



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 257 OF 2012**

*(From the original Conviction and Sentence in the Criminal Case No. 930/2012 of the Principal Magistrate's Court at Voi: S.M. Wahome – PM)*

PATREMMY MWALIMA MWAKWEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT**

The appellant herein **PATREMMY MWALUMA MWAKWEKA** has filed this appeal challenging conviction and sentence by the learned principal magistrate sitting at Voi Law Courts on a charge of **FORCIBLE DETAINER CONTRARY TO SECTION 91 OF THE PENAL CODE**. The facts of the charge were as follows:

**“On the 26<sup>th</sup> day of October, 2011 in Voi Township within Taita Taveta County being in possession of LR No. 1956/337 – Voi Municipality of DAVID MACHARIA KANGETHE without colour of right, held possession of the said land in a manner likely to cause breach of the peace or reasonable apprehension of breach of the peace against **DAVID MACHARIA KANGETHE** who was entitled to the land.”**

The prosecution case was that the appellant forcibly entered into and took possession of a parcel of land which belonged to the complainant one **DAVID MACHARIA KANGETHE**. The prosecution called a total of four (4) witnesses.

**PW1 DAVID MACHARIA KANGETHE** in his testimony stated that he purchased the parcel of land in question from one ‘*Daudi Mbinga*’ for the sum of Kshs. 200,000/=. **PW1** claims that when he went to view the plot it was vacant. However, after completing the sale he went back and found the appellant in occupation of the plot and a small structure thereon. **PW1** states that civil litigation over the matter has been on-going for seven (7) years.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He stated in defence that he has occupied the said plot since 1986 and alleges that the person who sold the plot to **PW1** had obtained title illegally. The appellant confirms that there is an on-going civil case over the matter being **Voi RMCC No. 40 of 2002** between himself and the complainant.

I have perused the ruling of the Hon. Senior Resident Magistrate in **RMCC 40 of 2002**. He found that the lower court had no jurisdiction to determine the question of ownership and referred the matter to the High Court and directed that the status quo be maintained. This ruling was delivered on 8<sup>th</sup> March, 2007 and the status quo at the time was that the appellant was in occupation of the land.

On 26<sup>th</sup> October, 2012 the trial magistrate proceeded to convict the appellant as charged and fined him Kshs. 60,000/= in default one year in prison. The appellant then filed this appeal. **MR. DZUMO** learned state counsel conceded the appeal.

A close perusal of the trial record reveals clearly that this was a purely civil dispute. The question revolved around ownership of **LR No. 956/337** a parcel of land in Voi municipality. The Senior Resident Magistrate sitting in Voi heard the civil dispute and directed that the matter be referred to the High Court to determine ownership. Before this was done a criminal case was instituted. It is clear that this was not a bona fide prosecution. The police were allowing themselves to be used to settle a civil dispute and to harass and intimidate one of the parties in that civil dispute. In his judgment at page 4 line 11 the trial magistrate states as follows:

**“The accused has desperately attempted to inform the court that he is a bonafide owner by occupation. The foregoing cannot hold any water since the plot in question was governed by the regime of the Registration of Titles Act Cap 281 and adverse possession could not arise. The judgment of the court in Voi SRMCC No. 40 of 2002 DAVID MACHARIA KANGETHE VS. PATREMMY cannot be any basis of the purported ownership. The judgment Dexb1 which in my humble view was per incuriam. The court made an error in deciding that the status quo be maintained. I have gone through the judgment and the ratio decidendi is that the [lower] court has no jurisdiction, it is obliged not even to hear the matter and if indeed it has already done so, it cannot make any substantive orders for want of jurisdiction. For the foregoing reason, the accused cannot rely on the said judgment Dexb1 as it is bad in law.”**

These observations are preposterous. The trial magistrate greatly erred and misdirected himself. He had no mandate to determine the question of ownership to title in a criminal case. The magistrate in **RMCC No. 40 of 2002** did not attempt to determine the matter – he merely made orders of status quo and correctly referred the matter to the High Court for determination of the question of ownership. The trial magistrate had **no right** to dismiss a ruling of a fellow magistrate of concurrent jurisdiction as ‘*bad in law*’. He cannot purport to sit on appeal over the decision of a magistrate of concurrent jurisdiction. As the learned state counsel has pointed out the status quo orders were valid and enforceable until the matter was determined by the High Court.

Once again it is evident that this prosecution was malafides. It was mounted solely to harass and intimidate the appellant and to countermand the orders of the magistrate in the civil case. The trial magistrate erred in allowing himself to be used as a pawn in this illegal game. The prosecution of the appellant was totally without basis as his presence on the land had been sanctioned by a court of law. Instead of awaiting a decision by the High Court the complainant (with the connivance of the police) moved to manipulate the criminal process in an attempt to unlawfully evict the appellant. This court cannot sanction or sanitize such type of jungle justice. I find the appeal is merited and I hereby quash the conviction of the appellant. His sentence is also set aside. If the fine or any part thereof had been paid, the amount paid is to be refunded to the appellant. It is so ordered.

**Dated and delivered in Mombasa this 20<sup>th</sup> day of January, 2014.**

**M. ODERO**

**JUDGE**