

REPUBLIC OF KENYA

Mshighati v Republic
High Court, at Mombasa August 10, 1992
Wambilyangah J

Criminal Appeal No. 119 of 1988

August 10, 1992, **Wambilyanga J** delivered the following Judgment.

The appellant was convicted, after trial on a charge of Trespass with intent to annoy contrary to section 5 of the Trespass Act Cap. 294.

It was common ground that the question of ownership of a parcel land known as KUMALA/MATA REREKE F.P. School had been a subject of an intense amount of litigation between the prosecutor and the appellant, and that although the proceedings initiated by the prosecutor and the appellant, and that although the proceedings initiated by the prosecutor before a panel of elders had been decided in his favour, the appellant had still preferred an appeal against the decision of the panel of elders. The outcome of the appeal was still awaited when the criminal case which culminated in the instant appeal was begun. Mr. Gakuhi for the appellant argued that, as the question of ownership had not been finally resolved, it could not be suggested that the appellant lacked a legal claim of right over the plot when he allegedly lacked a legal claim of right over the plot when he allegedly entered it.

This submission is consistent with the appellant's evidence in lower court when he said that he had owned the disputed plot for a long time and that the crops on it at that time were also his property.

In the light of those aspects it can not be said that the requisite intention to commit the criminal offence charged was established beyond reasonable doubt. To say that the appellant operated under a mistaken belief is also untenable for he was still entitled to assert his rights over the land by following the legal channel. The interest of the prosecutor in the land was historically of a more recent nature as he had only bought the same from a third party. But whether his interest in the land is legally superior to that of the appellant can only be determined by a court of civil rather than of criminal jurisdiction.

The upshot of the foregoing is that the appeal is allowed. The conviction is quashed and sentence is set aside.