW1 stated that he had reported the matter at the police station on 4th October 2012, and that the accused persons started destroying his fence on 10th October 2012. The appellants' submission was that the trial court should not have relied on the evidence, which is so conflicted. In their view, the complainant was fabricating issues as he could not report on 4th October 2012 events that were to take place on 10th October 2012, exactly 6 days later.

8. The second ground of appeal was that the trial magistrate erred in law in considering extraneous issues in convicting the appellants. This was because it relied on the evidence that there was a destroyed fence as PW1, PW2 and PW3 had testified. According to the appellants, other than the evidence of these three witnesses, there was no other evidence to show that the appellants entered the complainant's parcel of land, whether Kericho/Kabianga 3024 or 3026.

9. The appellant's third ground was that the sentence meted out was harsh and excessive in the circumstances. According to the appellants, section 91 provided that forcible detainer is a misdemeanor, while section 36 of the Penal Code provides the penalty for misdemeanors, which is 12 months or a fine or both. It was their submission that they were first offenders, and that the trial court had noted that they were remorseful, yet it proceeded to give them a custodial sentence without a fine. Their submission is that the sentence was harsh and excessive and the court should have given them a fine.

10. The appellants' fourth ground is that the trial court erred by failing to consider their defence. Their submission was that they had given sworn evidence in which they gave the circumstances under which they were arrested and charged.

11. The appellants were also aggrieved that the investigating officer did not appear in court and produce

the OB in which the complainant reported at the police station, which in their view was the only link to connect the dots. They therefore prayed that the court quashes the conviction and sets aside the sentence against them.

12. Finally, with respect to the 5th ground, the appellants contended that the trial court erred by convicting them without analyzing the evidence.

13. Ms. Mwangi opposed the appeal on behalf of the State. Her submission with respect to ground 1 of the appeal was that the prosecution proved its case beyond reasonable doubt that the offence of forcible detainer was committed by the appellants. She noted that the complainant, PW1, had testified on 28th January 2016 after the Court determined that the matter should start afresh. PW1 was able to prove that he was the owner of Kericho/Kabianga/3026 and 3024 and that the three accused persons had damaged his fence and encroached on Kericho/Kabianga/3026.

14. She further noted the evidence of PW2, who testified that he had seen the accused pull down the fence between Kericho/Kabianga/3026 which belongs to the complainant and Kericho/Kabianga/3025 which belonged to the appellants. It was her submission that this evidence was corroborated by the evidence of PW3 and PW4. Her submission was that the prosecution had therefore proved its case against the appellants beyond reasonable doubt, and they had to prove that they did not commit the offence of forcible detainer.

15. According to the State, the first appellant, Charles Kiprono Biegon, did not deny having encroached on the parcel of land belonging to the complainant, and neither did the 2nd appellant. The 3rd appellant, Peter Kipkoech Biegon, according to the State, admitted that they needed a road to their farm and that they had attempted an out of court settlement with the complainant, which did not bear fruit. He too, did not deny encroaching on the complainant's parcel of land. Further, that in cross-examination, he admitted that they always used parcel number 3024 and 3026. It was Ms. Mwangi's submission that the defence evidence was contradictory and lacked the strength to displace the prosecution evidence. In her view, they were rightly convicted and sentenced

16. The state disputed the contention that the sentence meted out was harsh and excessive. According to the State, forcible detainer is a misdemeanor which, under section 36 of the Penal Code, is punishable with imprisonment for a term not exceeding two years or a fine or both. In the State's view, the trial magistrate had discretion on whether to fine the appellants or to imprison them, or to fine and imprison them. He chose to imprison them for one year while the Act provides for a term of two years' imprisonment.

17. To the contention that the trial magistrate failed to consider the defence in its entirety, the state's response was that the court did consider the defence but the prosecution evidence on record outweighed the defence evidence.

18. With respect to the final ground, that the court convicted the appellants without analysing the evidence, the state's response was that the court did analyse the evidence of both the prosecution and defence and that is how he was able to arrive at a sound judgment. It therefore prayed that the appeal be dismissed and the conviction and sentence of the lower court upheld.

19. I have read and considered the trial court record of proceedings, and the appellants' grounds of appeal. I have also heard and considered the submissions of Counsel for the appellants and the State.

20. As the first appellate court, I am aware that I am under a duty to reconsider and re-evaluate the evidence on record, bearing in mind that I did not see or hear the witnesses, and reach my own conclusion-**See Okeno vs R [1972] EA. 32 and Mohamed Rama Alfani & 2 Others vs Republic, Criminal Appeal No. 223 of 2002.**

21. The evidence before the trial court was as follows. PW1 was the complainant, Paul Kiprono Ngeno, from Kaborok area. He stated that he owned parcel No. Kericho/Kabianga/3026 and 3024, and has been

in control of the land since 1998. He produced the original title deeds to the two properties in evidence. He further testified that on or about 10th October and 31st October 2012, the accused went to his farm and broke the fence which was at the boundary. At the time this event occurred, he was in the company of one John Koech. He reported the incident to Sisiot Police Station

22. PW2, Kipngetich Erick Rotich, a neighbour of the accused persons and the complainant, told the court that on 10th October 2012, he saw the three accused persons break down a boundary between Kericho/Kabianga/3026 and 3025. He was 10 metres away herding his cattle and saw them pull down wires and posts. He stated in cross-examination that the accused were accompanied by their father.

23. John Kibiegon Koech, PW3 stated that he is a farmer and also a neighbour of the complainant and accused in Kaborok area, Sisiot, His evidence was that on 10th October 2012, he saw the sons of Andrew Rogony destroy the farm in particular the boundary of the complainant. That they removed wires and posts and cut the wires and posts in parcel no.3026 and encroached on it.

24. PW4, Joseph Kiprono Sigei, also told the court that he saw the accused pull down posts and wires in the complainant's farm. His evidence is that he resides on parcel no.1594 which is next to Kericho Kabianga /3026 and was a witness to the sale of the land to the complainant in 1998. In cross-examination by Counsel for the appellants, he stated that the complainant had bought 14 points from the father of the accused. The prosecution closed its case on 16th September 2016 after the investigating officer and Land Registrar failed to appear.

25. At the close of the prosecution case, the trial magistrate found that the accused had a case to answer and placed them on their defence. All the appellants elected to give sworn evidence and accused 1, Charles Kiprono Biegon, indicated that he would call 3 witnesses.

26. In his defence, the first accused, Charles Kiprono Biegon, told the court that he was arrested while he was at home in Kericho/Kabianga 3025 ploughing. Peter Kipkoech Biegon's evidence was that he was harvesting maize from 3025, and that they share a boundary with the complainant. He stated that they need a road to their farm and that they had attempted an out of court settlement which had failed. He also stated that he was aware that their father had sold land parcel no.3026 to the complainant about 1994. In cross examination, he stated that 3026 had belonged to his uncle, Joel Kiplagat who sold it in 1998, and that it belongs to the complainant. He also confirmed that he was aware the land belonged to the complainant. He further stated that they use 3026 to reach the road, as well as 3024, but denied that he damaged the complainant's fence.

27. Japheth Kiptoo Biegon's evidence was that he was in Kericho on 11th October 2012 when he was called by Charles Biegon. That the police came then went away; then he was told by PW1's wife that he was wanted at Sisiot Police Station, where they were remanded. Japheth further stated that they were told that they had damaged PW1's fence. He produced a survey plan and map in respect of the parcels of land, and stated that there had been another matter (in court) relating to land parcel number 3026, but that it had been determined. In cross-examination, he stated that they reside on 3025, that 3024 is not fenced, but 3026 is. He did not know who broke the fence.

28. DW4 was Andrew Kipyegon Rogon, the father of the 3 accused persons. His testimony was that he and the accused stayed on parcel No.3025. The complainant had bought land parcel no. 3024 from his elder brother and 3026 from him. He produced a photo which he stated was showing a boundary between 3025 and 3026, but none between 3024 and 3025. He confirmed selling 3026 to PW1 but denied that they used the complainant's land to access the road. The appellants then closed their case.

29. In his decision dated 30th September 2016, the court set out the prosecution and defence evidence. He set out the issue for determination as being whether the prosecution has proved its case and whether the defence sworn statements had merit and substance to displace the prosecution case. His finding was that the acts of the accused as stated by the prosecution constituted acts of forcible entry that have dispossessed the complainant. He further stated that he found the prosecution witnesses credible and to

have enabled the court reach a sound determination. He relied on the decision in **R vs Kevin Kiptoo Barabara [2015] eKLR** and **Criminal Appeal No.65 of 2005 – Geoffrey K. Gathira vs Republic [2006] eKLR** with regard to the failure to call the investigating officer. He dismissed the defence as lacking merit and substance and convicted the accused persons. He sentenced them to 12 months' imprisonment.

30. The appellants were charged with the offence of forcible detainer contrary to section 91 as read with section 36 of the Penal Code. Section 36, titled "*General punishment for misdemeanours*" provides as follows:

When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

31. Section 91 provides as follows:

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.

32. In **Murang'a Criminal Appeal No. 430 of 2013 Richard Kiptalam Biengo vs Republic**, the Court observed as follows with respect to the offence of forcible detainer:

"A literal reading of section 91 of the Penal Code shows that the prosecution will only prove an offence of forcible detainer against an accused person if it demonstrates that:-

(a) A person has actual possession of land;

(b) The person has no right over the land;

(c) The act of possession is against the interests of the legal owner or the person legally entitled to the land; and,

(d) The act of possession of the land is, therefore, likely to cause a breach of the peace or a reasonable apprehension of the breach of the peace."

33. In his decision in **Busia Criminal Appeal 8 of 2012- Albert Ouma Matiya vs Republic**, Kimaru J observed as follows with regard to the elements of the offence of forcible detainer:

"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."

34. The appellants have argued in their first and third grounds that the trial court erred by convicting them against the weight of evidence, and in considering extraneous issues. I have considered the evidence before the trial court which I have set out above. Four prosecution witnesses testified that they saw the accused break the complainant's fence and encroach upon land title number Kericho Kabianga 3026. The evidence before the Court, which the appellants confirmed, is that this land belongs to the complainant, and a title for it and for Kericho /Kabianga/3024 were placed before the court. That being the case, it seems to me that the trial court was correct in its finding that the prosecution had established the offence of forcible detainer contrary to section 91 of the Penal Code.

35. It is not clear from the submissions of Counsel what the extraneous evidence referred to in the third ground refers to, and I cannot find any extraneous matters relied on by the trial court in reaching its decision.

36. The applicants fourth and fifth grounds are that the trial court erred by failing to consider the appellant's defence in its entirety, and in convicting the appellant without first analyzing the evidence.

37. The decision of the court shows that the trial magistrate considered the prosecution case. It found that the evidence of the prosecution witnesses corroborated the evidence of the complainant, and that the accused persons confirmed that title no 3026 belonged to the complainant. On this basis, he concluded that the sworn evidence of the accused lacked merit and substance. I have considered the defence tendered by the accused against the findings of the trial court. While the defence tendered by the 1st and 3rd accused was to deny that they pulled down the complainant's fence or encroached on his land, the evidence of the 2nd accused lent credence to the prosecution case. He confirmed that they used title number 3026 to access the road, and that there had been a dispute with the complainant over the land. Their father, PW4, while conceding that the land belonged to the complainant, and that he had sold it to him, denied that the accused had encroached on the said land.

38. It seems to me that given the evidence adduced by the prosecution, the trial court properly dismissed the defences as lacking merit. The eye witness evidence of the prosecution witnesses was not displaced by the accused, and in my view, they were properly convicted as charged.

39. The appellants had complained about the failure to call the investigating officer as a witness. In the case of **P.M. and Others Vs. Republic [2014] eKLR** which is referred to in **R vs Kevin Kiptoo Barabara [2015] eKLR** relied on by the trial court, it was held that the failure to call the investigating officer would not be fatal to the prosecution case, and that it was only in rare circumstances that the evidence of the investigating officer would play a major role for a sound determination of a case in favour of the prosecution. I agree with the trial court on this issue.

40. The ground which I wish to consider finally relates to the sentence imposed on the appellants, which was imprisonment for a period of 12 months. The appellants argue that the sentence was manifestly harsh and excessive in the circumstances. I note that the penalty provided for under section 36 of the Penal Code is a period of imprisonment for two years, or a fine, or both. From the record, it appears that the accused were first offenders. They erred by getting involved in a dispute over land which, from their evidence, was sold by their father when some of them, such as the 3rd appellant, Peter Kipkoech Biegon, had barely reached the age of reason. I find that a less severe sentence than half of the penalty provided by law could have been imposed in the circumstances of this case.

41. Section 354(3) of the Criminal Procedure Code gives the High Court power, on an appeal from a subordinate court, to reduce or increase the sentence, or alter the nature of the sentence.

42. In the circumstances of this case, noting that the accused are first offenders, I believe that a sentence of six months imprisonment and a further six months on probation is a fitting penalty for the offence charged.

43. The appellants shall therefore serve a period of six months imprisonment and six months on probation. It goes without saying that should the appellants commit any offence while on probation, they are liable to be sentenced afresh for the offence in accordance with the provisions of section 7 of the Probation of Offenders Act.

44. Save for that alteration in sentence, the appeal is otherwise without merit and is dismissed and the conviction by the lower court upheld. Right of appeal within 14 days has been explained to the appellants.

Dated Delivered and Signed at Kericho this 5th day of December 2016.

MUMBI NGUGI

JUDGE