

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 89 OF 2013**

**Original Criminal Case NO. 245 of 2012 of the**

**DSM RMS Court at Kisutu**

**PONDA ISSA PONDA.....APPELLANT**

**V**

**REPUBLIC.....RESPONDENT**

Date of last Order                      20 /11/2014  
Date of Judgment                        27/11/2014

**JUDGMENT**

**A. Shangwa. J.**

The Appellant Ponda Issa Ponda was charged with 49 other persons in the Resident Magistrates' Court of Dar es Salaam at Kisutu in Criminal Case No. 245 of 2012. They were charged with offences under various chapters of the Penal Code Cap. 16 R.E. 2002. First, under chapter XLIV which relates to

conspiracies. Second, under chapter IX which relates to unlawful assemblies and riots and other offences against public tranquility. Third, under chapter XXVII which relates to theft. Fourth, under chapter XLVI which relates to solicitation and incitement. The charge against the Appellant and 49 others contained five counts as follows:

**1<sup>st</sup> Count:** Conspiracy to commit offence C/S 384 of the Penal Code.

**2<sup>nd</sup> Count:** Forcible Entry C/S 85 of the Penal Code.

**3<sup>rd</sup> Count:** Forcible detainer C/S 86 of the Penal Code.

**4<sup>th</sup> Count:** Theft C/SS 265 and 258 of the Penal Code.

**5<sup>th</sup> Count for 1<sup>st</sup> Appellant alone:** Incitement C/S 390 of the Penal Code.

The Appellant's co-accused persons were not found guilty on 1<sup>st</sup> to 4<sup>th</sup> counts. They were acquitted. The Appellant was not found guilty on the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> counts but he was found guilty on the 2<sup>nd</sup> count only relating to Forcible Entry C/S 85 of the Penal Code. So, he was convicted. After conviction, the trial court found that it was inexpedient to inflict custodial sentence on him. So, he was discharged on condition that he commits no offence for a period of twelve months and to keep the peace and be of good behaviour during the said period. However, he was not satisfied with both conviction and order for his conditional discharge. He appealed to this court

through the legal services of Mr. Juma Nassoro, Advocate. His appeal is based on six grounds namely:-

- 1. That the trial Magistrate erred in law and fact in convicting him of the offence of Forcible Entry without proof beyond reasonable doubt.*
- 2. That the trial Magistrate erred in law and fact by coming up with decisive facts which were not part of the evidence of the prosecution witnesses.*
- 3. That the trial Magistrate erred in law and fact by making her*

*decision relying on exhibit P5 which was illegal evidence under the law.*

*4. That the trial Magistrate erred in fact and law by conducting the case biasely against the Appellant.*

*5. That the trial Magistrate erred in law and fact by taking into consideration that he participated in the construction of the mosque as a relevant fact in the commission of the offence of Forcible Entry.*

*6. That the trial Magistrate erred in law and fact by entering conviction against him on Forcible Entry while there was ample evidence showing*

*that the case evolve over a dispute of the legality and Power of Sale of the disputed land by BAKWATA to AGRITANZA LTD which is a land dispute.*

The particulars of the offence which was charged on the 2<sup>nd</sup> count against the Appellant and 49 Others who were acquitted are that on 12<sup>th</sup> October, 2012 at Chang'ombe Markas area within Temeke District in Dar es Salaam Region in a violent manner and without colour of right, they did enter on a piece of land belonging to AGRITANZA LTD in order to take possession thereof.

Before looking at the grounds of appeal and for the sake of fairness, it is very important to look at the historical background to this case albeit in brief. It is as follows: Early in the year, 1964, the **East African Muslim Welfare Society** in Tanzania acquired 27.7 acres of land at Chang'ombe Markas area in Temeke District, Dar es Salaam. For political reasons, the said society was abolished by the Government in 1968 and BARAZA KUU LA WAISLAM TANZANIA (BAKWATA) was formed in its place. After being formed, BAKWATA took over all assets which belonged to the said society including the land at Chang'ombe Markas area which was acquired by the said society as wakf property.

Some Moslems led by their sheikhs and Imams have since then noted with regrets that the said wakf

land has been always subdivided and sold by BAKWATA to private businessmen for their private use. This time, on 18<sup>th</sup> June, 2011, the Registered Trustees of the National Muslim Council of Tanzania (BAKWATA) entered into an agreement with AGRITANZA LTD for Sale / exchange of 22, 378 Sqm area of land at Chang'ombe Markas area, Temeke District at a sum of Tshs. 150,000,000/= and in addition to be given about 40 acres of land located at Kisarawe Town area, Coast Region. The tendency by BAKWATA to subdivide and sell land at Chang'ombe Markas area which is wakf land and the above mentioned Agreement between BAKWATA and AGRITANZA made the Appellant who is a **Mullah** and other Moslems to be surprised.



The Appellant decided to look for one Hafidhi Sefu Othman of AGRITANZA LTD for discussion. He communicated with him and they met at Mtambani Mosque Kinondoni in the office of one Imam. When they met, he informed Hafidhi Sefu Othman that the land which was sold to AGRITANZA LTD by BAKWATA is wakf land and that before selling it, Moslems were not involved. It was agreed that a temporary Mosque should be built there in order to protect the said wakf land from being alienated to private use. It was further agreed that the Appellant should look for a different land to compensate AGRITANZA LTD. Thereafter, the Appellant and other Moslems under the influence of their religious belief constructed a temporary Mosque on the wakf land which they

named **Masjid Hassan Bin Amir**. Despite the aforesaid agreement, Hafidhi Sefu Othman decided to report the Appellant and other Moslems to the Police at Chang'ombe Police Station alleging that they have trespassed on their land and constructed a Mosque thereon. As a result, the police arrested him on 16/10/2012 during the night at Tungi Mosque Temeke. They also arrested his fellow Moslems on 16/10/2012 and 17/10/2012 during the night. His fellow Moslems who were arrested are 36 men and 13 women. They were arrested from the wakf land in issue where they had gathered to pray and construct a temporary Mosque. After being arrested, the Appellant together with his fellow Moslems were taken to the Court of the Resident Magistrate of

Dar es Salaam at Kisutu to answer charges which were framed against them. All of them pleaded not guilty to those charges.

I now resort to the Appellant's grounds of Appeal. Learned counsel for the Appellant Mr. Juma Nassoro & Company Advocates listed six grounds of appeal in his Amended Memorandum of Appeal to challenge conviction against the Appellant in respect of the offence of Forcible Entry. I find that these grounds are closely intertwined and interrelated. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> grounds are completely covered under the first ground of appeal which in my view is sufficient to dispose of this appeal. I will therefore deal with this ground alone.

On this ground, the court is called upon to consider as to whether or not there was evidence before the trial Court to prove beyond reasonable doubt the offence of Forcible Entry against the Appellant. This offence is prohibited under S. 85 of the Penal Code which provides as follows and I quote:-

*“S. 85 Any person who, in order to take possession thereof, enters on any land or tenements in a violent manner, whether the violence consists in actual force applied to any other person or in threats or in breaking open any house or collecting an unusual number of people, is guilty of forcible entry and, for the purposes*

*of this section, it is immaterial whether he is entitled to enter on the land or not:*

*Provided that a person who enters upon lands or tenements, of his own but which are in the custody of his servant or bailiff does not commit the offence of Forcible entry."*

In this case, the Appellant does not dispute the fact that he entered into the land in dispute and supervised the construction of a temporary Mosque thereon. He does not dispute also that he wanted to take possession of that land but he denied to have done so in a violent manner. In his defence, he told

the trial court that before entering on that land to supervise the construction of a temporary mosque thereon, he met with P.W5 Hafidhi Sefu Othman of AGRITANZA LTD twice and that when he met him for the first time, he informed him that it was a mistake to buy the disputed land because it is wakf land and that they agreed that a temporary Mosque should be built thereon to safe guard the wakf land from being misused. Furthermore, it was agreed between them that the Appellant should look for another land for compensation to P.W5. In addition to that, the Appellant told the trial Court that he met with PW5 for the second time on 11/10/2012 at Mtambani Mosque, Kinondoni and that when they met, it was agreed between them that within seven days, P.W.5

will be given another land and that P.W. 5 paid Tshs 500,000/= on the spot as his contribution for constructing a temporary Mosque thereon. In his testimony, P.W 5 did not deny to have met with the Appellant at Mtambani Mosque and did not deny to have had discussions with him concerning the disputed land which is wakf property for all Moslems, and he did not deny to have agreed with the Appellant on the idea of building a temporary Mosque thereon.

P.W. 7 William Keneth Milanzi told the trial Court that on 12/10/ 2012 while guarding seif's property near the disputed land, he saw a group of people who greeted him "Asalaam Aleykum" and that they introduced themselves as visitors to their land and that those people remained on the diputed land up to

16/10/ 2012 when they were arrested by the police. P.W.9 C7212 D/ sgt Juma told the trial Court that after receiving complaints from P.W. 5 that people had trespassed on his land, he went there on 14/10 2012 and found people there and that he made arrangements to arrest them. P.W.10 Insp. Thobias Walelo also told the trial Court that on 14/10/2012, he went there and found a group of people there and that when he asked one of them as to what they were doing there, he replied that they were guarding Moslems' property. P.W. 11 Ame Anange Anyoke told the trial Court that he participated in the arrest of 36 men and 13 women who were sleeping in groups on the disputed land and that their arrest was done by



**fifty police men** during the night on 16/10/ 2012 and 17/10/ 2012.

In my opinion, the evidence of the aforementioned prosecution witnesses only establishes that a good number of people did gather on the disputed land but it does not establish that the number of people who had gathered there is unusual. It appears to me that all those people who had gathered there either for prayer or for construction of a temporary Mosque are good Moslems. They pray to **Allah** days and nights. Let that alone, the evidence of the aforementioned prosecution witnesses does not prove beyond reasonable doubt that the Appellant is the one who collected them there. The available version is that the group of men and women who were arrested from the

disputed land went there of their own volition to construct a temporary Mosque on the wakf land.

The trial Court's record shows that after arresting the suspects, the police took some caution statements from some of them as indicated herein below:-

-P.W. 8 E1141 D/sgt Mkombozi took the caution statement of Mukadamu Abdallah Swalele (5<sup>th</sup> accused).

-P.W.12 E 2937 DC Matiku took the caution statement of Halid Issa Abdallah and Abdallah Haule Senza (26<sup>th</sup> and 32<sup>nd</sup> accused persons respectively).

-P.W. 13 E 5733 D/C Zakayo took the caution statement of Ayub Juma @ Baba Sala (37<sup>th</sup> accused)

-P.W. 15 D/ 3249 D/ sgt Amozi took the caution statement of Hussein Ally (17<sup>th</sup> accused).

-P.W. 16 P8556 Detective Ismail took the caution statement of Feiswali Bakari @ Hussein (12<sup>th</sup> accused).


I have read the caution statements of the above mentioned accused persons which were recorded by P.W.8, P.W.12, P.W.13, P.W. 15 and P.W.16. None of them did mention in his caution statement in a categorical manner that the Appellant led them to the disputed plot to do any evil. Under these circumstances, the Appellant who was tried with them stands blameless.

In my view, notwithstanding the fact that P.W.5 changed his mind and reported the Appellant to the Police; as it was agreed between him and the Appellant, that the land in dispute is wakf land and that in order to protect it from being alienated into private use, a temporary mosque should be built thereon, it cannot be safely said that the Appellant entered on it for taking its possession in any violent manner physical or otherwise. As already said, there is no express indication that a group of Moslems who gathered there were collected by the Appellant.

Therefore, I agree with counsel for the Appellant Mr. Juma Nassoro that the trial Court wrongly convicted the Appellant of the offence charged against

him on the 2<sup>nd</sup> count as there was no sufficient evidence to prove beyond reasonable doubt that he forcibly entered on the disputed land.

For these reasons, I allow his appeal, quash his conviction on the 2<sup>nd</sup> count and set aside the order of his conditional discharge that was imposed on him by the trial Court in Criminal Case NO. 245 of 2012 which was filed in the Court of the Resident Magistrate at Kisutu in Dar – es – Salaam.

  
A. Shangwa.

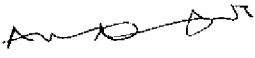
**JUDGE**

27/11/2014

Delivered in open Court this 27<sup>th</sup> day of November, 2014 in the presence of the Appellant and Mr. Juma



Nassoro for the Appellant and Mr. Tumaini Kweka  
Senior State Attorney for the Respondent.

  
A. Shangwa.

**JUDGE**

27/11/2014