

IN THE HIGH COURT OF TANZANIA

AT IRINGA

APPELLATE JURISDICTION

(Iringa Registry)

(PC) CRIMINAL APPEAL NO. 6 OF 2011

(From the decision of the District Court of Njombe
District at Njombe in Criminal Appeal No. 5 of 2011
Original Criminal Case No. 56 of 2011 of
Njombe Urban Primary Court)

DAFROSIMA D/O MTUNDU APPELLANT

VERSUS

CYPRIAN MLELWA RESPONDENT

(Date of last Order 18.4.2012
Date of Judgement 11.6.2012)

JUDGEMENT

KIHIO, J.

The appellant, Dafrosina D/o Mtundu was charged with the offence of Criminal trespass contrary to Section 299 (a) of the Penal Code, Cap. 16 R.E. 2002 on the 1st count and threatening to kill contrary to Section 89 (2) of the Penal Code on the 2nd count in Njombe Urban Primary Court. She was convicted of Criminal trespass contrary to the said Section 299 (a) of the

Penal Code and sentenced to a fine of shillings 200,000/= or three months imprisonment in default of payment of fine. However, she was acquitted on the 2nd count.

She unsuccessfully appealed to the District Court against the conviction and sentence.

The District court upheld the trial court's decision holding that at the time the appellant entered in the disputed land she knew that it was under the hands of the respondent.

Dissatisfied with the District Court's decision she came to this court in this appeal.

The facts of the case as established in the evidence in the trial court are that there was a dispute over the land at Ngalangala between the respondent, Cyprian Mlelwa and the appellant's father-in-law, one Markus Rafael Mteuele and on 12/1/2011 the Village Land Council declared the respondent the rightful owner of the said land.

It was in the evidence of the respondent and his witness, John Twalo (PW.3) that on 5/2/2011 the appellant and other people were in his (respondent's) land clearing grass with a machete commonly known as "*Nyengo*".

In her defence, the appellant said that her father-in-law gave her the disputed shamba three years ago and on

15/12/2010 she grew maize and potatoes. She went on to say that the dispute between the respondent and her (appellant's) father-in-law was decided when her maize and potatoes were not yet harvested. She called witnesses who told the trial court that they were clearing grass in their farm.

The trial court found that the appellant's guilt was proved beyond reasonable doubt.

The appellant filed a Petition of Appeal containing two grounds of appeal, namely:-

1. That the District Court erred in law and fact in failing to find that the trial court erred in law in entertaining the criminal charge of criminal trespass without first satisfying itself as to the final decision of the land ownership dispute of the suit premises.
2. That the District Court erred in holding that the charge at the Primary Court was proved beyond reasonable doubt.

The appellant is represented by Mr. Ngafumika, learned counsel while the respondent is represented by Mr. Danda, learned counsel.

Mr. Ngafumika submitted that there was a dispute over the

disputed land between the respondent and the appellant's father-in-law, one Marcus Mteuele. He further submitted that there is an appeal pending in the District Land and Housing Tribunal between the respondent and the said Marcus Mteuele in respect of the disputed land. He contended that there was no adjudication between the respondent and Marcus Mteuele in the Village Land Council because what was in the village Land Council was mediation. He further contended that there was a suit between the respondent and Marcus Mteuele in Ihungiro Ward Tribunal. He argued that the Village Land Council's decision was not a final determination of land dispute. He further argued that it was wrong on the part of the Primary Court to continue to entertain a criminal charge of criminal trespass without first been satisfied that there was final determination of land dispute. He referred this court to the case of **Saidi Kassim Mtaka V. Seifu Mamba** – P.C. Criminal Appeal No. 5 of 1999, Dar-es-Salaam registry (unreported) where it is held that:-

"It is now well settled position of law that a charge of criminal trespass cannot succeed where the matter involves land in dispute whose ownership has not been finally determined in a civil suit in a court of law".

As regards the second ground of appeal he submitted that under Section 299 in a charge of criminal trespass the entry must be unlawful or in the alternative if the entry was lawful then the person in that land remains there unlawfully. He further