



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 10 OF 2000**

(From the Original Conviction and Sentence in Criminal Case No. 1804 of 1999 of the Principal Magistrate’s Court at Kitui, P. N. Wekesa Esq. on 13.1.2000)

**JOSEPH MBUSI MALANGA ::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

Coram: J. W. Mwera J.

Mr. Kinyua J. Advocate for Appellant  
Mrs. Ntarangwi Senior State Counsel for Respondent  
C.C. Muli

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**J U D G E M E N T**

20 In the lower court at Kitui the appellant was charged under S.91 Penal Code in that between 23rd March 1998 and 18.10.99 at Kaveta sub location Changwithya, he was found holding land parcel No. Changwithya/Kaveta/727 in the name of Raphael Mitau Kingalya without any colour of right.

The appellant was tried, found guilty and placed on 12 – months probation with effect from 13.1.2000. He filed a home-made petition of appeal with five grounds which Mr. J. Kinyua adopted and argued. That the complainant Raphael had no capacity to complain over land parcel No. 727 which was in the name of his deceased brother Musili Kingalya. That the appellant and the said Raphael Kingalya never had a case between them over the said land and accordingly the complainant had at no time served orders or even evicted the appellant; that sufficient explanation was given by the appellant to be on the land and that the prosecution before the lower court was in fact supposed to be a civil litigation instead. The Learned State Counsel was of the view that although land No.727 once belonged to the complainant’s brother, it had later been awarded to him by court and the appellant had to obey that.

10 The rest of the submission by counsel are incorporated in the following determination. First the reproduction of S.91 Penal Code.

“91. 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.”

Both sides were agreed here that the appellant was and is still in actual 20 possession of parcel No.727. He claimed in his evidence in defence that he has lived here since birth and he had a case pending over this land. The record of appeal was prepared in such a way as to exclude the documentary exhibits which the complainant and the appellant relied on in the lower – a regrettable omission indeed. However when it came to a breach of the peace, it could be assumed that if as and when the complainant desired the appellant to vacate the land and the later resisted a reasonable apprehension of a breach of the peace could arise.

But then was Raphael the complainant, a person entitled by law to the possession of this plot No. 727? Apparently not, quite so. Raphael said inter alia: “I went to land parcel No. 727/Changwithya/Kaveta registered in the name of MUSILI KANGALYA. I had a case with KILONZO KINGALYA and MUSILI KINGALYA, my brothers.”

That the case concerned a claim of their father’s land. When it ended Raphael got several parcels of land including No. 727. That the brothers refused to vacate the land 10 awarded to the complainant and so he got an eviction order against them on 1.7.97. He added

“My brothers refused to come out of these two, Mbusi, the accused refused to come out of parcel No.727.”

In cross examination the complainant said:

I had no case with you. You had a case with Musili, my deceased brother. The land is now mine.”

Without more, it cannot be said at this point that Raphael was the one entitled to land No.727 at the time of the complainant. He told the Learned Trial Magistrate that it was registered in the name of his late brother Musili. That he has never had a case with the appellant and that the appellant had a case with Musili. As such and that is borne out in Raphael’s evidence he had eviction orders arising from the case (HCCC 473/85) against his brothers. Such orders could not affect the appellant because the two never a case between them. Accordingly Raphael should not and could not in law serve eviction orders from a case the appellant was not a party to, on the appellant. Civil orders affect parties directly joined as parties in a suit or their agents, servants etc as established and proved. Here it was not shown that the appellant was Musili’s agent either. So if any eviction orders were served on him arising from C.C. 473/85 they were of no effect. The appellant was not a party in that case and apparently he was not an agent or otherwise, of any party there.

It can be said that his case with Musili, which he said was still pending somewhere, gave him colour of right to be in possession of the land he has been on since birth. He gave that explanation to the Learned Trial Magistrate who should have seen that under S.91 Penal Code the appellant could not be said to have had no 10 colour of right. If Raphael had to complain of ownership here it lay only by way of civil litigation.

In sum this appeal is allowed. The conviction is quashed and the sentence set aside.

Judgement delivered on 28th November 2000.

**J. W. MWERA**

**JUDGE**