



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIM APP 270 OF 00**

**JACOB NDERITU KIMARA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant was convicted by the Resident Magistrate Nyeri on 2 counts:-

1. Forcible detainer c/s 91 of the Penal Code.
2. Interfering with bodily features c/s 24(1) of the Registered Land Act Cap 300 Laws of Kenya.

The appellant and the complainant (PW 1) are closely related. The subject matter of the charge in Land parcel Number MAHIGA/KIHOME/798 is a subdivision of Land Parcel Number MAHIGA/KIHOME/16 which was family land to be subdivided between the appellant and PW 1.

PW 1 filed Nyeri High Court Civil suit Number 60/85 against the appellant in respect of the said family land. Judgment was entered in favour of PW 1. From the available evidence it is not clear how the subdivision was effected. No order authorising the Executive Officer of this court to sign trustee documents on behalf of the appellant were produced at the trial. The appellant denies that any subdivision took place.

It is also apparent from the proceedings that survey work, if any, was called out twice. The reason for this does not come out clearly for the evidence. It was the prosecution's case at the trial that boundary features were fixed separating Parcel No. 798 and 799. No proof of the said features having even been placed was tendered. But in order to justify the conviction to learned magistrate proceeded on the assumption that there must have been some boundary features. It was not open to the learned magistrate to make assumptions on a criminal matter. It was upon the prosecution to prove its case against the appellant case against the appellant beyond reasonable doubt. Having found that there was no evidence to link the appellant with the removal of the boundary features he should have acquitted the appellant of the charge.

The subdivision having been faulted the appellant cannot be said to be a forcible detainer of the complainants land. The conviction cannot be sustained. The learned provincial state counsel rightly conceded the appeal.

I allow the appeal quash the conviction and set aside sentence. The appellant will be set at liberty.

**Dated this 17th day of October 2002.**

**J.K. MITEY**

**JUDGE**

