IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

CRIMINAL APPEAL NUMBER 4 of 2012

(Originating from the Bagamoyo District Court, Criminal Case No. 382/2008 F. E. Haule-RM)

HASSAN HAMIS.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 24-02-2012

Date of Judgment: 28-02-2012

JUMA, J.:

The important question raised by this appeal relates to the proof of *actus reus* and *mens rea* of the offence of criminal trespass in Tanzania. Appellant (Hassan Hamis) was charged at the District Court of Bagamoyo for the offence of criminal trespass contrary to section 299 (a) of the **Penal Code, Cap. 16**. He was on 6 December, 2011 convicted and sentenced to serve one year in prison. The particulars

of the offence averred that at about 09.30 hrs at Udindiru Village within Bagamoyo District the appellant, jointly and together with others, entered into the farm of Simba Motors Company with intent to commit an offence therein.

At his trial, the prosecution evidence indicated that Simba Motors of Dar es Salaam owns a farm at Mapinga in Bagamoyo District. On 13th December 2008 Arnold Yona, a Security Officer at Simba Motors Ltd received information regarding trespass on the farm. Arnold Yona, who testified as PW3, received that information from Atanas Matheo (PW2) - another employee of Simba Motors who was a watchman cum security guard at the Mapinga farm. PW3 travelled to Bagamoyo Police station and reported the encroachment. It was this report which led to the arrest of the appellant and others.

Atanas Matheo (PW2) remembers that on 13th December 2006 the police officers visited the farm to arrest the trespassers who were carrying out their farming activities within the farm. Detective Constable Edson (PW4) was the police investigation officer who

was assigned by the OC CID the task of investigating the criminal trespass on Simba Motors farm. PW4 gave an account on how he established that it was the Simba Motors was the real owner of the disputed farm. He did this by talking to Bartholomew Vitalis and Divyeshi Mohan (PW1), the two officers of the Simba Motors. According to PW4 these two officers were able to prove that Simba Motors owned the farm. They proved to him by showing him the Title Deed. PW4 reported his findings to the OC CID which led to the arrests of the appellant and other accused. According to PW4, appellant and other accused were charged with the offence of criminal trespass because they did not present any title deed to prove ownership.

Appellant testified in his own defence as DW7. He testified that he was a mere casual labourer assisting to erect a house belonging to one Mr. Kilembe when the police and members of people's militia arrived on 13-12-2008 and arrested him and others. The arresting officers told them that the police were pursuing an investigation following an incident of murder the

previous. This explanation of their arrest was not true. It was when they arrived at the police station when they were told the real reason behind their arrest. They were arrested because of their alleged trespass into a farm belonging to Simba Motors. Appellant' s explanation that he was a casual labourer working for a Mr. Kilembe, failed to convince the police. Upon cross examination, appellant told the trial court that he did not know who between Mr. Kilembe and Simba Motors owned that farm.

The main grounds of appeal as contained in the Petition of Appeal in essence raises three legal issues for my determination. The first ground relates to the alleged failure of the trial court to evaluate the evidence relating to important ingredient of *mens rea* of the offence of criminal trespass. Second, whether an offence of criminal trespass is sustainable without first establishing the issue of ownership of disputed land. The third ground is basically about the failure of the trial court to consider the defence, which the appellant advanced during his trial. Appellant had in his defence, consistently maintained that he entered

the disputed farmland to look for casual employment and his entry into the disputed area was neither unlawful nor was it motivated by the intention to intimidate or annoy anybody.

When this appeal came up for hearing on 24th February 2012, the appellant was represented by two Learned Counsel, Emmanuel Safari and Ndusyepo. Respondent Republic was represented by Mr. Innocent Mhina, the learned State Attorney. Mr. Safari argued grounds one and three together and he later argued the second ground separately. On the combined grounds one and three, Mr. Safari submitted that the guilty intention of the appellant (as 14th accused) is lacking from the evidence that the prosecution presented at the district court. Mr. Safari referred me to page 3 of the judgment of the trial court where a prosecution witness (PW3) testified that the appellant (as 14th accused) was clearing the forest with 12th accused when the police arrived to arrest them.

Mr. Safari further submitted that the prosecution did not present any evidence showing that the

appellant was in the disputed farm in pursuance of any intention to annoy or intimidate. According to Mr. Safari, the presence of the appellant to work for a Mr. Kihemba negated any notion that he had any *mens rea* in the form of an intention to commit any offence or annoy or intimidate anybody.

On the second ground of appeal regarding the question whether an offence of criminal trespass is sustainable without first establishing the issue of ownership of land. Mr. Safari submitted that even the prosecution witness Divyeshi Mohan (PW1) testified that a dispute over land was pending before the Land Division of the High Court. According to the Learned Counsel, the trial court should in the circumstances have stayed the criminal proceedings against the appellant pending the outcome of the decision by the High Court Land Division. To support his thrust of submission, Mr. Safari cited the case of **Sylivery Nkangaa v. Raphael Albertho [1992] T.L.R. 110** where Mwalusanya, J. (as he then was) held that a charge of criminal trespass cannot succeed where the matter involves disputed land whose ownership has not been

finally determined by in a civil suit and that a criminal court is not the proper forum for determining the rights of those claiming land ownership.

Mr. Mhina learned State Attorney who appeared for the Republic supported the appeal and opposed both the conviction of the appellant and consequent sentence. The Learned State Attorney noted that the prosecution did not prove the elements constituting the offence of criminal trespass. Like Mr. Safari, Mr. Mhina submitted that the learned trial magistrate should not have convicted the appellant without first ascertaining the ownership of disputed farm.

From the from the submissions of the learned counsel for the parties, this Court of first appeal is obliged to re-evaluate the entire evidence that was adduced before the trial district court and arrive at its own conclusions. In my re-evaluation of evidence on the three grounds of appeal I will be guided by the question whether the ingredients constituting the offence of criminal trespass under section 299 (a) of the **Penal Code** for were proved to the required standard. The relevant Section 299-(a) provides,

299. Any person who–
(a) unlawfully enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property;

My reading of the above-cited section 299 (a) is that the first essential ingredient constituting the offence of criminal trespass is entry i.e. the physical part or *actus reus* of the offence. This physical part of the offence of criminal trespass should be evidenced by proof that there was unlawful entry into or upon property in the possession of another. Looked at closely, the *actus reus* of criminal trespass requires proof of not only an entry that is unlawful, but also proof that the complainant was in possession of property subject of entry. It therefore follows that a lawful entry or an entry into a property whose ownership is not determined does not constitute the *actus reus* of criminal trespass.

Relating the evidence on record to the requirements of *actus reus* of criminal trespass for which the appellant was convicted; the aspect of

unlawful entry is clearly lacking from evidence before the trial district court. Appellant does not dispute the fact that he was arrested whilst working as a casual labourer in a building site. At the very least, appellant defended himself that he was in the disputed farmland under an honest and reasonable belief that the land belonged to Mr. Kilimbe. PW1 Divyeshi Mohan Divecha (Administrative Manager of Simba Motors) conceded the fact that the ownership of the farm is disputed and a land case is pending at the High Court (Land Division). He also conceded that the appellant and others were also in the High Court Land Division to claim ownership over the same farmland.

The aspect of unlawful entry can only be sustained if it is established that the complainant was in possession of the property. My own re-evaluation of evidence tallies with submissions of the learned counsel that ownership of the farm was not proved for purposes of founding a conviction for criminal trespass. I found it rather odd that, the administrative officer of Simba Motors could not tender the Title Deed to prove ownership at a criminal trial, but it was

a police officer D/Constable Edson (PW4) who testified that his doubts over ownership were cleared when he received a Title Deed from the officers of Simba Motors. With due respect, as pointed out by Mwalusanya, J. in **Sylivery Nkangaa v. Raphael Albertho (supra)**, I do not think it was appropriate for a criminal trial court on the basis of evidence of a police officer to establish ownership over the farm. The detective constable Edson did not testify how he identified the boundaries of the farm. Neither did this witness testify on the nature of training or experience he had on how to identify boundaries of surveyed parcels of land.

From the foregoing, it is clear to me that the prosecution did not prove beyond reasonable doubt that this appellant unlawfully entered onto any property belonging to the complainant. Consequently, it is my finding and holding that the *actus reus* of the offence of criminal trespass was not proved to the required standard.

I propose to determine whether the trial court addressed the *mens* rea of the offence of criminal

trespass, i.e. the guilty mind in the form of either an intention to commit any offence or to intimidate, or insult or to annoy. As I have observed earlier, the state of mind for purpose of section 299 (a) of the **Penal Code** is evidence proving that when the appellant made his unlawful entry he intended to commit an offence or to intimidate, insult or annoy any person in possession of the farm.

Mr. Safari is with due respect correct in his submission that there is no evidence on record to show any guilty mind on the part of the appellant. The reason why the Appellant was in the farm to erect a house when the police operation arrived negates any notion of guilty mind suggesting that he entered in order to annoy or intimidate. Like any other unemployed youth, appellant was entitled to look for casual employment. There is no evidence that the farm was fenced or had clearly marked boundaries to warn off potential trespassers. The police should be advised avoid using the offence of criminal trespass solve what is essentially a civil dispute over land.

From the foregoing, I agree with the two learned Counsel that *mens rea* of the offence of criminal trespass was not proved.

Before I conclude, I should also point out that my re-evaluation of evidence in light of section 299 of the **Penal Code** does not support the sentence of one year imprisonment which the trial court imposed on the appellant. A sentence of one year can only be imposed where the offence criminal trespass was committed in any building, tent or vessel used as a human dwelling or any building used as a place of worship or as a place for the custody of property. In my opinion, where unlawful entry was not into any building or human dwelling; the trial court cannot in law impose a sentence of one year in prison under section 299 of the **Penal Code**. My opinion is borne out of my reading of the sentencing portion of section 299, which states,

> *299. Any person who–*
>
> *(a) unlawfully enters into or upon property in the possession of another with intent to commit an offence or to*

intimidate, insult or annoy any person in possession of the property;

(b).....

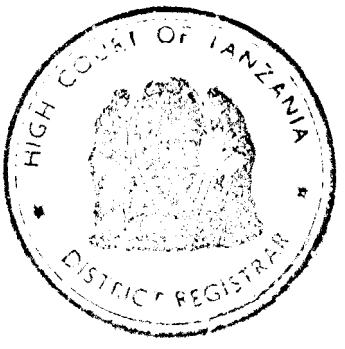
commits an offence of criminal trespass and is liable to imprisonment for three months; if the property upon which the offence is committed is any building, tent or vessel used as a human dwelling or any building used as a place of worship or as a place for the custody of property, the offender is liable to imprisonment for one year. [Emphasis provided]

Therefore, a sentence for one year can only be sustained by a trial court if there is evidence to prove that the property upon which the offence of criminal trespass was committed is a building used as human dwelling or as a place of worship or as a place for custody of property. In this present appeal no evidence was presented to establish the nature of building subject of unlawful entry by the appellant. There is only the evidence that appellant was arrested while he was assisting in the construction of a house belonging to Kilimbe. There is no evidence whatsoever that appellant had trespassed into any building used as human dwelling belonging to Simba Motors to

attract a one year prison sentence under section 299 of the **Penal Code**.

For all above reasons, I hereby allow the appeal, consequent upon which the conviction is quashed and the sentence of one year imprisonment is set aside. Appellant is accordingly set at liberty.

DATED at DAR ES SALAAM this 28th February, 2012



I.H. Juma,

JUDGE