

IN THE HIGH COURT OF TANZANIA  
AT SUMBAWANGA

**PC CRIMINAL APPEAL NO. 2 OF 2013**

**(Appeal from the decision of the District Court of Sumbawanga in  
Criminal Appeal No. 65 of 2012 and Original Criminal Case No.  
687 of 2012 in Sumbawanga Urban Primary Court)**

**THOBIAS EMMANUEL ..... APPELLANT**

**Versus**

**JOSEPH NGOLE ..... RESPONDENT**

23<sup>rd</sup> January & 24<sup>th</sup> February, 2014

**JUDGMENT**

**MWAMBEGELE, J.:**

This matter stemmed from the Sumbawanga Urban Primary Court in which the appellant Thobias Emmanuel was arraigned on a charge of malicious injuries to property c/s 326 of the Penal Code, Cap. 16 of the Revised Edition, 2002. He was convicted and sentenced to pay fine of Tshs. 200,000/= or to serve a twelve month imprisonment in default. He was aggrieved by the conviction and sentence and in consequence whereof he lodged an appeal in the District Court. The appellate District Court dismissed his appeal. Undeterred, the appellant has come to this court

through a law firm going by the name of Chambi & Co. Advocates filing a petition of appeal containing five grounds of complaint.

On 19.12.2013 when this appeal was called on for hearing both parties appeared in person but the appellant had the services of Mr. Chambi, learned Counsel while the respondent was unrepresented. The respondent prayed to argue the appeal by way of written submissions which prayer this court granted and proceeded to schedule the submissions dates. Both parties have submitted their written submissions as ordered.

The grounds of appeal, as presented, revolve around the ownership of the disputed land to which the appellant is claimed to have destroyed crops and a well dug therein. Mr. Chambi learned Counsel for the appellant submits that the trial and appellate courts ought to have considered that the appellant was allocated the patch of land including its developments. Mr. Chambi contends that the definition of the land, as per section 2 of the Land Act, Cap. 113 of the Revised Edition, 2002, included the surface of, and below the earth and things naturally growing on the land, except minerals and petroleum. The learned Counsel cited ***Ismail Bushaija Vs R*** [1991] TLR 100 in support of this proposition.

On the other hand, as can be gleaned from the proceedings, the respondent claims to have been allocated the disputed land by the Utengule Village Government. There was abundant evidence at the trial that the respondent had planted trees, banana plants, *et cetera* which he used to irrigate using water from a well which was dug therein. There was

as well a water pump and plastic pipes which were scattered in the disputed plot for that purpose. All the trees and banana plants were cut down and burnt together with the plastic pipes by the appellant. On seeing the destruction done by the appellant, the respondent reported the matter to the Central Police Station and subsequently an agricultural officer assessed the damage at a tune of Tshs. 1,600,000/=.

I have subjected the rival written submissions of the parties to serious scrutiny in the light of the evidence on record. It is not disputed that each one of the parties claims ownership of the disputed land. The record shows that the respondent occupied the land prior to its being allocated to the appellant by the Municipal Council. I have as well thought if the defence of bona fide claim of right applies to the circumstances of this case. Let me first deal with this defence.

The defence of the bona fide claim of right is enacted by the provisions of section 9 of the Penal Code. The section provides:

- "A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud."

The evidence on record is loudly clear that the appellant had a claim of right; he was allegedly allocated the disputed land by the Municipal Council. However, the evidence on record is equally loudly clear that he found the land developed; there was a well dug therein and a pump and plastic pipes which were used in irrigating the disputed land. The appellant proceeded to destroy the developments on the disputed land and the plastic pipes as well. This aspect, clearly demonstrates that the appellant, despite having a claim of right over the disputed land, had an intention to destroy the respondent's property beyond the claim of right under the pretext that he had been allocated the land by the Municipal Council. Having found the disputed land developed by planting trees and banana plants with a well dug therein and plastic pipes to irrigate it, the appellant ought to have been very careful in cutting them down and burning them together with the plastic pipes. Mr. Chambi's contention to the effect that the appellant was allocated the disputed land with its developments, assuming it true, surely, cannot extend to the pump and plastic pipes. The appellant called one Mbise from the Municipal Council to testify in support of his case. Mr. Mbise, unfortunately, did not address the court on whether or not the outgoing occupier of the disputed land was compensated in line with the land legislation. There was evidence at both lower court to the effect that the appellant was allocated the disputed land and therefore entitled to occupy the same. In the premises appellant could not have been held to act without colour of right when he fell the trees and other crops planted by the complainant on the disputed land. However, as already observed above, the appellant went beyond by destroying (burning) the plastic pipes as well. This act constituted criminal

entitled.

The situation is exacerbated by the fact that the appellant proceeded to do the destruction even after the matter was reported to the relevant authorities. I am of a settled view that the appellant's belligerent behaviour was in the circumstances not called for and that he was doing that at his own peril. I am in agreement with the reasoning and verdicts arrived at by both the trial court and first appellate court. The appellant's reprehensible and destructive acts were unwarranted and cannot be condoned by courts of law. In the circumstances of this case, ostensibly, the appellant knew, or ought to have known, that he was acting beyond his bona fide claim of right to his own peril. I am afraid, I have not been able to find any justifiable reasons to fault the decisions of both courts below. They were both well reasoned and well written as well.

In the end result, this appeal is dismissed. There is need to resolve this matter in an appropriate court over ownership of the disputed land, if any of the parties so wishes.

DATED at SUMBAWANGA this 24<sup>th</sup> day of February, 2014.

**J. C. M. MWAMBEGELE**  
**JUDGE**

