



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOI
APPELLATE SIDE
CRIMINAL APPEAL NO. 2 OF 2014

(From Original Conviction and Sentence in Criminal Case No. 706 of 2012 of the

Senior Principal Magistrate's Court at Voi – Hon. S. M. Wahome, SPM)

IVORY CHRIS MUSOVYA.....APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

JUDGMENT

1. Appellant was on 16th October 2013 convicted by the Principal Magistrate's Court Voi with the offence of Forcible Detainer contrary to Section 91 of the Penal Code Cap 63. On conviction he was sentenced to pay a fine of Kshs. 80,000/- and in default to imprisonment for one year.
2. Appellant being aggrieved by the said conviction and sentence filed this appeal.
3. Learned Counsel for the Republic Mr. Gioche at the hearing of the appeal stated that he did not support either the conviction or sentence. In my view that was right in view of the evidence tendered by the prosecution.
4. Prosecution's case was that the complainant Patrick Henry Mwalili was allocated parcel No. 2551 in 1981 by village elders. That was at a time when he was the Officer-In-Charge of Voi Police Station (OCS). That in the year 2001 Appellant went to him and asked whether he could look after his land. He allowed him to be on his land.
5. The land in question, from the evidence, seems not to be land which is adjudicated. Michael Mutisya Kiio an adjudication officer gave evidence stating that the land namely No. 2551, fell within his jurisdiction. He stated that the plot was initially recorded in the register in both the names of the complainant and the Appellant. That it was after the elders heard the dispute between complainant and Appellant over the ownership of the land, and after the determination of that sitting was in favour of the complainant, specifically on 18th November 2009, that Appellant's name was deleted from the register held by the adjudication office.
6. That evidence of the adjudication officer was in tandem with the defence evidence. Appellant in his

defence, under oath, stated that he decided to give complainant some of his land in 1984. The complainant was then the OCS of Voi Police Station. Appellant had been arrested on allegation of having stolen railway pipes and was taken to Voi Police Station, before the complainant, but was never charged. It was following his release by the complainant that he agreed to give him some of his land. Appellant however said the exact acreage he was to give complainant was not determined because complainant failed to go to him for measurement to be done. Further it was not determined because Appellant wanted as a precondition to determination of acreage for complainant to refund to him the expenses he had incurred.

7. That evidence by Appellant was largely supported by his witnesses. Moreover one witness, DW2, a former Chief of the area confirmed that Appellant had been on the land in question since 1972. That witness confirmed that Appellant had continued to be in occupation of the land upto the date he was arrested in respect to this case but that complainant had not occupied it.

8. Appellant was charged with the offence of Forcible Detainer. Section 91 of the Penal Code is in the following terms-

“Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause 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.”

9. Hon. Justice Ouko (as he then was) in the case **RICHARD MWANGIRI NDORO –Vs- REPUBLIC (2005)eKLR** set out the ingredients of that offence as follows-

“The offence of forcible detainer is committed where-

i. a person is in possession of land without colour or right;

ii. that above person holds on to possession in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace;

iii. the breach in question must be directed at a person entitled by law to the possession.”

I wholly adopt the above as the requirement of Section 91.

10. In respect of (i) and (ii) above the evidence did not support the same.

The Adjudication Officer, PW1, clearly stated that the land had been in both the names of the complainant and Appellant. Further evidence shows that Appellant had been in possession since 1972, whereas the complainant had not been in possession thereof. There also was no sufficient evidence that Appellant was likely to cause breach of the peace.

11. But I think the most important failure by prosecution was failure to show any evidence that the complainant’s claim to possession was supported by Law. The lower Court case was heard denovo in April 2013. By that date the applicable law relating to Law was The Land Act 2012 and The Land Registration Act 2012. The Land Registration Act under Section 26(1) provides that a Certificate of Title is to be held as conclusive evidence of proprietorship. That Section is in the following terms-

“26.(1) The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person names as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate, and the title of that proprietor shall not be subject to challenge, except-

a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, uprocedurally or through a corrupt scheme.

2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

It therefore follows where a claim is made which is not supported by a Certificate of Title such a claim rightly belongs to the Civil Court which Court would determine the rightful owner of the land. The Learned Counsel for the Republic was right when he submitted that this dispute rightly belonged to the Environmental and Land Court and not in the Criminal Court.

12. I find that I am, in view of the above, in agreement with the concession by Counsel for the Republic. For the above reasons the Appellant’s appeal against conviction and sentence does succeed. The conviction of the Appellant is hereby quashed and the sentence is hereby set aside. I do order the Appellant to be set free unless otherwise lawfully held.

Judgment by:-

MARY KASANGO

JUDGE

In the presence of:-

..... for Appellant

..... for Respondent

DATED and DELIVERED at VOI this 8TH day of OCTOBER, 2014.

.....

JUDGE