



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.264 OF 2003
(From Original Conviction and Sentence in Criminal Case No.304 of 2003 of the
Resident Magistrate's Court at Kaloleni – C. Obulutsa, Esq. – R.M.)**

FRANCIS KENGA KADZOMBA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was charged with Forcible Detainer contrary to Section 91 of the Penal Code in that without colour of right held Plot of Dume Katana Charo.

The complainant said he found the Appellant and his son planting sisal right at the middle of hisland to divide it. The complainant referred the matter to his advocate. PW.3 also heard of the dispute. He got a letter from Advocate. The witness said he had seen appellat planting crops.

PW.4 said he was an official from Lands Office and he had been sent to see the disputed land. PW.5 reported that someone was cultivating in his land.

The first substituted charge was for the offence of trespass. Section 91 provides for the offence of forcible detainer and states:-

“Any person 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, against a person entitled by law to the possession of land is guilty of misdemeanor termed forcible detainer.”

In this case the evidence is that the evidence is that the Appellant purchased the land in 1983. He produced agreement of purchase. The widow of the seller confirmed that the Appellant purchased about 2½ acres of the land. She also said complainant bought the land from another person. According to DW.4 Appellant paid Kshs.3,500/- for the land.

There was a dispute as to ownership of the land until Defendant showed his Title Deed in court.

There is evidence that Accused vacated and ceased to cultivate the land. Therefore he was not in actual possession at the material time. He had been coming there to cultivate. The appellant was not holding possession of the land in a manner likely to cause a breach of the peace. No evidence of this nature was offered by the prosecution. In fact the complainant was proceeding in a civil manner to resolve the dispute. He reported to the elder and engaged an advocate to resolve the matter and the matter was eventually resolved by the officer from the Lands Office who brought the map and showed boundaries of the land in court.

From the above I find that the Appellant was not properly convicted. Until he was shown the boundaries he had a claim of right to the land. That being the case the State Counsel has indicated that this case was prosecuted by a Police Constable Mukonesi. This is contrary to provisions of Section 85 Criminal Procedure Code. The trial is therefore a nullity. The State concedes this appeal on that ground.

I therefore allow the appeal, quash conviction and set aside sentence.

On the issue of retrial I have stated above that the Appellant had been wrongly convicted and therefore I do not order a retrial.

The Appellant shall be set free at once unless otherwise lawfully held.

Dated at Mombasa this 3rd day of May, 2004.

JOYCE KHAMINWA

J U D G E

In presence of:-

Mrs. Mwangi – State Counsel

Mr. Mulongo h/b for Gakuhi

Appellant present